No. 122487

In the

Supreme Court of Illinois

PEOPLE *EX REL.*
SCHAD, DIAMOND & SHEDDEN, P.C.,

Relator-Appellant,

v.

MY PILLOW, INC.,

Defendant-Appellee.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
First Judicial District, No. 1-15-2668.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Law Division, No. 12 L 7874 Consolidated with No. 12 L 6782.
The Honorable **Thomas R. Mulroy**, Judge Presiding.

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF APPELLEE MY PILLOW, INC.

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INTEREST OF AMICUS CURIAE

The Illinois Chamber of Commerce (the "Chamber") is the voice for Illinois businesses. Its "association" consists of manufacturers, railroads, insurers, retailers, banks and a host of other industrial and commercial concerns. Those businesses provide jobs to a myriad of Illinois workers as well as income that is applied to the general economy in the form of redistributed expenditures, profits and taxes.

The Chamber recognizes the significance of the question presented by this appeal, and the impact it will have upon businesses throughout the state, and thereby the public in general. The Chamber wants to make its position on these issues clear. The Illinois General Assembly created the Illinois False Claims Act for the purpose of allowing private citizens to step into the shoes of the Illinois government to deter fraud. The subsequent enactment of the attorney's fee provision provides a powerful tool for the government, allowing the deterrent effect of a whistleblower's legal fees to be absolved. But Mr. Diamond has manipulated the fee provision by making his law firm the Relator that he represents; this has created a cottage industry for Mr. Diamond whereby he collects both attorney's fees and a percentage of the whistleblower award – a double recovery.

Where tax law is complex and litigation is expensive it is of paramount importance that the attorney's fee provision in the Act is being used for its intended purpose: to combat actual fraud. It is the Illinois Department of Revenue's job to monitor businesses and identify tax infractions to assure compliance with tax laws. A relator's enforcement of tax law and his substantial recoveries from attorney's fees and whistleblower damages sets a dangerous precedent for the State, its citizens, and businesses and is contrary to public policy. From the perspective of the Illinois business community and the general public, the

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Illinois Chamber of Commerce requests that this Court uphold the Appellate Court's decision that Relator is not entitled to attorneys' fees for the work of its own lawyers. (Op. ¶ 99.).

SUMMARY OF THE ARGUMENT

The award of attorney's fees to a self-represented relator lawyer is contrary to Illinois public policy and is an impingement on Illinois businesses and the common good of Illinois citizens. The collection of attorney's fees by Stephen Diamond ("Diamond") or his law firm, as a relator, is against public policy because both legislative history of the False Claims Act and legal precedent reveal the purpose of the attorney's fee provision is to help the victim avoid unnecessary cost in furthering the common good.

The intention and purpose of the Illinois False Claims Act (the "Act") mirrors the federal law. Congress intended the federal False Claims Act attorney's fee provision to enable private plaintiffs to bring claims, and help the government combat fraud, without the burden of legal fees. Yet, Congress warned that the attorney's fee provision could be subject to abuse and that the provision's purpose is not to penalize businesses.

Relator's self-representation through its member lawyers is abusive and damaging to Illinois businesses. This Court has already recognized, in *Hamer v. Lentz*, 132 Ill.2d 49 (1989), that awarding attorney's fees to a self-represented relator who does not incur any legal fees is also a threat to public policy.

Moreover, Diamond's double recovery makes a mockery of the Act in violation of the common good. Defendants sued by Diamond must factor into their defense and settlement analysis Diamond's demand for both damages and attorney's fees under the Act. Diamond's abusive manipulation of the attorney's fee provision allows Diamond to

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double-recover, which impedes the common good. Diamond has profited from his cottage industry by targeting Illinois businesses and hard-working citizens. Awarding attorney's fees to a relator-lawyer, who is incentivized by his own financial gain, is harmful to the common good.

The Illinois Department of Revenue has the duty to administer and enforce tax law, but Diamond has interfered with that duty. The Department is impeded in its efforts to bring Illinois businesses into compliance with the tax laws because Diamond intervenes before the Department can engage with the businesses. As a result, the common good is further harmed as inconsistent tax policies and rulings are created by Diamond's pursuit of filing claims under the Act before the Department can audit and address issues.

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ARGUMENT

Statutes enacted by the Illinois General Assembly are created with the purpose of promoting the common good among all citizens. The Illinois False Claims Act ("Act" or "IFCA") is no exception to the common good principle. *See* 740 ILCS 175/1, 4 (West 2004). Thus, the Act's provision awarding attorney's fees to Relator should not impinge on Illinois businesses and the common good of Illinois' citizens. But the creation of a "cottage industry" by relator-lawyer Stephen B. Diamond ("Diamond" or "Relator") is generated and supported by an abuse of that very attorney's fee provision, allowing the common good principle to be consumed.

This brief will explain, from the perspective of the Illinois business community and the general public, through the voice of the Illinois Chamber of Commerce, why this Court should uphold the Appellate Court's ruling denying a relator-lawyer's right to recover attorney's fees under the Act. Each section supports the overall position that sanctioning Relator's manipulation of the attorney's fee provision of the Act does not promote the common good or public policy.

I. DIAMOND, AS A RELATOR-LAWYER, HAS CREATED A HARMFUL COTTAGE INDUSTRY BY FILING LAWSUITS UNDER THE ACT IN VIOLATION OF THE COMMON GOOD.

The Act is a government tool to combat fraud. It allows a private individual to step into the shoes of the government and bring suit under the Act against persons or businesses the individual believes defrauded the government. 740 ILCS 175/1, 4 (West 2004). This is known as a qui tam suit.

The attorney's fee provision in the Act has allowed this Relator to create a harmful cottage industry based on an abuse of that fee provision. "The qui tam provision has effectively recruited attorneys to pursue whistleblower cases because of the large

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recoveries available," including "court-awarded attorney's fees and a percentage of the recovery." Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam, Litigation under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1236 (2008). The Government only occasionally intervenes in the suit, granting relators unfettered discretion to initiate, to conduct and to settle FCA suits. *Id.* In typical litigation plaintiffs have discretion as well. However, suits brought under the FCA are different because defendants must consider the attorney's fee provision, with regard to a relator standing in the shoes of the government, while assessing the risks of the litigation. A relator's flexibility in litigating FCA suits creates a strong incentive to draw litigation out to maximize financial gain. Dayna Bowen Batthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J. L. REFORM 281, 331 (2007) ("Due to the sizable financial gain, relators pursue cases with poor factual support or flimsy legal theories to establish bad precedent and waste public resources.").

The attorney's fee provision of the Act can be significantly manipulated by a relator, stepping into the shoes of the government, in multiple ways. First, there is potential for abusive fee generation where a relator-lawyer is able to recover fees for work done, whether actually paid for or not. And second, the effect of a double recovery for a relator-lawyer, allowing an attorney to collect lucrative settlements that contain both attorney's fees and also damages that amount to multiple times what the government recovers from the tax deficiency. *United States ex Rel Taxpayers Against Fraud v. Gen Elc.*, 41 F.3d 1032, 1036 (6th Cir. 1994) (revealing relator agreed counsel would receive 25% of the relator share and attorney's fees amounting to a recovery of $4 million). This penalizes

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Illinois businesses by allowing relator-lawyers to receive large windfalls, under the Act, at the expense of businesses and the government.

Moreover, Illinois businesses' expansive payouts to Diamond for attorney's fees over the years has threatened the public confidence in the government, as businesses naturally grow skeptical that their government is looking out for their best interest. Thus, the very purpose of the qui tam provision in the Act is diminished.

Here, Diamond has exploited the government's hesitance to intervene in these suits. As a result, he has created a cottage industry from pursuing businesses on state tax laws and engaging in abusive fee generation. Statistics reveal Diamond's success in turning the Act into a cash cow. By 2016, Diamond received approximately $5.9 million in attorney's fees and $5.7 million from his share of settlements. *Id.* (revealing the significant amount of money Diamond has made by receiving both attorney's fees and money from the settlement). The statistics, however, reveal only a small glimpse of his financial gain from filing suits under the Act.[1]

Diamond's cottage industry has been identified as a problem by the business community, *Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen. Assemb. (July 26, 2012) The Revenue Committee held a public hearing in 2012 to discuss with businesses and the Illinois Chamber of Commerce the potential problems with the Act. *Id*. When assessing litigation risk, businesses always assess financial implications of the litigation, the harm that might be done to the business's reputation, and the likelihood of success if the case went to trial. However, under the Act, the fee-shifting provision adds

[1] The data only reveals Diamond's recoveries to 2016. He has recovered significant amounts in the past year that are not cited in this brief.

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an extra step to the analysis. As a result, businesses with very small tax liabilities are forced to make a decision whether to assert their defenses or settle simply to avoid Diamond's abusive fee generation.

The public policy behind suits under the Act is to permit private plaintiffs to sue on behalf of the government. Pamela H. Bucy, *Private Justice*, 76 CAL L. REV. 1, 30 (2002). This allows the government, through a relator, to fulfill its duty in protecting the public from harm and furthering the common good. Diamond's manipulation of the Act does not protect the public. Instead Diamond's exploitation of the attorney's fee provision is contrary to the common good as businesses and tax-paying citizens are victimized by his ability to effectuate double-recovery by receiving attorney's fees as a lawyer while representing himself and also recovering a share of the recovery as the relator.

While government funds are generated by Diamond's abusive cottage industry, it comes at the expense of harm to businesses and citizens of Illinois. *See, Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen. Assemb. (July 26, 2012) (revealing how businesses have been victimized by paying extensive fees in IFCA suits over small tax liabilities). An unchecked attorney's fee provision in the Act has resulted in an avalanche of qui tam suits. App. Ct. Op. at ¶ 144 (citing Relator has filed over 600 suits and has hundreds still pending on the Cook County Circuit Court's docket.) [2]

A. Diamond Abuses the Attorney's Fee Provision to Generate Fees in Violation of the Common Good.

Diamond's ability to continue abusing the attorney's fee provision in the Act has allowed him to create a harmful cottage industry. This Court in *Hamer* revealed that the threat of abusive fee generation was not an unreasonable concern. *Hamer v. Lentz*, 132

[2] To date, Diamond's circuit court filings have surpassed 1,000 in total number.

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Ill.2d 49 at 60 (1989). This Court warned that if a relator-attorney received attorney's fees on behalf of his member attorneys, the "fee provision might be used by lawyers with an inactive practice to solely generate fees. *Hamer*, 132 Ill.2d 49 at 59 (citing to *Aronson v. United States Department of Housing and Urban Development*, 866 F.2d 1, 4 (1st Cir. 1989) and *Falcone v. Internal Revenue Service*, 714 F.2d 646, 647-48 (6th Cir. 1983)). As a result, this Court did not think it advisable to leave the door open for unscrupulous attorneys, and felt the most effective way to deter abusive fee generation was to deny attorney's fees to lawyers representing themselves. *Hamer*, 132 Ill.2d 49 at 62. (holding an attorney, who is also a relator, should not recover fees as an attorney, even where if his own law firm represents him).

Additionally, policy-based concerns reveal that the guaranteed minimum and the potential maximum awards under the Act coupled with the high settlement rate due to the fee-shifting provision of the Act has created a strong financial incentive for relators to file a qui tam action. Michael Rich, *supra* at 1249. In *The Public Hearing of Illinois House Revenue and Finance Committee*, businesses revealed the risks involved in contesting Diamond's fee petition, as additional costs are incurred if they lose. 98th Gen Assem. (July 26, 2012). With the current framework in place under the Act, prior to the Appellate Court's decision in this case, Illinois' circuit courts have no checks and balance system to prevent abusive fee generation from a self-represented relator who submits a fee petition. Knowing this, businesses are forced to consider not only the litigation risks, but also the large attorney's fee potential in a qui tam action when deciding whether to fight both the claim and the fee petition or to just settle with Diamond.

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Relators, like Diamond, have found an improper way to manipulate the fee provision to double the recovery and financial gain under the Act – at the expense of everyone but himself. As a result, relators, like Diamond, have preyed on businesses, knowing that the government will not intervene or audit their abusive fee generation.

This Court should also appreciate that an attorney-relator who is representing himself (or is represented by a law firm created for the sole purpose of collecting attorney's fees) has an obvious stake in furthering litigation to maximize his financial gain. *See, Falcone v. Internal Revenue Serv.*, 714 F.2d 646, 648 (6th Cir. 1983) (explaining that awarding fees to the member lawyers representing the firm "gives rise to the danger of creating a cottage industry for claimants . . . as a way to generate fees rather than to vindicate personal claims"). The following is a small, but representative, sample of the attorney's fees Diamond has received, demonstrating his ability to generate abusive fees in cases he has filed: (1) $109,061 from Quill for a tax liability of $5,181, (2) $310,667 from Office Depot, (3) $156,000 from KB toys, (4) $130,000 from Relax the Back, (5) $372,000 in fees from Ralph Lauren, (6) $15,000 from Wrestling Gear for a tax liability of $4,600, (6) $365,000 from Cowabunga Enterprises, (7) $43,000 from Viking Office Products, Inc. and Office Depot, Inc., and (8) $150,896 from Beach Body. (C00347, C00349); Michael J. Bologna, *Small Business Owner's Tax Nightmare Ends with 30,000 Settlement*, Bloomberg BNA (October 19, 2016).

These statistics reflect a relator's financial incentive to stretch out litigation and increase his fees, even for innocent and/or minor tax infractions. Relator's control over IFCA suits has resulted in the "running up" of fees for businesses, a practice this Court deemed in *Hamer* to be contrary to public policy. *Hamer*, 132 Ill.2d 49 at 60 ("making a

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business out of filing lawsuits under a fee-shifting provision is less about vindicating citizens' rights and more about generation of revenue for a law firm.) Here, the filing of IFCA suits is not done with the purpose of assisting the government and private citizens. Relator is incentivized by the lucrative nature of receiving attorney's fees under the Act. Relator's ability to extort abusive fees against businesses has sullied the true purpose of the attorney's fee provision. This Court should put a stop to this by affirming the Appellate Court's correct interpretation of the provision's purpose.

B. Diamond Receives a Double Recovery Through Attorney's Fees and Relator's Share in Violation of the Common Good.

Illinois has a strong public policy against double recovery. *Barkei v. Delnor Hospital*, 207 Ill. App.3d 255, 264 (1990). Therefore, when a party incurs no attorney's fees for doing the work, the opposing party has no obligation to pay for fees. *Uptown People's Law Ctr. v. Dep't of Corrections*, 2014 IL App (1st) 130161, P24. (citing to *Label Printers v. Plfug*, 245 Ill.App. 3d 435, 439-40) ("A court cannot award fees even where the statute authorized the payment of fees.").

In *Uptown,* the public policy against double recovery revealed that attorney's fees cannot be awarded when no additional funds are spent in the representation. *Uptown*, 2014 IL App (1st) at P. 25. Here, the Appellate Court applied this principle holding that Diamond cannot be allowed to double dip by self-representing himself, as it is against Illinois public policy. (App. Ct. Op., ¶¶ 132-33.) This Court has also revealed that allowing a relator and his firm to recover attorney's fees for his own self-representation and to receive a share of the proceeds of the total recovery is against public policy. *Uptown*, 2014 IL App (1st) at P. 24 (citing to *Label Printers v. Plfug*, 245 Ill.App. 3d 435, 439-40) (holding a court cannot

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award fees when the attorney incurs no obligation to pay even if "the statute authorized the payment of fees.").

The following numbers are Relator's total awards from attorney's fees plus his share of the settlement: (1) in 2012 Diamond collected $2,594,881, (2) in 2013 Diamond collected $1,862,802, (3) in 2014 Diamond collected $2,324196, (4) in 2015 Diamond collected $1,438,777, and (5) in 2016 Diamond collected $1,463,136. (C00347, C00349, C00352). From 2012 until 2016 Diamond collected a total of $9,653,796 in attorney's fees and his share of the settlement. *Id.*

The data demonstrates the vast amount Diamond has received from businesses by recovering both attorney's fees and the Relator's share. In allowing Diamond to double-dip in damages, he has created a cottage industry at the expense of businesses. This Court should consider the public policy considerations outlined in *Uptown* and preserve the intent of the Act for the common good.

C. Illinois Businesses and Citizens are the True Victims of Relator's Abusive Cottage Industry.

Diamond's harmful cottage industry has forced businesses to pay large sums in attorney's fees, causing those businesses to lay off workers and even shut their doors. Companies that have been victimized by Diamond's scheme have made their concerns known to the legislature. For example, in 2012 Kathy Stevens at the Public Hearing expressed her concerns to the Revenue Committee stating that Brunswick, a company local to Illinois, paid $12,000 in fees and damages to Diamond over a $58 default. *Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen Assem. (July 26, 2012). [3]

[3] Brunswick is a member of the Illinois Chamber of Commerce Tax Institute.

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Additionally, Jeff Pape's small online business that sold a $10 jump rope to Diamond resulted in a $30,000 settlement to Diamond and the State. Michael J. Bologna, S*mall Business Owner's Tax Nightmare Ends with 30,000 Settlement*, BLOOMBERG BNA (October 19, 2016). Mr. Pape, an accountant, was not aware of the nuances within the shipping and handling tax statute. *Id.* While, Diamond pursued litigation, Mr. Pape had to shut down his business for several days over the span of four months which disallowed Mr. Pape to increase his profits. *Id.* In the end, Mr. Pape settled with Relator for $8,800, $4,600 went to the state, $4,200 went to Diamond for the settlement, and $5,000 went to Diamond for attorney's fees while Mr. Pape paid an additional $10,000 in legal fees for his own defense. *Id.* (explaining the 19-month stretch of litigation created a great amount of stress on him, his family, and his kids).

Another example of a small business owner victimized by Relator's cottage industry is Aaron Susman, the owner of a small folk fabric company. *Public Hearing of Illinois House Revenue and Finance Committee,* 98th Gen Assem. (July 26, 2012). Mr. Susman failed to include sales tax on his tax returns. *Id.* (stating he did not know Illinois law required the shipping costs be included in the cost of goods for tax). *Id.* Mr. Susman's tax liability totaled $1,500. He explained in the *Public Hearing* in front of the Revenue and Finance Committee that he, like many other businesses, has to consider the risks of paying attorney's fees to Diamond, the risk of going to court, the risk of losing in court, and then the risk of having to cut his staff. *Id.* Ultimately, Mr. Susman settled to reduce the amount owed to Diamond in attorney fees. *Id.* Following the suit, Mr. Susman let many staff go and eventually closed his business. *Id.* Like so many other small businesses,

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he had to abandon fighting Diamond and settle to keep his company. In the end, Mr. Susman's business was closed and people lost their jobs over a default of $1,500. *Id.*

These are just three examples, made public, out of the hundreds of business owners that have fallen victim to Diamond's manipulation of the fee provision under the Act. This affects not only Illinois businesses and employees, but their families and communities; the public as a whole. Allowing an award of attorney's fees to a relator-lawyer, incentivized by his own financial gain is harming the common good. Indeed, for minor infractions, businesses risk paying absorbent amounts in attorney fees to Diamond.

Diamond argued to the appellate court, in this case, that he provides a great service to Illinois in uncovering tax deficiencies and collecting tax dollars. But Diamond's efforts result in far more than collection of tax deficiencies, at the expense of Illinois businesses and the common good principle. The Department of Revenue is charged with the administration and collection of Illinois taxes. The Department conducts audits, monitors taxpayers, and collects taxes. Diamond's actions impede the ability of the Department of Revenue to do its job, and have a negative impact on Illinois' businesses and citizens. Because of the fee provision abuse, the benefit Diamond purports to add actually results in a tremendous detriment to the State of Illinois.

By upholding the Appellate Court's decision, this Court will further the goal of promoting the common good by helping businesses remain financially stable, while also furthering public policy by no longer allowing abusive fee generation and double recovery.

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II. LEGISLATIVE HISTORY AND LEGAL PRECEDENT REFLECT THE PURPOSE OF AWARDING ATTORNEY'S FEES IS TO HELP THE VICTIM AVOID COST IN PROMOTING THE COMMON GOOD.

The Illinois General Assembly modeled the IFCA (the "Act") on the federal False Claims Act ("FCA"). In construing the Act, courts have relied on federal courts' interpretation of the federal FCA for guidance. *People ex rel. Schad, Diamond & Shedden, P.C. v. QVC, Inc.*, 2015 IL App (1st) 132999, P. 30*; accord United States ex rel. Geschrey v. Generations Healthcare*, LLC, 922 F.Supp. 2d 695, 704 n.4 (N.D. Ill. 2012) (explaining the Federal FCA applied equally to the IFCA because Illinois courts "look to the similarly worded federal act.").

A. The Legislative Intent Reflects the Purpose of the Attorney's Fee Provision is to Incentivize Individuals to Report Fraud, Not to Act as a Reward.

President Lincoln created the FCA to encourage informants to report fraud. False Claims Act, 31 U.S.C. § 3729 (1862). It wasn't until 123 years later in 1986, when Congress increased the FCA's penalties to include indirect damages and allow attorney's fees to be awarded for qui tam plaintiffs. 31 U.S.C. §§ 3729-3733 (1986). Congress explained that the attorney's fee provision provided an incentive for employees "who report fraud and abuse in conjunction with false claims prosecutions." *Congressional Record*, at 22336 (Representative Brooks). Congress also recognized that changes to the FCA could enhance the ability of the government to prosecute fraudulent activity. *Id.* (Representative Brown). The purpose of adding the attorney's fee provision was to help the government by allowing private plaintiffs to bring FCA suits without the burden of legal fees.

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However, while the FCA has an important deterrent effect, the Judiciary Committee in Congressional Records revealed the FCA "is not a penal statute." *Id.* Thus the attorney's fee provision and other consequential damages should not be so intrusive to the defendant that they operate as a punishment. The Committee stated their fear that indirect damages and attorney's fees could be "too sweeping." They stated that awarding attorney's fees for "civil investigative demands, if authorized at all," should not extend "to written interrogatories," because damages for "written interrogatories may be subject to great abuse and encourage fishing expeditions." *Id.* at 22338. The Congressional Record also states Representatives feared the award of attorney's fees could be harmful and an undue burden on "honest business men" who strive to give consumers the best work product "at the best price." *Id.* Therefore, Representatives urged the FCA be monitored to ensure that congressional intent is respected.

When Illinois' General Assembly modeled the Act after the federal FCA, it did so for the same reasons as expressed in Congress' intent for enacting the FCA, including the attorney's fee provision. Whistleblower Reward and Protection Act, Public Act 87-662 (1991). [4] The legislative history of the Act states it is important that the statute adhere to the federal FCA. *Public Hearing of Illinois House Revenue and Finance Committee*, 98th Gen Assem. (July 26, 2012). Illinois, like the federal government, wanted to provide a private initiative to supplement the enforcement efforts made by government agencies that do not have the resources to conduct their own investigation. Public Act 87-662 (1991). As a result, Illinois, like the federal government, provided an incentive to qui tam plaintiffs

[4] The General Assembly renamed the Illinois False Claims Act in 2009, replacing the Act's previous name, Whistleblower Reward and Protection Act.

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to report fraud without the burden of litigation costs or fear of retaliation. False Claims Act, Public Act 87-662 (2010). Ultimately, the General Assembly gave the Illinois Attorney General the primary responsibility for overseeing all IFCA claims. *Id.*

Congress drafted the FCA to allow qui tam plaintiffs to combat fraud on behalf of the government and generate money to help the deficit. *Congressional Record*, at 22336. In turn, the attorney's fee provision was added to incentivize individuals to pursue fraud, and obtain independent counsel, without the burden of litigation costs. *Id.* It was not intended to provide a double-recovery or to penalize businesses.

This Court must recognize Congress' concern that the federal FCA's attorney's fee provision and indirect damages could be "too sweeping," is equally applicable to the Act. *Id.* at 22338 (Representative Brown). At the federal level, the Judiciary Committee advised that the statute be monitored to ensure that it is not abused. *Id.* The Judiciary Committee conveyed that the fee provision's purpose is not to penalize or hinder citizens and businesses, rather to allow private plaintiffs to obtain independent counsel and combat fraud in furtherance of the common good. *Id.* These concerns apply at the state level as well.

B. This Court has Established That the Purpose of Awarding Attorney's Fees is to Relieve the Informer's Burden of Costs to Retain an Independent Lawyer.

This Court has already established that rewarding relator-lawyers, like Diamond, is against public policy. See, *Hamer*, supra. This Court stated that the "award of fees is intended to relieve plaintiffs of the burden of legal costs; it is not intended as…a reward for plaintiffs." *Hamer v. Lentz*, 132 Ill.2d 49 at 59 (citing to *Aronson v. United States Department of Housing and Urban Development*, 866 F.2d 1, 4 (1st Cir. 1989) citing *Falcone v. Internal Revenue Service*, 714 F.2d 646, 647-48 (6th Cir. 1983)). The premise

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behind this holding is to encourage all plaintiffs, including lawyers, to retain independent counsel without the burden of legal fees. *Hamer*, 132 Ill.2d 49 at 59. This Court acknowledged that an independent lawyer brings an unbiased and objective opinion even to counsel Relator. *Id.* at 62. In contrast, a self-represented lawyer, his member attorneys and firm, all have the same interest in the suit and are not truly independent. *Id.* As a result, a relator's representation of himself as both a client and attorney in IFCA suits violates public policy, because the attorney's fee provision rewards relator for representing his own interest. In such situations, no attorney fees are necessarily incurred, as the Relator's self-representation creates no obligation to pay legal fees to any attorney – win or lose.

Indeed, in *Hamer*, this Court determined that the attorney's fee provision is an incentive for individuals to report fraud without being deterred by the obstacle of legal fees. *Hamer*, 132 Ill.2d 49 at 59. As a result, attorney's fees cannot be awarded when an attorney did not actually incur fees. This Court explained that the legal fees of the relator-lawyer in *Hamer* were not an obstacle, because the relator could perform his own legal work and his fellow member's work. *Id.* Thus, it is contrary to public policy to allow an attorney to represent himself and charge for member lawyers and his services when relator personally incurs no fees.

Here, the Appellate Court observed the ethical implications of allowing Diamond to collect attorney's fees he did not actually incur. App. Ct. Op. at ¶ 144. The court held that if they were to award attorney's fees to Diamond as a Relator it could create the

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potential for abusive fee generation and double recovery. *Id.* Thus, it is contrary to public policy to allow Diamond to recover attorney's fees as both a relator and an attorney. [5]

Hamer is even more compelling because it relates to the common good principle. Even the United States Supreme Court, in *Kay v. Ehrler,* 499 U.S. 432 (1991) did not explicitly address the most relevant issue in this case of whether an attorney who represents himself, with his member-lawyers, is entitled to attorney's fees. The precedent from *Hamer* is significantly more important to this issue.

As *Hamer* explained, awarding Diamond attorney's fees is against public policy because it grants fees that are not actually incurred by Diamond as relator. The award of attorney's fees will allow for abusive fee generation and double recovery. This Court should apply the same analysis as it did in *Hamer*, and recognize the public policy implications if the legislature's purpose and the common good is not promoted.

III. RELATOR'S ENFORCEMENT OF SUITS UNDER THE ACT HAS CONCERNING IMPLICATIONS ON GOVERNMENT'S SEPARATION OF POWERS AND PUBLIC POLICY THAT ENDANGERS THE COMMON GOOD.

The purpose of the qui tam plaintiff is to allow a private citizen to litigate on behalf of the government in furthering the common good. Both the Act and the federal FCA provide that the government may pursue claims "through any alternate remedy available." 31 U.S.C. § 3730(c)(5); see also, e.g., 740 ILCS 175/4(c)(5). Yet, public policy concerns arise when the judicial branch and the relator-attorney are enforcing tax policy, a task that is exclusively given to the executive branch of government.

[5] Diamond has often identified additional counsel in these IFCA cases, although the petitions he has filed seeking fees reflect the majority of time, if not complete legal work, has been incurred by himself and his employees.

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A. Relator's Enforcement of Suits Under the Act and Tax Policy Jeopardizes the Government's Separation of Powers.

In qui tam suits, power is taken away from the executive branch and given to the judicial branch and citizens. While the Act itself may not violate separation of powers, its enforcement has muddled what responsibility lay with each branch. *Mistretta v. United States*, 488 U.S. 361, 380 (1989). The Illinois Department of Revenue has revealed that this is currently a problem in Illinois government. Mark Dyckman, General Counsel at the Illinois Department of Revenue, has argued that false claims are interfering with the Department's authority to administer and enforce tax laws. *Public Hearing of Illinois House Revenue and Finance Committee,* 98th Gen Assem. (July 26, 2012). The Department has a responsibility to address state tax issues as well as coordinate and regulate tax policies. However, the Department has observed that they have not been able to properly perform their job because tax policy is being enforced by relators filing IFCA suits alleging tax liability.

Many of the IFCA claims filed by Diamond involve an insignificant amount of money from a business owner, who either inadvertently failed to include certain sums on tax returns or did not fully understand a tax law's obligation to collect. The effect of a business's liability for a small deficiency is minimal in comparison to the great effect Diamond's abusive fee manipulation has on establishing tax policies. Diamond has derailed the Department's ability to broaden their objectives because of businesses' distrust in Illinois' tax system. *Id.* Diamond's IFCA suits are interfering with the Department's ability to conduct audits to help businesses come into compliance with the law. *Id.* Dyckman has explained that the Department's resources are depleted in bringing good faith tax payers into compliance with the tax law, when half-way through the process the

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Department is stopped because Diamond has filed an IFCA suit against the taxpayer. Dyckman stated that had the Relator not sued, the Department would not have penalized the retailer. *Id.*

Ultimately, Diamond's interference in the enforcement of tax law has restricted the Department's ability to take care that laws be fully executed. Contrary to principles of sound public policy, private, unelected citizens are given discretion, through the IFCA, to set tax policies and enforce tax laws. This discretion has historically been with the executive branch to investigate, file suit, and choose meritorious theories to litigate.

Additionally, public policy also disfavors a relator pursuing tax liability because political accountability is erased. It is in the public's interest to have the government assess whether prosecution of a particular suit is in the best interest of the government and the overall common good of society. Richard A. Bales*, A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381 425. Relators' broad discretion to pursue FCA claims has created inconsistent rulings as well as problematic tax policy.

Overall, Illinois business and the general public are harmed when individuals who are motivated by fee generation are shaping tax law and regulations through the monopolization of the IFCA. In effect, Diamond's pursuit of hundreds of IFCA suits has allowed him to dictate tax policy, enforce tax liability, and set legal precedent. Diamond has taken on the role of the legislature, the executive, and the judiciary, and he obtains double the recovery of any other Relator for his "work." There are serious implications in allowing non-elected or appointed individuals, who may not understand the tax code, establish tax policy through hundreds of IFCA suits.

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If allowed to continue, Diamond and other relator-lawyers will adversely affect Illinois' economy, business, and the common good while double-lining their pockets with a share of the proceeds of the action and with attorney fees. Upholding the Appellate Court's decision gives this Court an opportunity to restore tax policy and administrative control and enforcement of tax laws to the Department which will ultimately restore the IFCA and its enforcement to promoting the common good.

CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Court's order which reversed the fee award to relator and held that the fee shifting provision of the Act does not permit the award of attorney fees to a self-represented relator-law firm.

Dated: March 21, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

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APPENDIX

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PROSECUTORIAL INDISCRETION: ENCOURAGING THE DEPARTMENT OF JUSTICE TO REIN IN OUT-OF-CONTROL QUI TAM LITIGATION UNDER THE CIVIL FALSE CLAIMS ACT

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***1234** This Article explores how the incentives created by the civil False Claims Act (FCA), a qui tam statute that is the government's primary litigation tool for combating fraud, influence the Department of Justice's (DOJ) prosecution of fraud actions. Over the past twenty years, the government and relators have recovered more than $18 billion in FCA actions, of which more than $11 billion was recovered in qui tam actions filed by private persons. Though other

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commentators have explored the policies underlying the FCA and even the FCA's incentives to "blow the whistle" and file a qui tam action, no one has closely analyzed the incentives that impact the government's subsequent decision whether to take over, dismiss, or allow the relator to proceed with a qui tam action. This Article's examination of these incentives reveals that the FCA improperly discourages the DOJ from wresting control of errant qui tam actions from relators.

As a result, over the last twenty years, 94% of qui tam FCA suits that the DOJ has allowed to proceed (totaling more than 3,000 actions) have been dismissed without recovering any funds. These non-meritorious suits have exacted a heavy toll on defendants, the judicial system, and the public as a whole. Meanwhile, the non-intervened qui tam actions that have succeeded in recovering funds present a different problem: FCA liability has expanded haphazardly without any guarantee that the new theories of liability will work to the public's benefit. These problems have combined to alienate regulated industries, threaten public confidence in the legitimacy of the government's fight against fraud, and endanger future industry cooperation in government enforcement initiatives. Where other commentators have urged drastic changes to the FCA to try to resolve these issues, this Article concludes that the problems can be largely ameliorated by two relatively minor amendments that would encourage the DOJ to exercise its intervention and dismissal powers more aggressively, without losing the current benefits of FCA litigation.

*1235 Introduction

The federal False Claims Act (the FCA), the government's primary civil litigation tool for combating fraud, [1] inspires no shortage of divergent opinions. [2] However, the FCA has indisputably returned an enormous amount of money to the public fisc. Since Congress last amended the statute in 1986, total FCA proceeds have exceeded $20 billion. [3] More than $12 billion of this total was recovered in actions filed by private citizens, known as qui tam [4] relators. [5] The FCA's success has been particularly striking in the health care arena, where total recoveries have topped $13 billion, of which more than $9 billion have been recovered in qui tam actions. [6] Congress has been so pleased with the FCA's success in recouping Medicare and Medicaid funds that it now encourages states to adopt their own false claims acts targeting health care fraud, though states must provide relators with at least the same rewards that they would receive under the FCA. [7]

Qui tam FCA actions are peculiar creatures of the law. [8] The qui tam relator does not suffer any injury, but instead brings the suit "in the name of the Government" [9] and has standing through a "partial assignment of the Government's damages claim." [10] The complaint is *1236 filed in camera with the court, [11] and the allegations often remain under seal for two years or more. [12] Before the allegations are unsealed, the government may take over the action, dismiss it, or allow the relator to proceed. [13] If the defendant is found liable, damages are trebled, and the defendant also must pay a penalty of between $5,500 and $11,000 for each false claim. [14] Most relators receive between 15% and 30% of the total proceeds, depending on whether the government takes over the action and the extent of the relator's contribution to the case. [15]

By allowing relators to file and prosecute on behalf of the government, the FCA delegates to relators much of the prosecutorial discretion that historically rested with the federal government, including the powers to investigate, to file suit, to choose what theories to litigate, and to settle. [16] The government's power to intervene in or move to dismiss qui tam actions provides a vital check on relators' exercise of that discretion. [17] However, the Department of Justice (DOJ) exercises its check only occasionally, intervening in less than a quarter of the qui tam actions filed [18] and moving

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to dismiss sparingly.[19] Thus, in the remaining large majority of cases, relators retain primary and nearly unfettered discretion to initiate, to conduct, and to settle their actions as they wish.[20]

The DOJ's failure to dismiss non-meritorious qui tam actions more frequently has resulted in 94% of non-intervened qui tam suits (more than 3,000 in all over the last twenty years) recovering no funds.[21] These suits have exacted a heavy toll on defendants, the judicial system, and even relators.[22] Moreover, the non-intervened qui tam suits that do ***1237** result in recovery present a different problem: the haphazard expansion of FCA liability without any guarantee that new theories of liability will work to the public's benefit.[23] The unchecked expansion of FCA liability, the avalanche of qui tam suits, and inconsistent court rulings alienate regulated industries, which threatens public confidence in the legitimacy of government action and future industry cooperation in government enforcement initiatives.[24]

Commentators have analyzed the FCA from different angles and have reached divergent conclusions about its problems and overall utility. Some have examined the FCA holistically and have concluded that its qui tam structure has enormous value in supplementing the government's regulatory and prosecutorial powers. These commentators have suggested that its qui tam provisions be exported into other contexts.[25] Others, noting the number of non-meritorious actions filed by qui tam relators and the overly aggressive expansion of FCA liability in the health care context, have proposed severe limits on qui tam actions.[26] Of those commentators who have looked at the incentives created by the FCA, most have focused on the problems arising from how the FCA encourages potential relators to "blow the whistle."[27]

Commentators have largely ignored, however, the incentives created by the FCA at a later stage of the litigation: when the government must decide whether to intervene in or dismiss a qui tam action, and if the government does neither, when the relator must decide whether to ***1238** prosecute her case or dismiss it.[28] This Article fills that gap. A close analysis of these incentives reveals that many of the problems that commentators have identified in current FCA litigation can be traced to the fact that the FCA encourages the government too often to stand by and allow relators to exercise nearly complete prosecutorial discretion in their qui tam actions. Based on this insight, this Article concludes that minor amendments to the FCA would alter the incentives on the DOJ at the intervention and dismissal stage of qui tam litigation and greatly ameliorate these problems, without eliminating the FCA's benefits.

Part I of this Article provides an overview of the False Claims Act, its most recent amendments, and the legislative purposes underlying those amendments. Part II examines available data about FCA prosecutions since the 1986 amendments and identifies trends revealed by those statistics. Part III explains the role of prosecutorial discretion in FCA litigation and the problems that arise by delegating prosecutorial power to relators. Part IV examines the incentives that influence the government's decision to dismiss, to intervene in, or to allow the relator to prosecute a qui tam action and the relator's decision whether to proceed in non-intervened cases. Part V explores the impact of those incentives on FCA litigation and the scope of FCA liability. Finally, Part VI proposes changes in the FCA to correct the flaws identified in this Article.

I. Overview of the FCA

A. History of the FCA

Congress enacted the FCA in 1863 at the urging of the War and Treasury Departments, which requested legislation that would allow the federal government to fight widespread fraud being perpetrated against ***1239** the Union Army.[29] Under the FCA, private citizens could act as qui tam plaintiffs and bring suits on behalf of the federal government to

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return funds to the Treasury that had been lost through fraud. [30] As originally enacted, the FCA imposed a fine of $2,000 for each violation plus double the actual damages resulting from the fraud. [31] To encourage those with knowledge of fraud to come forward, the FCA guaranteed to a successful qui tam relator a full one-half of the amount recovered. [32]

In 1943, Congress amended the FCA in an effort to prevent so-called "parasitic" suits. Specifically, the amendments responded to the Attorney General's concerns that relators were filing qui tam actions based on pending criminal indictments. [33] According to critics, because these relators were not providing any new information to the government, they should not be entitled to any of the proceeds. Some legislators urged the complete abolition of the qui tam provisions of the FCA, but instead the final legislation imposed jurisdictional limits on qui tam actions, removed any guarantee that the relator would recover a portion of the proceeds, and decreased the relator's potential maximum recovery to 10% of the final proceeds should the government intervene in the action and 25% should the government not intervene. [34]

With Congress's abolition of any guaranteed recovery for the relator and its erection of jurisdictional roadblocks, private use of the FCA plummeted. By the mid-1980s, qui tam relators filed only about six qui tam cases per year. [35] In 1986, Congress reinvigorated the qui tam provisions of the FCA to combat perceived widespread fraud among defense contractors. [36]

B. Purposes of the 1986 amendments

In 1981, the General Accounting Office found that most government fraud remained undetected and that the government prosecuted only a small percentage of those cases in which it detected fraud. [37] The ***1240** Department of Justice estimated that this fraud drained between 1% and 10% of the federal budget at a cost of between $10 and $100 billion annually. [38] Congress expressed particular concern about fraud in defense procurement. Nearly half of the largest 100 defense contractors were under investigation for potential fraud. [39] Moreover, Congress found that fraud in the defense industry could endanger human health and might even threaten national security. [40]

Congress concluded that "serious roadblocks" prevented the DOJ from obtaining information and that investigation and litigation tools were inadequate. [41] Congress found that regulators had a difficult time detecting fraud without inside information from employees who witnessed the fraud or were otherwise involved in it. [42] Yet potential whistleblowers declined to come forward because they believed that their complaints would be ignored and feared retaliation from employers. [43] Congress also found that federal investigators would not address "questionable" allegations that could lead to "very significant cases" because of scarce resources and that funding was unlikely to increase. [44] Though Congress did not suggest as much explicitly, some commentators have contended that collusion between regulated industries and their regulators could explain the government's inaction in some cases. [45] Finally, Congress found that a "resource mismatch" existed when investigators targeted a large corporation, because the corporation could devote many times the government's manpower and resources to defending any allegations. [46]

In response to these problems, the House sought "to amend the existing civil false claims statute in order to strengthen and clarify the government's ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud." [47] The Senate was blunter about its financial motives: "The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to ***1241** recover losses sustained as a result of fraud against the Government." [48]

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To achieve these goals, Congress increased the financial incentives for relators to bring suits and to cooperate with the government in their prosecution. First, the 1986 amendments established the minimum recovery of 15% as a "finder's fee" to encourage the whistleblower initially to come forward. [49] Second, Congress increased the maximum potential recovery to either 25% or 30%, depending on whether the government intervened, [50] and allowed successful relators to recover their attorneys' fees from the defendant. [51] Finally, Congress created a separate cause of action to allow relators to hold their employers liable for retaliation. [52]

C. Procedures in current FCA litigation

A relator who brings a qui tam FCA action does so "in the name of the Government," and must file the complaint in camera with the court and serve it, along with a written disclosure of "substantially all material evidence and information the person possesses," on the government. [53] The complaint is not served on the defendant. Once filed, a qui tam action cannot be dismissed without the written consent of the court and the Attorney General of the United States. [54]

The Attorney General must investigate any alleged FCA violation "diligently," [55] and for at least sixty days after it is filed, the complaint must remain under seal. [56] The government may request extensions of the sixty-day investigation period, during which time the complaint remains under seal and the government need not make its intervention decision. [57] Extensions are routinely granted, and qui tam actions ***1242** typically remain under seal for at least two years after they are filed. [58] By the end of the investigation period, the government must decide either to "proceed with the action, in which case the action shall be conducted by the Government" or to "decline[] to take over the action, in which case the person bringing the action shall have the right to conduct the action." [59]

The FCA provides no guidance for when the government should intervene, and the DOJ has not described publicly its specific considerations in making that decision. [60] The FCA is similarly silent on when the government should move to dismiss a qui tam action; however, one United States Attorney's office claims unofficially that it dismisses cases that have no merit or that conflict with the government's significant policy or statutory interests. [61]

When the government intervenes, it assumes "primary responsibility for prosecuting the action" and is not bound by any action of the relator. [62] The relator retains the right to continue as a party to the action subject to certain limitations. [63] If the government does not intervene, the relator may conduct the action. [64] In that case, the government may require that it be provided with copies of all pleadings and depositions and, "without limiting the status and rights of the person initiating the action," may intervene later "upon a showing of good cause." [65]

If the government or the relator prevails, the amount of the relator's recovery depends on whether the government initially intervened in the action, the relator's involvement in the fraud, and the extent to which the relator's allegations were based on previously disclosed information not provided by the relator. [66] Potential relator recoveries fall into four tiers, from smallest to largest:

> ***1243** 1. A relator convicted of criminal conduct arising from her role in the alleged FCA violation is dismissed from the action and receives none of the proceeds. [67] Even if she is not convicted for her

involvement in the underlying fraud, a relator "who planned or initiated" the FCA violation may have her share of the recovery reduced by the court, depending on her "role . . . in advancing the case to litigation." [68]

2. If the government intervenes and the court finds that the suit was based primarily on information disclosed in another hearing or other specific media, other than that provided by the relator as an original source, the relator's recovery is limited to 10% of the proceeds. [69]

3. In all other cases in which the government intervenes, the relator is entitled to receive between 15% and 25% of the proceeds, "depending upon the extent to which the person substantially contributed to the prosecution of the action." [70]

4. If the government does not intervene, the relator is entitled to receive between 25% and 30% of the proceeds, depending on what the court determines is "reasonable for collecting the civil penalty and damages." [71]

In addition, the FCA entitles any relator in the latter two categories to recover from the defendant her reasonable expenses, including attorneys' fees and costs. [72]

II. Trends in FCA Litigation

A. Statistical trends

The Department of Justice has compiled statistics on FCA matters initiated since the 1986 amendments and the recoveries resulting from those matters. [73] While imperfect, [74] these statistics provide the best ***1244** available perspective on how the 1986 amendments have impacted FCA litigation. These statistics reveal three notable trends.

1. The number of qui tam FCA actions and the recoveries from these actions have increased dramatically.

The 1986 amendments had an immediate impact on the filing of qui tam actions. Prior to the 1986 amendments, relators filed only six qui tam FCA suits per year. [75] The next year, relators filed thirty-one qui tam actions. [76] The number of new qui tam actions topped 100 in 1992, and it peaked in 1997 at 546. [77] Since 2000, the number of qui tam actions filed annually has hovered between 311 and 431. [78]

In the first year after the 1986 amendments, FCA recoveries totaled approximately $86 million, all from FCA actions initiated by the government. [79] As the number of qui tam actions increased, so too did proceeds from those actions. Qui tam recoveries grew steadily thereafter, and in 2000 proceeds from qui tam actions surpassed $1 billion for the first time. [80] In the seven years since 2000, qui tam recoveries have averaged near $1.25 billion annually. [81]

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While qui tam recoveries have grown steadily, proceeds from non-qui tam actions have remained relatively constant. [82] Proceeds from qui tam suits exceeded non-qui tam recoveries for the first time in 1997 and have continued to do so each year, with the exception of 2006. [83] As a result of the much stronger growth in qui tam proceeds over the last decade relative to recoveries in government-initiated matters, qui tam recoveries now constitute a majority of total FCA recoveries. Since 1987, the government has recovered more $20.2 billion through FCA actions. [84] Of that total, approximately $12.6 billion, or around 62%, have been recovered through qui tam suits. [85]

***1245** 2. Health-care fraud cases predominate, both in number and total proceeds, over fraud alleged in defense contracting and other industries.

During its consideration of the 1986 amendments--in the midst of the Cold War-- Congress focused almost exclusively on stamping out fraud in defense procurement. [86] The actions brought in the years following the amendments reflected this focus. In 1987, 258 FCA actions were brought where the Department of Defense (DOD) was the primary agency impacted by the fraud, [87] as compared to fifteen in which the primary agency was the Department of Health and Human Services (HHS). [88]

Over the next decade, the number of health care cases grew, and the number of defense cases declined. In 1996, the number of health care suits (199) surpassed the number of defense contracting cases (125) for the first time. [89] That trend has continued, and in 2007, [90] eighty-eight defense contracting matters were initiated [91] compared to 218 matters relating to HHS. [92]

Unsurprisingly, as health care actions have eclipsed defense contracting cases in number, the amount of proceeds has followed suit. Since 2000, the total proceeds from FCA defense contracting claims were approximately $1.3 billion. [93] In four separate years during that period, health care recoveries exceeded that figure, and total health care proceeds for that timeframe exceeded $9.5 billion. [94]

3. The government has initiated a steadily decreasing number of new FCA matters since 1986, reflecting a decline in new government-initiated matters in all areas except health care fraud.

From 1987 through 1996, the government initiated an average of approximately 253 new FCA matters each year. [95] In the eleven years since, the government has initiated on average only 110 matters ***1246** annually. [96]

This trend reflects a decline in the number of defense matters initiated by the government. The number of new non-qui tam defense matters declined from 236 in 1987 to forty-six in 1997, the first year that the government initiated more new health care than defense matters. [97] The downward trend has continued, and the government initiated only an average of fourteen defense cases annually between 2000 and 2007. [98] Similarly, the number of new non-qui tam actions involving agencies other than HHS and DOD has declined in recent years. Since 1993, when the number of these actions peaked at 189, the number of new "other" matters has decreased, with an average of fifty-six filed annually since 2000. [99]

Though the number of other types of government-initiated suits has declined, the government's initiation of health care fraud matters has remained constant. Between 1989 and 2007, the government initiated an average of twenty-eight new health care FCA matters annually, and the annual number of new matters has hovered between eighteen and fifty. [100]

B. Conclusions drawn from the statistical data

These statistical trends suggest some conclusions about the impact of the 1986 amendments on FCA litigation. First, the 1986 amendments have been successful in revitalizing qui tam actions as a fraud-fighting tool. After an initial ramping-up period, the number of cases filed by qui tam relators has increased dramatically, and the data show that the amendments' incentives to encourage potential relators to take the initial step of "blowing the whistle" have been effective. Similarly, the precipitous increase in recoveries resulting from qui tam actions reveals not only that the 1986 amendments were effective in encouraging whistleblowers to come forward, but also that they caused the initiation of a significant number of meritorious suits that have allowed the government to recover funds that otherwise would have been lost to fraud. [101] The DOJ, commentators, and other supporters of the FCA have ***1247** looked to these statistics in declaring the 1986 amendments a success. [102]

Second, since the 1986 amendments qui tam actions have become a significant force in determining how the government allocates its investigative and litigation resources. This conclusion proceeds first from the observation that relators file many more FCA actions each year than the government initiates new investigations. [103] This disparity is the result of both an increase in new actions by relators and a concurrent decrease in the number of new matters initiated by the government. [104]

The government's statutory responsibilities under the FCA then explain how the increase in the number of qui tam actions would cause a decline in government initiation of FCA matters. The FCA requires the Attorney General to investigate diligently any FCA violations alleged by relators, [105] and the DOJ expends "significant resources" on these investigations. [106] Assuming a finite and insufficient pool of government investigatory resources, [107] a dollar spent on a statutory investigation triggered by the filing of a qui tam action means that the DOJ can spend one less dollar on a government-initiated investigation. Thus, as qui tam relators file more actions, the government simply does not have the necessary resources both to investigate new qui tam allegations and to continue to initiate its own investigations at the same pace. Moreover, ***1248** the success of qui tam actions in achieving large recoveries inevitably puts pressure on the DOJ to continue to prioritize the investigation of future qui tam cases in its allocation of investigative and prosecutorial resources. [108]

Third, as relators and their counsel have come to influence the government's allocation of prosecutorial resources, they have steered the focus of the government's FCA enforcement away from defense contracting and towards health care. In the early years after the enactment of the 1986 amendments, qui tam actions in the defense arena outnumbered qui tam health care actions. [109] New health care qui tam actions overtook new defense qui tam actions in 1996, however, and since then relators have filed more than twice as many health care qui tam actions than defense qui tam cases. [110] Moreover, in recent years, health care qui tam actions have become more complex and target more sophisticated fraud. [111]

Relators' shift in focus from defense to health care is a result of the FCA's recovery structure, which provides for treble damages in addition to a penalty of between $5,500 and $11,000 for each FCA violation. [112] In the defense context, recoveries typically are related to damages, because the number of actionable claims is small. [113] But in the health care arena, a provider often will submit a separate claim for each patient or procedure. [114] Thus, potential recoveries and settlements can spiral quickly into tens or hundreds of millions of dollars, surpassing or even dwarfing the damages award. [115] In light of these incentives, relators' ***1249** shift in focus is unsurprising: they simply followed the money.

In the last decade, as relators have shifted their focus to health care, the number of new government health care fraud matters has remained essentially constant. [116] Meanwhile, the numbers of defense and "other" matters initiated by the government have declined consistently and, at least in the case of new defense matters, precipitously. [117] The government preference for initiating new health care fraud matters over other fraud cases can be explained in part by the emphasis that the Clinton and Bush Administrations have placed on fighting health care fraud. [118] However, the focus on health care fraud would not need to come at the expense of other fraud if relator actions did not force the DOJ to expend resources to investigate the increasing number of complex qui tam health care actions. Thus, the decline in new non-health care government-initiated matters coupled with the upswing in new qui tam health care actions indicate that relators are causing the government to reallocate its resources from developing new non-qui tam fraud matters in non-health care areas to investigating qui tam health care actions. [119]

To review, the available statistical data suggest three conclusions: (1) the 1986 amendments have been successful in motivating whistleblowers to file an increasing number of meritorious FCA suits; (2) the success of the 1986 amendments has forced the government to adjust its allocation of investigative and prosecutorial resources based on the actions of relators and their counsel; and (3) the increasing focus by relators on health care fraud has resulted in the government shifting resources away from its own investigations of fraud in the defense industry and toward qui tam health care cases.

*1250 III. The Problem of Prosecutorial Discretion in FCA Litigation

Since Congress passed the 1986 amendments to the FCA, the amendments, the FCA generally, and judicial interpretation of both have been attacked from many corners on policy, economic, and jurisprudential grounds. Inter alia, critics contend the following: courts have countermanded the intent of Congress in passing the 1986 amendments by interpreting certain statutory terms restrictively and construing a materiality requirement in the statute; [120] courts have frustrated the intended incentives of the 1986 amendments by failing to award sufficiently high awards to relators; [121] and the amendments, with their higher damages and penalties and incentives for whistleblowers, sound a death knell for the health care industry as a whole. [122]

In particular, policy-based concerns have focused more specifically on a handful of themes. Some commentators have noted that the guaranteed minimum and high potential maximum awards under the FCA and the high settlement rate of FCA cases provide too strong of a financial incentive for relators to file a qui tam action regardless of the legal or factual viability of the claims. [123] Others have recognized that the prevalence of qui tam actions encourages the government to prosecute or allow the continuation of suits that it normally would not have initiated on its own, even where these suits attempt to push the boundaries of FCA liability in directions that do not serve the public ***1251** interest. [124] Still others have commented that aggressive legal theories of liability tend to result in inconsistent and unconsidered precedent that hinders the reasoned expansion of FCA liability and makes it difficult for government contractors to self-regulate effectively. [125] Finally, commentators have argued that allowing private relators to negotiate settlement agreements with government contractors can result in terms that are not to the public's benefit, particularly when the settlement involves a corporate integrity agreement governing the contractor's future activities. [126]

Ultimately, all of these policy-based critiques stem from an overarching concern that the FCA's qui tam provisions delegate an undue amount of prosecutorial discretion to relators acting as private attorney generals. [127] This delegation

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causes alarm for one simple reason: while the public prosecutor is trusted to act largely in the public interest, the FCA presumes and encourages the relator to act solely in her own financial interest. [128]

First, though, prosecutorial discretion must be described in the context of FCA litigation. Professor Vorenberg defined prosecutorial discretion in the criminal arena as: "the ability to make decisions about guilt and degree of punishment without the limits of rules or other constraints on freedom of action, including judicial review, generally imposed on other public officials making decisions of comparable import." [129] Specifically, a criminal prosecutor must decide (1) when to initiate an investigation; (2) whether to charge; (3) what crimes to charge; and (4) when to plea bargain. [130] Because of the serious ***1252** financial, mental, and societal consequences that a criminal indictment can have for a potential defendant, the decision to charge a person with a crime is considered the most important function exercised by a prosecutor. [131]

Analogously, in the FCA context, the prosecutor must decide (1) when to investigate; (2) whether to file a lawsuit; (3) what factual and legal theories to assert; and (4) whether and when to settle. [132] Just like a criminal indictment, the filing of an FCA action causes the defendant to incur significant expense and suffer anxiety, embarrassment, and reputational harm. [133] The risks in an FCA action, even for a corporate defendant, are significant. Particularly in the health care context, potential statutory damages and penalties can top one billion dollars, [134] and a successful FCA prosecution can result in exclusion of a health care provider from Medicare. [135] Exclusion or debarment can be the equivalent of the death penalty in the health care industry, where much of a provider's business typically is dependent on Medicare reimbursement. [136]

Unlike in the criminal context, however, the FCA explicitly permits a private party--the qui tam relator--to act as a private attorney general. [137] Particularly in cases in which the government does not intervene, the FCA delegates to the relator the power to fulfill nearly all of the responsibilities typically reserved to the government, including ***1253** undertaking investigations, filing lawsuits, determining what factual and legal theories to assert, and deciding whether and on what terms to settle. [138] In other words, when the government does not intervene in or move to dismiss a qui tam lawsuit, the delegation of prosecutorial discretion to the relator is nearly absolute.

This near-complete delegation of prosecutorial discretion to a relator motivated by self-interest raises issues at every phase of litigation. First, when deciding whether to file an action and whom to name, a public prosecutor typically will weigh the public costs and benefits of pursuing an action before filing. [139] Sometimes, the cost of pursuing an otherwise meritorious action, both in terms of the expenditure of limited government resources and of potential public harm, will outweigh the harm caused by the defendant, and in those cases, the public prosecutor typically will not prosecute. [140] A relator, however, will file an FCA suit if she expects that it will make her money. If her discounted gain (the reasonably expected award discounted by the chance of losing) exceeds her discounted loss (the expected cost of litigation discounted by the probability that the relator will prevail), she will prosecute. [141] As a result, the relator will pursue actions aggressively, even where the actual harm caused by the defendant's conduct is low or the societal harm resulting from the prosecution would outweigh the potential recovery.

Similarly, when deciding which legal and factual theories to assert, the Attorney General must consider the proper application of policies underlying the laws or regulations at issue and the impact that any developments will have on future enforcement. [142] A qui tam relator, however, acts only in her self-interest and is exclusively interested in winning her lawsuit. [143] The only disincentives preventing a relator from arguing legal or factual theories unsuccessfully are

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potential Rule 11 sanctions and the statutory threat of being forced to pay the defendant's attorneys' fees, both of which require a court to find that the relator's allegations were legally frivolous or had no basis in fact. [144] Yet, the ***1254** potential reward for success is very high. As discussed below, [145] the result is that a relator will argue theories that, if successful, are inconsistent with larger regulatory goals or are counterproductive to the public interest. [146] Conversely, the relator may choose not to argue, or may be unaware of, legal theories that would serve the public interest.

Finally, when considering possible settlement, public prosecutors look at numerous factors, including the damages and penalties to be paid, the allocation of settlement funds among the various fraud allegations, and future restrictions on the defendant's activities. [147] In an FCA action, the government will attempt to maximize the public's interest in remuneration for injuries resulting from the fraud while also guaranteeing appropriate monitoring of conduct going forward. [148] A qui tam relator, however, will try to achieve the highest possible immediate monetary satisfaction by forsaking future monitoring in favor of payment of damages and penalties, of which she will receive her statutory share. [149] In particular, a relator who has blown the whistle on her employer is permitted to, and typically will, assert a claim for retaliation under the FCA. [150] Any recovery that the relator obtains from such a claim is hers alone and is not shared with the government. [151] Thus, relators often will seek to maximize settlement funds allocated to their retaliation claim at the expense of recoveries for the substantive FCA claims from which the government gets a majority share. [152] Such an allocation obviously does not work to the public's benefit.

The FCA provides two powerful ways, however, for the DOJ to check a relator's otherwise unfettered exercise of discretion. [153] First, the government can move to dismiss a qui tam action. [154] Second, the ***1255** government may intervene in a qui tam action and assume primary responsibility for its prosecution. [155] Though the DOJ can exercise these powers at any time during the litigation, [156] the discussion herein will be limited to the effectiveness of intervention and dismissal prior to the unsealing of the complaint. At that point in the litigation, the DOJ's decision to wrest control of a qui tam suit from the relator provides the strongest check on the relator's exercise of prosecutorial discretion.

The government's ability to dismiss a qui tam suit over the relator's objection is a safety valve that allows the government to minimize damage from a suit that never should have been filed. [157] Particularly if a case is dismissed prior to unsealing, the government is able almost to wipe the slate clean and spare the defendant the bulk of its potential defense costs and the embarrassment of public fraud allegations. Moreover, timely dismissal prevents a court from passing on the merits of a weakly-supported or poorly-reasoned legal or factual theory, thus avoiding a decision that establishes unhelpful precedent that does not assist future actors in avoiding liability or improperly limits future government recoveries. [158]

While the statute does not specify appropriate bases for dismissal, the government typically will dismiss qui tam actions that lack merit or conflict with the government's statutory or policy interests. [159] For instance, the government has moved to dismiss on grounds that include conflict between a suit's prosecution and other government priorities, [160] concern about revealing classified information, [161] an attempt to resolve issues surrounding a controversial government program, [162] and concerns that a low-value FCA suit would be inefficient to prosecute. [163] The government's motion will be granted so long as the government can show a rational relationship between dismissal and a valid government ***1256** purpose. [164]

The government's other choice, intervention, allows the government to supplant the relator's exercise of discretion with its own. The government assumes primary responsibility for prosecuting the action and is not bound by any action by

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the relator. [165] When intervening, the DOJ examines the factual and legal theories asserted by the relator and can adopt all or some of them in its amended complaint or discard them entirely. [166] The government typically files an amended complaint after intervening, reshaping the relator's allegations to align with the government's interests in the case. [167] Going forward, the government is primarily responsible for the litigation and can settle the suit over the objection of the relator. [168]

The majority of criticisms based on the delegation of prosecutorial discretion to qui tam relators arise when the DOJ uses neither of these checks on a relator's authority and neither dismisses nor intervenes in a relator's suit. In opting not to intervene, the government leaves to the relator the option of continuing to prosecute her claims with little or no interference. [169] While some relators voluntarily dismiss their claims once the government has declined to intervene, those that choose to proceed with their actions are left to exercise prosecutorial discretion essentially unchecked. In those cases, the relators, whose decisions are driven by self-interest, often fail to act in public interest.

This is not to say that the exercise of prosecutorial discretion by the DOJ is beyond criticism. For instance, the DOJ's control of agency litigation can reduce the scope and effectiveness of an agency's own enforcement of its substantive regulations. [170] In addition, Professor ***1257** Matthew has argued that public prosecutors have at least an indirect financial interest in funds recovered through successful FCA actions, as those moneys are used to pay for future enforcement efforts. [171] Successful prosecutions also can serve the personal agendas of prosecutors, as, for instance, "sensational prosecutions" can encourage support for a political career. [172] Professor Krause in particular has recognized that the danger of overzealous prosecution is particularly acute in FCA litigation, where prosecutors may lack the perspective to see how an individual case might impact future development of the law and thus pursue cases that lead to unwarranted expansion of FCA liability. [173]

Moreover, Congress raised concerns in passing the 1986 amendments that federal prosecutors did not have the resources or sometimes the will to pursue reported cases of fraud diligently enough. [174] Congress hoped that the amendments would create a "working partnership" between the relator and the government and correct the imbalance in litigation resources between underfunded government prosecutors and large, profitable government contractors. [175] The amendments also created a financial incentive to whistleblowers and their counsel to continue to litigate some non-intervened cases as a safeguard to prevent meritorious cases that initially appear "questionable" from going unprosecuted. [176]

***1258** That non-intervened qui tam lawsuits have resulted in nearly $300 million in recoveries is evidence that Congress was rightfully concerned about the DOJ's capacity and motivation to pursue all meritorious cases of fraud. [177] Yet the pendulum has swung too far in the other direction. Before the 1986 amendments, relators filed few actions, and the DOJ thus exercised almost absolute prosecutorial discretion; [178] now relators have nearly unfettered discretion in more than three-quarters of qui tam cases.

Furthermore, the trends identified above show that the problems resulting from the delegation of prosecutorial discretion to qui tam relators have become more pronounced and disproportionately impact the health care industry. Though government-initiated FCA matters once predominated over qui tam actions, since 2001 relators have filed nearly four times as many FCA actions as the government. [179] Relators have filed more than four times as many actions targeting health care fraud than defense fraud over the past decade. [180] The government intervenes in less than a quarter [181] and

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dismisses very few. [182] Particularly in the health care industry, this delegation of FCA prosecutorial discretion has led to alienation of providers and endangers future enforcement initiatives that depend on cooperation with regulators. [183]

Many commentators have blamed the self-interest of relators for the problems that have arisen in the enforcement of the FCA. [184] As a result, they have urged the passage of severe restrictions on qui tam actions, either limiting the types of actions that a relator can file [185] or forbidding relators from proceeding with non-intervened actions entirely. [186] ***1259** However, by targeting relators, these solutions ignore the fact that Congress intended the financial incentives in the FCA to encourage whistleblowers to come forward and that those incentives have been highly successful. [187] The problem instead is that the government is not fulfilling its responsibility to counterbalance relators' financial motivations with appropriate consideration of the public interest. Intervention and dismissal are the DOJ's key tools to strike that balance, and thus, the government's decision whether to use those tools and the relator's subsequent decision whether proceed in a non-intervened case should be the focus. Yet the incentives under the FCA that influence these decisions remain largely unexamined. The following section addresses that oversight.

IV. Incentives under the FCA

A. The government's decision to intervene, decline to intervene, or move to dismiss

The government's decision after its investigation of a qui tam relator's allegations can be viewed as a two-step process: first, the government must make the threshold decision of whether to move to dismiss; then, if the government decides not to dismiss, it must decide whether to intervene.

1. Whether to move to dismiss

The DOJ typically dismisses qui tam lawsuits on grounds that they lack merit or conflict with the government's significant statutory or policy interests. [188] The government benefits from successfully dismissing a qui tam suit by avoiding the costs of allowing such cases to proceed. [189] These costs include litigation expenses incurred by the relator and the defendant [190] and the burden that litigation places on the ***1260** already overtaxed judicial system. [191]

On the other hand, the costs of dismissing the suit include any harm caused by permitting the defendant's conduct to continue and the detriment to the government and the individual prosecutor of foregoing the possible benefits of a favorable outcome. These potential benefits include the majority of any settlement or judgment obtained that is returned to the government fisc, [192] the specific portion of the proceeds that becomes available to the DOJ for future FCA investigations, [193] and the political benefits to an individual prosecutor of a successful recovery. [194] In weighing the benefits against the costs of dismissal, these benefits are discounted by the chance that the case would not result in a favorable outcome. Consequently, the government will move to dismiss a qui tam lawsuit only when the perceived social costs of allowing a case to proceed outweigh its potential benefits.

The costs and benefits of dismissal outlined above are all inherent to the decision itself, in that they exist any time the government must decide whether to dismiss a lawsuit. It is striking that the FCA, which creates external incentives that influence many other government and relator decisions, provides no explicit incentive impacting the government's exercise of its statutory authority to move to dismiss a relator's action. Though the FCA authorizes the court to award the defendant fees and expenses where an action is clearly frivolous or filed for the purpose of harassment, that award is made against the relator only. [195] Additionally, the FCA does not require the government to express any opinion about

the legal, factual, or policy merits of a non-intervened action, so the government suffers very little politically when it does not dismiss even a frivolous qui tam suit. In fact, the DOJ often isolates itself further from criticism--and tries to do as little harm as possible to the relator's case--by disclaiming any opinion on the merits of a non-intervened case when it weighs in on other legal issues. [196]

***1261** 2. Whether to intervene

When the government has decided not to dismiss a qui tam action, the government then must decide whether to intervene. [197] In their illuminating and rigorous mathematical analysis of when and why relators blow the whistle under the FCA, Professors Depoorter and De Mot also explored the economic factors that impact the government's intervention decision. [198] On one hand, the benefit to the government of intervening is that, should it prevail, it will retain approximately ten percent more of the proceeds. [199] This benefit is discounted by the chance that the government will not prevail. [200] Thus, if the potential proceeds are higher, so too is the value of the additional 10% that the government will receive if it intervenes. [201] On the other hand, the government's cost of intervening is the expected litigation expenses. [202]

In light of the costs and benefits of intervention, the government will intervene where the expected benefit of intervention (an additional 10% of the proceeds), discounted for the chance that it will not prevail, outweighs the government's cost of litigation. Put another way, the chance of the government intervening is proportional to (1) the potential recovery and (2) the chance of winning. [203]

***1262 B. The relator's decision whether to continue to prosecute when the government does not intervene**

When the government declines to intervene but does not have the case dismissed, the relator then must decide whether to continue to prosecute her suit or to dismiss it herself. [204] The costs and benefits to the relator of proceeding with the prosecution of a non-intervened case are not particularly complex. [205] The benefit to the relator of proceeding is that, if she prevails, she is entitled both to 25% to 30% of the proceeds and to her reasonable attorneys' fees and expenses. [206] This benefit is discounted by the probability that the relator will not obtain a favorable outcome to the suit. [207] Meanwhile, the costs of proceeding are the tangible and intangible expenses of litigating the case, which include time, the emotional strain of litigation, and the potential for retaliation once her suit becomes public. [208] Her costs also include her attorney's fees and expenses, discounted by the chance that she will prevail. [209] Thus, the relator will proceed with her suit only if the potential recovery, discounted by the chance of losing, outweighs the perceived costs.

V. Problems Caused by the FCA's Incentives

As explained above, many of the problems identified by critics of the FCA stem from its delegation of prosecutorial discretion to relators and the failure by the government to exercise adequate control over that delegation. [210] The government has two avenues for exercising that control: dismissal and intervention. These options mirror one another: intervention allows the government to take control of cases that are particularly important or valuable, while dismissal allows the ***1263** government to exercise terminal authority over cases that lack merit or are affirmatively harmful to its interests.

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The government intervenes in approximately 22% of all qui tam actions. [211] Whether the government intervenes depends largely on two factors: the chance of prevailing and the potential recovery. [212] Thus, the 22% of qui tam actions in which the government intervenes are most likely those in which both factors are present, i.e., when the chance of a large recovery is highest. This logical conclusion is confirmed by the fact that recoveries in intervened qui tam actions far exceed those resulting from non-intervened cases. [213]

The fact that the FCA encourages the government to intervene in the "best" cases is a significant success of its incentives. By encouraging the government to intervene--and thus obtain an additional ten percent of the proceeds--in the most valuable cases, the FCA fulfills its overarching purpose of maximizing the moneys returned to the federal fisc. [214] Moreover, the sharp upturn in proceeds recovered through qui tam actions is evidence that the FCA encourages whistleblowers to come forward with meritorious cases of significant fraud against the government, a further success for the 1986 amendments. [215]

The FCA's problems arise, however, from the remaining 78% of qui tam actions in which the government does not intervene. Because the government rarely dismisses qui tam FCA suits, the relator is left to exercise nearly complete discretion over nearly all non-intervened qui tam actions. [216] The consequences of this are two-fold: first, too many non-meritorious qui tam suits are litigated, and second, relators are able to exert undue influence over the direction of FCA enforcement and the expansion of FCA liability. The incentives created by the FCA explain the origins of these problems and suggest solutions.

A. The litigation of non-meritorious qui tam suits

At first blush, the DOJ appears to be acting irrationally by failing to dismiss more non-intervened qui tam actions. As explained previously, the government should be expected to move to dismiss a qui tam lawsuit if the perceived social costs of allowing a case to proceed outweigh its ***1264** potential benefits. [217] Ninety-four percent of non-intervened cases result in no recovery. [218] And though some of these non-meritorious cases may be useful in defining the outer limits of FCA liability, the costs of the litigation in the vast majority of these cases outweigh any benefit to the public. In other words, most non-intervened suits exact a net cost on the public. [219] Indeed, a senior DOJ official acknowledged in remarks to a conference of health care lawyers that the merit of many non-intervened cases "has been questionable at best." [220] Thus, pursuant to the weighing of incentives discussed above, the government should dismiss most qui tam cases. Yet, the government exercises its dismissal power only sparingly. [221]

This apparent contradiction can be understood, however, by examining the issue not on a case-by-case basis, but from a broader perspective. Non-intervened qui tam suits have resulted in proceeds totaling nearly $300 million. [222] This number may pale in comparison to the billions of dollars recovered from actions in which the government intervenes, but each non-intervened suit still results in an average recovery of approximately $75,000, of which the government receives approximately $57,000. [223] As the social costs of allowing a non-meritorious suit to proceed in litigation are not easily calculable, it is reasonable to conclude that the average benefit of a non-intervened suit outweighs the government's perception of the potential costs, resulting in a systemic bias against dismissal. Such a bias is further reinforced by Congress's admonition when it passed the 1986 amendments that qui tam relators should be allowed at times to pursue cases of questionable merit even though the government may choose not to intervene. [224] The result is that the government does not dismiss, and relators are permitted ***1265** to proceed with, thousands of non-meritorious qui tam suits. [225]

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Another factor that may reinforce the systemic bias against dismissal is the government's inability to predict with certainty which suits will lead to a favorable result. Though the DOJ may be able to determine that the merits of some cases are "questionable at best" after an initial investigation, the settlement pressures on a defendant are enormous, due both to the potential for a large award of damages and penalties and the low standard of proof relative to criminal actions. [226] As a result, even cases that the government may peg as unlikely to succeed or even entirely non-meritorious may lead to a favorable outcome. Consequently, when the DOJ moves to dismiss a qui tam case on the ground that it lacks merit, it runs the risk of foregoing the unexpected windfall of a large settlement.

Given the absence of any tangible negative consequences from permitting a suit of "questionable" merit to proceed, the DOJ does not dismiss qui tam suits unless there is a unique circumstance to justify dismissal. While relators dismiss some of these actions voluntarily when the government chooses not to intervene, [227] the public and defendants absorb the cost of litigating the others. [228] These costs need not be incurred. The government expends significant resources conducting a diligent investigation of each qui tam action that is filed. [229] The DOJ can recognize after this investigation that the merits of many of ***1266** the cases in which it does not intervene, but does not dismiss, are questionable. [230] What is required to encourage the DOJ to dismiss the most "questionable" of those actions is a potential negative consequence that outweighs the potential benefit of an unexpected favorable outcome to those cases. The next Part discusses an amendment to the FCA that would create such a potential negative consequence.

B. Relators' undue influence on FCA prosecution

A more complex problem with the FCA's incentive structure is revealed by examining what happens to non-intervened suits when the government does not dismiss them. Just as the FCA encourages intervention when a substantial recovery is likely, it discourages the government from intervening when the potential recovery is low or it is unlikely that either the relator or the government will prevail. Thus, suits in which the government is unlikely to intervene can be grouped generally into three categories: (1) actions where there is a low likelihood of a low potential recovery; (2) actions with a high likelihood of recovery and low potential recovery; and (3) actions in which the likelihood of recovery is low and the potential recovery is high.

As noted above, a relator will proceed with her suit only if the potential recovery, discounted by the chance of losing, outweighs the perceived costs. [231] In cases within the first category, where the potential recovery is low and a favorable result is unlikely, the costs of continuing to prosecute almost always will outweigh the discounted potential recovery. Thus, a rational relator typically will dismiss her actions. When a case falls in the second category--with the high likelihood of a low recovery--the relator is likely to proceed. Though the potential benefit of proceeding is low, so too are her costs, because her litigation expenses are heavily discounted by her high chance of prevailing.

The handling of these two categories of cases comports with the purposes of the FCA. First, little is lost when a relator dismisses a low-value suit that is most likely without merit. The relator recovery structure of the FCA is intended to encourage whistleblowers to come forward with helpful information. [232] When the relator's information does not appear likely to lead to proof of valuable fraud, it is best for the public that the case is dismissed. [233] Second, by encouraging relators to ***1267** prosecute meritorious low-value cases independently, the FCA allows the government to purchase the prosecution of more minor fraud at the cost of the relator's increased recovery, thus freeing up limited government resources to pursue higher-value cases. This result fulfills the additional goal of the 1986 amendments of supplementing the government's litigation resources. [234] Furthermore, because these cases have a high likelihood of a

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favorable outcome, they most likely target fraud that falls within the previously defined scope of FCA liability and do not require relators to exercise excessive prosecutorial discretion in determining what legal arguments to make.

The third category of non-intervened cases--where the possible recovery is high and the likelihood of a favorable outcome is low--is more problematic. To understand how relators will deal with these suits, one must look a little more carefully at the relator's costs of proceeding. As explained previously, these potential costs include time, emotional strain, the chance of retaliation, and her attorneys' fees, all of which are only slightly discounted here because of the small likelihood of success. [235] Thus, it would appear that the relator's costs typically will be high.

However, the relator's costs are not fixed across all cases that fall within the third category. Discovery is responsible for the bulk of the expense of trying cases in federal court, a phenomenon particularly true of FCA suits in the healthcare context, which tend to be factually complex and document-intensive. [236] As a result, if the relator believes that discovery will be necessary before her slim chance of a favorable result can come to fruition, her perceived costs will be high, and she will be more likely to dismiss her case. On the other hand, if the relator believes that she may be able to achieve a favorable result without engaging in discovery, her perceived costs will be much lower, and she will be more likely to proceed.

Therefore, there are two sub-categories to this third category of non-intervened cases. In the first sub-category, the relator believes that ***1268** discovery is necessary to achieve a favorable result because the facts are highly disputed. There, the defendant is unlikely to settle unless and until discovery reveals facts that establish liability or the court denies a motion for summary judgment. [237] Consequently, the costs of litigation likely will be high. In the second sub-category, the relator believes that she can achieve a favorable result before discovery because liability depends on the viability of a novel legal theory and the facts largely are not in dispute. There, a ruling on a motion to dismiss either will result in a dismissal of the relator's action or will lend credibility to the relator's legal theory and encourage a prompt settlement. Either way, the cost to the relator and her counsel of either winning or losing is likely to be low. Considering the government's and the relator's decisions together, then, a qui tam action that states a novel legal theory is not likely to be taken over by the government because the chance of prevailing is low, but the relator is likely to proceed with such a case because the cost of doing so is relatively low.

As a result, relators exercise nearly unfettered prosecutorial discretion in precisely those cases in which government oversight is most essential. As discussed above, the exercise of prosecutorial discretion in the FCA context involves four main decisions: (1) when to investigate; (2) when and whether to file a lawsuit; (3) what factual and legal theories to argue; and (4) whether, when, and on what to terms to settle. [238] The issue here is with the third decision of what legal arguments to make. When the relator proceeds in a non-intervened case that asserts a novel legal theory, the relator argues her theory without government oversight. The court's disposition of that theory impacts more than the relator's individual suit: if the claim is deemed viable, it can create a new area of FCA liability; if the claim is dismissed, it can foreclose an entire arena of potential liability.

No matter the result, the government should be involved in deciding whether a new legal theory should be advanced and how it should be argued. Unlike the relator, who cares only about the result in her own case, the government has an interest in the development of FCA liability on a larger scale, including preventing harm to its regulatory aims from improper expansion or constriction of FCA liability, enforcing the public's interest in preventing improper expenditure of tax dollars, and vindicating its rights as the real party in interest in all FCA actions. [239] ***1269** Yet the current version of the FCA allows, and in fact encourages, relator-created theories to proceed without the government exercising oversight to protect these larger interests. The DOJ's failure to filter out undesirable legal theories results in the haphazard and aggressive expansion of FCA liability, particularly in the health care arena. [240]

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To see how the FCA encourages unconsidered expansion of liability, imagine that a relator brings a qui tam FCA lawsuit that is factually sound, but based on a novel and untested theory of liability. As explained previously, the government is unlikely either to dismiss or to intervene in the suit, and the relator likely will pursue her case at least through the defendant's inevitable motion to dismiss. Because the relator's theories are novel and may not be argued skillfully, [241] the motion likely will be granted and the case dismissed. [242] However, there is a small chance that some part of the relator's action might survive the defendant's motion. [243] At that point, the relator will gain dramatically increased leverage in settlement negotiations for two reasons. First, the relator has overcome the main obstacle to prevailing. Second, should the defendant wish to appeal the trial court's decision, it must litigate through trial before any appeal. Thus, the relator's case likely will settle before her theory is tested any further. [244] As soon as the relator's success becomes public, other relators and the government will investigate and file actions alleging the new legal theory. The existence of a decision validating that theory, combined with the potential for sizable damages and penalties, will lead defendants to settle most of this second generation of cases before the new legal theory is again tested in court. [245]

In this manner, the government abdicates its role of guiding the development of FCA liability down a reasoned path that comports with the public interest. Instead of giving the government an incentive to ***1270** evaluate new legal theories and determine which ones should be pursued, the qui tam provisions of the FCA encourage the DOJ to focus its resources on those cases most likely to succeed and to leave the assertion and evaluation of new theories of liability to relators. [246] As a result, cases that attempt to expand FCA liability are not under the unitary control of the government, whose interests the FCA protects and who is its ultimate beneficiary, but in the hands of hundreds of relators and their counsel, acting only in their own self-interest.

An examination of how FCA liability expanded into the area of off-label marketing of pharmaceuticals illuminates how this problem already has arisen in the real world. [247] In August 1996, Dr. David Franklin filed a qui tam FCA lawsuit against Parke-Davis, a pharmaceutical manufacturer and his former employer, alleging that Parke-Davis used false statements to promote two of its prescription drug products for off-label uses, i.e., uses for which the drug was not approved by the Food and Drug Administration. [248] Franklin alleged that, as a result of Parke-Davis's false statements, more doctors prescribed its drugs for off-label uses, patients filled those prescriptions, and pharmacists ultimately submitted claims for reimbursement of the prescriptions to the federal government. [249] According to Franklin, the claims were false because a prescription for an off-label use typically is not eligible for reimbursement under Medicaid. [250] Franklin also alleged that Parke-Davis paid kickbacks to doctors who prescribed large quantities of its drugs and failed to comply with federal regulations requiring that drugs be provided for clinical trials at no cost. [251]

After investigating Franklin's claims for more than three years, the DOJ did not intervene, [252] the case was unsealed, and Parke-Davis filed a motion to dismiss Franklin's complaint. [253] The court granted Parke- ***1271** Davis's motion with respect to Franklin's kickback and clinical trial allegations. [254] Though it recognized that Franklin's off-label marketing claims "take[] the parties into territory that is not well charted by the existing decisional law," the court declined to dismiss them. [255] Specifically, the court rejected Parke-Davis's argument that Franklin alleged only truthful off-label marketing and characterized the "gravamen" of Franklin's claim to be that Parke-Davis knowingly made false statements that ultimately caused the submission of false claims. [256] The court acknowledged that it would be a "much closer question" if Franklin alleged only truthful off-label marketing. [257]

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The court answered that question two years later when it denied Parke-Davis's motion for summary judgment. [258] The court held that, while claims under subsection (a)(2) of the FCA [259] must establish a "double-falsehood," i.e., that a false record or statement was used to get a false or fraudulent claim paid or approved by the Government, subsection (a)(1) [260] requires only that the defendant submit or cause a false claim to be submitted to the government. [261] In other words, the court found that Parke-Davis could be liable under the FCA for truthful marketing of its drugs for off-label purposes, so long as that marketing caused the submission of false claims to Medicaid for reimbursement. [262] This decision was the first of its kind. [263]

Less than a year after the court denied summary judgment, Parke-Davis's parent company agreed to pay more than $430 million to resolve both potential civil liability and pending criminal charges relating to its off-label marketing. [264] The settlement designated $83.6 million to resolve Franklin's FCA claims, and Franklin received approximately $24.64 million, or nearly 30%, of that amount. [265]

The Franklin case shows the immediate impact that a single ***1272** successful qui tam case based on a new theory of liability can have. Though commentators have criticized the Franklin decisions [266] and no published case has permitted the same expansion of liability, [267] the floodgates have opened, and other drug manufacturers have begun settling off-label marketing claims for hundreds of millions of dollars rather than risk treble damages, penalties, and even potential debarment. [268]

The long-term impact of Franklin is still uncertain. Some already question whether the settlements that pharmaceutical companies are paying will force them to change their ways, or if multi-million dollar fines are merely a slap on the wrist to companies that measure their revenues by the billions. [269] Most likely, the theory of FCA liability approved by the Franklin court eventually will be tested by other courts; whether the theory will become commonly-accepted is difficult to predict.

The ultimate legal viability of the theory upheld in Franklin--or any other relator-created theory of liability--is not the issue, however. Courts inevitably make mistakes, and the judicial system is structured to allow for their eventual correction. What, then, is the problem with the government conducting a post hoc review only of successful new theories of FCA liability? Since the Franklin settlement, the Department of Justice has pursued FCA cases aggressively that assert fraud in off-label marketing and happily trumpets its recoveries. [270] Thus, one might argue, the DOJ must have undertaken an assessment of the costs and benefits of that theory and determined that punishing off- ***1273** label marketing in this manner works to the public's benefit. In other words, the argument may go, the DOJ has exercised its prosecutorial discretion retroactively, thus guaranteeing that FCA liability expands only in ways that advance the public good. After all, if FCA were not a proper avenue for enforcing rules against off-label marketing, the DOJ could simply decline to bring additional prosecutions and move to dismiss new ones.

This line of reasoning, however, fails to recognize political reality. Public prosecutors are subject to political and indirect financial incentives to maximize recoveries under the FCA. [271] While a prosecutor might be able to ignore these pressures and objectively assess the desirability of a new theory of liability before that theory has been shown to be a potential fount of FCA recoveries, it is unrealistic to expect a prosecutor to fail to pursue any theory of liability proven to be able to lead to the recovery of hundreds of millions of dollars. Moreover, given the success of the relator in Franklin, [272] if the government did not pursue off-label marketing, relators certainly would. Then, should the government decide that it no longer wishes to prosecute off-label marketing, the DOJ would have to move to dismiss the new qui tam actions, also

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a politically unviable option in light of the recoveries in Franklin and subsequent cases. With dismissal being unrealistic, the government would be foolish not to intervene in new off-label qui tam actions, as declining intervention would cost the government an average of ten percent of the hundreds of millions of dollars at stake.

Thus, Franklin provides one example of how the DOJ has lost control over the expansion of FCA liability by allowing relators to pursue a novel legal theory without government oversight. This lack of control is a problem in its own right because it represents a fundamental failure by the DOJ specifically to assume responsibility for prosecution of a quasi-criminal statute that seeks to redress injury to the federal government. [273] The government's failure to exert control over the expansion of FCA liability also means that such expansion occurs inconsistently and haphazardly. [274] As a result, entities that deal frequently with the ***1274** government, such as health care providers and defense contractors, become cynical and alienated when faced with an ever-shifting regulatory landscape. [275] The health care industry believes that the government's litigation strategy is based on the pursuit of maximum recoveries rather than any principled concept of what activities will be subject to punishment. [276] As this distrust deepens, cooperation between the health care industry and government regulators becomes less likely, and without cooperation, the government will be required to rely on increasingly coercive means of obtaining compliance from the health care industry. [277]

VI. Proposed Solutions

Having identified the problem--that the FCA encourages the government to allow qui tam suits that lack factual or legal merit or propose novel legal theories to proceed--the solution appears simple: amend the statute so that if the government chooses not to intervene in a qui tam action, the suit is dismissed. Some states that have adopted their own versions of the federal FCA have taken this tack. [278]

This solution is overbroad, however, in that it would contravene the intent of the 1986 amendments and eliminate significant benefits currently provided by qui tam suits. Congress recognized that the government sometimes does not pursue potentially meritorious cases due to limited resources. [279] Thus, it decided to encourage relators to act as a check to make sure that when initially "questionable" cases uncover fraud, that fraud does not go unpunished. [280] In addition, as discussed ***1275** above, the FCA effectively encourages relators to continue to pursue meritorious suits where the potential recovery simply is not high enough to warrant government intervention. [281]

Amending the FCA to require dismissal of qui tam actions when the government declines to intervene would eliminate these important benefits. The government would be forced either to intervene in all meritorious cases, thus placing a strain on already limited government resources, or accept that some meritorious FCA cases would not be prosecuted. Neither result is desirable. The amendment also would allow the government the final word on which cases are worth pursuing, a result that would run contrary to the intent of Congress. In light of the strong support with which the 1986 amendments were passed and the continuing support that the FCA enjoys, [282] such a radical limitation on qui tam actions likely would not be politically feasible.

Consequently, the problem requires a more nuanced treatment and, specifically, an approach that finds a way to ameliorate the separate symptoms of (a) too many non-meritorious lawsuits surviving the government's intervention decision and (b) the DOJ's failure to take an active role in steering the course of FCA enforcement. In light of these two separate problems, this Article proposes a two-pronged legislative solution.

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A. Joint and several liability for defendants' attorneys' fees

First, I suggest that the government be made jointly and severally liable with the relator for the defendant's reasonable attorneys' fees and expenses. The FCA currently allows a prevailing defendant to recover fees and expenses from the relator alone where the court finds that her claims are "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." [283] In passing this provision, Congress intended to create a strong disincentive to the filing of frivolous or harassing suits and urged courts to enforce the fee-shifting provision strictly. [284] However, the experience of the last twenty years shows that this disincentive is not sufficient to prevent relators from bringing non-meritorious actions. [285]

***1276** By making the government responsible for a defendant's attorneys' fees and expenses when a qui tam action is frivolous, the FCA would encourage the government to assess more thoroughly the factual and legal viability of new qui tam allegations. Rather than merely assuming that any qui tam action should be allowed to proceed absent some compelling reason for dismissal, the government instead would need to determine whether the action is likely to be found to be frivolous. If the government determines that an adverse finding is possible, the potential cost of allowing the claim to proceed would then outweigh the small possibility of a favorable outcome, and the government would dismiss the claim.

Because this amendment would encourage the DOJ to dismiss a claim upon a determination that the claim could possibly be found frivolous--a lower threshold than actual frivolousness--it would lead to the dismissal of some claims that a court ultimately would not have deemed frivolous. This is a desirable result, as any non-meritorious claim, frivolous or not, results in unnecessary costs to the government, relators, and the judicial system. [286] Of course, the effectiveness of a new fee-shifting provision would depend on courts being willing to impose joint and several liability for attorneys' fees on the government. Thus, for this amendment to be effective, Congress also should emphasize its desire that courts enforce the new provision strictly.

B. Authorizing courts to require government certification of novel legal theories

Second, in order to force the government to take a more active role in assessing the desirability of new legal theories, this Article proposes that the FCA be amended to allow a court, in a non-intervened action where the relator's theory of liability presents a matter of first impression, to require the government to certify whether it believes that the theory has legal merit and serves the public interest. The court would not be bound by the certification and could choose to allow an unapproved qui tam action to proceed [287] or to dismiss an action despite the government certification.

Forcing the government to take a position on the merits of novel, relator-created legal theories would serve a number of useful purposes. ***1277** First, the DOJ's perspective would provide helpful guidance to the court and would encourage the DOJ to be consistent in its FCA enforcement. [288] Second, the requirement of a public assessment would place political pressure on the agency to weigh the financial, social, and regulatory costs and benefits of the claim and provide a reasoned assessment of whether it should be permitted to proceed. Third, regulated entities would be able to plan future activities based on the government's position, and even though the government's stance would not constitute binding precedent, entities relying on it in good faith would be shielded from FCA liability. [289] Finally, at the very least a public stand by the government on a disputed regulatory subject would help assuage the frustration of entities in the health care sector and other heavily regulated industries that feel that FCA enforcement is driven only by the DOJ's desire to maximize its recoveries. [290] This in turn would make the relationship between government regulators and regulatees less rancorous and encourage cooperation in future enforcement activities.

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Professor Matthew has suggested a similar amendment that would require the government to certify in all non-intervened qui tam cases that it has evaluated the relator's claims and deems the case worthy to continue. [291] Under that amendment, if the government declined to certify a qui tam action, it would be subject to dismissal unless the relator could show good cause for why it should be permitted to continue. [292] Such an amendment certainly would be equally, if not more, effective as that proposed herein in addressing the issues that she and this Article raise. Nevertheless, I believe that Professor Matthew's proposal would raise some of the same concerns as requiring dismissal of all non-intervened suits, in that it would limit severely the ability of relators to act as a check on the DOJ's lack of resources and will to prosecute some meritorious fraud claims. [293] On the other hand, the ***1278** amendment proposed herein, by not presuming dismissal of all non-intervened claims, will allow relators to continue to perform this valuable function. In addition, government certification will not be required where no novel legal issue is present, thus limiting any additional expenditure of DOJ resources.

Conclusion

Few could dispute that the 1986 amendments to the FCA have been effective in motivating potential qui tam relators to assist the government in identifying fraud and returning funds to the federal fisc. However, the amendments have had the unintended consequence of discouraging the DOJ from wresting control of qui tam litigation from relators as often as it should. Relators instead are left to pursue their financial interests by aggressively litigating cases even non-meritorious cases, regardless of the burden that they place on defendants and the judicial system. As a result, relators litigate far too many non-meritorious qui tam actions. Moreover, when novel relator-created legal theories succeed, they cause the expansion of FCA liability in undesirable directions without government oversight.

Much of the blame for these problems is put on relators, and thus commentators who are critical of the FCA have suggested significant amendments to the FCA that would gut its qui tam provisions. But in large part the relators are only doing what Congress expected and intended for them to do: act in their own self-interest. The problem instead lies with the DOJ, which is failing to counterbalance the financial motivations of the relator with its own considerations of how FCA actions can best serve the public interest.

As the problem lies largely with the government's inaction, wholesale restrictions on qui tam actions are overbroad. Rather, two minor amendments to the FCA would alter the incentives and encourage the government to exercise its discretion responsibly. First, the government should be made liable along with relators for the defendants' reasonable attorneys' fees and expenses in frivolous non-intervened cases. Courts should enforce this new provision strictly to force the government to assess the viability of each new qui tam action honestly and dismiss those that lack merit. Second, courts should be empowered to require the government to certify whether new legal theories propounded in non-intervened action have merit and serve the public interest. These measures will increase the government's stake, both financially and politically, in ensuring that only qui tam actions that have some merit and work to the public's benefit are litigated. Moreover, the suggested ***1279** amendments will encourage uniformity in judicial decision-making and ameliorate the impression in heavily-regulated industries, such as health care, that DOJ enforcement is driven only by a desire to maximize recoveries.

Footnotes

a1 Assistant Professor of Law, Capital University Law School. B.A., University of Delaware; J.D., Stanford Law School. I am indebted to my wife, Amy Minardo, as well as Michael Bronson, Benjamin Glassman, and Jeffrey Miller, all of whom

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1 S. Rep. No. 99-345, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5268.

2 See, e.g., James B. Helmer, Jr., How Great Is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act, 68 U. Cin. L. Rev. 737, 744, 759-61 (2000) (trumpeting FCA's "spectacular results" and suggesting that courts more frequently award "attractive relator's shares" to encourage more whistleblowing); Timothy P. Blanchard, Medicare Medical Necessity Determinations Revisited: Abuse of Discretion and Abuse of Process in the War Against Medicare Fraud and Abuse, 43 St. Louis U. L.J. 91, 116-17 (1999) (decrying the government's prosecution methods in cases alleging fraud in medical necessity determinations as "a mockery of the administrative process and fundamental notions of due process" that evidences "a lack of integrity of some Government agents and agencies in the name of fighting fraud and abuse").

3 Civil Div., U.S. Dep't of Justice, Fraud Statistics--Overview, October 1, 1986-September 30, 2007, at 1-2 (2007), available at http:// www.taf.org/stats-fy-2007.pdf [hereinafter Fraud Statistics].

4 "Qui tam" is short for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means "who pursues this action on our Lord the King's behalf as well as his own." Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 n.1 (2000).

5 Fraud Statistics, supra note 3, at 1-2.

6 Id. at 3.

7 42 U.S.C.A. §1396h(b)(2) (West 2007). See also Publication of OIG's Guidelines for Evaluation State False Claims Acts, 71 Fed. Reg. 48,552 (Aug. 21, 2006) (setting forth guidelines for compliance with 42 U.S.C. §1396h).

8 Qui tam statutes themselves are rare at the federal level, with the FCA being only one of a handful and by far the most frequently litigated. See Stevens, 529 U.S. at 768 n.1 (listing three other federal qui tam statutes).

9 31 U.S.C. §3730(b)(1) (2000).

10 Stevens, 529 U.S. at 773.

11 31 U.S.C. §3730(b)(2)-(3).

12 Pamela H. Bucy, Games and Stories: Game Theory and the Civil False Claims Act, 31 Fla. St. U. L. Rev. 603, 609 (2004) [hereinafter Bucy, Games and Stories]. However, the government sometimes will share with defendants the substance of a relator's allegations to advance either its investigation or settlement negotiations. Keith D. Barber et al., Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation, 1 Ind. Health L. Rev. 131, 143-44 (2004).

13 31 U.S.C. §3730(b)(4), (c)(2)(A).

14 See id. §3729(a) (allowing penalty of between $5,000 and $10,000 for each FCA violation); 28 C.F.R. §85.3(a)(9) (2007) (increasing penalty to between $5,500 and $11,000).

15 31 U.S.C. §3730(d)(1)-(2).

16 See Sharon Finegan, The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law, 111 Penn. St. L. Rev. 625, 672 (2007).

17 Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 72 (2002) [hereinafter Bucy, Private Justice].

18 Fraud Statistics, supra note 3, at 6.

19 Bucy, Private Justice, supra note 17, at 71.

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20 See infra Part III.

21 Fraud Statistics, supra note 3, at 6.

22 Dayna Bowen Matthew, The Moral Hazard Problem with Privatization of Public Enforcement: the Case of Pharmaceutical Fraud, 40 U. Mich. J.L. Reform 281, 331 (2007) [hereinafter Matthew, Moral Hazard]; Bucy, Private Justice, supra note 17, at 63.

23 Matthew, Moral Hazard, supra note 22, at 320; Joan H. Krause, "Promises to Keep": Health Care Providers and the Civil False Claims Act, 23 Cardozo L. Rev. 1363, 1409 (2002) [hereinafter Krause, Promises to Keep].

24 Krause, Promises to Keep, supra note 23, at 1414-15.

25 See Bucy, Private Justice, supra note 17, at 76-79 (recommending expansion of the FCA's qui tam model, with some modifications, into the areas of environmental and securities regulation).

26 See Matthew, Moral Hazard, supra note 22 (arguing that the government should be required to join or move to dismiss all qui tam actions); Christina Orsini Broderick, Qui Tam Provisions and the Public Interest: An Empirical Analysis, 107 Colum. L. Rev. 949, 998-99 (2007) (recommending that qui tam actions be limited to medical necessity claims); see also Finegan, supra note 16 (examining problems arising from the blurring of the line between civil and criminal law under the FCA).

27 See, e.g., Ben Depoorter & Jef De Mot, Whistle Blowing: An Economic Analysis of the False Claims Act, 14 Sup. Ct. Econ. Rev. 135 (2006) (identifying problems resulting from relator actions involving the timing of whistle-blowing and its impact on the government's settlement position); Marsha J. Ferziger & Daniel G. Currell, Snitching for Dollars: the Economics and Public Policy of Federal Civil Bounty Programs, 99 U. Ill. L. Rev. 1141, 1171-72 (1999) (analyzing the FCA along with other statutes that pay rewards to whistleblowers to determine how to maximize reporting of meritorious cases); Elletta Sangrey Callahan & Terry Morehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273 (1992) (discussing the propriety of financial incentives for whistleblowing).

28 The closest any commentator has come to an in-depth look at these incentives is Professor Bucy's game theory analysis of litigation under the FCA. See Bucy, Games and Stories, supra note 12. However, Professor Bucy's analysis differs from that undertaken in this Article in two crucial ways. First, she does not seek, as I do here, to examine whether the FCA's incentives give rise to problems that have been identified by critics, exploring instead how the FCA changes the dynamics among a potential whistleblower, the defendant, and government regulators. See id. at 675 ("The first [goal] was to explore how a private attorney general model such as the FCA alters the regulatory world and whether the alteration is for better or worse."). Second, Professor Bucy assumes for the purpose of her analysis that the defendant committed the alleged fraud. See id. at 628 ("Second, we will assume that T, a public company, has actually engaged in significant wrongdoing .... Again, this is not a normative statement about wrongdoing by regulated industries, but necessary for our discussion."). While that assumption serves her purposes, it would oversimplify my examination of the FCA's incentives to the point of rendering it useless.

29 J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 555-56 (2000). For obvious reasons, supporters of the False Claims Act often connect the statute to President Abraham Lincoln, and thus the Act is sometimes referred to as "Lincoln's Law." See Helmer, supra note 2, at 738.

30 See 31 U.S.C. §3730(b) (2000).

31 Beck, supra note 29, at 555-56.

32 Helmer, supra note 2, at 739.

33 Beck, supra note 29, at 558-59.

34 Id. at 560-61.

35 Steve France, The Private War on Pentagon Fraud, A.B.A. J., Mar. 1990, at 46, 48.

36 Helmer, supra note 2, at 742-43.

37 S. Rep. No. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5267.

38 Id. at 3, as reprinted in 1986 U.S.C.C.A.N. 5266, 5268.

39 Id. at 2, as reprinted in 1986 U.S.C.C.A.N. 5266, 5267.

40 Id. at 3, as reprinted in 1986 U.S.C.C.A.N. 5266, 5268.

41 Id. at 4, as reprinted in 1986 U.S.C.C.A.N. 5266, 5269.

42 Id.

43 Id. at 4-5, as reprinted in 1986 U.S.C.C.A.N. 5266, 5269-70.

44 Id. at 7, as reprinted in 1986 U.S.C.C.A.N. 5266, 5272; see also 132 Cong. Rec. H9382-03, at 23 (daily ed. Oct. 7, 1986) (remarks of Rep. Berman) ("Another reason for providing for this full party status [for relators] is to keep pressure on the Government to pursue the case in a diligent fashion.").

45 Bucy, Private Justice, supra note 17, at 73.

46 S. Rep. No. 99-345, at 8, as reprinted in 1986 U.S.C.C.A.N. 5266, 5273.

47 H.R. Rep. No. 99-660, at 16 (1986).

48 S. Rep. No. 99-345, at 1, as reprinted in 1986 U.S.C.C.A.N. 5266, 5266.

49 Id. at 28, as reprinted in 1986 U.S.C.C.A.N. 5266, 5293; 132 Cong. Rec. H9382-03, at 24 (remarks of Rep. Berman).

50 31 U.S.C. §3730(d)(1)-(2) (2000). The Senate initially proposed that the maximum relator rewards should be increased to 20% and 30% in intervened and non-intervened cases, respectively. S. Rep. No. 99-345, at 27, as reprinted in 1986 U.S.C.C.A.N. 5266, 5292. The Senate described these changes as not "substantial." Id. at 27-28, as reprinted in 1986 U.S.C.C.A.N. 5266, 5292-93. However, in light of the nearly two billion dollars awarded to relators since the amendments, clearly the increased maximum recoveries have substantially boosted relator recoveries.

51 S. Rep. No. 99-345, at 29, as reprinted in 1986 U.S.C.C.A.N. 5266, 5293.

52 31 U.S.C. §3730(h); see S. Rep. No. 99-345, at 34, as reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

53 31 U.S.C. §3730(b)(1)-(2).

54 Id. §3730(b)(1).

55 Id. §3730(a).

56 Id. §3730(b)(2).

57 Id. §3730(b)(3)-(4).

58 Bucy, Games and Stories, supra note 12, at 609. See also U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui tam (Whistleblower) Suits 2, http:// www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited Aug. 5, 2007) [hereinafter Government Intervention] (advising relators that, in the Eastern District of Pennsylvania, "most intervened or settled cases are under seal for at least two years").

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59 31 U.S.C. §3730(b)(2), (4).

60 See, e.g., Robert D. McCallum, Jr., Assistant Attorney Gen., Remarks to the American Health Lawyers Association Meeting (Sept. 30, 2002) (stating only that the DOJ reviews each case "carefully" and considers the opinion of the affected agencies in determining whether to intervene).

61 See Government Intervention, supra note 58, at 2.

62 31 U.S.C. §3730(c)(1).

63 Id. For instance, the government may dismiss or settle the action over the relator's objection, so long as the relator is granted a hearing. Id. §3730(c)(2)(A)-(B).

64 Id. §3730(c)(3).

65 Id.

66 See generally United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97, 104-06 (3d Cir. 2000) (discussing the multi-tiered structure for relator recoveries); Helmer, supra note 2 (same).

67 31 U.S.C. §3730(d)(3).

68 Id.

69 Id. §3730(d)(1).

70 Id.

71 Id. §3730(d)(2).

72 Id. §3730(d)(1)-(2).

73 See Fraud Statistics, supra note 3.

74 The DOJ tracks only those cases that are not referred to individual United States Attorney's offices. See id. at 2.

75 France, supra note 35, at 48.

76 Fraud Statistics, supra note 3, at 1.

77 Id.

78 Id.

79 Id. at 1-2.

80 Id.

81 Id.

82 Id.

83 Id. Total recoveries in non-qui tam suits were slightly higher than the proceeds from relator-initiated suits for the first time in ten years in 2006, as a result of anomalously high recoveries in the non-qui tam category. However, in 2007, qui tam recoveries once again surpassed recoveries in non-qui tam actions, and the 2006 data does not appear to presage a shift in the balance of recoveries.

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84 Id.

85 Id.

86 See S. Rep. No. 99-345, at 2-3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5267-68; France, supra note 35, at 46 (noting that some lawyers viewed the 1986 amendments as potentially "the most dangerous foe of the military-industrial complex since the Viet Cong").

87 Fraud Statistics, supra note 3, at 4.

88 Id. at 3.

89 See id. at 3-4.

90 The most recent data covers fiscal year 2007 and encompasses newly received referrals, investigations, and qui tam actions through September 30, 2007. See id. at 1-2.

91 Id. at 4.

92 Id. at 3.

93 Id. at 4.

94 Id. at 3.

95 Id. at 1-2.

96 Id.

97 Id. at 4.

98 Id.

99 Id. at 5.

100 Id. at 3.

101 This conclusion is based on two assumptions. First, given the number of large settlements in FCA cases, I assume that government contractors usually will not settle a lawsuit that lacks all merit. This assumption is not as obvious as it might first appear, as some critics argue that contractors that otherwise would prevail at trial sometimes will settle in order to avoid the risk of treble damages, exorbitant penalties, and potential disbarment should the government prevail. See, e.g., Joan H. Krause, Health Care Providers and the Public Fisc: Paradigms of Government Harm under the Civil False Claims Act, 36 Ga. L. Rev. 121, 204-05 (2001) [hereinafter Krause, Government Harm]. Even assuming that some settlements occur without underlying liability, however, the problem is likely not so prevalent as to undercut the conclusion that the trend of increasing FCA recoveries is indicative of increased effectiveness at ferreting out actionable fraud. The second, and in some ways more interesting, assumption underlying this conclusion is that a violation of the FCA necessarily equates to an instance of fraud, as defined in common law, on the government. An inquiry into whether the types of activities targeted by the FCA constitute what traditionally has been termed "fraud" is beyond the scope of this Article, however.

102 See, e.g., Bucy, Private Justice, supra note 17, at 54; McCallum, supra note 60 (declaring that the DOJ "is fully committed to the fair and vigorous use of the False Claims Act ... to punish those companies and individuals that steal from taxpayers" and noting that the government and relators together had recovered $5.2 billion in health care fraud cases under the FCA since the 1986 amendments); False Claims Act Recoveries Top $17 Billion Since 1986, False Claims Act Update & Alert (Taxpayers Against Fraud Educ. Fund, Washington, D.C.), Jan. 24, 2006, http://www.taf.org/whistle77.htm.

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103 Since 2001, relators have filed nearly four times as many actions as the government. See Fraud Statistics, supra note 3, at 1-2.

104 Id.

105 31 U.S.C. §3730(a) (2000).

106 McCallum, supra note 60.

107 See S. Rep. No. 99-345, at 8 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5272 (recognizing that "with current budgetary restraints, it is unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase"); Matthew, Moral Hazard, supra note 22, at 330 ("Without question, the Government's resources are stretched, and its ability to investigate and prosecute fraud effectively is compromised by its limited budget and personnel.").

108 These pressures are self-perpetuating. As the DOJ dedicates more resources to relator-initiated suits, fewer resources are available for it to initiate its own investigations. With fewer government-initiated matters, the recovery from those suits relative to qui tam proceeds will tend to decline, thus increasing the political pressure on the DOJ to continue to dedicate resources preferentially to qui tam suits.

109 Fraud Statistics, supra note 3, at 3-4.

110 Id.

111 McCallum, supra note 60.

112 See supra note 14 and accompanying text.

113 The FCA defines a "claim" to include any request or demand for money for property. 31 U.S.C. §3729(c) (2000). In the defense procurement context, then, "claims" are typically requests for payment under a contract.

114 See S. Rep. No. 99-345, at 9 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5274 ("Each separate bill, voucher or other 'false payment demand' constitutes a separate claim for which a forfeiture shall be imposed, and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable for a forfeiture for each ... even though several such forms may be submitted to the fiscal intermediary at one time." (internal citation omitted)); United States ex rel. Tyson v. Amerigroup Ill., Inc., 488 F. Supp. 2d 719, 740-42 (N.D. Ill. 2007) (assessing civil penalty for false enrolment form completed by defendant for each of 18,130 patients, even though intermediary submitted only twenty-four claims to government resulting from the forms, for a total FCA penalty of nearly $100 million).

115 See, e.g., United States v. Mackby, 339 F.3d 1013 (9th Cir. 2003) (upholding in face of Eighth Amendment challenge FCA penalty of $555,000 where damages totaled approximately $58,000); Tyson, 488 F. Supp. 2d at 739-42 (awarding nearly $100 million FCA penalty where damages totaled $48 million).

116 Fraud Statistics, supra note 3, at 3.

117 Id. at 4-5.

118 See Sarah Helene Duggin, The Impact of the War over the Corporate Attorney-Client Privilege on the Business of American Health Care, 22 J. Contemp. Health L. & Pol'y 301, 332-33 (2006) (setting forth public statements made by Bush and Clinton Administrations regarding enforcement priorities).

119 At first blush, one might think that the government's shift away from defense industry fraud is the result of the defense industry in fact committing less fraud. However, FCA recoveries in actions claiming fraud against the Department of Defense have remained nearly constant. In the first ten years after the 1986 amendments, proceeds from defense FCA cases averaged just over $200 million annually. Fraud Statistics, supra note 3, at 4. In the last decade, those same proceeds averaged over $170

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million annually. Id. Particularly in the light of the declining number of defense FCA cases over the last ten years, these data suggest that defense fraud is not in decline.

120 Gregory G. Brooker, The False Claims Act: Congress Giveth and the Courts Taketh Away, 25 Hamline L. Rev. 373 (2002) (arguing, inter alia, that courts have erred in not allowing qui tam cases against States or their subdivisions, imposing a materiality requirement, and requiring the government to prove damages).

121 Helmer, supra note 2, at 760-61.

122 Stephanie L. Trunk, Note, Sounding the Death Toll for Health Care Providers: How the Civil False Claims Act Has a Punitive Effect and Why the Act Warrants Reform of Its Damages and Penalties Provision, 71 Geo. Wash. L. Rev. 159 (2003).

123 See Matthew, Moral Hazard, supra note 22, at 297 ("Due to the sizable potential of financial gain, some qui tam relators will pursue cases with poor factual support or pursue flimsy legal theories that establish bad precedent and waste public resources."); Finegan, supra note 16, at 674 ("Qui tam relators are also incentivized to file suit even if their case is weak and unlikely to succeed at trial."). Some commentators who criticize the prevalence of unsuccessful qui tam lawsuits refer to these lawsuits as "frivolous." See, e.g., Broderick, supra note 26, at 975 (labeling all suits in which the relator does not prevail "frivolous"). However, the term "frivolous" has a specific legal meaning that makes its use in this context problematic. Rule 11 permits the punishment of any attorney or party that makes frivolous factual or legal arguments. Fed. R. Civ. P. 11(b)(2), (c). Moreover, the FCA allows for the award of the defendant's attorneys fees against a relator who bring an action that is "clearly frivolous." 31 U.S.C. §3730(d)(4) (2000). Obviously, however, not all suits that lack merit are sanctionable. See Fed. R. Civ. P. 11 advisory committee's notes (indicating that unsuccessful arguments based "even in minority opinions, in law review articles, or ... consultation with other attorneys" often are not frivolous). Thus, to describe all unsuccessful qui tam claims as frivolous is at least confusing, and this Article will not use the term "frivolous" to describe a claim or action unless it fits that legal definition.

124 See Matthew, Moral Hazard, supra note 22, at 300.

125 See id. at 327; Krause, Promises to Keep, supra note 23, at 1410-15.

126 Finegan, supra note 16, at 662-63.

127 See id. at 672-77 (discussing prosecutorial discretion problems in qui tam litigation); Pamela H. Bucy, Moral Messengers: Delegating Prosecutorial Power, 59 SMU L. Rev. 321, 322-23 (2006) [hereinafter Bucy, Moral Messengers].

128 While research shows that whistleblowers typically are not motivated by the potential for monetary gain, Bucy, Moral Messengers, supra note 127, at 338 & n.86, the FCA calls that a relator's motive into question by dangling the "carrot" of a monetary reward. Moreover, relators' counsel, who play an integral role in the exercise of the prosecutorial discretion delegated to relators, usually work on a contingency fee basis, and thus unquestionably are motivated by the prospect of a financial reward.

129 James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1523-24 (1981). Professor Vorenberg explained further that a precise definition of prosecutorial discretion is not generally necessary because discretion is a relative concept. Id. at 1524 n.9. While defining the degree of prosecutorial discretion available to qui tam relators for the purposes of this Article is unimportant, understanding what decisions fall within the scope of prosecutorial discretion in FCA litigation is helpful.

130 Id. at 1524-25; see also Theodora Galacatos, Note, The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intrabranch Conflict over Congressional Oversight and the Exercise of Prosecutorial Discretion, 64 Fordham L. Rev. 587, 599 (1995) ("[P]rior to trial, the prosecutor must decide: (1) which crimes to prosecute and against which groups or individuals; (2) when to investigate; (3) whether to charge; (4) whether to divert the potential defendant from the criminal system to civil proceedings; and (5) whether to plea bargain or dismiss charges.").

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131 Kenneth J. Melilli, Prosecutorial Discretion in an Adversary System, 1992 BYU L. Rev. 669, 671; see also Vorenberg, supra, note 129, at 1525-26 (describing impact of a criminal charge on a potential defendant).

132 The analogy between criminal and FCA prosecutions is particularly apt in light of the severity and quasi-criminal nature of FCA sanctions. See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784-85 (2000) (recognizing that "the current version of the FCA imposes damages that are essentially punitive in nature"); United States ex el. Atkins v. McInteer, 470 F.3d 1350, 1360 (11th Cir. 2006) (noting "quasi-criminal nature of FCA violations (i.e., a violator is liable for treble damages)").

133 See Bucy, Private Justice, supra note 17, at 63-64 (cataloguing expense to defendant of responding to qui tam FCA suit, including harm resulting from concern by third-party investment banker and credit agency about outcome of investigation).

134 See Press Release, U.S. Dep't of Justice, Justice Dept. Civil Fraud Recoveries Total $1.2 Billion for FY 2003; False Claim Act Recoveries Exceed $12 Billion Since 1986 (Nov. 10, 2003) (stating that HCA Inc. paid a total of $1.7 billion in damages, penalties, and fines for fraudulent activities).

135 Finegan, supra note 16, at 651.

136 Id.; Ralph F. Hall & Robert J. Berlin, When You Have a Hammer Everything Looks Like a Nail: Misapplication of the False Claims Act to Off-Label Promotion, 61 Food & Drug L.J. 653, 676 (2006).

137 31 U.S.C. §3730(b)(1) (2000).

138 The federal circuits are split on the question of whether the government can block the settlement of non-intervened qui tam actions. See Gretchen L. Forney, Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator under the False Claims Act, 82 Minn. L. Rev. 1357, 1374-77 (1998).

139 Finegan, supra note 16, at 672; Edward S.G. Dennis, Jr., Prosecutorial Discretion: The Federal Government's Charging Decision, C900 A.L.I.-A.B.A. 463, 468 (1994) (listing nineteen factors that prosecutors consider).

140 Finegan, supra note 16, at 672.

141 Ferziger & Currell, supra note 27, at 1171-72.

142 See, e.g., Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 204 (1969) (discussing factors considered by prosecutors in selecting legal theories).

143 Finegan, supra note 16, at 673.

144 See Fed. R. Civ. P. 11(c) (allowing for the imposition of sanctions for unwarranted legal arguments or allegations made with knowledge that they are unlikely to have factual support); 31 U.S.C. §3730(d)(4) (2000) (permitting award of defendant's attorneys' fees and expenses against relator where the defendant prevails and the court finds that the relator's claims were "clearly frivolous").

145 See infra Part V.B.

146 See Matthew, Moral Hazard, supra note 22, at 326-27.

147 See generally Finegan, supra note 16 (discussing problems arising from settlement of FCA actions by either relators or the government and the imposition of agreements binding defendant's future actions).

148 Id. at 647.

149 Id.

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150 See 31 U.S.C. §3730(h) (2000).

151 Finegan, supra note 16, at 647.

152 Id. For instance, in United States ex rel. Sharma v. University of Southern California, the relator entered into a settlement agreement with the defendant that provided for a total payment of $650,000, of which $400,000 was allocated to the relator's retaliation claim. 217 F.3d 1141, 1143 n.2 (9th Cir. 2000).

153 Bucy, Private Justice, supra note 17, at 72.

154 31 U.S.C. §3730(c)(2)(A); see United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1143-45 (9th Cir. 1998) (permitting the government to dismiss action ten years after filing).

155 31 U.S.C. §3730(b)(4), (c)(3).

156 In order to intervene after the court unseals the complaint, the government must show good cause for doing so. Id. §3730(c)(3).

157 See Bucy, Private Justice, supra note 17, at 70-71.

158 See Matthew, Moral Hazard, supra note 22, at 301-02.

159 Government Intervention, supra note 58, at 2. See Sequoia Orange Co., 151 F.3d at 1145 (holding that the government may dismiss a qui tam FCA action so long as dismissal is rationally related to any legitimate government purpose).

160 Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 930 (10th Cir. 2005).

161 Id.

162 Sequoia Orange Co., 151 F.3d at 1142-43.

163 Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003). While the reason given for dismissal in Swift would seem applicable in other cases, its application is likely to be limited to the unique facts of the case, in which the relator alleged FCA violations by DOJ officials. Id.

164 Sequoia Orange Co., 151 F.3d at 1145. But see Swift, 318 F.3d at 253 (holding that the FCA does authorize judicial review of decision by the Executive Branch).

165 31 U.S.C. §3730(c)(1) (2000).

166 For instance, in Rockwell International Corp. v. United States, the government filed a joint amended complaint with the relator after intervention that left out substantial portions of the relator's original theory of liability. 127 S. Ct. 1397, 1404 (2007). The government eventually prevailed at trial on a theory not raised in the relator's complaint, which led to the court dismissing the relator from the suit and the relator being unable to recover his attorneys' fees. Id. at 1412.

167 See Government Intervention, supra note 58, at 3 (stating "usual practice" with Eastern District of Pennsylvania of filing amended complaint setting forth the government's own version of the facts).

168 31 U.S.C. §3730(c)(2)(B).

169 Id. §3730(c)(3). The government may request a temporary stay of discovery in a non-intervened case where it may interfere with a separate government investigation, id. §3730(c)(4), and even may move to dismiss a non-intervened action at any stage, id. §3730(c)(2)(A). However, the former is merely a minor inconvenience, and the latter is rarely sought.

170 See Michael Herz & Neal Devins, The Consequences of DOJ Control of Litigation on Agencies' Programs, 52 Admin. L. Rev. 1345, 1346 (2000) (critiquing the impact of DOJ's centralized control of government litigation on agencies' substantive policies).

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171 Dayna Bowen Matthew, Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud under the Civil False Claims Act?, 76 Ind. L.J. 525, 580 nn.318-19 (2001) [hereinafter Matthew, Tainted Prosecution].

172 Krause, Promises to Keep, supra note 23, at 1412.

173 Id. at 1412-13.

174 See 132 Cong. Rec. H9382-03, at 23 (daily ed. Oct. 7, 1986) (remarks of Rep. Berman) ("Another reason for providing for this full party status is to keep pressure on the Government to pursue the case in a diligent fashion. Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain. I do not say this to impune [sic] the ability or character of Government attorneys ...."); H.R. Rep. No. 99-660, at 22-23 (1986) ("Nevertheless, the Committee is concerned that there are instances in which the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action.").

175 S. Rep. No. 99-345, at 8 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5273 ("An additional problem noted by hearing witnesses, exists when large, profitable corporations are the subject of a fraud investigation and able to devote many times the manpower and resources available to the Government."); 132 Cong. Rec. H9382-03, at 23 (remarks of Rep. Berman) ("The law that we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff.").

176 See S. Rep. No. 99-345. at 7-8, as reprinted in 1986 U.S.C.C.A.N. 5266, 5272-73 ("Federal auditors, investigators, and attorneys are forced to make 'screening' decisions based on resource factors. Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient. And with current budgetary constraints it is highly unlikely that the Government's corps of individuals assigned to anti-fraud enforcement will substantially increase.").

177 See Fraud Statistics, supra note 3, at 2 (showing total proceeds in non-intervened cases of $397,608,163).

178 See supra note 35 and accompanying text.

179 See Fraud Statistics, supra note 3, at 1-2.

180 See id. at 3-4.

181 Fraud Statistics, supra note 3, at 6.

182 Bucy, Private Justice, supra note 17, at 71.

183 Krause, Promises to Keep, supra note 23, at 1414.

184 See id. at 1414 ("It is one thing to provide the government with the discretion to pursue potential violations of law; it is quite another to say that private individuals should be permitted to profit by using the FCA to sue for violations of unclear rules that contain no private rights of action.... While prosecutorial discretion may be an imperfect screen for preventing unwarranted use of the FCA, it is infinitely preferable to a bounty system enforced by private individuals.").

185 See Broderick, supra note 26, at 998-99 (proposing amendment to limit qui tam actions to medical assistance claims); Matthew, Tainted Prosecution, supra note 171, at 588 ("Ideally, the anti-kickback and self-referral laws should be entirely exempt from qui tam enforcement.").

186 See Matthew, Tainted Prosecution, supra note 171, at 588 (arguing that if qui tam actions alleging violations of anti-kickback and self-referral laws are permitted to continue, these actions should be dismissed automatically if the government declines to intervene).

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187 See S. Rep. No. 99-345, at 27-28 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5292-93 (instituting minimum award to relator as a "finder's fee" to encourage whistleblowers to come forward).

188 See supra note 61 and accompanying text.

189 Recall that unlike a qui tam relator, a public prosecutor typically weighs public costs and benefits in its exercise of prosecutorial discretion. See supra notes 137, 142, 147-148 and accompanying text; cf. Finegan, supra note 16, at 672 (noting that the government often will not prosecute technical statutory violations that cause little public harm "because there would be little benefit to the public relative to the cost of pursuing the action").

190 Matthew, Moral Hazard, supra note 22, at 333.

191 Id. at 327-28.

192 Id. at 300 n.69.

193 See Matthew, Tainted Prosecution, supra note 171, at 583-86 (explaining how the proceeds from successful FCA cases are used to fund further investigations).

194 See Krause, Promises to Keep, supra note 23, at 1412.

195 31 U.S.C. §3730(d)(4) (2000). Though the FCA does not specify who is to pay the attorney fee award, courts have assumed that the burden falls on the relator. United States ex rel. Bain v. Ga. Gulf Corp., 208 Fed. App'x 280 (5th Cir. 2006).

196 See, e.g., Statement of Interest of the United States Regarding Defendant's Motion to Dismiss at 3, United States ex rel. Howard v. Lockheed Martin Corp., No. 1:99CV285 (S.D. Ohio Apr. 20, 2007) ("While the United States takes no position on whether the Second Amended Complaint satisfies Rule 9(b), or, more generally, on the merits of relators' claims, ...").

197 31 U.S.C. §3730(b)(4).

198 Depoorter & De Mot, supra note 27, at 149-51; see also Bucy, Games and Stories, supra note 12, at 650-52 (analyzing the government's decision whether to intervene using game theory).

199 On average, relators are awarded 16% of the proceeds when the government intervenes and 26% when it does not. See Fraud Statistics, supra note 3, at 2 (reporting total recoveries and relators' share from qui tam actions in last twenty years when government does and does not intervene). Though the actual relator's award in any given case likely will differ from these averages, the government is unlikely to learn anything in its pre-intervention investigation that will tell it what impact intervention would have on the eventual relator's award. Thus, the government will assume in most cases that by deciding to intervene it will become entitled to 10% more of the eventual proceeds.

200 Depoorter & De Mot, supra note 27, at 150.

201 Id.

202 Id.

203 Id. at 149. Depoorter and De Mot also concluded that two other factors influence the chance that the government will intervene. First, they recognized that, as the difference grows between the relator's recovery with intervention and without so too does the chance that the government will intervene. As previously set forth, see supra note 199, the government generally assumes that this difference in relators' percentage of proceeds is fixed at 10%. Second, Depoorter and De Mot found that intervention becomes more likely as the difference between the probability that the government will prevail and the probability that the relator will prevail increases. Depoorter & de De Mot, supra note 27, at 149. While the government's involvement as a general rule correlates to an decreased chance that a suit will be dismissed, see Bucy, Private Justice, supra note 17, at 51 n.290 (setting forth that 2.1% of intervened qui tam actions and 71.1% of non-intervened actions are dismissed), and some situations may exist where the government's involvement will increase the probability of obtaining a favorable result more

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than in others, discovering such situations is beyond the scope of this Article. Thus, this Article assumes that the benefit of the government's intervention in a suit is fixed and consequently will not impact the government's intervention decision.

204 31 U.S.C. §3730(c)(3) (2000); see also Government Intervention, supra note 58, at 2 ("If the United States declines to intervene, the relator may prosecute the action on behalf of the United States, but the United States is not a party to the proceedings apart from its right to any recovery. This option is frequently used by relators and their attorneys.").

205 See Bucy, Games and Stories, supra note 12, at 666-67.

206 31 U.S.C. §3730(d)(2).

207 Bucy, Game and Stories, supra note 12, at 667.

208 Id.

209 Typically, a relator enters into a contingency fee agreement with her counsel such that the relator is not responsible for her attorney's fees. See Bucy, Private Justice, supra note 17, at 58. In addition, a relator may not prosecute a non-intervened case pro se. United States ex rel. Lu v. Ou, 368 F.3d 773, 775-76 (7th Cir. 2004) (citing United States v. Onan, 190 F.2d 1 (8th Cir. 1951)). Thus, the decision whether to proceed with a non-intervened case in reality is a decision that the relator must undertake with her counsel, and attorney's fees will enter inevitably into that calculation. However, because her fees are recoverable should she prevail, see 31 U.S.C. §3730(d)(2), their weight is discounted by the chance that the relator will prevail.

210 See supra notes 123-128 and accompanying text.

211 See Fraud Statistics, supra note 3, at 6; McCallum, supra note 60 (recognizing an intervention rate between 20% and 25%).

212 See supra note 203 and accompanying text.

213 See Fraud Statistics, supra note 3, at 2 (showing recoveries in intervened actions of approximately $12.3 billion and in non-intervened actions of almost $300 million).

214 See supra notes 47-48 and accompanying text.

215 See supra notes 49-52 and accompanying text.

216 See supra notes 178-182 and accompanying text.

217 See supra notes 188-194 and accompanying text.

218 See Fraud Statistics, supra note 3, at 6.

219 Some of these cases are voluntarily dismissed by relators when the government declines to intervene, thus minimizing the resulting public harm. See Government Intervention, supra note 58, at 2 (claiming that when the government declines to intervene, relators "frequently" prosecute their action, and that when the DOJ advises relators that it intends not to intervene, dismissal is "usually" the result). Yet, even in these cases the DOJ delegates too much power to the relator, as the government relinquishes the power to avoid public harm with no guarantee that the relator will act appropriately.

220 McCallum, supra note 60.

221 Bucy, Private Justice, supra note 17, at 71.

222 See Fraud Statistics, supra note 3, at 2.

223 See id.

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224 See S. Rep. No. 99-345, at 7-8 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5272-73; McCallum, supra note 60 ("On the one hand, we must be watchful that relators can proceed to prove a potentially meritorious case, consistent with the intent of Congress, even where we choose not to do so.").

225 The extreme circumstances of the cases in which the government has moved to dismiss provide further evidence of an institutional bias against dismissal. For instance, in United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., the government moved to dismiss thirty-four qui tam actions filed by the same relators alleging violations of regulations promulgated in 1984 under the Agricultural Marketing Agreement Act ("AMAA"). 151 F.3d 1139, 1141-42 (9th Cir. 1998). In 1994, after ten years of litigation over the AMAA regulations, the Secretary of Agriculture announced his intention to dismiss all litigation relating to the regulations, including the qui tam FCA suits, to end divisiveness in the citrus industry. Id. at 1142-43. Similarly, the government moved to dismiss a qui tam action relating to the Rocky Flats Nuclear Weapons Plant, arguing that the action would result in the disclosure of classified information and delay the closure of the Rocky Flats facility. Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005). According to the government, delaying the closing of the facility would cost the government approximately one million dollars per day and expose the two and a half million people who live within fifty miles of Rocky Flats to continued health risks. Id. at 936 n.18. Most qui tam actions, however, neither implicate industry-wide concerns like those addressed in Sequoia Orange Co. nor involve the potential financial and human costs in Ridenour.

226 Given the punitive sanctions available under the FCA, the fact that the plaintiff need only prove its case by a preponderance of the evidence makes the risk of proceeding to trial high enough to encourage the defendant strongly to settle. Finegan, supra note 16, at 649, 670.

227 See supra note 219.

228 See Matthew, Moral Hazard, supra note 22, at 333 ("[W]eak cases will impose litigation and enforcement costs not internalized by the private plaintiff.").

229 See 31 U.S.C. §3730(a) (2000) (requiring the Attorney General to investigate all alleged FCA violations "diligently"); McCallum, supra note 60 (stating that the DOJ "expend[s] significant resources on the qui tam caseload").

230 McCallum, supra note 60.

231 See supra notes 204-209 and accompanying text.

232 See S. Rep. No. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5266-67.

233 However, for reasons set forth above, supra note 219, the preferable course is for the government to dismiss sua sponte even those non-meritorious actions that a relator typically would dismiss herself.

234 See S. Rep. No. 99-345, at 8 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5273.

235 See Bucy, Games and Stories, supra note 12, at 667.

236 See Brookings Inst., Justice For All: Reducing Costs and Delay in Civil Litigation, Report of a Task Force 6-7 (1989) (lawyers surveyed estimated that 60% of litigation costs in a typical federal case are attributable to discovery); Pamela H. Bucy, Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups, 35 Loy. U. Chi. L.J. 1021, 1033 (2004) ("Because of their complexity, FCA cases are expensive to prepare and lengthy to resolve."); McCallum, supra note 60 ("[W]e have certainly seen growing complexity in the types of matters filed, particularly as [relators] continue their focus on health care fraud, and more sophisticated types of fraud schemes.").

237 See Karen Halverson Cross, Parol Evidence under the CISG: The "Homeward Trend" Reconsidered, 68 Ohio St. L.J. 133, 154 (2007) ("In other words, the denial of a summary judgment motion in the vast majority of cases will set the parameters for the parties' settlement of the dispute.").

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238 See supra note 132 and accompanying text.

239 See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 773-74 (2000) (finding that relators have standing to bring FCA actions as partial assignee of government's claim).

240 See Matthew, Moral Hazard, supra note 22, at 320.

241 See id. at 301-02 (noting that qui tam actions "may be weakly supported [and] poorly reasoned").

242 Bucy, Private Justice, supra note 17, at 51 n.290.

243 Six non-intervened cases in one hundred result in some recovery, see Fraud Statistics, supra note 3, at 6, but an unknown number of these assert new legal theories.

244 See Finegan, supra note 16, at 670 (describing "great pressure" on defendants to settle FCA actions).

245 See Krause, Government Harm, supra note 101, at 205-06 ("To the extent that settlement removes many factual and legal issues from judicial scrutiny, it precludes a provider from arguing a range of issues that are crucial both to the development of FCA jurisprudence and to the underlying regulatory policy.... What results from such settlements is an amorphous collection of quasi-legal guidance with no precedential value, on which the government will happily rely in future enforcement efforts.").

246 Matthew, Moral Hazard, supra note 22, at 300 ("When forced to allocate scarce enforcement resources, the Government will carefully choose the strongest cases to pursue; these are cases with credible witnesses, firm evidence, and colorable theories of recovery.").

247 See United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39 (D. Mass. 2001).

248 Id. at 45-46.

249 Id.

250 Id.

251 Id.

252 Despite the statutory requirement that the Attorney General make an intervention decision before the end of the sixty-day investigation period and any extensions thereof, 31 U.S.C. §3730(b)(4) (2000), the DOJ elected neither to intervene nor to decline to intervene, claiming that it still required additional time to investigate Franklin's allegations. See United States Amicus Brief Opposing Defendant Parke-Davis' Motion to Dismiss at 2, United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39 (D. Mass. 2001) (No. 96-11651). This non-decision effectively served as a decision by the government neither to intervene nor to dismiss.

253 Franklin, 147 F. Supp. 2d at 46.

254 Id. at 54-55.

255 Id. at 53.

256 Id. at 52.

257 Id.

258 See United States ex rel. Franklin v. Parke-Davis, No. Civ.A. 96-11651, 2003 WL 22048255 (D. Mass. Aug. 22, 2003).

259 31 U.S.C. §3729(a)(2) (2000).

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260 Id. §3729(a)(1).

261 Parke-Davis, 2003 WL 22048255, at *1-2.

262 Id. at *4-6.

263 See Matthew, Moral Hazard, supra note 22, at 325 (describing the "unique approaches" relator took to existing law).

264 Press Release, U.S. Dep't of Justice, Warner-Lambert to Pay $430 Million to Resolve Criminal & Civil Health Care Liability Relating to Off-Label Promotion (May 13, 2004), available at http://www.usdoj.gov/opa/pr/2004/May/04_ civ_322.htm.

265 Id.

266 See, e.g., Matthew, Moral Hazard, supra note 22, at 320-27; Hall & Berlin, supra note 136.

267 But see United States ex rel. Hess v. Sanofi-Synthelabo, Inc., No. 4:05CV570, 2006 WL 1064127 (E.D. Mo. Apr. 21, 2006) (relying extensively on first Franklin decision, without mention of second, to dismiss relator's complaint that failed to allege false or fraudulent off-label marketing by defendant).

268 See Hall & Berlin, supra note 136, at 676 (discussing potential risk of debarment); Press Release, Michael Sullivan, U.S. Attorney, U.S. Dep't of Justice, Schering to Pay $435 Million for the Improper Marketing of Drugs and Medicaid Fraud (Aug. 29, 2006) (on file with author); Press Release, U.S. Dep't of Justice, Biopharmaceutical Firm Intermune to Pay U.S. Over $36 Million for Illegal Promotion and Marketing of Drug Actimmune (Oct. 26, 2006), available at http://www.usdoj.gov/opa/pr/2006/October/06_civ_728.html; Press Release, U.S. Dep't of Justice, Cell Therapeutics, Inc. to Pay United States $10.5 Million to Resolve Claims for Illegal Marketing of Cancer Drug (Apr. 17, 2007), available at http://www.usdoj.gov/opa/pr/2007/April/07_civ_258.html; Press Release, U.S. Dep't of Justice, Eli Lilly and Company to Pay U.S. $36 Million Relating to Off-Label Promotion (Dec. 21, 2005), available at http:// www.usdoj.gov/opa/pr/2005/December/05_civ_685.html; Press Release, U.S. Dep't of Justice, Medicis Pharmaceutical to Pay U.S. $9.8 Million to Resolve False Claims Allegations (May 8, 2007), available at http:// www.usdoj.gov/opa/pr/2007/May/07_civ_336.html.

269 See Denise LaVoie, Cracking Down on Off-label Marketing, Star-Ledger (Newark, N.J.), May 11, 2007.

270 See sources cited supra note 268.

271 See supra notes 170-173 and accompanying text.

272 Dr. Franklin ultimately received approximately $27 million for his role in the civil FCA action. See Hall & Berlin, supra note 136, at 662.

273 See Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784-85 n.1 (2000) (recognizing that "the current version of the FCA imposes damages that are essentially punitive in nature").

274 Another example of the haphazard expansion of FCA liability that can result from non-intervened qui tam actions is the theory of implied certification. This theory holds that when a defendant submits a claim for payment, it impliedly certifies that it is in compliance with all governing federal rules, statutes, and regulations. Thus, if the defendant violates a rule, statute, or regulation prior to submitting a claim, that claim is false and the defendant can be held liable under the FCA. The theory of implied certification became widely known in a non-intervened qui tam action filed in the Middle District of Tennessee. United States ex rel. Pogue v. Am. Healthcorp, Inc., 914 F. Supp. 1507 (M.D. Tenn. 1996). There, the court vacated its own dismissal of a relator's complaint and held that the defendant's violation of federal anti-kickback statutes tainted the defendant's subsequent Medicare and Medicaid claims, even though those claims contained no explicit falsehood. Id. at 1514. This theory was later "refined" in the Fifth Circuit. See Matthew, Tainted Prosecution, supra note 171, at 536. Like the decision in Franklin, the theory of implied certification also has been subject to ferocious criticism from commentators. See, e.g., id. at 534-40; John T. Boese & Beth C. McClain, Why Thompson Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act, 51 Ala. L. Rev. 1 (1999).

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275 Krause, Promises to Keep, supra note 23, at 1414.

276 Id.

277 Id.

278 See James F. Barger, Jr. et al., States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts, 80 Tul. L. Rev. 465, 487 (2005) (recognizing that the Texas FCA contains a provision requiring dismissal of a qui tam complaint if the government does not intervene).

279 S. Rep. No. 99-345, at 7 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5272.

280 Id. at 7-8, as reprinted in 1986 U.S.C.C.A.N. 5266, 5272-73.

281 See supra note 234 and accompanying text.

282 See France, supra note 35, at 47 (recounting that 1986 amendments passed with "warm endorsement" from President Reagan, "minimal opposition" in Congress, and no open objection from the defense industry).

283 31 U.S.C. §3730(d)(4) (2000).

284 S. Rep. 99-345, at 29, as reprinted in 1986 U.S.C.C.A.N. 5266, 5294.

285 See supra note 218 and accompanying text

286 See supra notes 219-221 and accompanying text.

287 The government would retain the power to move to dismiss the qui tam action, see 31 U.S.C. §3730(c)(2)(A), but as this Article has shown, the government often does not move to dismiss even those actions that it believes lack merit. See McCallum, supra note 60 (stating that the DOJ permits qui tam actions to proceed even though many have "questionable" merit).

288 See United States ex rel. Franklin v. Parke-Davis, No. Civ.A. 96-11651, 2003 WL 22048255, at *3 (D. Mass. Aug. 22, 2003) (requesting amicus brief setting forth the government's view of the states' power under Medicaid to cover the cost of off-label prescriptions).

289 See United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999) (recognizing that "[a] contractor relying on a good faith interpretation of a regulation is not subject to liability"); see also Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1052-55 (8th Cir. 2002) (reviewing agency opinions to determine whether defendant's statement was "knowingly" false in light of potential ambiguity).

290 See Krause, Promises to Keep, supra note 23, at 1413 (describing opinion in health care industry that recent anti-fraud efforts are "border[ing] on extortion") (internal quotation omitted) (alteration in original).

291 See Matthew, Moral Hazard, supra note 22, at 336.

292 Id.

293 See supra notes 279-282 and accompanying text.

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ARTICLE: THE MORAL HAZARD PROBLEM WITH PRIVATIZATION OF PUBLIC ENFORCEMENT: THE CASE OF PHARMACEUTICAL FRAUD

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* Associate Professor and Associate Dean of Academic Affairs, University of Colorado School of Law. I am indebted to my colleagues at the University of Colorado including Nestor Davidson, Allison Eid, David Getches, Clare Huntington, Mark Loewenstein, Carolyn Ramsey, Amy Schmitz, Phil Weiser, and Mimi Wesson, who commented on earlier drafts of this paper. I owe special thanks to Pierre Schlag and Max Stearns for their extreme generosity and encouragement, and to Pam Bucy for her excellent inspiration and kindness. The idea for this paper was first critiqued at an invaluable workshop organized by my friends at the University of St. Louis; I thank Sidney Watson especially for her vision in this regard. Finally, I appreciate the research assistance of Adam Romney and Rachel Ollar. Notwithstanding all this assistance, I am solely responsible for any errors that remain.

Highlight

This Article takes a law and economics approach to exploring some of the costs that arise when governments rely on private enforcement to accomplish the goals of public law. The analysis focuses on qui tam enforcement under the Civil False Claims Act, because a remarkable body of empirical data demonstrates the expansive role private qui tam relators are playing in enforcing Medicare and Medicaid fraud and abuse laws. The Article further focuses on the application of these laws to the pharmaceutical industry. This focus is enlightening because the Government, as well as private enforcers have recently targeted this industry so that emerging legal trends in private enforcement are readily evident. The economic concept of moral hazard - a well-recognized theory that a person takes more risks and exercises less care when insured than she would if uninsured - is applied to reconceptualize the costs and benefits of private enforcement. These costs are most dramatic when, as in the case of pharmaceutical fraud, the government overwhelmingly cedes to private enforcers its responsibility to protect the social good. This phenomenon is called the "privatization" of public enforcement. The analysis demonstrates a fundamental divergence between private and public incentives in False Claims Act prosecutions. The availability of private enforcers creates significant opportunities for public prosecutors to overenforce. Moreover, the reduction in short-term risk causes Government prosecutors to reduce the care that typically controls their exercise of prosecutorial discretion. The explanatory power of the moral hazard analysis is borne out by a review of case law that demonstrates private enforcement patterns that significantly depart from the public goals of federal anti-fraud law. The Article concludes by proposing legislative language that would reform the qui tam statute, and bring public and private enforcement goals into alignment.

Text

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Introduction

Private enforcement of public law is a central feature of the modern regulatory state in areas as wide-ranging as civil rights, **[*282]** environmental protection, antitrust, securities law enforcement, and civil prosecution to protect the United States against Medicare and Medicaid fraud. Much has been written about whether and when it is appropriate to authorize private actions to pursue public objectives in these various contexts. Scholarly attention in this area has focused primarily on the misalignment between incentives that drive so-called "private attorneys general" and the public good. Some have highlighted the risks of overenforcement by private attorneys in civil rights cases. [1] Others have raised concerns of prosecutorial error in environmental protection suits. [2] Still others have warned of misdirected resources in antitrust [3] and securities litigation. [4] At the same time, some scholars have argued for judicial control to limit the perverse incentives that drive private enforcers. [5] Others advocate executive branch control to prevent private enforcers from overreaching. [6] Yet, despite the well-deserved, scholarly attention on both sides of this debate, the literature has missed a different and vitally important set of incentive effects: the effects that the availability of private enforcement have on the Government's incentives.

This Article fills that gap. Here I demonstrate that the concept of moral hazard - the well-recognized theory that a person takes more risks and exercises less care when insured than she would if uninsured - provides substantial explanatory power to re-conceptualize the costs and benefits of private enforcement. The availability of private enforcers creates significant opportunities for public prosecutors to overenforce. Moreover, the reduction in short term risk causes public prosecutors to reduce the care that typically controls their exercise of prosecutorial discretion. Focusing **[*283]** on the moral hazard analogy offers a new set of tools with which to approach the current debates about private enforcement of public laws. Furthermore, focusing on the application of these tools to the Civil False Claims Act provides fertile ground to examine the "real life" consequences of moral hazard in private-public prosecution. The Civil False Claims Act (FCA) [7] is the Government's "weapon of choice" for combating

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[1] Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, *100 Colum. L. Rev. 1384, 1452 (2000).*

[2] See *id. at 1452;* see also Barton H. Thompson, Jr., The Continuing Innovation of Citizen Enforcement, *2000 U. Ill. L. Rev. 185, 204-06 (2000)* (claiming evidence of underenforcement by private agencies, where the private enforcers fail to bring suits that would benefit the common good).

[3] Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, *94 Mich. L. Rev. 1, 2 (1995).*

[4] Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, *107 Harv. L. Rev. 961, 970 (1994).* Grundfest also observed that the converse is true; private plaintiffs may fail to bring cases under the federal securities law that the government would pursue if it had the resources. *Id. at 970.*

[5] Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1205 (1982).

[6] Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, *91 Va. L. Rev. 93, 106 (2005);* see also Robert F. Blomquist, Rethinking the Citizen as Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values, *22 Ga. L. Rev. 337, 338 (1988).*

[7] *31 U.S.C. §3729* (2000). The FCA provides in pertinent part, as follows:

(a) Liability for Certain Acts. - Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; …

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fraud. [8] The qui tam [9] provision of that statute allows the Government to enlist the assistance of private parties in the Government's prosecution of fraud. [10] The statute, for **[*284]** sound legal and policy reasons, was drafted to place the Government squarely in control of all FCA prosecutions, including those involving qui tam relators. However, the data presented here shows that the Government is losing control of these actions at an alarming rate.

Since 1986, over 4,700 qui tam cases have been filed and a total of $ 15 billion has been collected in settlements and judgments against defendants under the FCA. [11] Total qui tam recoveries have soared from a mere $ 390,000 in the year 1988, to $ 1.1 billion in 2005. [12] Most notably, the percentage of privately initiated FCA actions reflects that an overwhelming majority of the cases brought under the statute in pursuit of public anti-fraud goals are now being brought by private, not public enforcers. In 1987, over ninety percent of FCA actions were filed by the Government alone, but by 2005, nearly eighty percent of all new FCA actions were filed by private qui tam litigants. This dramatic privatization of FCA claims has hindered the orderly development of well-reasoned substantive law and has clearly distorted the market incentives and relationships between industry actors.

Nowhere is this trend more pervasive than in the FCA cases against the pharmaceutical industry. Nearly all of the largest settlements and judgments announced against pharmaceutical defendants during the last three years have involved a qui tam relator. In fact, the impact of private litigants' leadership in these cases has been significant, and contrary to the original intent of the Act. Therefore, FCA prosecution of pharmaceutical fraud provides an ideal case to study what occurs when the Government overwhelmingly cedes its responsibility to protect the social good to private enforcers.

In light of the increase in privatization of prosecutions of claims against the Government, this Article examines the fundamental divergence between private and public incentives in FCA prosecutions. Understanding the effects that

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(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person …

Id. at §3729(a)(1)-(3), (7); see also Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, ***110 Stat. 1321 (1996);*** Civil Monetary Penalties Inflation Adjustment, *64 Fed. Reg. 47099, 47104* (Aug. 30, 1999)(to be codified at 28 C.F.R. pt. 71).

[8] Jo-Ellyn Sakowitz Klein, The Stark Laws: Conquering Physician Conflicts of Interest?, *87 Geo. L.J. 499, 502 (1998).* See generally Dan L. Hargrove, Soldiers of Qui Tam Fortune: Do Military Soldiers Have Standing to File Qui Tam Actions Under the False Claims Act?, *34 Pub. Cont. L.J. 45, 47 (2004)* (explaining the FCA is the U.S. Government's most potent weapon against contractor fraud).

[9] Qui tam plaintiffs are called "relators" and may bring a civil action for violation of the FCA and, according to *31 U.S.C. §3730*(b), may recover up to twenty-five percent of the government's total judgment or settlement proceeds awarded in an FCA action pursuant to *31 U.S.C. §3730.* The phrase "qui tam" is a truncation for the Latin phrase given to the private causes of action a plaintiff may bring on behalf of the government. The entire Latin phrase is "qui tam pro domino rege quam se ipso in hac parte sequitur," which means "who as well for the king as for himself sues in this matter." Black's Law Dictionary 1282 (8th ed. 2004).

[10] *31 U.S.C. §3730* defines the qui tam action as follows:

A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. §3730 (b)(1).

[11] John T. Boese, Civil False Claims and Qui Tam Actions H-1 (3d ed. 2006).

[12] See id.

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private enforcement has on Government incentives in the FCA context suggests a new approach to aligning public and private incentives elsewhere. I propose a solution focused on reinvigorating the traditional role that public agencies play in overseeing private attorneys general. Reforming the FCA to solve the moral hazard problem is imperative, and can shed important light on how to conceptualize private enforcement across the entire spectrum of public regulation.

[*285] Part I of the Article compares the statutory role of the qui tam relator to empirical evidence of the actual function of private plaintiffs in fraud prosecution. It then presents data describing the enormity of the current trend - away from the oversight and control the statute originally intended the Government to exercise, towards independence on the part of private enforcers - that I call "privatization." In Part II, I use the concept of moral hazard to explain the results of this trend. The Government's abdication of authority under the FCA results in over-prosecution and a harmful reduction in the Government's exercise of caution in the selection and pursuit of these cases. Part III tests the moral hazard explanation by offering several examples of recent, enormously lucrative and highly publicized FCA prosecutions against pharmaceutical defendants. It confirms that the moral hazard explanation is informative in this context. These cases show that privatization is costly. Due to the moral hazard problem that arises from privatization, FCA claims increasingly attract plaintiffs with questionable motives who advance and inadvertently make bad law, which supplants the reasoned regulatory regime that should govern Government contractors' conduct. [13]

The explanatory power of the moral hazard concept is demonstrated by several examples of FCA actions against pharmaceutical companies that have resulted in billions of dollars in settlements and judgments without any clear finding of fault or liability. In Part IV, I propose a revision for the qui tam statute, and provide suggested legislative language to accomplish this much needed reform.

I. Distorting The Relationship Between the Government and the Qui Tam Relator

The plain language of the FCA reveals the originally-intended balance between the Government and private relators' roles in prosecuting fraud under the FCA. Congress intended the **[*286]** Government to control FCA litigation by qui tam relators. [14] Congress crafted the FCA statute to grant permission to private parties to litigate on behalf of the Government, but the statute requires such parties to be meticulously accountable and subordinate to the Government in such cases. This section reviews the statutory language of the FCA that preserves the Government's authority over FCA prosecutions, and then reviews data that reveals that the Government's statutory authority has been usurped.

Although the FCA was originally enacted in 1863 to encourage private individuals to join in the fight against fraud on the Government during the Civil War, the statute laid virtually dormant until 1986. [15] In that year, Congress amended the FCA's whistleblower or qui tam provision to substantially increase the rewards available to private

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[13] For example, in 2004, the largest and most lucrative of all FCA health fraud cases was a qui tam filing in which the Government learned the proof was insufficient to criminally convict the defendants only after spending hundreds of millions of public dollars to pay qui tam relators and litigation costs, only after the pharmaceutical firms paid hundreds of millions of dollars in civil and criminal fines, and only after individual physician defendants capitulated and pled guilty to criminal charges, leaving the private qui tam relator to repeat the same charges anew, against another defendant. See Neil Weinberg, The Dark Side of Whistleblowing, Forbes, Mar. 2005, at 90.

[14] See, e.g., Myriam E. Gilles, Representational Standing: U.S. ex rel. Stevens and the Future of Public Law Litigation, *89 Cal. L. Rev. 315 (2001);* see also John H. Beisner, Matthew Shors & Jessica Davidson Miller, Class Action "Cops": Public Servants or Private Entrepreneurs?, *57 Stan. L. Rev. 1441 (2005).*

[15] See False Claims Amendment Act of 1986, Pub. L. No. 99-562, §§3-4, *100 Stat. 3153, 3154-58 (1986)* (codified as amended at *31 U.S.C. §3730);* James B. Helmer, Jr. & Robert Clark Neff, Jr., War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation, 18 Ohio N.U. L. Rev. 35, 46 (1991); James Roy Moncus III, The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?, *55 Vand. L. Rev. 1549, 1553-55 (2002).*

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persons who bring actions on behalf of the Government. [16] This amendment brought the partnership between public and private enforcement of the FCA to life.

The originally contemplated structure of the law placed the U.S. Government squarely in control of all anti-fraud litigation. Recent experience, however, indicates that Congress' intent has not been borne out in practice, to the detriment of both the Government and the qui tam relator. According to the plain language of the statute, the qui tam relator is intended to assist in the prosecution of the action subject to the Government's leadership. The qui tam provision creates a private cause of action that allows the relator to engage in litigation both for himself and on behalf of the U.S. Government. [17] The statute requires that actions filed by a qui tam relator remain under seal while the Government is allowed a period of time to investigate the claim and decide whether or not to intervene and prosecute the claim directly. [18] After sixty days, the **[*287]** Complaint may be unsealed, and the qui tam relator may proceed with prosecuting the claim. [19] If the Government chooses to intervene, the Government takes over the prosecution of the case. If, however, the Government declines to intervene, the Government may actively monitor the case, which includes the right to review all pleadings [20] and to later join the case for "good cause shown." [21] In fact, the statute gives the Government a number of additional options so that it can control a case, even if it decides neither to intervene nor declines to intervene until the case is about to conclude. [22] The Government may request an indefinite number of continuances while it considers and reviews the case at issue. [23] When the Government does intervene, its primacy is unquestionable. [24] The qui tam relator must give its full cooperation, or the **[*288]** Government may choose to limit the private party's role in litigation. [25]

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[16] See *31 U.S.C. §3730*(d)(1)-(2) (2000) (a qui tam plaintiff may receive between 15 and 30 percent of trebled damages proved and of fines between $ 5,500 and $ 11,000 per fraudulent claim, plus expenses including attorneys fees); Pamela H. Bucy, Private Justice and the Constitution, *69 Tenn. L. Rev. 939, 943 n.21 (2002).*

[17] *31 U.S.C. §3730*(a) provides in salient part that any person may bring an action under the False Claims Act on behalf of himself, as well as on behalf of the Government.

[18] *31 U.S.C. §3730*(b)(2).

[19] Id.

[20] Id. §3730(b)(3).

If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

31 U.S.C. §3730(c)(3).

[21] Id.

[22] Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall - (A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

Id. §3730(b)(4)(A)-(B).

[23] Id. §3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2).").

[24] When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." Id. §3730(b)(5).

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Additionally, the Government has several other entitlements throughout the course of litigation. The Government must receive a full disclosure of "substantially all" the qui tam relator's material evidence. [26] During the virtually unlimited period of time when it may review the contents of the relator's claims, the private plaintiff must give the Government its full cooperation in the investigation. The Government may cause the qui tam relator's claim to be stayed. [27] The Government may preempt the relator's claim by pursuing **[*289]** the matter through alternative means. [28] The Government may settle the matter over the qui tam relator's objection. [29] The Government may

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If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

Id. §3730(c)(1).

[25] Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as -

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

Id. §3730(c)(2)(C).

Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

Id. §3730(c)(2)(D).

[26] A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to *Rule 4(d)(4) of the Federal Rules of Civil Procedure.* The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

Id. §3730(b)(2).

[27] Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

Id. §3730(c)(4).

[28] Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

Id. §3730(c)(5).

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also simply dismiss the claim. [30] Ultimately, the Government may even move to reduce the relator's statutory share, or completely cut the relator out of his share of proceeds at the end of a case that the Government and relator have litigated together for years. [31]

[*290] In exchange for the information and assistance the qui tam relator provides, the statute gives the plaintiff a right to share in the proceeds from any settlements or judgments paid by the defendant, whether or not the Government intervenes. [32] However, the Government's decision to intervene is a vitally important one to the relator, not only because it determines the percentage share of recovery that a qui tam relator may be awarded, but also because the evidence shows that when the Government intervenes and takes over the lead role of prosecuting FCA cases, the chances of success and monetary value of that claim increase substantially. [33]

The relators' share of rewards in FCA cases is greatly enhanced by the Government's presence. [34] Not only are the amounts of relators' recoveries and rewards greater when the Government intervenes, but the chances of winning those rewards are improved greatly by the Government's participation. [35] As of September 30, 2005, the Government had intervened in 940 FCA cases. [36] The Government had declined to intervene in 3,288 cases, and 901 FCA matters were open and under investigation at that time. [37] When the Government intervenes, the disposition of the case is far more likely to end in judgment or settlement, resulting in financial recovery for both the Government and the qui tam relator.

Eighty-three percent of the cases in which the Government has intervened have resulted in settlement or judgment, while only six percent of the cases in which the Government has declined to intervene have had the same result.

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[29] The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

Id. §3730(c)(2)(B).

[30] The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

Id. §3730(c)(2)(A).

[31] See, e.g., *United States ex rel. Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352, 371 (E.D. Pa. 2000),* remanded from *205 F.3d 97 (3d Cir. 2000),* rev'g *52 F. Supp. 2d 420 (E.D. Pa. 1988)* (After working extensively with plaintiff, the Department of Justice tried unsuccessfully, through protracted litigation under the FCA, to limit the relator's share of settlement proceeds negotiated with SmithKline). The fact that the Government can and sometimes does seek to prevent any recovery by the relator raises the possibility of the Government simply riding the coattails of litigation largely prosecuted by the relator, winning in court, and then attempting to bar the relator from enjoying any of the fruits of the litigation. Such a situation would produce a serious disincentive for the Government to participate in, much less lead, a qui tam case.

[32] In a successful false claims action, the qui tam relator is statutorily entitled to receive between twenty-five and thirty-five percent of the proceeds of any recovery or settlement paid in a case in which the Government does not intervene. See *31 U.S.C. §3730*(d)(2). In a case in which the Government does intervene, the relator is entitled to receive between fifteen and twenty-five percent of the recovery of settlement or judgment paid based upon "the extent to which the person substantially contributed to the prosecution of the action." Id. §3730(d)(1).

[33] Since 1986, a total of $ 9.239 billion has been recovered in cases where the Government has intervened, while during the same period, $ 400 million has been recovered in cases pursued by relators alone. See Boese, supra note 11, at H-2.

[34] Since 1986, relators' rewards in cases where the Government has intervened have totaled $ 1.5 billion, while relators have recovered only $ 99.3 million in cases where the Government did not participate. Id.

[35] Since 1986, a total of 5,129 FCA cases have been filed. Id.

[36] See id. at H-6.

[37] Id.

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Conversely, the percentage of cases dismissed where the qui tam relator proceeds alone - eighty percent - is huge when compared to the mere four percent of cases dismissed when the Government is present. [38] Certainly, the **[*291]** benefits the relator receives from the Government's intervention are clear. [39]

On the other hand, the Government receives benefits from qui tam relators' participation in FCA cases as well. The Government's investigation and prosecution is made more effective by the inside information the qui tam relator provides. This information enhances the Government's chances of success and the size of recoveries from defendants. [40] Certainly, the Government is able to pursue a larger number of cases in the presence of qui tam relators than it would without such private enforcement assistance.

Although the Government has committed significant resources to FCA enforcement, these resources are stretched. There are a number of state and federal enforcement agencies simultaneously investigating and prosecuting pharmaceutical fraud. In some instances, these agencies are engaged in a coordinated effort, sharing investigatory information, and centrally managing a prosecutorial effort. However, in many instances there is no coordination, and investigations as well as prosecutorial efforts overlap. [41] Despite the number of agencies, and professionals within **[*292]** those agencies addressing the health care fraud problem, the Government continues to be shorthanded in its effort to find and prosecute pharmaceutical and other health care fraud. When large corporations engage in fraud, it is often only revealed in ways that are difficult to uncover and complex to unravel. [42] For these reasons, the qui tam relator is often essential to uncovering and understanding the fraudulent schemes, and is essential to the prosecutorial effort.

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[38] See Robert Fabrikant et al., Health Care Fraud: Enforcement and Compliance §4.01[3], at 4-53 (Release 19, Law Journal Press 2006).

[39] Alternatively, one might surmise that the qui tam relators perform a sorting function for the government, reducing the total universe of potential FCA cases, to the most colorable or valuable claims. That private attorney generals might filter the meritless cases is not supported by the examples of cases dismissed and criminal claims tried after civil settlements have been reached. See infra Part III. While the higher quality claims may be the ones that are settling, the cases going to trial are examples of claims that could and perhaps should have been foreclosed even before they were disposed of by expensive litigation. Id.

[40] See Pamela H. Bucy, Games and Stories: Game Theory and the Civil False Claims Act, *31 Fla. St. U. L. Rev. 603, 616 (2004).*

[41] Annually, the Office of Inspector General of the Department of Health and Human Services (OIG) issues a "Work Plan" to announce the areas of its investigative focus. For example, the Work plan for the fiscal year 2003 indicated that the OIG would be focusing on illegal marketing and distribution of prescription drugs and other fraudulent schemes as an area of its investigative focus. Office of Inspector Gen., U.S. Dep't of Health & Human Servs., Workplan Fiscal Year 2003 (2003), available at *http://oig.hhs.gov/reading/workplan/2003/Work%20Plan%202003.pdf*. Both the Civil and Criminal Divisions of the Department of Justice participate in the evaluation and investigation of qui tam actions filed under the False Claims Act. Each United States Attorney's Office also has a health care fraud coordinator and prosecutes local cases. Several programs to coordinate these efforts operate under the auspices of the DOJ. For example, under the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 §201,***110 Stat. 1936, 1992-96*** (codified at *42 U.S.C. §§1320a-7c)* (HIPAA), the National Health Care Fraud and Abuse Control Program is run by the Attorney General, and the Secretary of the Department of Health and Human Services (DHHS). Similarly, the National Health Care Fraud Task Force, chaired by the Deputy Attorney General, coordinates prosecutions run by the DOJ, DHHS/OIG, The Centers for Medicare and Medicaid Services (CMS), and state and local prosecutors. The Department of Health and Human Services Office of Inspector General conducts fraud audits and investigations and then refers cases to the Department of Justice for administrative, civil, and criminal prosecution. In addition to the Department of Justice, several other investigatory and prosecutorial federal departments, including the Defense Criminal Investigative Service, the Federal Bureau of Investigation, the Postal Inspection Service, and the Drug Enforcement Agency, are involved in prosecutorial activities ranging from record reviews to criminal indictments involving pharmaceutical fraud. See Joan H. Krause, A Conceptual Model of Health Care Fraud Enforcement, *12 J.L. & Pol'y 55, 59-60 (2004).*

[42] See Pamela H. Bucy, Private Justice, *76 S. Cal. L. Rev. 1, 3-5 (2002).*

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When the Government and qui tam relators work together, both benefit. However, Congress sought to balance the Government's primacy under the statute by including protections for relators within the terms of the FCA. The statute creates a cause of action for a plaintiff who suffers retaliation from his or her employer, and provides for the recovery of damages plus twice the amount of back pay, compensatory and special damages, and attorneys' fees. [43] The 1986 Amendments to the FCA provided powerful protection for the qui tam relator, whenever she has a good-faith reasonable belief when reporting that his employer has defrauded the Government. [44] The statute also contains protections against abuses by relators such as the original source jurisdictional bar. [45]

Reviewing the FCA's procedural and substantive terms, it is clear that Congress lodged leadership on anti-fraud claims with the Government, notwithstanding the symbiotic relationship between the Government and the qui tam relator.

Recent cases indicate a departure from the balanced system the FCA was intended to implement. Prior to 1986, an average of six claims per year [46] were filed under the old statute. [47] There have been 4,704 qui tam cases filed since that year. [48] Qui tam recoveries **[*293]** have increased by over one hundred thirty percent during the past ten year period, providing a significant incentive to motivate private parties to prosecute fraud against the Government. [49] The data also make it easy to see why relators are eager for Government intervention. The Government's participation markedly increases the absolute dollar amount of recoveries available to qui tam plaintiffs. [50] Recent reports of several high profile FCA cases, each of which cost taxpayers hundreds of millions of dollars to prosecute but which ultimately had questionable basis in fact, [51] belie the seductive influence of the large financial incentives imbedded in the FCA statutory structure. Often, the DOJ announces settlements from health care providers that pay qui tam awards to individual plaintiffs in excess of $ 15 million. [52] Awards to plaintiffs of between $ 1 million and $ 10 million are announced regularly. [53] Over the eighteen years since Congress amended

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[43] *31 U.S.C. §3730*(h).

[44] Id.

[45] Id. §3730(d)(1) (providing that if the false claims suit brought by the qui tam relator is based on allegations that have already been publicly disclosed, however, the qui tam relator is the "original source" of that publicly disclosed information, and the relator is barred from recovery). See also *United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97, 106 (3d Cir. 2000)* (finding a qui tam relator may not receive proceeds from a settlement claim publicly disclosed, for which the relator was not the original source).

[46] See Bucy supra note 42, at 156.

[47] During the 1986 revision of the False Claims Act, the statute was regarded as underutilized, and therefore, the Legislature's objective was to increase the number of cases being filed. See S. Rep. No. 99-345, at 1-2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5266-67.

[48] See Boese, supra note 11, at H-1.

[49] See infra Table 1.

[50] See Michael G. Scheininger & Gregory T. Jaeger, ABA Ctr. for Continuing Legal Educ. Nat'l Inst. Nov. 19-20, 1998, The Pre-Intervention Presentation to the Government: An Important Step in Successful Qui Tam Defense M-2 (1998).

[51] See Weinberg, supra note 13, at 90.

[52] See Fabrikant et al., supra note 38, §4.01[3][f]; see also John F. Murphy, What Are the Rewards, Examples of Recoveries by Whistleblowers, *http://www.whistleblowerlawyer.com/reward.htm* (last visited Nov. 30, 2006) (on file with the University of Michigan Journal of Law Reform) (indicating a recovery for $ 22.5 million to the relator in a case against United Technologies, Inc. which involved a helicopter contract and $ 18.45 million paid to the relator who filed against Lucas Industries, Inc. to allege falsification of gear box records on Navy fighter jets and Army rocket launchers).

[53] Fabrikant et al., supra note 38, §4.01[3][f]. When Congress amended the False Claims Act in 1986 to treble the damages available to qui tam relators, Congress clearly intended to provide a strong financial incentive for private parties to report and

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the FCA statute, relators have collected the majority of their earnings under the statute within the last five years. Since 1986, private False Claims Act plaintiffs have been awarded $ 1.42 billion in total judgments and seventy percent of that total - $ 995.0 million - has been paid out to relators since the year 2000. [54] The data below in Table 1 illustrates significant **[*294]** trends in qui tam litigation over the past seven years. Table 1 below shows that the Government has proportionately increased its returns on funds expended for enforcement. This suggests the Government is getting more than it is spending on anti-fraud prosecution under the FCA. This is an advantageous outcome for the Government.

Table 1[55]

Quantifying the Recent Role of The Qui Tam Relator

(1998-Present)

	1998	1999	2000	2001	2002	2003 [56]	2004	2005	Inc-rease [57]
Total Recovered Amount	613.6	713.4	1,572.37	1,795.3	1,210.2	2,219.2	681.2	1,418.5	131%
Recovery Amount Returned to Government for Future Prosecution	119.6	137.5	158.2	181.9	209.0	240.6	240.6	240.6	50.3%
Number of	589	623	463	398	383	427	528	494	(16.1%)

prosecute fraud. S. Rep. No. 99-345, at 10-12 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5275-77. In fact, the size of qui tam relator recoveries in health care fraud cases alone has been increasing substantially since 1986. These rewards, paid to individuals as well as to corporate qui tam relators, in recent years, have often exceeded $ 20 million. Laurie E. Ekstrand, U.S. Gov't Accountability Office, Information on False Claims Act Litigation: Briefing for Congressional Requestors Dec. 15, 2005 1-2 (Jan. 31, 2006), available at http://www.gao.gov/new.items/d06320r.pdf. In 1998, two qui tam relators earned $ 52 million for their role in prosecuting SmithKline Beecham Corporation in an FCA action alleging fraud and improper billing practices by*SmithKline. United States ex rel. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420 (E.D. Pa. 1998).* But see *United States ex rel. Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000)* (revising relators' awards based on original source and "first to file" jurisdictional bars).

[54] Id.

[55] See Fried, Frank, Harris, Shriver & Jacobson LLP, Qui Tam FCA Statistics, Sept. 30, 2003, http://www.ffhsj.com/quitam/fcastats.htm (last visited Nov. 30, 2006) (on file with the University of Michigan Journal of Law Reform).

[56] Data from 2004 and 2005 present some notable aberrations. In 2004, although a total of 528 new matters were filed, and nearly eighty percent of those were qui tam actions, total fraud recoveries declined to $ 681.2 million. This represents a 69.3% drop in recoveries, despite a twenty-one percent increase in the number of qui tam actions filed over the previous year. In 2005, however, overall recoveries rose again to $ 1.4 billion. There was a 16.1% increase in the number of new matters filed overall. While we cannot tell from this data what might account for the decline in 2004 recoveries, two observations are relevant. First, the 2005 data suggests the upward trend in privatization has resumed. Second, the privatization trend is most pronounced in health care cases where nearly ninety percent of FCA litigation is initiated by a qui tam plaintiff. See Boese, supra note 11, at H-2.

[57] Aside from the aberration in 2004, on average, FCA recoveries have increased 119.24% each year during the period from 1998 to 2005. See id.

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New FCA Matters									
Number of New Qui Tam	470	482	367	310	320	334	415	394	(16.2%)
Percent Qui Tam	79.8	77.4	79.3	77.9	83.6	78.2	78.6	79.8	-
Number of New Health Cases	323	340	260	215	212	243	304	306	(17.0)%
Percent Qui Tam	88.9	91.4	85.8	83.7	92.9	89.3	90.8	88.2	-
Number of New Defense Case	107	143	87	85	88	89	115	110	2.8%
Percent Qui Tam	72.9	76.9	88.5	87.1	81.8	87.6	86.1%	88.2%	-

The data in Table 1 tells at least two important stories. First, it illustrates the profitable enterprise that FCA litigation is for both private qui tam relators and for the Government. Second, these statistics illustrate the sizeable share of FCA prosecutions led by **[*295]** private plaintiffs in every major category of fraud cases prosecuted under the statute.

Table 1 also shows that in FCA prosecutions generally, the annual share of FCA matters filed by qui tam plaintiffs has remained relatively constant over the period from 1998 to 2005. The data further confirm that the Government is not merely recovering misspent funds lost to fraud, but actually making a profit on its anti-fraud enforcement activities. During this time, the Government certified an increasing amount of recovered settlements, judgments, and fines to return to its coffers for future enforcement. However, the increase in the amounts recovered during this time grew faster than enforcement expenditures. [58]

The most striking information conveyed by this data, however, is the extent to which private qui tam enforcement has become the leading method of prosecuting fraud under the FCA. [59] However, even Table 1 does not tell the whole story. Looking only at recent history, it appears from Table 1 that the level of qui tam activity under the statute has remained relatively stable.

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[58] See Jack A. Meyer, Fighting Medicare Fraud: More Bang for the Federal Buck: Prepared for Taxpayers Against Fraud Education Fund (May 21, 2004) (on file with the University of Michigan Journal of Law Reform) [hereinafter Meyer Report], available at http://www.taf.org/meyerreport.htm; see also Dayna Bowen Matthew, Tainted Prosecution of Tainted Claims,76 Ind. L.J. 525, 582-83 (2001) (discussing the impact of the Government's share of enforcement proceeds exercised by independent prosecutorial discretion).

[59] In 1999, 481 new FCA claims were filed. The next year that number dropped precipitously to only 366 cases. In 2001, 300 cases were filed under the FCA; 320 were filed in 2002; and 326 were filed in 2003. This means there has been an 8.6% increase in the number of cases filed over the past three years. This is despite a 42.6% increase in the total spending outlays for Federal Civil False Claims Act enforcement in the health care fraud area alone. See Civil Div., U.S. Dep't of Justice, Fraud Statistics - Overview (Oct. 1, 1986-Sept. 30, 2005) (on file with the University of Michigan Journal of Law Reform), available at http://www.ffhsj.com/quitam/pdf/stats_overview.pdf (noting the total federal costs of health care fraud enforcement); see also Whistleblowersonline.com, Qui Tam False Claims Act-Statistics, http://www.whistleblowersonline.com/demographics.htm (last visited Nov. 30, 2006) (on file with the University of Michigan Journal of Law Reform) (noting the total number of qui tam cases filed).

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Table 2 summarizes the substantial growth in private prosecutions under the FCA since the statute's last amendment in 1986 and demonstrates the tremendous impact private parties have had on FCA enforcement. **[*296]**

Table 2

Quantifying The Historical Role of the Qui Tam Relator (1987-Present)

	1987	2005	Increase
Number of New FCA Matters	393	494	25.7%
Percent Qui Tam	8.1%	79.7%	-
Number of New Health Care	18	306	1600%
Percent Qui Tam	22.2%	88.2%	-
Number of New Defense	263	110	(58.2%)
Percent Qui Tam	6.8%	88.1%	-

Table 2 provides concrete evidence of the privatization of False Claims Act prosecution. Taken together, the data in Tables 1 and 2 show: an increase in the absolute number of new FCA claims filed over the past ten years; a dramatic increase in the percentage share of those claims being brought by private plaintiffs; and an astounding increase in the number of those FCA cases that are brought against defendants in the health care sector. From 1987 to 2005, the percentage of new FCA claims filed by private qui tam parties increased nearly ten-fold from 8% in 1987 to 79.7% in 2005. The upsurge in the number of health care fraud cases is overwhelmingly driven by private enforcement. In 1987, eighteen new cases were filed by the Department of Health and Human Services and four of those, or 22%, were filed by qui tam parties. By contrast, in 2005, 306 new health care fraud matters were filed and 270 of those, or 88%, were filed by private litigants.

The empirical fact is that the vast majority of anti-fraud enforcement is conducted by private, rather than Government, enforcers. While the balance of power appears to have shifted away from the Government and towards private enforcement, in order to determine whether this data represents a true departure from the original design of the statute the salient question is whether these qui tam-directed cases are different in any meaningful way from cases the Government controls. The trend is a significant one only if the Government's declining role and the increased presence of private enforcement results in some substantive departure from the statute's intent. The important question is whether privatization changes either the Government's procedural decisions or the substantive law decided in FCA cases. The next section introduces the moral hazard theory to explain the ways in which privatization has a profound impact on the Government's enforcement decisions.

[*297]

II. The Moral Hazard Problem of the Qui Tam Relator

Without question, the qui tam statute provides a key dimension to the anti-fraud effort. The law grants relators a lucrative share in settlement and judgment proceeds as an incentive to encourage private attorneys general to undertake the discovery of fraud. The private enforcers can minimize the costs of proving fraud by providing valuable "inside information." [60] On the other hand, there are also costs associated with the relator's participation. Privatization means the qui tam relator is not being effectively subordinated to the Government's direction or supervision. This has impact on the quality of cases pursued, the number of cases pursued, and the strength of legal theories advanced when cases are pursued. Due to the sizable potential of financial gain, some qui tam relators will pursue cases with poor factual support or pursue flimsy legal theories that establish bad precedent and waste public resources. In contrast to the Government, the qui tam relator does not have the ethical obligation to protect the interests of the public at large. Moreover, the private relator has neither an ethical nor financial interest compelling it to consider the impact of frivolously imposing defense costs on target companies. The Government,

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[60] Pamela Bucy, Information as a Commodity in the Regulatory World, *39 Hous. L. Rev. 905, 908 (2002).*

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on the other hand, is expected to exercise prosecutorial discretion that takes into account what social goods might be sacrificed by initiating a lawsuit. However, when relators initiate FCA claims, the Government's initial prosecutorial choice - whether or not to sue - has been usurped by a private party. Where a relator has initiated the FCA claim, the investment choices the Government now faces are very different.

Compare the Government's investment choices with and without relators when deciding whether to initiate an FCA suit: When the Government initiates an FCA claim independently, it does not know in advance what the outcome of that lawsuit will be. Because its enforcement budget is limited, the Government chooses which cases are meritorious and most likely to lead to a return on its investment of scarce public resources. A key part of the Government's calculus includes its obligation to choose litigation opportunities and strategies that will further legislatively-established objectives for the public good. With these goals in mind, the Government will effectively triage the cases it pursues based on the size of the case, the seriousness of the fraud alleged, **[*298]** the potential proceeds that may come from the case, the time it will take to litigate the case, the quality of information available about the case, and several other considerations. [61] If the costs of pursuing any particular case outweigh the potential benefits, the Government will decline to pursue that case and Government resources will be available for use in other cases.

The Government's calculus changes in the presence of a qui tam relator. When the Government decides whether to intervene in a case brought by a qui tam relator, the Government spends virtually no public resources to initiate a relator-directed lawsuit. Moreover, the Government incurs only minimal monitoring costs to sit back and allow the private party to file an FCA case and to pay the up front litigation costs for pursuing that claim. The potential return on this small investment ranges from zero to seventy percent of trebled damages. Therefore, the incentive for the Government to allow these cases to go forward is very high. It is of no moment that the relator-directed cases may be ones which the Government would not bring directly given its limited resources. Moreover, whereas the Government gets the benefit of employing its resources elsewhere if it declines to pursue a case directly, the Government frees negligible resources by opposing the progress of a qui tam initiated case. In fact, at first blush, the most expensive alternative available to the Government is to prematurely intervene in a case that will then become the Government's responsibility to prosecute. The structural incentives for the Government all point in one direction: stand back and allow qui-tam suits to go forward. This problematic incentive structure is explained by the concept of moral hazard.

A. Applying the Theory of Moral Hazard to Private Qui Tam Enforcement

Moral hazard, simply defined, is opportunistic behavior on the part of an insured party. The term moral hazard describes a problem that increases the size of losses an insured suffers when the insured party exchanges its cost-minimizing behavior, for cost-generating conduct, based on the presence of an insurance contract. [62] Moral hazard results when an insured party is less averse to risk due to the knowledge that any losses from risky behavior will **[*299]** be borne by the insurer. [63] As a result of the decrease in risk-averse behavior, moral hazard increases costs. [64]

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[61] Ben Depoorter & Jef De Mot, 2006 Whistle Blowing: An Economic Analysis of the False Claims Act, 14 Sup. Ct. Econ. Rev. 135, 148-51 (Francesco Parisi et al. eds., 2006).

[62] See Robert Cooter & Thomas Ulen, Law and Economics 50 (3d ed. 2000).

[63] *Rickerford v. Westchester Fire Ins. Co., 186 So. 109 (La. Ct. App. 1939),* reinstated on reh'g by, *187 So. 676 (La. Ct. App. 1939);* see Lee R. Russ & Thomas F. Segalla, Couch on Insurance §81:98 (3d ed. 2005) ("The term "moral hazard' means a substantial hazard, one that would influence the conduct of a reasonable person, as distinguished from a mere psychological or ethical risk… . Such as to sustain a holding that the insured would suffer less by a destruction of the property than would ordinarily be the case in the absence of its breach." (emphasis added)).

[64] See Cooter & Ulen, supra note 62, at 50 ("Moral hazard arises when the behavior of the insuree [sic] changes after the purchase of insurance so that the probability of loss or the size of the loss increases.").

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A well-known example of moral hazard involves insured medical patients' overconsumption of health care services: An insured patient may visit the doctor more often than an uninsured one, simply because the immediate personal cost to do so is less to the insured than to the uninsured patient who must pay "out of pocket" for each visit. The end result, however, is that the patient's changed behavior is based on the presence of insurance that was intended to reduce overall costs, but which ironically will increase the medical costs borne, not only by the insured patient, but by all participants in the health care system. Insurance makes the patient more prone to act as a hypochondriac, visiting the doctor more often than he would absent insurance, and thus increasing utilization and overall costs to care for that patient. The example of an insured patient describes how moral hazard results in overconsumption of resources.

Another paradigmatic moral hazard problem involves insured property owners who exercise suboptimal care over their property. When a car owner is insured against losses due to theft, she may not bother to lock her car doors, purchase an alarm, or choose well-lit locations when parking in a high crime area. The same car owner, if uninsured, will exercise more care to prevent automobile theft, in order to avoid the personal cost of replacing her car if it is damaged or stolen. [65] In this case, the car owner's expectation that insurance coverage will pay for any losses due to theft decreases the care the insured automobile owner takes to prevent costly crimes, even though the insurance contract was intended to reduce costs. The example of the careless automobile owner provides an illustration of how moral hazard causes a suboptimal exercise of caution. [66] The thesis of this section of the Article is that moral hazard can also describe the ways in which the Government changes **[*300]** its behavior when private enforcers - specifically, qui tam relators - are present. The moral hazard impact of private enforcers causes both the overconsumption of enforcement resources, and a suboptimal exercise of prosecutorial discretion or care on the part of the Government. [67] Here is how the analogy works:

When a qui tam relator prosecutes the Government's false claims case, the Government acts as an insured party. The presence of the private plaintiff in relator-directed FCA cases insures the Government from the costs associated with initiating litigation, pursuing discovery, generating and responding to pre-trial motions, and directly bearing the risk of failure if the claim proves frivolous or specious. Instead of incurring these costs, the Government may rely upon the relator, who is motivated to search out and investigate potentially lucrative allegations of fraud by the generous rewards available under the FCA, [68] to absorb these costs by prosecuting on the Government's behalf. In a real sense then, the Government spreads its prosecutorial risk to private qui tam plaintiffs. However, to the extent that the private plaintiff does not discriminate between worthy and frivolous claims the way the Government would, for reasons discussed below, moral hazard will increase the number and decrease the quality of anti-fraud cases prosecuted.

Moral hazard causes the Government to make different prosecutorial decisions because of the presence of the qui tam relator, than it would otherwise make in the absence of the insurance provided by the private plaintiff. Because of the presence of qui tam relators, the Government prosecutes or allows the relator to prosecute excessive numbers of FCA cases that the Government alone would not bring. When forced to allocate scarce enforcement resources, the Government will carefully choose the strongest cases to pursue; these are cases with credible witnesses, firm evidence, and colorable theories of recovery. However, because the Government's investment in

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[65] See Sherman Folland, Allen Goodman & Miron Stanom, The Economics of Health and Health Care 153 n.3 (4th ed. 2004).

[66] Id.

[67] See Tom Baker, On the Genealogy of Moral Hazard, *75 Tex. L. Rev. 237, 274 (1996)* (providing an excellent discussion of several additional "multiple" problems of moral hazard).

[68] See *31 U.S.C. §3729*(a) (2000). A qui tam plaintiff may receive between fifteen and thirty percent of trebled damages proved and of fines between $ 5,500 and $ 11,000 per fraudulent claim, plus expenses including attorneys fees.

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spurious qui tam suits is minimal, [69] and the potential payoff is sizeable, [70] the Government will behave opportunistically **[*301]** and allow the relator to prosecute excessive numbers of FCA cases, regardless of their merit.

Moreover, the Government, as a result of moral hazard, exercises suboptimal caution in selecting legal theories, which arguments to make, and which strategies to employ. There is no immediate payoff for monitoring the quality of qui tam cases that proceed independently. The Government imagines it has nothing to loose even if these cases fail because all immediate costs of failed cases under the FCA are borne by the private plaintiff. Thus, in the face of weak monitoring incentives, the Government will allow cases based on weak facts or even unfounded or experimental theories of recovery to proceed. Nothing is immediately lost to the Government for this carelessness. [71] Most cases settle before the weakness of the relator's theory can be tested, or cases are dismissed with minimal monitoring costs imposed on the Government. The cases that are tried may not be tried in time to establish the strength of allegations beneath the FCA claim. Often they are novel and no precedent serves to guide the Government's discretion. In either event, the Government may rely on the qui tam relator to incur the vast majority of litigation costs for frivolous as well as worthy claims and so the Government makes little attempt to distinguish the two.

Once a qui tam plaintiff files an action under the FCA, the Government is protected against two eventualities. First, it is protected against the cost that the charged fraud will go undetected. Second, the Government is protected against the costs of prosecuting the alleged fraud even if the allegations are frivolous. The Government then has assurance that whether it intervenes or not, the relator's self-interest will cause the case to be prosecuted, at minimum, with the zeal that is warranted by the relator's expectation of earning a thirty percent share of the proceeds from the case. This, it turns out, is enough zeal to allow the Government to rely perhaps too easily on the relator's decisions and prosecutorial strategies. Instead of investing the resources to come up with its own theories, or, at least to test those proposed by the relator, the Government can pursue multiple untested cases with minimal effort. The Government is not required to test the credibility of the witnesses (including the relator) when it declines to intervene. Absent intervention, the Government may not confirm the soundness of documentary evidence or the support for allegations. This **[*302]** suboptimal exercise of care allows the Government to take on (or allow) prosecution of cases that well may be weakly supported, poorly reasoned and therefore of limited value as either a legal precedent or as a signal to future actors who wish to avoid engaging in fraudulent conduct. When such cases proceed, the public good is not served. In this way the moral hazard incentives have the same impact here as in any other case of an insured party. Moral hazard results in the Government relying on its insurance, in the form of a qui tam relator, to allow it to exercise too little care while taking on too many cases.

Before going further, a note about one simplifying assumption is in order. Here, the moral hazard model presents only two possible choices for the Government. Either the Government can prosecute an FCA case on its own, or it can risk the moral hazard of allowing a qui tam plaintiff to prosecute independently on its behalf. In fact, many more choices exist for the Government between these two extremes. Just as an insured may reduce the impact of moral hazard by choosing to incrementally increase the level of care exercised, [72] the Government could choose to monitor more closely, intervene earlier, or even to conduct a comprehensive evaluation of each case and dismiss the frivolous ones at the earliest possible opportunity. However, the model here offers only a binary choice for two reasons. First, this simplification more closely reflects the statutory reality. Under the FCA, there is little reason for

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[69] The Government does bear some minimal monitoring costs. Some argument can also be made that the more the Government entertains frivolous suits, the more it signals a willingness to participate in specious litigation, thus inviting an increase in the number of cases that it has to monitor but would not pursue.

[70] The Government may intervene the more likely settlement appears.

[71] Arguably, the Government's calculus is incomplete because it does not take into account the social costs of allowing to proceed litigation that is likely to be unproductive.

[72] For example, in the face of a $ 1000 deductible, the insured automobile owner will exercise more care and mitigate the effects of moral hazard more effectively than the owner might in the face of a $ 200 deductible. The owner need not be relieved of one hundred percent of the costs to be subject to moral hazard.

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the Government to choose any of the moral hazard mitigating behavior listed above. Secondly, the binary simplification appears to more closely reflect the empirical reality. Recall the startling trend toward privatization and the increased numbers of privately filed FCA suits. The sheer volume of these cases suggests the Government is choosing between two extremes.

Having laid out the basic structure of the moral hazard analogy, the theory offers some useful principles about how to address the problems caused by moral hazard. Economists describe moral hazard as the "rational response to economic incentives brought about by the elasticity of demand to the price of care." [73] Assume FCA cases represent investment opportunities for the Government. [74] **[*303]** When the Government determines how many cases it will prosecute, it is making an investment decision about unknown future events. Thus, the Government's demand for FCA cases is a function of the price (or the litigation costs) associated with each prosecutorial decision, and the expected benefits the Government will receive from the case. As the cost of prosecuting a given case increases, the Government's demand for that case will generally decrease. This describes a normal, downward-sloping demand curve for cases. However, for some FCA cases, where the expected benefit is greater, the Government's demand curve is steeper. Some cases will be so potentially lucrative or otherwise attractive to the Government that the Government will prosecute (or invest in) those cases at all costs. For example, the Government may focus attention on prosecuting a particularly egregious fraudulent scheme that has impact on a vulnerable group. [75] Call these the "high stakes cases." In these instances, the Government's demand for such cases is inelastic and the danger of moral hazard is minimal. In all other cases - say the "regular cases" - the Government's demand for FCA cases is more elastic and the danger of moral hazard is present.

The solution economists propose to mitigate the danger of moral hazard is to insure only those goods for which the insured's demand is inelastic. In the FCA context, applying this solution would require the Government to declare that its interest in certain FCA cases is inelastic, before the Government may rely wholly on the qui tam relator to prosecute the case. If the law required the Government to first establish its own assessment and basis for prosecuting each case before allowing qui tam relators to control its litigation, then the risks and resulting costs of moral hazard might be controlled.

B. Understanding the Costs of Moral Hazard

Moral hazard costs include the loss associated with imprudently wasting scarce Government enforcement resources, the risk of compromising socially important goals, the imposition of unnecessary litigation costs on parties to excessive litigation, the risk of establishing unclear or affirmatively bad legal precedent, and the risk of sending mixed deterrence signals to other providers and **[*304]** manufacturers who may be targeted as FCA defendants in the future. To understand how excessive costs are generated by moral hazard, consider Kenneth Arrow's observation that moral hazard occurs when an insured party who benefits from insurance has control over the events that give rise to insured losses. [76]

Again, the analogous party to an insured in the FCA context is the Government. The events that give rise to losses are the statutory precautions that the Government could, but fails to, exercise under the current law. The FCA currently permits the Government to choose not to monitor closely or select carefully where frivolous lawsuits are concerned. This is the same as the property owner who retains control but does not exercise care with his property, failing to take steps to prevent fires (install smoke detectors) or theft (park where well lit). The laissez faire choices of both the Government and the insured property owner give rise to preventable losses due to fire, theft and frivolous FCA claims, respectively. The more insurance protection is available, the greater the insured's reliance on

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[73] See Folland, Goodman & Stanom, supra note 65, at 153.

[74] This analogy makes sense because the Government does not begin a lawsuit knowing what its return will be. Like an investor, the Government chooses to expend funds on a somewhat uncertain enterprise.

[75] See, e.g., *United States v. NHC Healthcare Corp., 115 F. Supp. 2d 1149 (W.D. Mo. 2000).*

[76] Kenneth J. Arrow, Uncertainty and the Welfare Economics of Medical Care, 53 Am. Econ. Rev. 942, 961 (1963), reprinted in 26 J. Health Pol. Pol'y & L. 851, 871 (2001).

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coverage will be. Sherry Glied describes this phenomenon as "dynamic moral hazard" because as insurance increases, the insured party engages in increasingly more costly behavior, on the assumption that insurance will pay for the increased costs. [77] We have seen that as FCA prosecution becomes increasingly privatized, the Government appears to permit more and more costly claims to proceed. [78]

A final method for understanding the costs imposed by moral hazard in FCA litigation is to compare the distinctive cost curves faced by the Government and qui tam relators. [79] When the Government sues a defendant pharmaceutical company under the FCA, whether directly, or by a qui tam plaintiff, the Government stands to benefit from the prosecution. The Government expects certain public policy benefits such as curbing illegal conduct, deterring future wrong-doing, and recovering misspent public dollars. Indeed, health care-related civil fraud recoveries in 2005 **[*305]** alone totaled over $ 1.1 billion. [80] Additionally, the Government will obtain some financial benefit from prosecuting fraud. Over the past five years, the Government has recovered $ 5.7 billion in settlements and judgments from health care corporations under the FCA. [81] The vast majority of these recoveries (eighty-three percent) [82] are returned to the Medicare Trust Fund to administer that program in future years. The remaining, smaller percentage is awarded to the Government's enforcement agencies for future prosecutions of health care fraud. Therefore, when the Government assesses the benefits of prosecuting false claims, it primarily considers benefits that accrue to the public good. These include the satisfaction of stopping fraud, deterring fraud, returning funds to the taxpayers, and the political advantages the Government obtains by increasing its fraud enforcement success. An individual Government prosecutor may receive a raise, promotion, accolade, or other benefit from having successfully participated in obtaining an FCA recovery, but for the most part the FCA recovery does not directly turn into purchasing power for the Government's individual prosecutor. Although the Government must also consider its tangible cash benefits that flow directly from its certified share of financial recoveries, the Government's interests in serving the public good are relatively large when compared to the smaller, direct financial benefits received by qui tam relators who are successful plaintiffs in FCA cases. The reverse is true for the qui tam relator.

A qui tam relator who obtains a $ 1 million share of any recovery obtained or earned from a target corporation will receive the direct and individual financial benefit of each dollar of the recovery amount. The relator may save this money, spend it, or otherwise purchase gratification with her award. A smaller percentage of the qui tam relator's benefits are intangible and directed toward public welfare. The plaintiff derives some satisfaction from stopping and deterring fraud, and from being helpful to the Government. However, the largest benefit to a qui tam plaintiff is from the financial share he receives when funds are recovered. For this reason, the immediate and direct financial benefit received by individual qui tam relators when they make a prosecutorial decision largely overwhelms the indirect benefit the relator derives from serving the public good. On the other hand, the immediate and direct financial gain to the Government prosecutor is minor, when compared to the larger benefit of serving the **[*306]** public good. Thus, when the Government independently selects cases to prosecute, it is motivated only in small part by the potential for direct financial gains, and motivated more directly by its proportionately larger duty to serve

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[77] See Sherry A. Glied, Health Insurance and Market Failure Since Arrow, 26 J. Health Pol. Pol'y & L. 957, 964 (explaining that ever more costly medical technology develops in response to the availability of insurance to pay for the new products, regardless of the new products' cost or marginal utility).

[78] See supra Tables 1 & 2.

[79] Here it is important to specify who precisely is the object of the term, "the Government." The active participant in FCA litigation enforcement is "the Government" referred to here. This branch of the government is distinguishable from entities such as the CMS who may be beneficiaries of the enforcement effort. Throughout this discussion, "the Government" is the actor who prosecutes fraud, either at the federal or state level, with or without the qui tam relator.

[80] See Boese, supra note 11, at H-3.

[81] See Meyer Report, supra note 58.

[82] See id. This number was calculated by aggregating the four-year total returns to the Medicare Trust Fund of $ 3.346 billion and the four-year aggregate of total returns in health care recoveries from 1999 to 2002 of $ 4 billion, and then dividing the first number by the second.

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the public good. Private plaintiffs do not select the same type or number of FCA cases to pursue as the Government would; the public mission is unlikely to be at the core of the qui tam plaintiff's motivation to prosecute. To the extent, then, that privatization results in the Government following the private plaintiffs' prosecutorial choices instead of its own, the Government is likely to harm the public good.

Now with the moral hazard theoretical model in place, the next step is to examine a set of real life public-private prosecutions in order to determine whether the theory of moral hazard is borne out by the facts. The next section focuses on one category of FCA cases in particular - pharmaceutical fraud - to seek evidence of the moral hazard effect of privatization. Pharmaceutical fraud is a target for Government prosecution so there are a number of cases to examine and the FCA data about them is readily available. The examples from private-public enforcement in this area are most likely examples that can be duplicated across many other industries and many other examples of public enforcement through private attorneys general.

III. The "Real Life" Impact of Moral Hazard in Government Enforcement in Pharmaceutical Fraud Cases

The Department of Justice is committed to enforcing the FCA in order to reduce the substantial number of Medicare and Medicaid dollars the American people pay annually to finance fraudulent health care schemes. [83] This is a worthy goal. [84] It is also clear that the pharmaceutical industry is the most recent and intense focus of the **[*307]** Government's anti-fraud campaign. [85] One can easily see why. The pharmaceutical industry accounts for approximately ten percent of all health care expenditures in the United States. [86] The industry's net sales and operating revenues for the year 2003 averaged $ 58.927 billion. [87] Moreover, the pharmaceutical industry is about to be injected with an unprecedented flow of additional revenues to be paid by the federal Government. The largest reform in Medicare and Medicaid since 1965 became law on December 8, 2003. On that date, President Bush signed the Medicare Prescription Drug Improvement and Modernization Act of 2003, [88] a law that will expand the

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[83] See Press Release, U.S. Dep't of Justice, Justice Dept. Civil Fraud Recoveries Total $ 2.1 Billion for FY 2003: False Claims Act Recoveries Exceed $ 12 Billion Since 1986 (Nov. 10, 2003), http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm (last visited Oct. 1, 2006) (on file with the University of Michigan Journal of Law Reform) [hereinafter Press Release, DOJ, Nov. 10, 2003].

[84] Estimates are that ten percent of the nation's health care expenditures are paid to reimburse fraud. Joan Krause, A Conceptual Model of Health Care Fraud Enforcement, 12 J.L. & Pol'y 55, 55 (2003).

[85] See, e.g., U.S. Dep't of Health & Human Servs. & the Dep't of Justice, Health Care Fraud and Abuse Control Program: Annual Report for FY 2003 (Dec. 2004), http://www.usdoj.gov/dag/pubdoc/hcfacreport2003.htm (on file with the University of Michigan Journal of Law Reform) [hereinafter Health Care Fraud Annual Report 2003] ("The HHS/OIG recommended that CMS work with states to pursue more efficient means of purchasing pharmaceuticals and initiate a review of the Medicaid rebate program … ."); U.S. Dep't of Health & Human Servs., & the Dep't of Justice, Health Care Fraud & Abuse Control Program: Annual Report for FY 2002 (Sept. 2003), http://www.usdoj.gov/dag/pubdoc/hcfacreport2002.htm (on file with the University of Michigan Journal of Law Reform) ("HHS/OIG estimated that the Medicaid program could have saved as much as $ 1.6 billion in 1999 for the top 200 brand and generic drugs if reimbursements had been made suing [sic] the lower [prices]."); U.S. Dep't of Health & Human Servs., & the Dep't of Justice, Health Care Fraud & Abuse Control Program: Annual Report for FY 2001 (Apr. 2002), http://www.usdoj.gov/dag/pubdoc/hipaa01fe19.htm (on file with the University of Michigan Journal of Law Reform) ("In Medicare, HHS/OIG studies spanning the last 4 years have revealed that Medicare and its beneficiaries pay considerably more than do other Federal health care programs for prescription drugs… . The HHS/OIG recommended that CMS continue to seek administrative and legislative remedies to reduce excessive drug reimbursement … .").

[86] Annual U.S. health expenditures are estimated to reach $ 1.9 trillion in 2005. See Tommy G. Thompson, U.S. Dep't of Health & Human Servs. et al., Health, United States, 2004: With Chartbook on Trends in the Health of Americans 4 (2004).

[87] U.S. Census Bureau, U.S. Dep't of Commerce, 3 Quarterly Financial Report for Manufacturing, Mining, and Trade Corporations: 2003 100 (2003).

[88] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, §101, ***117 Stat. 2066, 2071 (2003).*** Ironically, this statute also contains provisions making FCA prosecution of pharmaceutical companies easier for plaintiffs. Id. at Title III, §§301-03.

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Medicare program's reimbursement for prescription drug purchases by at least $ 534 billion [89] over the next ten years. By some estimates, the cost of this program could be as much as $ 1.2 trillion. [90] This new law represents the largest expansion in Medicare's history and importantly increases mandatory **[*308]** Government payments for prescription drugs exponentially between now and 2015. [91]

The result of a large and largely unregulated industry, [92] poised to receive enormous infusions of the federal money, earmarked by a massive reform statute for mandatory payment to Medicare vendors, who must pay treble damages if their billings are found to be fraudulent, and where up to one third of those trebled damages might be paid to private parties who file claims that allege improper billing for prescription drugs is not surprisingly a boon for potential private plaintiffs. Some have called it "the perfect storm." [93]

The Government has collected $ 1.6 billion from pharmaceutical firms in settlements and judgments over the last three years. [94] Another $ 600 million in criminal penalties has been collected from defendant drug companies during the same period. [95] The overwhelming majority of these reported cases have involved a qui tam relator; few were initiated by the Government alone. [96] It is clear that the Government could not prosecute these large, lucrative FCA cases against pharmaceutical companies without the help of qui tam relators. The cases allege complex schemes of pricing, marketing, and payment schemes for which insider information is crucial. [97] However, where the FCA statute contemplates a prosecutorial effort led and directed by the Government, [98] instead, private plaintiffs appear to be directing the Government's exercises of **[*309]** prosecutorial discretion, for example, choosing what actions to initiate and determining what theories of recovery to advance against target defendants. The Government's recently failed case against TAP Pharmaceutical executives is an example of how the Government is ceding, if not losing control of FCA prosecution.

A. The Tap Pharmaceutical Prosecution

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[89] See Office of Mgmt. & Budget, Executive Office of the President, Dep't of Health & Human Servs. at "Medicare Advantage Enrollment" (2005), http://www.whitehouse.gov/omb/budget/fy2005/hhs.html (on file with the University of Michigan Journal of Law Reform).

[90] See Ceci Connolly & Mike Allen, Medicare Drug Benefit may Cost $ 1.2 Trillion, Wash. Post, Feb. 9, 2005, at A1.

[91] In the year 2000, Americans spent $ 132 billion on prescription drugs. See Andrew Harris, Recent Congressional Responses to Demands for Affordable Pharmaceuticals, 16 Loy. Consumer L. Rev. 219, 223 (2004).

[92] See Daniel Higgins & Sandra Golze, OIG to Pharmaceutical Companies: Nearly all Marketing Incentives Suspect; Between the Lines, a Caution to Doctors, Hospitals and GPOs, 11 Health L. Rep. 41, at 1485 (2002) (citing the HHS Inspector General Janet Rehnquist's "Compliance Program Guidance for Pharmaceutical Manufacturers," Draft, ***67 Fed. Reg. 62057 (2002),*** which referred to "ill-fitting regulations" that make the pharmaceutical industry a difficult one for the government to provide prospective guidance).

[93] Terry Carter, Drug Wars: Coalition Tactics Make Price Fight Look Like Battle over Tobacco, ***88 A.B.A. J. 41, 41 (2002)*** ("Like so many weather fronts and patterns coming together in one place at the same time, this "perfect storm' over prescription drug prices is made up of public opinion, consumer groups, regulators, criminal investigators, politicians and plaintiffs lawyers.").

[94] See Boese, supra note 11.

[95] Id.

[96] Id.

[97] Id.

[98] See, e.g., 31 U.S.C. §3730 (b)(1) (2000) (defining the central role of the Government in a qui tam action from its inception to its conclusion: "A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." (emphasis added)).

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Tap Pharmaceuticals (TAP) is a joint venture between Abbott Laboratories and Takeda Chemical Industries of Japan. [99] TAP manufactures the prostate cancer drug Leuprorelin Acetate under the name Lupron in the United States and under the name Prostap in the United Kingdom. [100] Lupron is used by physicians and, therefore, reimbursed under Medicare, Part B. [101]

Two qui tam relators initiated FCA suits against TAP, sometime around 1996. Former Vice President for Sales at TAP Douglas Durand and urologist Dr. Joseph Gerstein, alleged in independent actions that the company engaged in three basic fraudulent pricing and marketing schemes to sell Lupron. First, the relators charged that TAP fraudulently set and controlled Medicare reimbursement rates for Lupron by inflating the Average Wholesale Price (AWP) it reported for the prescription drug. The AWP is a series of rates generated by the pharmaceutical industry, and published by independent publishing companies that compile data annually to report the average prices of pharmaceutical products. Although these numbers are self-reported by the industry, the AWP provides the base number upon which the Federal Government calculates its percentage share of the reimbursement amount that providers will receive under Medicare, Part B for the drugs that they prescribe. [102] Durand alleged that TAP committed fraud under **[*310]** the FCA by violating the Prescription Drug Marketing Act (PDMA) [103] when the pharmaceutical manufacturer marketed the spread between the discounted price physicians paid for Lupron and the inflated AWP it reported for purposes of Medicare reimbursement. This alleged scheme allowed physicians to pay a lower price for prescription drugs, but then receive a higher Medicare reimbursement for the cost of those drugs based on the inflated AWP. [104]

Durand and Gerstein also alleged that TAP violated the federal anti-kickback laws [105] by giving gifts and grants to induce physicians to switch from competitors' drugs to Lupron. [106] Finally, the relators alleged that TAP committed fraud when it provided free samples of Lupron to physicians, knowing that those physicians would bill Medicare and

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[99] Mary Ann Liebert, On The Move, 24 Biotechnology L. Rep. 59, 59 (2005); Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $ 1 Billion in FY 2002 (Dec. 16, 2002), http://www.usdoj.gov/opa/pr/2002/December/02_civ_720.htm (on file with the University of Michigan Journal of Law Reform).

[100] David L. Douglass & Olabisi A. Onisile, Pharmaceutical Marketing Practices: Providers Beware, 16 Health L. 6, 31 (2004); see David Spurgeon, Companies May Face Tighter Regulation over Promoting Drugs, 329 Brit. Med. J. 998 (Oct. 30, 2004).

[101] Medicare, Part B, reimburses providers for the cost of certain prescription drugs that are administered by physicians directly to patients. The Government will reimburse providers up to eighty percent of the allowable cost of these prescription drugs. Beneficiaries must pay the remaining twenty percent of the cost of these drugs. Both percentage shares are based upon the self-reported AWP that industry pharmaceutical companies provide annually. See 42 U.S.C.A. §13956 (West Supp. 2006).

[102] Id.

[103] See Prescription Drug Marketing Act of 1987, Pub. L. No. 100-293, ***102 Stat. 95 (1988)*** (amending sections 331, 333, 353 and 381 of the Food Drug and Cosmetic Act, *21 U.S.C. §301,* to "place restrictions on the distribution of drug samples, to ban certain resales of drugs by hospitals and other health care entities, and for other purposes").

[104] Marc J. Scheineson & Shannon T. Kinger, Lessons from Expanded Government Enforcement Efforts Against Drug Companies, *60 Food & Drug L.J. 1, 8 (2005).*

[105] *42 U.S.C. §1320a-7b*(b) (2000). The anti-kickback statute is a criminal statute that prohibits transactions that intentionally induce patient referrals in exchange for remuneration.

[106] For example, the qui tam complaints alleged that TAP offered Dr. Joseph Gerstein $ 65,000 to reverse his decision to switch from TAP's product Lupron to Zoladex, manufactured by AstraZeneca, an apparently lower-cost competitor to the TAP product. See Press Release, U.S. Dep't of Justice, TAP Pharmaceutical Products Inc. and Seven Others Charged with Health Care Crimes; Company Agrees to Pay $ 875 Million to Settle Charges (Oct. 3, 2001), http://www.usdoj.gov/opa/pr/2001/October/513civ.htm (on file with the University of Michigan Journal of Law Reform) [hereinafter Press Release, DOJ, Oct. 3, 2001].

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Medicaid to collect reimbursements for these free drugs. [107] Durand and Gernstein alleged TAP's fraudulent conduct extended over several years. [108] If proved, their allegations would have exposed the manufacturer to trebled damages for each physician's claim for reimbursement for Lupron, throughout the multi-year period. In 2003 alone, TAP's U.S. Lupron sales totaled $ 788 million and its overseas sales totaled $ 183 million. [109] Thus, TAP's exposure in this claim was enormous.

In October 2001, TAP pled guilty to conspiracy to violation of the Prescription Drug Manufacturing Act and agreed to pay $ 875 million, the largest health fraud settlement in U.S. history, to resolve criminal and civil fraud allegations against it. [110] TAP paid **[*311]** criminal fines of $ 290 million, $ 559.5 million to settle FCA claims, and $ 22.5 million to settle state law claims. [111] TAP also agreed to enter into a corporate integrity agreement, requiring the company to report its AWPs to Medicare and Medicaid under supervision. [112] The qui tam relators in this case, Durand and Dr. Gerstein received $ 77.9 million and $ 17 million, respectively, as their share of the settlement proceeds, plus attorneys' fees and costs. [113] At settlement, none of the three underlying allegations against TAP had been proved. However, a criminal trial on the merits of the underlying fraud claims followed.

On the same day that FCA settlement with TAP was announced, the Government filed separate criminal charges against eleven individual TAP executives allegedly responsible for engaging in the fraudulent conduct that was the basis for the now settled FCA case. [114] The Government's star witness was the qui tam relator, Douglas Durand. [115] Durand and Gernstein testified during the criminal trial that lasted from April 11, 2004 [116] to July 2004 when a Boston jury returned an unequivocal "not guilty" verdict in favor of the TAP executives. [117] Apparently, the private relators' testimony did not convince jurors that TAP executives had committed criminal fraud. [118] First, charges were dropped against three TAP executive defendants, either for insufficient evidence or due to "undisclosed health reasons." [119] Then the Court dismissed the anti-kickback charges entirely, also reversing one defendant's guilty plea, because the court held that as a matter of law, the defendants could not have committed the alleged anti-

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[107] See Douglass & Onisile, supra note 100, at 32.

[108] See Press Release, DOJ, Oct. 3, 2001, supra note 106.

[109] See Product Portfolio: Lupron Depot/Lucrin, ESPICOM Pharmaceutical & Medical Company Profiles (Apr. 2004) ((on file with the University of Michigan Journal of Law Reform), available at Westlaw, PHARMEDPROF Database.

[110] Huge Settlement Announced in TAP Pharmaceutical Case, Health Care Fraud & Abuse Newsl. (L.J. Newsl., New York, N.Y.), Oct. 2001, at 1.

[111] Id.

[112] See Press Release, DOJ, Oct. 3, 2001, supra note 106.

[113] Huge Settlement Announced in TAP Pharmaceutical Case, supra note 110.

[114] See Weinberg, supra at note 13, at 90; Press Release, DOJ, Oct. 3, 2001, supra note 106.

[115] See Matthew Arnold, Federal Court Acquits TAP Employees of Kickback Charges, Med. Marketing & Media, Aug. 2004, at 11.

[116] Defense Makes Closing Argument in Trial of Drug Company Employees, Obesity, Fitness & Wellness Wk., July 31, 2004, at 708.

[117] See Matthew Arnold, supra note 115; see also James D. Wareham & Candice S. Shepherd, Georgetown Univ. Law Ctr. Continuing Legal Educ., Managing Whistleblower Claims Under the False Claims Act, (Mar. 10-11, 2005), 2005 WL 1611863; Alice Dembner, TAP Officials on Trial Today In Fraud Case, Boston Globe, Apr. 20, 2004, at A1; Alice Dembner, TAP Trial Jurors say Proof was Lacking: Enough Doubt Seen for Acquittals, Boston Globe, July 27, 2004, at B1 [hereinafter Dembner, TAP Trial Jurors say Proof was Lacking].

[118] Dembner, TAP Trial Jurors say Proof was Lacking: Enough Doubt Seen for Acquittals, supra note 117.

[119] Defense Makes Closing Argument in Trial of Drug Company Employees, supra note 116, at 708.

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kickback crimes where **[*312]** HMOs were concerned. [120] Next, if reports about the case that appeared in the popular business press are credited, the private qui tam relators' underlying factual story fell apart. The evidence showed that payments alleged to physicians were never made, and overcharges allegedly sent to Medicare did not actually take place. [121] In the end, jurors simply did not believe the evidence was sufficient to support a criminal conviction. The foreman said, "there was enough doubt that you couldn't send somebody to jail." [122]

The jury verdict for the defense in the TAP litigation provides one illustration of private litigants directing public prosecution in a way that serves their personal interests but harms the public good. While we know the substantial extent to which the private parties' financial interests were served by this litigation, we are left somewhat baffled by the Government's passivity as this saga unfolded. One might legitimately question the extent to which the Government paid attention to the social goals of the underlying statutes which include restricting prescription drug re-sales prohibited by the PDMA and containing overutilization of health care resources via enforcement of the Medicare Anti-Kickback statute. One wonders why the Government did not foresee the weakness of the relators' claims in advance of the criminal trial, the plea bargains, and the lucrative settlement agreement. Did the Government rely so completely on the financially self-interested qui tam relators that it risked building its case upon fabricated testimony? We cannot really know what the Government prosecutors were thinking at the time, but we do know enough to examine why the Government behaved as it did.

We do know the charges that provided the basis for the largest health care fraud settlement in U.S. history were not proven beyond a reasonable doubt. Notwithstanding the obvious difference between the standards of proof required in criminal and civil cases, the jury's decision in the criminal case does cast a shadow on the strength of the civil qui tam case. Yet the private relators convinced the Government to bring an action that resulted in enormous settlement concessions from defendants for whom litigation becomes financially unfeasible. We know that the relators' allegations proved potent enough to deprive the defendants not only of money, but three physician defendants pled guilty to criminal charges to settle the allegations of wrong-doing against them. And **[*313]** yet the story Mr. Durand told the jury was not potent to convince them to convict. Therefore, it does not seem likely that the Government chose to not intervene in this claim solely on the strength of the relator's underlying case, because the relator's claims were strong enough to stand on their own without Government intervention.

In qui tam-directed litigation, the strength of the underlying claims may not drive the settlement negotiations. Instead, the Government's responsibility to examine relators' assertions and control the prosecution of public cases appears to have been influenced by the magnitude of possible recoveries - for both the private and public enforcers - and the willingness of the qui tam relator to pursue these recoveries with or without the Government's intervention. The irony is that this incentive structure is not costless. For example, TAP found out too late that Durand's story could not convince a jury; the defendants had already written the check and "done the time." Also, despite the size of the Government's financial investment in this prosecution, the outcome does little to advance the cost-containment goals Congress had in enacting the relevant public laws. Durand, on the other hand, after six-plus years meeting and working with federal investigators and attorneys, collected his $ 77.9 million and moved to Florida to retire with his family. [123] But not before he filed another qui tam action against a second pharmaceutical company, AstraZeneca Pharmaceuticals, L.P., alleging almost identical charges and claims. [124] While we do not know whether Mr. Durand's allegations against AstraZeneca will prove any more convincing at trial, we do know that Mr. Durand was paid another $ 47.5 million for his work on the AstraZeneca case. [125]

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[120] See Weinberg, supra note 13, at 90.

[121] Id.

[122] See Dembner, TAP Trial Jurors say Proof was Lacking, supra note 117.

[123] See Huge Settlement Announced in TAP Pharmaceutical Case, supra note 110.

[124] See infra Part III.B (discussing the AstraZeneca facts).

[125] Jonathan K. Henderson & Quintin Cassady, Drug Deals in 2006: Cutting Edge Legal and Regulatory Issues in the Pharmaceutical Industry, 15 Annals Health L. 107, 121 (2006); Press Release, U.S. Dep't of Justice, AstraZeneca

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TAP is not the first or only case that the Government has settled first and then tried in related proceedings only to find that the FCA allegations proved insufficient to support a criminal conviction. Caremark, a pharmacy benefits management firm, [126] **[*314]** paid $ 161 million before its employees were exonerated of wrongdoing. [127] Blue Cross Blue Shield of Illinois also paid $ 144 million before learning in a related trial that the basis of the FCA suit it settled would not withstand scrutiny. [128] In each of these cases, defendants admitted criminal liability for conduct that ultimately proved not to be criminal at all. In each instance, the Government paid the cost of prosecuting the relator-directed case. [129] In each case, no reported legal determination serves to clarify the parameters of permissible conduct for future market participants. This approach to enforcement raises important questions about the social impact of incurring substantial enforcement costs in cases of uncertain substantive strength. Ideally, the Government is accountable for weighing the social costs and benefits of each case. However, the privatization trend calls this into question. The TAP litigation is not an isolated example of a case in which the Government's oversight may have been compromised by privatization. The next section surveys several recent pharmaceutical fraud prosecutions to illustrate other costs imposed by this trend.

B. Government Inaction Invites Litigation

About the same time that he initiated the TAP litigation discussed above, Mr. Durand filed another qui tam action in the U.S. District Court for the District of Delaware against AstraZeneca Pharmaceuticals, LP (AstraZeneca), another pharmaceutical manufacturer and marketer. [130] This qui tam action alleged that from January 1991 through December 2002, AstraZeneca engaged in conduct that violated the FCA in the manufacturing and marketing of its anti-prostate cancer drug, Zoladex. [131] The Complaint alleged three types of violations. [132] First, AstraZeneca was charged with inducing physicians to purchase Zoladex by offering illegal remunerations in the form of free samples, unrestricted educational grants, travel, and entertainment gifts. [133] Durand argued these marketing favors violated the Anti-Kickback Law. [134] Second, the Complaint alleged criminal violations against AstraZeneca in **[*315]** connection with its pricing of Zoladex and other drugs. [135] Specifically, the Complaint alleged that AstraZeneca significantly inflated the Average Wholesale Prices (AWP) upon which Medicare reimbursements are based. [136]

Pharmaceuticals LP Pleads Guilty to Healthcare Crime; Company Agrees to Pay $ 355 Million to Settle Charges (June 20, 2003), http://www.usdoj.gov/opa/pr/2003/June/03_civ_371.htm (on file with the University of Michigan Journal of Law Reform) [hereinafter Press Release, DOJ, June 20, 2003]; see also AstraZeneca Pays $ 355 Million to Settle False-Claims Case, 5 Andrews Gun Indus. Litig. Rep. No. 8, at 28 (Dec. 26, 2003).

[126] See infra Part III.D (discussing PBM's and their market role).

[127] See *United States v. Brown, 108 F.3d 863 (8th Cir. 1997);* see also Jan Crawford Greenburg, Health Penalties in Caremark Fraud Case, Chi. Trib., June 17, 1995, at NEWS, p. 3.

[128] See Weinberg, supra note 13, at 90.

[129] See Press Release, DOJ, Oct. 3, 2001, supra note 106.

[130] See Press Release, DOJ, June 20, 2003, supra note 125.

[131] Id.

[132] Id.

[133] Id.

[134] *42 U.S.C. §1320a-7b*(b) (2000).

[135] Press Release, DOJ, June 20, 2003, supra note 125.

[136] It is important to note that neither Medicare statutes nor regulations historically have defined the AWP. Fabrikant et al., supra note 38, §10.02[2], at 10-9. Instead, Medicare contractors performed and reported their own AWP calculations, based on pharmaceutical pricing publications and databases. See Joan H. Krause, Regulating, Guiding, and Enforcing Health Care Fraud, *60 N.Y.U. Ann. Surv. Am. L. 241, 266* (2004-05). In 1997, the Balanced Budget Amendment began to prescribe a percentage of the AWP for which the government would reimburse drug manufacturers. Under the Medicare Prescription Drug Improvement and Modernization Act of 2003, in 2006, prescription drug benefits will be added to Medicare which will pay seventy-five percent

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The Complaint further alleged that AstraZeneca reported an AWP that bore no relation to the actual cost of the drug Zoladex. [137] Instead, AstraZeneca ran a program called "Return-to-Practice" inviting physicians to purchase Zoladex at a discounted rate, knowing that because the AWP was inflated, the reimbursement rate that the Government would pay for the drug was much higher than the actual cost to physicians. [138] AstraZeneca allegedly marketed the spread between the reported AWP and the discounted purchase price physicians actually paid for its drug. The third allegation against AstraZeneca was that the company gave free samples of Zoladex to physicians, knowing that the physicians would bill Medicare and Medicaid, as well as other federally-funded insurance programs and private insurers, for reimbursement for the cost of these free drugs. [139]

In December 2003, AstraZeneca settled its case despite the fact that many of the allegations Durand alleged were identical to those raised in the TAP litigation. [140] Durand's presence as the relator and the similarity of charges raises a question as to the underlying value of his claims. AstraZeneca pled guilty to conspiring to violate the Prescription Drug Manufacturing Act and agreed to pay a total of $ 355 million to settle the criminal, FCA, and state Medicaid charges against it. [141] AstraZeneca paid $ 63.9 million in criminal fines; $ 266.2 million to settle the FCA liability claims; and $ 24.9 **[*316]** million to settle the state law claims. [142] AstraZeneca also entered into a corporate integrity agreement designed to monitor the way it reports AWP for prescription drug reimbursements in the future. [143] Finally, in addition to the plea agreement, criminal fines, and civil fines, AstraZeneca paid $ 47.5 million to Mr. Durand. [144]

The fact that Douglas Durand was the plaintiff whistleblower in both the TAP case and the case against AstraZeneca should not be overlooked. The similarity between the charges brought in both instances should not be viewed as coincidence. Mr. Durand was employed at TAP for approximately seven months as a Vice President of Sales. [145] After quitting his job in 1996, Durand worked for approximately eight years on the AstraZeneca and TAP litigation and earned in excess of $ 125 million for his work as a whistleblower. [146] Undoubtedly, his presence in the FCA cases made it possible for the Government to obtain inside information about the pricing and marketing practices of pharmaceutical companies that they would not have otherwise had without a management-level source of information. Nevertheless, the fact that the Government had been involved in investigating pharmaceutical pricing on an industry-wide basis before Durand filed his suits and the fact that Durand was employed at TAP for less than a year before filing his suits suggest that some questions might be raised about the proportionality relationship between the contribution Durand made to prosecution and the amount of his compensation as a qui tam relator. Douglas Durand is not the only repeat player among recent qui tam relators.

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of drug costs between a patient's deductible and $ 2,250; beneficiaries will pay for drug costs between $ 2,250 and $ 5,100; and Medicare will pay ninety-five percent of drug costs above $ 5,100. Rick Mayes, Medicare and America's Healthcare System in Transition: From the Death of Managed Care to the Medicare Modernization Act of 2003 and Beyond, 38 J. Health L. 391, 417-19 (2005). Until 2006, Medicare will base its reimbursement for outpatient drugs on the AWP. Id.

[137] See Press Release, DOJ, June 20, 2003, supra note 125.

[138] Id.

[139] Id.

[140] Id.; see also, AstraZeneca Pays $ 355 Million to Settle False Claims Case, supra note 125.

[141] Press Release, DOJ, June 20, 2003, supra note 125.

[142] See id.

[143] Id.; see Fabrikant et al., supra note 38, §10.02[1], at 10-4 (discussing how the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA), Pub. L. No. 108-173, ***117 Stat. 2065*** (Dec. 8, 2003), changed the Average Wholesale Price methodology); see also Fabrikant et al., supra note 38, §10.02[2], at 10-8 to 10-9 (discussing the old reimbursement for Medicare Part B drugs and biologicals based upon AWP, and quoting the CMS proposal for replacing the old AWP calculation).

[144] See Press Release, DOJ, June 20, 2003, supra note 125.

[145] Weinberg, supra note 13, at 90.

[146] Id.

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Most notable among repeat qui tam relators is an enterprise called Ven-A-Care. A company based in the Florida Keys, Ven-A-Care has been the lead plaintiff in at least three recent FCA qui tam cases. [147] Ven-A-Care now operates as a professional qui tam relator **[*317]** with several cases pending, now under seal. [148] Ven-A-Care is unique in that the cases it pursues did not involve first-hand experience with an allegedly fraudulent Medicare pharmaceutical vendor, but rather are based on their own private investigation work leading to a qui tam action. [149] Prior to 1994, when Ven-A-Care filed its first qui tam lawsuits against Fresenius, the organization was a small pharmaceutical company located in a strip mall in Key West, Florida. [150] Annual revenues barely amounted to $ 1 million in sales per year and increased competition, along with declining reimbursements, threatened its future. [151] According to the Ven-A-Care principals, they got into the qui tam relator business on a "hunch" that one of its competitors was falsifying patient records. [152] After hiring an FBI agent, Ven-A-Care filed and settled a False Claims Act claim for $ 486 million. [153] The principals of Ven-A-Care, Louis Cobo and Mark Jones, no longer sell intravenous drugs for a living; they are now professional qui tam relators. [154]

Another qui tam relator of interest is George Couto. Mr. Couto was involved in developing a program for the Bayer Corporation to enable it to offer a forty percent discount on its drugs sold to one of its major clients, Kaiser-Permanente Medical Care. [155] The price break was under the "private labeling program," which Mr. Couto, in his capacity as Marketing Manager for Bayer Corporation, helped to design. [156] Under the private labeling program, Bayer discounted the sale price of its drug Cipro and other pharmaceuticals **[*318]** to Kaiser in order to keep that company's business. [157] However, since Medicaid reimbursements [158] were based upon the "best price" that

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[147] Ven-A-Care's first claim was a suit against a Germany-based medical care company, Fresenius Medical Care (Fresenius). Fresenius agreed to pay the U.S. Government $ 486 million to settle a lawsuit in which Ven-A-Care alleged Fresenius defrauded the Medicare and Medicaid programs. Ven-A-Care received $ 40 million as its share of the Government's recovery. Second, Ven-A-Care filed the original qui tam suit against Bayer Corporation, which resulted in a $ 14 million settlement by the defendant pharmaceutical company in order to resolve allegations that Bayer defrauded forty-five states' Medicaid programs by falsely overstating the average wholesale prices for its drugs. Third, Ven-A-Care filed Texas ex rel. Ven-A-Care of the Florida Keys, Inc. v. Warrick Pharmaceuticals Corp., No. GV002327 (Tex. Dist. Ct. April 20, 2004) (settlement agreement and release) (on file with the University of Michigan Journal of Law Reform). In April 2004, the defendants agreed to settle that case, and Ven-A-Care netted $ 5.3 million for its work as relator in that litigation.

[148] David Villano, Spy: Fraud; Key West's Ven-A-Care Is Getting Rich Ferreting out Abuse in the Healthcare Industry, Fla. Trend Mag., May 2002, at 76 ((on file with the University of Michigan Journal of Law Reform).

[149] Id.

[150] Id.

[151] Id.

[152] Id.

[153] Ven-A-Care declined Fresenius' predecessor's offer to participate in a scheme that Fresenius' predecessor promised would quickly lead to large profits. Ven-A-Care declined because they were suspicious that any company could make "quick money" given the nature of their business. This "hunch" led Ven-A-Care to investigate and then prosecute Fresenius and subsequently began its new business of investigating and filing qui tam claims. Id.

[154] Id.

[155] See Press Release, DOJ, Nov. 10, 2003, supra note 83.

[156] Peter Aronson, A Rouge to Catch a Rouge, Nat'l L.J. (Aug. 18, 2003), available at http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1059980477198.

[157] Id.

[158] Under Medicaid, states have substantial discretion in setting provider reimbursement rates generally. However, Federal regulations limit Medicaid reimbursement rates in order to control costs. See Etienne E. Pracht & William J. Moore, Interest Groups and State Medicaid Drug Programs, 28 J. Health Pol. Pol'y & L. 9, 13 (2003).

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Bayer offered to its Medicaid purchasers, [159] the private labeling program allowed Bayer to sell drugs to Kaiser at a discount that was not reported to the Government for best pricing purposes. [160] Couto not only negotiated this transaction with Kaiser, but is reported to have believed that the program was "potentially illegal" at the time **[*319]** that he negotiated the deal with Kaiser. [161] Nevertheless, Couto and his team,

faced with the potential of losing all of Kaiser's [Cipro] business … due to deep, deep discounting and our need to balance Kaiser's sales with impact on [Government] best pricing scenarios [sic], [we have] constructed various contracting scenarios … [and have] responded professionally, efficiently, and most of all, very quickly. [162]

After Couto completed the Kaiser deal in late 1999, in February 2000, he filed an FCA action against Bayer. [163] In it, he alleged that the private labeling program resulted in Bayer's filing numerous false claims for payment from the Government, and violated the False Claims Act. [164] In April 2000, the U.S. Attorney's Office in Boston announced a $ 257 million settlement and plea agreement with Bayer. [165] George Couto's share of that settlement was twenty-

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[159] At the time of the case, the "best price" was defined in the Omnibus Budget Reconciliation Act of 1990, *42 U.S.C. §1396r-8*(c)(1)(C) (2000) as follows:

(i) In general

The term "best price" means, with respect to a single source drug or innovator multiple source drug of a manufacturer, the lowest price available from the manufacturer during the rebate period to any wholesaler, retailer, provider, health maintenance organization, nonprofit entity, or governmental entity within the United States, excluding -

(I) any prices charged on or after October 1, 1992, to the Indian Health Service, the Department of Veterans Affairs, a State home receiving funds under section 1741 of title 38, the Department of Defense, the Public Health Service, or a covered entity described in subsection (a)(5)(B) of this section;

(II) any prices charged under the Federal Supply Schedule of the General Services Administration;

(III) any prices used under a State pharmaceutical assistance program; and

(IV) any depot prices and single award contract prices, as defined by the Secretary, of any agency of the Federal Government.

(ii) Special rules

The term "best price" -

(I) shall be inclusive of cash discounts, free goods that are contingent on any purchase requirement, volume discounts, and rebates (other than rebates under this section);

(II) shall be determined without regard to special packaging, labeling, or identifiers on the dosage form or product or package; and

(III) shall not take into account prices that are merely nominal in amount.

Omnibus Budget Reconciliation Act of 1990, *42 U.S.C. §1396r-8*(c)(1)(C) (2000).

[160] When states extend outpatient prescription drug coverage to Medicaid beneficiaries, participating pharmaceutical manufacturers must sign a rebate agreement with the Government. The rebate agreement indirectly controls drug prices that the government pays. It requires drug manufacturers to offer the government either 15.1% off the "average manufacturer price" of a drug sold to a private purchaser, or the "best price" given to a non-Medicaid purchaser. *42 U.S.C. §1396r-8* (2000).

[161] Aronson, supra note 156.

[162] Id.

[163] Id.

[164] Id.

[165] Boston U.S. Attorney's Office Announces Agreement with Bayer, GlaxoSmithKline to Settle Medicaid Overcharges, Kaiser Daily Health Pol'y Rep. Apr. 17, 2003, available at *http://www.kaisernetwork.org/daily_reports/rep_ind* ex.cfm?DR_ID=17232;

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four percent, or $ 34 million. [166] George Couto died at the age of thirty-nine, five months before the case settled; his children are the primary beneficiaries of his work as a qui tam relator. [167]

Privatizing FCA prosecution invites qui tam players like Durand, Ven-A-Care, and Couto. These relators used their information of wrongdoing to file suit rather than to effect change within the organizations or laws at issue. Moreover, by their claims, little has been done to improve or clarify the legal regime under which future manufacturers must operate. When the Government is a prosecutor independent of qui tam relator influence, its self-interest is clearly subordinated to its duty to serve the public good. However, when the Government is influenced by self-interested qui tam relators the result of their influence may deleteriously affect the law.

[*320]

C. The Substantive Limitations of Qui Tam-Made Law

Highly motivated qui tam plaintiffs develop and press theories of recovery that often require aggressive interpretations of existing law. In many instances, as with the TAP Pharmaceutical case, these matters are settled without any judicial or legislative opportunity to change the law in an orderly fashion that provides guidance for future transactions. In other instances, courts have sufficient precedent to realize that the relator's theory of recovery would be an imprudent advancement in the law. In still other cases, relators present issues of first impression for the courts that regulators have been addressing for years. Whether qui tam relators raise wholly novel issues or issues that are new to courts but not regulators, courts have found themselves making brand new law in response to qui tam claims. [168] A recently settled qui tam case that centered on a well-established practiced called "off-label marketing" illustrates the shortcomings of such qui tam made law.

On May 13, 2004, the Department of Justice (DOJ) entered into a Settlement Agreement and Release with Warner-Lambert Company, Inc. (Warner-Lambert); its parent company, Pfizer, Inc. (Pfizer), a pharmaceutical manufacturer; Parke-Davis, a subdivision of Warner-Lambert; and Dr. David Franklin, the qui tam relator who initially filed the action alleging pharmaceutical fraud. [169] Under this settlement, the defendants agreed to plead guilty to criminal charges alleging violation of the Food, Drug and Cosmetic Act (FDCA) and to pay $ 430 million to resolve criminal and civil charges against it. [170] In addition to the criminal fines of $ 240 million, Warner-Lambert paid to settle the FCA claims, Warner-Lambert also agreed to pay $ 83.6 million to the federal Government, and another $ 38 million to settle the alleged state law **[*321]** consumer claims. [171] Under the agreement, Warner-Lambert will pay $ 24.6 million to the relator, Dr. David Franklin. [172]

Bayer Agrees to Biggest Medicaid Fraud Settlement, USA Today, Apr. 16, 2003, available at http://www.usatoday.com/money/industries/health/drugs/2003-04-16-drug-settlement_x.htm; see also Health Care Fraud Annual Report 2003, supra note 85, at 2.

[166] Bayer Agrees to Biggest Medicaid Fraud Settlement, supra note 165.

[167] Id.

[168] See Joan H. Krause, "Promises to Keep": Health Care Providers and the Civil False Claims Act, 23 Cardozo L. Rev. 1363, 1368 (2002) ("When health care FCA suits are settled rather than tried, these innovative theories are not subject to review by a court - raising the very real possibility that federal prosecutors are themselves "legislating' an expansion of the law.").

[169] See United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39 (D. Mass. 2001); Press Release, U.S. Dep't of Justice, Warner-Lambert to Pay $ 430 Million to Resolve Criminal & Civil Health Care Ability Relating to Off-Label Promotion (May 13, 2004), http://www.usdoj.gov/opa/pr/2004/May/04_civ_322.htm (on file with the University of Michigan Journal of Law Reform) [hereinafter Press Release, DOJ, May 13, 2004].

[170] Letter from Michael J. Sullivan, United States Attorney for the District of Massachusetts, to Robert B. Fiske, Jr., and James P. Rouhandeh, Attorneys, Davis Polk & Wardwell (May 13, 2004) (on file with the University of Michigan Journal of Law Reform). The recent Parke-Davis settlement brings the total amount collected from pharmaceutical companies to settle civil claims in the last three years to $ 1.6 billion.

[171] Press Release, DOJ, May 13, 2004, supra note 169.

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The Warner-Lambert Company manufactures and sells pharmaceutical products through its division and co-defendant Parke-Davis. [173] Both entities were acquired by Pfizer. [174] The Food and Drug Administration (FDA) approved the Parke-Davis drug, Neurontin, as a second-line drug to treat epilepsy. [175] However, Parke-Davis, through its parent, Warner-Lambert, aggressively marketed Neurontin as a treatment for other purposes. Neurontin was marketed as a treatment for pain, attention deficit disorder, migraine headaches, drug and alcoholic withdrawal seizures, restless leg syndrome, Amyotrophic Lateral Sclerosis, and as a first-line mono-therapy treatment for epilepsy. [176] Because these were not FDA approved uses, they are called "off-label" uses for the drug Neurontin. Physicians in most states are permitted to prescribe off-label uses for FDA-approved drugs, provided the FDA has approved of the use and the physicians believe, in their best medical judgment, that the drug would serve the best interest of their patient. [177] Nevertheless, in an Information filed in the United States District Court for the District of Massachusetts on May 13, 2004, the U.S. Attorney alleged violations of various sections of the Food Drug and Cosmetic Act. [178]

The allegations included charges that the companies marketed Neurontin for uses unapproved by the FDA, misbranded Neurontin for uses unapproved by the FDA, and deliberately decided not to seek FDA approval for the unapproved uses it encouraged in order to increase its Neurontin sales. [179] The core of the **[*322]** Government's allegations against Warner-Lambert consisted of the charge that the company fraudulently promoted off-label sales of Neurontin for use as a pain medication and for other unapproved applications, using well-prepared sales representatives, "medical liaisons" who falsely posed as objective medical representatives to promote off-label use of Neurontin, conference presentations, and teleconferences including fraudulent clinical updates of the drug's efficacy as a non-epilepsy use drug. [180] Further allegations included anti-kickback charges against Warner-Lambert. [181] The qui tam relator alleged that the defendants paid kickbacks to physicians in the form of preceptor fees, consultant fees, and travel gifts, in exchange for prescribing large quantities of Parke-Davis drugs in violation of *42 U.S.C. §1320*(a-7)(b). [182] The Complaint further alleged that Parke-Davis promoted scientifically invalid drug studies to encourage the use of Neurontin. [183] Lastly, Franklin's Complaint contained mislabeling allegations. [184]

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[172] Id. Franklin filed his qui tam action on August 20, 1996. During the period from 1996 through 1999, the Government considered intervening. In 1999, the Government declined to intervene and instead filed an amicus brief and preserved its option to intervene at a later date, and the case seal was lifted. The settlement on May 13, 2004 completed an eight-year period of investigation and litigation against *Parke-Davis. Parke-Davis, 147 F. Supp. 2d at 46;* see also Bernadette Tansey, Huge Penalty in Drug Fraud Pfizer Settles Felony Case in Neurontin Off-Label Promotion, S.F. Chronicle, May 14, 2004, at C-1;

[173] *Parke-Davis, 147 F. Supp. 2d at 44;* see also Aronson, supra note 156. Also, for all of the facts alleged, see the original complaint. *Complaint, United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39 (D. Mass. 2001) (No. 96-11651PBS), 1996 WL 33578368.*

[174] *Parke-Davis, 147 F. Supp. 2d at 44 n.2.*

[175] *Id. at 45.*

[176] Press Release, DOJ, May 13, 2004, supra note 169; see also *Parke-Davis, 147 F. Supp. 2d at 45.*

[177] *Parke-Davis, 147 F. Supp. 2d at 44.*

[178] *Complaint, United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39 (D. Mass. 2001) (No. 96-11651PBS), 1996 WL 33578368.*

[179] Id.

[180] Id.

[181] Id.

[182] Press Release, DOJ, May 13, 2004, supra note 169.

[183] Id.

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The relator alleged that Neurontin was distributed with labels and instructions that were inadequate as directions for the use for which the drug was introduced into interstate commerce in violation of the FDCA. [185]

These allegations came to light on August 20, 1996 when Dr. David Franklin filed a qui tam action against Warner-Lambert, under seal, in the United States District Court for the District of Massachusetts. Dr. Franklin, a Ph.D. who had been employed by Warner-Lambert as a medical liaison for five months, filed the charges that later appeared in the Government's Information against Warner-Lambert. [186]

Most of Dr. Franklin's allegations were dismissed early in the case. [187] For example, the court held that a violation of the Federal Anti-Kickback statute was not a per se violation of the False Claims Act. [188] Rather, the court said that in order for a kickback violation to become actionable under the FCA, the Government must have conditioned payment of the claim upon a certification, whether implied or expressed, that the claimant was in compliance with the **[*323]** anti-kickback provision itself. [189] No such certification was filed by the defendant in this case. [190] Therefore, the Court held that the relator's claim could not rest on any false certification theory. [191] Significantly, the court declined to adopt Dr. Franklin's novel notion that the theory of false certification could cover claims filed not by the defendant itself, but by third parties. Declining this extension of the false claims theory promoted by the relator, the court dismissed the anti-kickback allegations under the FCA in this case. [192]

Also, the court dismissed the relator's claim that the defendants violated FDA regulations that required clinical trials to be provided free of charge. [193] The Parke-Davis Court identified its view of the proper limits to Medicare fraud prosecution under the FCA, saying that the plaintiff's clinical trials count was an example "of the Relator improperly seeking to use the FCA as a means to enforce various regulatory proscriptions of the FDA." [194] The court declined to allow the relator to use the FCA to prosecute various alleged regulatory violations as fraud, and cited the Pogue case [195] with approval for its proposition that the FCA was not "intended to operate as a stalking horse for the enforcement of every statute, rule or regulation." [196]

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[184] Id.

[185] Id.

[186] *United States ex rel. Franklin v. Parke-Davis, 147 F. Supp. 2d 39, 44, 46 (D. Mass. 2001).*

[187] For example, the court dismissed Dr. Franklin's claims relating to the Veterans' Administration, holding these were not pled with sufficient specificity under *Fed. R. Civ. P. 9(b)* to survive a motion to dismiss. See *id. at 43-50, 55* (denying in part and granting in part defendant's Rule 9 and 12(b)(6) motions).

[188] *Id. at 54.*

[189] *Id. at 54-55; United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002); Gublo v. Novacare, Inc., 62 F. Supp. 2d 347, 355 (D. Mass. 1999); United States ex rel. Pogue v. American Healthcorp, Inc., 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996).*

[190] *Parke-Davis, 147 F. Supp. 2d at 55.* But see United States ex rel. Franklin v. Parke-Davis, No. Civ.A. 96-11651PBS, 2003 WL 22048255, at 7 (D. Mass. Aug. 22, 2003) (finding arguments regarding implied certification persuasive though the court declined to reverse the claim).

[191] *Parke-Davis, 147 F. Supp. 2d at 55.*

[192] Id.

[193] Id.

[194] Id.

[195] *United States ex rel. Poque v. American Healthcorp, Inc., 914 F. Supp. 1057, 1513 (M.D. Tenn. 1996).*

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However, Dr. Franklin's off-label marketing claims did survive early dismissal. These were allegations that the Parke-Davis marketing scheme caused submission of numerous off-label prescriptions for Nurontin to the Medicaid program through the use of false and fraudulent statements about the safety and efficacy of the drug. [197] Remarkably, Parke-Davis' defense rested essentially on the argument that it had not submitted the false claim for reimbursement for Nurontin. Rather, Parke-Davis actually conceded that **[*324]** submitting claims for reimbursement for off-label prescriptions was a violation of the False Claims Act; the defendants simply alleged that the providers, not the manufacturers, would be liable under such a theory of recovery. [198] The core of the court's decision to permit the off-label use charges to proceed rested on the relator's allegation that defendants used false and fraudulent statements to induce the providers to submit false and fraudulent claims for reimbursement for Neurontin. The Court conceded that "[a] much closer question would be presented if the allegations [against Warner-Lambert] involved only the unlawful - yet truthful - promotion of off-label uses to physicians … ." [199] Thus, the cumbersome machinery of an FCA action was mobilized to address whether or not Warner-Lambert's advertising was truthful. Despite the defendant's admission of liability, it is important to note that this court did not conclude that off-label marketing was directly actionable under the FCA. In fact, the court observed that the FDA permits physicians to prescribe drugs for off-label usage. [200] On the other hand, the FDA does prohibit drug manufacturers from marketing and promoting drugs for off-label uses, [201] and the FDA prohibits the distribution of drugs where the labeling includes information about off-label uses. [202] In fact, the Parke-Davis Court found the terms of the FCA provided limited ability to address the complex policy issues and wide variety of state practices regarding off-label marketing. [203]

The court limited off-label claims to ones that satisfied a "double-falsehood" requirement. [204] These would apply only to the relator's claims resting on *31 U.S.C. §3729*(a)(2) - the false statements provision of the FCA. The court held that under this provision, both the statements by the defendants used to induce the filing of claims for reimbursement, and the claims for reimbursement themselves, had to be false in order to be actionable under the FCA. [205] However, the court did not completely foreclose **[*325]** FCA actions alleging that only the claim for reimbursement was false under the false claims provision of the FCA, *31 U.S.C. §3729*(a)(1). This "much closer question" remains a possible, colorable cause of action. [206] The debate then turned to the question of whether a

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196 *Parke-Davis, 147 F. Supp. 2d at 55.*

197 *Id. at 51-53, 55.*

198 *Id. at 51-53.* Defendants allege that the physicians' submission of false claims were an intervening cause, breaking the chain of liability to the manufacturer for promoting off-label use. The Court rejected this claim, holding that physicians' prescriptions were foreseeable, and therefore, not an intervening force to break the causal connection between the pharmaceutical companies' conduct and liability. *Id. at 52-53.*

199 *Id. at 52.*

200 *Id. at 44* (citing *Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341, 350 (2001)* (finding that the FDA seeks to regulate pharmaceuticals without interfering with the practice of medicine)).

201 *21 U.S.C. §331*(d) (2000).

202 Id.

203 *Parke-Davis, 147 F. Supp. 2d at 52.;* see also United States ex rel. Franklin v. Parke-Davis, No. Civ.A. 96-11651PBS, 2003 WL 22048255, at 2 (D. Mass. Aug. 22, 2003).

204 *Parke-Davis, 147 F. Supp. 2d at 52, 55.*

205 *Id. at 51-52.*

206 Id.

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claim for reimbursement for an off-label use was indeed false in each of the relevant states. The court concluded that where a state's Medicaid program permitted off-label uses of drugs, a claim for such reimbursement would not be false within the meaning of the FCA. [207] The Court concluded, and in fact Parke-Davis conceded, that eight states did not provide reimbursement for off-label drug prescriptions and, therefore, in those states off-label claims for reimbursement were by definition false within the meaning of the FCA. [208]

The Parke-Davis case is significant for the unique approaches the qui tam relator took to existing law. First, the qui tam asserted that pharmaceutical companies may be held liable under a false certification theory for false claims that they themselves did not submit, but rather for the claims of physicians that were submitted as a result of the marketing and promotion of off-label uses for non-FDA approved drugs. [209] This third-party approach to false certification under the FCA is unique to pharmaceutical fraud cases. Secondly, the pharmaceutical manufacturers' statements used to induce or "cause" filing of false claims under the false statements provision of the FCA must be actually false in order to support FCA liability. However, claims defined as "false" are fully reimbursed by several states, and recognized by the federal courts as important to the regular practice of medicine. [210]

Although Warner-Lambert agreed to plead guilty to the counts which rested on its practice of promoting off-label usage of its products, [211] it is unlikely that this qui tam settlement in any way clarifies or has advances the regulatory law that controls the complex issue of off-label marketing. In some ways, the qui tam approach to this issue ignores existing common and statutory law on point entirely. First, it should be noted that the U.S. Supreme Court has held that off-label marketing is "necessary" to the FDA's **[*326]** mission. [212] Second, the Supreme Court has specifically recognized that primary jurisdiction over this issue properly rests with the administrative authority of the FDA. [213] Third, the Supreme Court has cited both the statutory complexity and the importance of competing interests it balances as two compelling reasons that should - but likely will not - dissuade qui-tam litigants from attempting to alter off-label marketing rules via the FCA. Rejecting the plaintiff's fraud claims based on off-label marketing of a medical device, the Court in Buckman Co. v. Plaintiffs' Legal Committee explained,

Flexibility is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives. For example, … "off-label" usage of medical devices (use of a device for some other purpose than that for which it has been approved by the FDA) is an accepted and necessary corollary of the FDA's mission to regulate in this area without directly interfering with the practice of medicine… . Thus, the FDA is

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[207] Parke-Davis, 2003 WL 22048255, at 2.

[208] Id. at 3

[209] *Parke-Davis, 147 F. Supp. 2d at 53-54.*

[210] Parke-Davis, 2003 WL 22048255, at 3.

[211] Warner-Lambert agreed to plead guilty to two criminal counts alleging violations of *21 U.S.C. §§331*(a), 331(d), 333(a), 352(f)(1) & 355. These counts alleged crimes of distributing unapproved new drugs and misbranding drugs with labels for inadequate directions for use, in violation of the FDCA. Letter from Michael J. Sullivan, supra note 170.

[212] See *Buckman Co. v. Plaintiff's Legal Comm., 531 U.S. 341, 350 (2001)* (holding plaintiffs' tort claims for injury from FDA approved orthopedic bone screws were pre-empted by the Food Drug and Cosmetic Act and the Medical Device Amendments (MDA) thereto).

[213] *Buckman, 531 U.S. at 348* ("The conflict stems from the fact that the federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and that this authority is used by the Administration to achieve a somewhat delicate balance of statutory objectives. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law."); *id. at 349 n.4* ("The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance with the medical device provisions.").

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charged with the difficult task of regulating the marketing and distribution of medical devices without intruding upon decisions statutorily committed to the discretion of health care professionals. [214]

In fact, while manufacturers like Warner-Lambert may not lawfully promote off-label uses themselves, physicians may do so. [215] Moreover, several states require insurance companies to cover prescriptions for off-label usage of drugs. [216] Yet, the FDA has **[*327]** repeatedly revised its regulations concerning the practice by manufacturers, because it has long acknowledged the important role played by off-label or unapproved usages in medical practice. [217] Courts have deferred direct common-law regulation of off-label marketing, based on their appreciation of the danger presented by interfering with the delivery of health care and relationships between manufacturers, physicians and their patients. [218] There are even issues of Constitutional dimension raised by off-label marketing. [219]

None of these larger concerns is directly addressed by Dr. Franklin's litigation against Warner-Lambert. Nothing in the Warner-Lambert record suggests that Dr. Franklin's qui tam action addressed: any of the existing regulations on point; the FDA's years of effort to balance competing public health concerns at issue; the federalism, primary jurisdiction and preemption issues courts face when addressing the matter; or even the first amendment rights raised by this long-standing practice. By definition and design, the FCA action compels a narrow focus on the issue of fraud and, consequently, relator-made law fails to address important substantive and policy issues. Off-label promotion practices are one example of the shortcomings of relator-made law.

D. The Expensive Proliferation of Weak Claims

Three additional recent pharmaceutical cases filed under the FCA underscore one final detriment presented by the proliferation of relator-directed lawsuits. Qui tam relators have begun to allege a wide variety of regulatory violations and oversight as the basis for an FCA claim. [220] This approach to the law has the potential to **[*328]** create poorly reasoned precedent and to expend considerable judicial resources in the process. So far, courts appear to be discerning the difference between federal level fraud, and the regulation questions qui tam relators are raising.

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[214] *Id. at 349-50* (emphasis added).

[215] See *Allergan, Inc. v. Alcon Laboratories, Inc., 324 F.3d 1322, 1324 n.1 (Fed. Cir. 2003).*

[216] For example, thirty-four states including Kansas, Maine, and Massachusetts require coverage of off-label prescriptions. *Kan. Stat. Ann. §40-2-167* (West 1999); Me. Rev. Stat. Ann. tit. 24-1, §4324-D (1997); *Mass. Gen. Laws Ann. ch. 176G, §4G* (West 1998). New Mexico and Washington have non-legislative agreements with insurance providers to cover off-label usage. And Hawaii regulators have promulgated an administrative rule with the force of law which requires insurance coverage of off-label usage. See Drusilla S. Raiford, Sheila R. Shulman, & Louis Lasagna, Determining Appropriate Reimbursement for Prescription Drugs: Off Label Uses and Investigational Therapies, 49 Food & Drug L.J. 37, 39 (1994).

[217] See Citizen Petition Regarding the Food and Drug Administration's Policy on Promotion of Unapproved Uses of Approved Drugs and Devices; Request for Comments, *59 Fed. Reg. 59,820-01* (Nov. 18, 1994); Draft Policy Statement on Industry-Supported Scientific and Educational Activities, *57 Fed. Reg. 56,412* (Nov. 27, 1992). But cf. Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body, *65 Fed. Reg. 1,000-01* (Jan. 6, 2000).

[218] See, e.g., *Sigma-Tau Pharm., Inc. v. Schwetz, 288 F.3d 141, 147-48 (4th Cir. 2002).*

[219] See *Wash. Legal Found. v. Kessler, 880 F. Supp. 26, 28 n. 1 (D.D.C. 1995).*

[220] See, e.g., *United States v. Whiteside, 285 F.3d 1345, 1351 (11th Cir. 2002); United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d 430, 436 (E.D. Pa. 2004); In re Genesis Health Ventures, Inc. v. Debtors, 272 B.R. 558, 563 (D. Del. 2002);* see also *United States ex rel. Perales v. St. Margaret's Hosp., 243 F. Supp. 2d 843, 852 (C.D. Ill. 2003)* (dismissing allegations that the purchase of medical practices at prices in excess of fair market value violated Stark and Antikickback laws and were actionable under the FCA).

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Nevertheless, this method of sifting the "wheat from the chaff" is expensive and does not guarantee that a uniform or consistent body of law will result.

In the first case, Medco Health Solutions, one of the world's largest pharmaceutical benefits management company (PBM), [221] was sued in the Eastern District of Pennsylvania by three qui tam relators: Hunt, Gauger, and Piancentile. In this case, the Government intervened, [222] and the U.S. Attorney, as well as twenty state attorneys general, joined the case, alleging that Medco encouraged providers to prescribe its drugs by switching patients to prescriptions it claimed would save both patients and their prescribers money. [223] Instead, the switches to Medco products actually increased costs to health plans and to patients. [224] These marketing techniques were not per se illegal. Rather, in the case of United States of America v. Merck-Medco Managed Care, L.L.C., et al., the United States and state attorneys general alleged that the switching program Medco sponsored caused providers and patients to incur increased costs, despite the representations made by Medco that these switches would save costs. [225] Thus, the falsity in this case, for FCA purposes, was provided by the defendants' misrepresentations, not by the underlying switching conduct itself. Whether a charge of federal fraud is the proper tool to address false advertising is open to question. In an industry as large as pharmaceuticals, creating legal precedent based on a few large, potentially aberrational cases may not only overstate the law, but may unnecessarily **[*329]** interfere with the development of a healthy and cost effective market. [226]

In a second case, the Civil False Claims Act provided the basis for a Bankruptcy Court finding in the matter of Genesis Health Ventures, et al. v. Debtors. [227] West End Pharmacy, Inc. (West End) a pharmaceutical provider, supplied services to Cherry Hill Convalescent Center (CHCC). Vitalink Pharmacy Services, Inc., a multi-state pharmaceutical provider, acquired West End and was later acquired by NeighborCare, whose parent is Genesis. Genesis is a Chapter 11 debtor. In a separate action, CHCC filed an FCA case against Genesis. The basis of this qui tam relator's claim was that Genesis violated the FCA when it failed to credit the Government for the return and resale of unused drugs supplied to the CHCC nursing home. When Genesis went into Chapter 11 bankruptcy, CHCC filed a proof of claim, seeking to value its FCA action against Genesis at $ 324 million. According to CHCC, its allegations under the FCA claim proved that Genesis had damaged the Government by overcharging for Medicaid drugs supplied to CHCC by West End. [228]

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[221] *Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d at 436.* A PBM contracts as an intermediary between health plans (purchasing prescription drugs) and pharmacies that provide those drugs to the patients enrolled in health plans. The list of drugs distributed by a PBM is called a formulary. Since they first appeared approximately thirty years ago, PBMs have sponsored sales promotion, rebate, and network programs to induce sales of their respective formulary products.

[222] See *Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d at 434.* Under the FCA, a person may initiate an action on behalf of himself and the United States Government under *31 U.S.C. §3730*(b)(1) (1994). Upon filing, the plaintiff must also serve a copy of the complaint and a sealed disclosure to the government. *31 U.S.C. §3730*(b)(2) (1994). Thereafter, under *31 U.S.C. 3730*(b)(4) (1994), the Government has sixty days, which may be extended, during which it must notify the court whether it will intervene and proceed with the litigation, or that it declines to intervene. However, *31 U.S.C. 3730*(c)(3) (1994) preserves the Government's right to intervene in that action at any time.

[223] See *Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d at 447.* The drug switching count is one of several allegations against the defendant PBM in this case.

[224] Id.

[225] Id.

[226] See Higgins & Golze, supra note 92, at 1485.

[227] *In re Genesis Health Ventures, Inc. v. Debtors, 272 B.R. 558, 571 (D. Del. 2002)* (granting motions to value claimant's proof of claim based on qui tam action at zero).

[228] West End provided pharmacy supplies to CHCC, stocking its drug carts for patient use. CHCC returned unused drugs to West End, which West End allegedly resold to other purchasers. However, CHCC alleged that West End billed Medicaid for

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The FCA claim at issue in Genesis was filed by qui tam relator R. Steven Scherfel. The Genesis Court declined to ascribe any value whatsoever to this FCA claim. It held that claims for payment are not false in the absence of clear federal statutory or regulatory requirements that West End credit the Government for unused pharmaceuticals. [229] Noting significant differences in the various states' approaches to reimbursement for unused drugs, the Court said this variety of approaches negates any "opportunity to conclude" that a failure to provide credits constitutes a false or fraudulent claim under the FCA. [230] The debtor, West End, did not act knowingly to file false claims, where there was no specificity about crediting returns under statutes, regulations or contracts. [231] Finally, the Court concluded that crediting returned drugs is not a condition of payment and, therefore, no false certification cause of **[*330]** action existed against West End. [232] The Genesis Court's analysis is of particular importance, because it is a bankruptcy court; bankruptcy courts have special expertise in determining when a set of inchoate rights has value. An essential element of the FCA cause of action against West End was that it made a claim for payment against the Government's public fisc. Finding no claim, and further no falsity, the Genesis Court's reasoning is instructive for future analysis of what might constitute a claim for payment under the FCA. This case illustrates that in the absence of any clear federal statute or regulation requiring a condition precedent to payment, the failure to satisfy that condition cannot result in transforming a claim for payment into an actionable claim under the FCA.

On similar grounds, the Eleventh Circuit in United States v. Whiteside [233] reversed a conviction under the Criminal False Claims Act, based upon the Government's failure to prove that its regulatory scheme could not be reasonably interpreted as the defendant argued. [234] In that case, the defendant was indicted on conspiracy and false statement charges arising out of cost reports that classified debt as being capital-related. [235] The relator's claims in this case challenged a debatable characterization of interest expense on the defendant's cost reports. [236] The court in Whiteside ruled that because the Government did not discharge its burden to prove beyond a reasonable doubt that the defendant's statement was not true under a "reasonable interpretation" of the law, [237] the conviction below had to be reversed. Courts appear appropriately unwilling to classify as fraud misinterpretations of vague, ambiguous, or contradictory regulatory schemes.

Without question, the Government's resources are stretched, and its ability to investigate and prosecute fraud effectively is compromised by its limited budget and personnel. [238] However, accommodating questionable qui tam plaintiffs, who advance novel but untested theories of recovery concerning small and contestable regulatory points related to pricing, accounting, and the delivery of care, replaces thoughtful, flexible, and appropriate regulatory authority with a privately-driven system of penalizing a range of non-fraudulent conduct, as though it were true

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returned drugs, without crediting the Government, for the fact that these pharmaceuticals were resold to other purchasers. *Id. at 562-63.*

229 *Id. at 569.*

230 Id.

231 *Id. at 570*

232 Id.

233 *United States v. Whiteside, 285 F.3d 1345, 1351 (11th Cir. 2002).*

234 *Id. at 1352.*

235 *Id. at 1350.*

236 *Id. at 1351.*

237 *Id. at 1352.*

238 Pamela H. Bucy, Civil Prosecution of Health Care Fraud, *30 Wake Forest L. Rev. 693, 756-57 (1995).*

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fraud. Neither the **[*331]** plain language of the statute nor the evidence we have of Congress' intent suggest that this is an advantageous arrangement.

The data along with summaries of the preceding pharmaceutical fraud cases confirm that the Government is allowing qui tam relators to influence its exercise of prosecutorial discretion. The qui tam-directed litigation hinders the development of good law, and costs companies, individuals, and taxpayers hundreds of millions of dollars. [239] In the case of the pharmaceutical industry, this approach to FCA enforcement leaves an already unregulated and disorderly industry in even further disarray. However, to appreciate fully the source of the Government's misdirection requires a closer look at the qui tam partnership between the private and the public enforcer.

The role of the relator in FCA litigation far exceeds the role of private attorney generals in other public-private forms of enforcement. For example, the citizen suit provisions of environmental statutes require all recoveries to be returned to the United States Treasury. [240] In marked contrast to the FCA, this allocation of funds significantly reduces the influence that private financial gain might have on private enforcement of these statutes. In many cases, a condition of settling environmental citizen suits requires defendants to donate funds to environmental advocacy groups. [241] Even this distribution of post-settlement funds does not represent the same level of financial self-interest with which qui tam relators must contend. In antitrust litigation, private enforcement is constrained by the standing requirement that requires the private plaintiff to have suffered an antitrust injury in order to bring a private cause of action. [242] Thus, only plaintiffs whose personal injuries are aligned with the offense to the public goal of promoting competition are eligible to recover treble damages. In contrast, courts construing the FCA have determined that a qui tam plaintiff need not have suffered any injury at all, either based on the reasoning that the Government is the real party in interest, or based upon the view that a qui tam plaintiff has a vested interest in recovery. [243] In securities class action suits, brought to enforce the laws that protect U.S. financial markets from fraud, recent legislation has reduced the **[*332]** independence of private attorneys and tied their interests to the individual investors in the class they represent. [244] For example, the law now requires a lead plaintiff to be named, and discovery cannot commence until after the initial pretrial motions have concluded. [245] These reforms more closely align the interests of private enforcers with the public goals of protecting the integrity of U.S. capital markets.

The pharmaceutical cases reviewed above offer numerous examples of the moral hazard problem with privatized public enforcement. Yet, these same inducement concerns, and questions about the expense and efficacy of developing law under such conditions, apply in other contexts as well - wherever the Government is overwhelmed by private prosecutors under environmental, antitrust, securities, and other public law statutes. Therefore, the next section explores ways to fix the moral hazard problem, by realigning private enforcers' interests with public priorities in the FCA context. However, the principles applied to suggest the following FCA reform, may be useful in looking at ways to improve private prosecution of public statutes generally.

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[239] See, e.g., James F. Barger, Jr. et al., States, Statutes and Fraud: An Empirical Study of Emerging State False Claims Acts, *80 Tul. L. Rev. 465, 481 (2005).*

[240] See, e.g., The Clean Water Act of 1977, *33 U.S.C. §1251*-1387 (1994).

[241] See Thompson, supra note 2, at 205-09.

[242] Brodley, supra note 3, at 16.

[243] See Joan H. Krause, Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act, *36 Ga. L. Rev. 121, 148-52 (2001).*

[244] See Joseph A. Grundfest & Michael A. Perino, The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation, *38 Ariz. L. Rev. 559, 559-62 (1996)* (describing the Private Securities Litigation Reform Act of 1995).

[245] Joseph A. Grundfest & Michael A. Perino, Securities Litigation Reform: The First Year's Experience, in 1015 Corporate Law & Practice Course Handbook Series, 955, 961-62 (1997), available at Westlaw, 1015 PLI/Corp 955.

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IV. A Proposed Solution: Revising the Qui Tam Provision of the Civil False Claims Act [246]

The data empirically demonstrate the unquestionable trend toward private enforcement of the FCA generally. [247] In these examples of public-private partnerships for enforcing the law, the public enforcer is no longer leading the majority of FCA cases. The trend is away from the Government's control over these federal claims, and from the formation of the underlying law it used to control. The most important cost imposed by this trend is the potential compromise of the social objectives that public enforcement is intended to serve. Where large financial payoffs inure to the personal benefit of the private enforcer, there is a **[*333]** greater likelihood that private economic interests will lead plaintiffs to pursue claims that diverge from the public goals of a public statute. Moreover, when a private plaintiff has the ability to proceed regardless of any meaningful quality control exercised by the public enforcement authority, the result is a proliferation of lawsuits that may prove personally lucrative, but inconsistent with the public purposes of the statutory scheme.

The pharmaceutical industry prosecutions provide numerous examples of the issues raised by the privatization trend because these lawsuits are being aggressively pursued to the fullest extent that the FCA will allow. [248] These cases provide examples of a long list of social costs imposed by overenforcement. The TAP Pharmaceutical litigation illustrates that weak cases will impose litigation and enforcement costs not internalized by the private plaintiff. Settled cases such as the Bayer Corporation private labeling case and the Parke-Davis "off-labeling" cases will do little to advance the law in a way that will predictably order future behavior. Excessive private enforcement compromises the ability of administrative agencies such as the FDA or the Department of Health and Human Services - charged with lawmaking and adjudicative authority under a public law - to exercise prosecutorial discretion and make use of complex procedural and substantive provisions to control abuses under the statutes like the Anti-Kickback statute and the FDCA. Overly lucrative financial incentives invite questionable plaintiff practices such as the plaintiffs who appear repeatedly in qui tam cases or plaintiffs who accept employment for short periods of time before their employer becomes a target defendant. The Parke-Davis litigation also illustrates that in cases where private enforcers advance novel interpretations of existing law, reliance on courts as the primary vehicle for screening inappropriate theories will inevitably lead to inconsistent interpretations of the law without agency oversight and control in the broad range of cases filed. The uncertainty that continues to surround the practice of off-label marketing, for example, is made no better by the piecemeal approach to litigation that private enforcement necessarily involves. The danger of establishing bad legal precedent remains as seen by the Merck-Medco, [249] Genesis Health, [250] and Whiteside [251] cases. The conclusion of this analysis is that Congress must now act to **[*334]** reform the Civil False Claims Act, bringing it back in line with its original objectives and reasonable limitations. The FCA should be amended to reflect a lesson derived from moral hazard theory. In the insurance law context, eliminating moral hazard occurs when an insured is exposed to potential losses so that the presence of insurance is less likely to increase unnecessary utilization or reduce the exercise of reasonable caution.

Applying that principle here, the Government must be exposed to the potential losses present in cases brought by qui tam relators. This will create an incentive for the Government to monitor these cases more closely and to more closely align the private enforcer's interests with those of the public. Moreover, comparing the procedural approaches to other public-private enforcement regimes also suggests reform to the FCA statute that may return

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[246] Of significant concern, but beyond the scope of this Article, are the Constitutional issues raised by qui tam relators prosecuting fraud under the FCA without adequate government supervision. The U.S. Constitution's Appointments and "take care" clauses may be sources of liability for inadequate supervision. See generally Bucy, supra note 16, at 955.

[247] See supra Part.I.

[248] See Fabrikant supra note 38, §1.05.

[249] *United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d 430 (E.D. Pa. 2004).*

[250] *In re Genesis Health Ventures, Inc. v. Debtors, 272 B.R. 558 (D. Del. 2002).*

[251] *United States v. Whiteside, 285 F.3d 1345 (11th Cir. 2002).*

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the Government to a position of control in public enforcement, while not compromising the benefits provided by private plaintiffs. The enforcement statutes that govern environmental citizen suits, antitrust, and securities enforcement, all include procedural mechanisms that operate to reduce the likelihood that a private plaintiff will base the decision to prosecute solely on the potential for private financial gain. [252] Whether it is the requirement to pay recovered funds into the U.S. Treasury, judicially imposed standing requirements, or class action reforms such as the requirement to name a lead plaintiff, the lesson of other public-private regimes is that private enforcers' interests must be legislatively subordinated to the public good.

All these reform objectives would be served if Congress amended the FCA statute to require the Government to evaluate the underlying merits of all cases in which it permits qui tam relators to prosecute in its stead. This could be done by requiring the Government to either join or move to dismiss each qui tam case within a certain statutory time period. [253] If the case is joined, the Government may return to a "monitor only" approach, allowing it **[*335]** to multiply its enforcement efforts but only where worthwhile cases are concerned. The full range of monitoring - choosing alternative enforcement, settling, and dismissing these worthy cases - would still be available to the Government. However, as a co-litigant, such a rule would cause the Government to allow qui tam relators to take over its leadership position of cases for which the Government's demand is more inelastic than elastic. This would minimize the moral hazard risk that the Government will rely upon the qui tam relator to prosecute costly, frivolous claims. The legislative language required to accomplish this reform is simple. The qui tam section of the Civil False Claims Act [254] could be amended to add the italicized language and omit the bracketed language below:

(b) Actions by private persons. -

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to *Rule 4(d)(4) of the Federal Rules of Civil Procedure.* The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. The Government may elect not to intervene but to allow the action to proceed. In this case, the Government must certify that it has evaluated the claim and, in accordance with *Rule 11 of the Federal Rules of Civil Procedure*, deems the case worthy to continue. The Government may elect to intervene and proceed with a certified action at any time.

(3) The Government may, for good cause shown, move the court for extensions of the time during which **[*336]** the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to *Rule 4 of the Federal Rules of Civil Procedure.*

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[252] See e.g., *Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996)* (explaining that the citizen suit provisions in the Resource Conservation and Recovery Act allow a private party bringing a waste clean-up suit to obtain injunctive relief but not damages for past clean-up costs); *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990)* (explaining that a private plaintiff may not recover damages for showing a simple injury, but must show the exact type of injury the antitrust statute was designed to prohibit); *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976)* (holding that a private cause of action for damages will not arise without an allegation that the "sceinter" had the "intent to deceive, manipulate, or defraud").

[253] Proposals requiring the Government to join or dismiss a qui tam case have recently been proposed in other contexts. See Aaron R. Petty, How Qui Tam Actions Could Fight Public Corruption, *39 U. Mich. J.L. Reform 851 (2006)* (proposing qui tam actions as a supplement to federal prosecution of state and local public corruption).

[254] *31 U.S.C §3730*(b).

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(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall -

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(d) Award to qui tam plaintiff. -

(1) If the Government proceeds with an action brought by a person under subsection (b), or if the Government certifies an action to be conducted by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than [25] 30 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action … .

These minimal changes in the statute will address the problems highlighted in this Article and demonstrated in the "real life" examples of several recently prosecuted pharmaceutical fraud cases. Adopting the changes suggested above will insert into the FCA protections already contained or implied in the approach of other statutes that employ private attorneys general for public law enforcement. Finally, the legislative reform this Article suggests corrects the moral hazard problem contained in the current FCA statutory structure. The Government would be placed once again in a position of control with respect to all FCA prosecutions. The Government will be responsible under the revised statute to cause frivolous claims to be dismissed, to intervene in cases requiring the Government's prosecutorial leadership, or to certify cases that proceed **[*337]** under the direction of qui tam relators independently, have merit, and will serve the public good. The FCA reform proposed would reverse the unchecked trend toward private parties' dominance in public enforcement, and reverse the unacceptably large social costs privatization imposes on society, and return the Civil False Claims Act to its original design to serve the public goals and achieve benefits that private-public enforcement is intended to protect.

Conclusion

Overenforcement by zealous "private attorneys general" has been a concern for decades. The seminal literature on joint public-private enforcement abounds with examples. When advancing her proposal to deputize private citizens to enforce civil rights statutes in police brutality cases, Professor Myriam Gilles counseled the need to limit private enforcement actions to those actually injured because such a limitation "promotes manageability and insulates the Justice Department from a potential onslaught of meritless or vexatious petitions." [255] Professor Frank Cross, in his article that is generally critical of citizen suits brought to enforce environmental statutes, found common ground with Professor Barton Thompson when it came to the potential dangers of excesses and overdeterrence, [256] though the latter wrote to champion not only private prosecutorial efforts, but also the role of private parties as monitors and informants under the environmental regulatory scheme. [257] Even Professor Thompson admitted that where private agencies bring suits the Government would not, these actions create the potential for overenforcement, which Professor Thompson calls "added zealousness error." [258] Private enforcers play a key role in promoting the socially beneficial goals that underlie the antitrust laws. [259] And yet, after noting that private remedies such as treble and punitive damages are "exceptionally powerful," [260] Joseph Brodley wrote that "private enforcers, driven

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[255] Gilles, supra note 1, at 1432.

[256] Frank B. Cross, Rethinking Environmental Citizen Suits, 8 Temp. Envtl. L. & Tech. J. 55, 68-69 (1989).

[257] Thompson, supra note 2, at 185-88.

[258] Id. at 201. Thompson also claims to have evidence of underenforcement by private agencies, where the private enforcers fail to bring suits that would benefit the common good. Id. at 199-203.

[259] Brodley, supra note 3, at 1.

[260] Id. at 11.

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by their own self-interest, **[*338]** may deviate from antitrust goals, and the strong penalties and litigation advantages available to private litigants magnify the mischief such litigation may cause." [261] Joseph A. Gunderfest wrote to urge the Securities and Exchange Commission to administratively limit implied private securities class actions on the grounds that in their effort to enforce the investor protection goals of the federal securities laws, private class action litigants

may therefore do much more than simply supplement federal enforcement efforts by bringing more of the same type of cases that the government would bring if it had the resources. In particular, private parties may pursue cases that the government would refuse to bring even it [sic] had infinite resources. [262]

All of these astute commentators have readily acknowledged the proposition that excessive and unsupervised private enforcement may compromise important social goals. After all, the statutes that permit the use of private enforcers to supplement Government prosecution, whether expressly or implicitly, enlist the aid of private enforcers in the pursuit of lofty social priorities. However, no one has empirically confirmed that when left to their own devices, private attorneys general will seek to serve their own personal interests, regardless of the impact they may have on the public good.

This Article demonstrates the overwhelming impact of a "real life" example of the divergence between private and public interests. [263] It offers the theory of moral hazard as an explanation for that divergence in the particular instance of qui tam [264] litigation. Finally, based on the root incentives that cause the divergence, the Article offers a proposal to close the gap between the motivations that drive private and public enforcers. The lessons learned herein will, I believe, reverse the harms currently being visited upon the social good by excessive and excessively independent qui tam enforcement of the FCA. Moreover, as legal scholars look to broaden the public-private partnership described by the qui tam section of **[*339]** the FCA, [265] these reforms will limit the chance that moral hazard problems will be exported broadly. Finally, the ideas presented here may also be applied to inform the public and private enforcement concerns that arise under securities class action enforcement, private antitrust actions, civil rights litigation, and citizen suits brought to force compliance with environmental laws and regulations.

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[261] Id. at 15.

[262] Grundfest, supra note 4, at 970. Grundfest also observed that the converse is true; private plaintiffs may fail to bring cases under the federal securities law that the government would pursue if it had the resources. Id.

[263] Notably, J. Randy Beck has traced accounts of actual qui tam abuses that occurred in English legal history from before the American Revolution until Parliament abolished the tool in the mid-twentieth century. J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, *78 N.C. L. Rev. 539 (2000).*

[264] See supra note 9.

[265] See, e.g., Bucy, supra note 42, (advocating expansion of a reformed version of the qui tam model to introduce private enforcement in protecting the environment and financial markets); see also Jill E. Fisch, Class Action Reform, Qui Tam, and the Role of the Plaintiff, Law & Contemp. Probs., Autumn 1997, at 167, 198-202 (suggesting the qui tam "enforcement partnership" as a way to reform class action lawsuits to enforce securities law).

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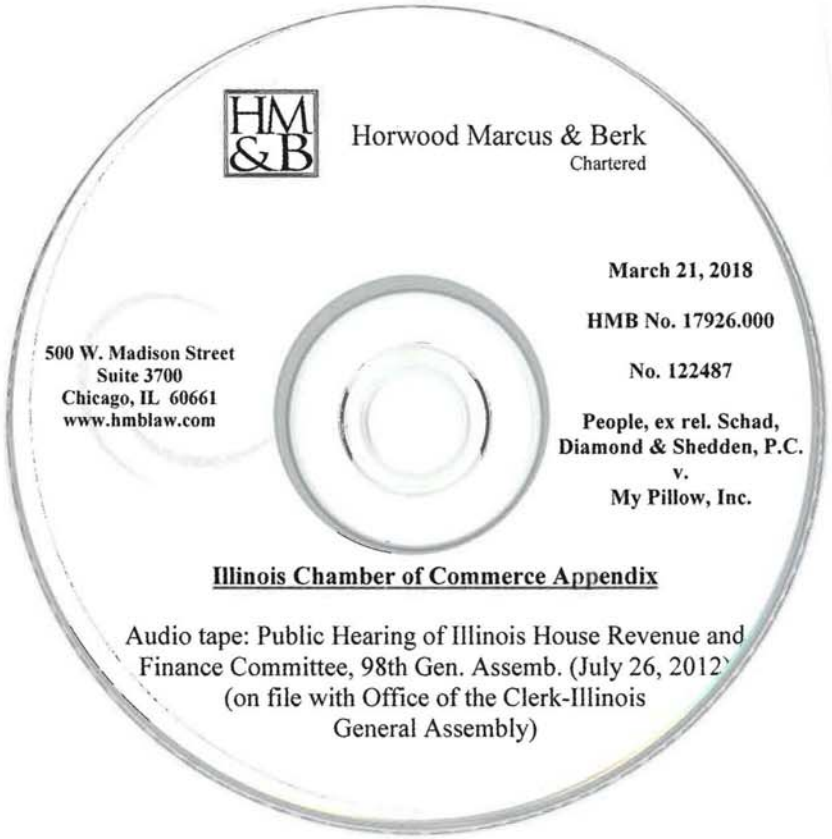

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***3 I. INTRODUCTION**

New crimes require new thinking about regulation. Because of computerization and globalization, today's world faces new crimes and new ways of committing old crimes. Because of the interconnectedness of our global financial markets, this evolving criminal activity has unprecedented power to wreak havoc on every aspect of modern life. [1] Law enforcement has no choice but to respond effectively.

One aspect of this new thinking is revising our concept of crime. Complex, economic wrongdoing is difficult to categorize as criminal primarily because it is enormously difficult to prove the high level of mens rea traditionally and appropriately required in criminal law. [2] Proving this ***4** requisite mental state by the heightened burden required in criminal cases is even more difficult. Moreover, even when proof of criminal intent beyond a reasonable doubt is possible, conducting the investigation and proving a case by these standards is so expensive and time-intensive for both the executive and judicial branches [3] that the costs often outweigh any benefit achieved. Lastly, imposing the criminal sanction of imprisonment on defendants whose wrongdoing, however destructive to society, may be malum prohibitum, is morally and practically questionable for a criminal justice system [4] and is often economically inefficient. [5]

Reevaluating our approach to modern day wrongdoing requires consideration of new regulatory tools. This Article addresses the tool of private justice. "Private justice" occurs when private persons initiate lawsuits to detect, prove, and deter [6] public harms. [7] No matter how talented ***5** or dedicated our public law enforcement personnel may be nor how

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many resources our society commits to regulatory efforts, a public regulatory system will always lack the one resource that is indispensable to effective detection and deterrence of complex economic wrongdoing: inside information. For the purposes herein, inside information is defined as significantly helpful information about economic wrongdoing produced by someone who has experience, insight, or contacts to, the industry or perpetrator involved. Private justice can supply the resource of inside information. Because of the necessary and nonsubstitutable nature of this resource, private justice is not just one option for addressing economic banditry in a global, computerized world; [8] it is the best option.

Private justice has received inadequate academic and policy analysis, [9] but has grown exponentially over the past few decades. [10] Recent ***6** experience shows that private justice offers extraordinary success in detecting illegal activity motivated by economic gain. [11] Private justice also ***7** challenges core personal values [12] and has the potential to mightily disrupt existing economic markets. [13] Effective use of private justice as a regulatory tool requires an appreciation of its systemic strengths and weaknesses.

Private justice actions have grown hodge-podge in American jurisprudence throughout the twentieth century, some created by legislatures, others by courts. [14] Today, private justice actions exist in almost every area of life that law seeks to regulate. [15] They vary in design, impact, success, disruption to economic stability, and values communicated. To date, no one has identified private justice as a phenomenon, analyzed its various models, assessed its impact or suggested how, as an institutional design, it is the future of effective regulation. It is time to do so.

***8** The rationale typically given for creating or recognizing private justice actions is that they supplement public resources. [16] This understates the importance of private justice, at least when it is optimally employed. Private justice is not simply a helpful adjunct to public regulation. Done correctly, it is an essential ingredient. Without the key resource of inside information that is available through private justice actions, public regulators cannot effectively detect, prove, or deter complex economic crime or public corruption. In our increasingly global, interconnected, and computerized world, such malfeasance has become more complex, more disruptive to legitimate societal institutions, and more difficult to detect. [17] There is little choice but to embrace private justice as part of any public regulatory system.

The significant resources private justice brings to regulatory efforts are inside information about violations and entrepreneurial legal talent. Of these, the resource of inside information is more important. This is an invaluable commodity that the regulatory world must pay for. This commodity must be priced high enough to overcome the disincentives to providing it and to alter existing personal and societal values against providing it. For private justice to work, supplying information about wrongdoing must be viewed as morally respectable, not repugnant.

Part I of this Article describes the various private justice models currently in use in the American legal system, noting how at least one of them does a good job of enticing those who have inside information about wrongdoing to come forward. Part II discusses the substantial systemic costs in using the private justice model, and suggests how a private justice paradigm can be optimally designed to minimize these costs while also maximizing the benefits of private justice. Appendix A-1 contains proposed legislation incorporating these suggestions. Part III discusses how and why an optimally designed private justice model should be expanded into two areas: protection of the environment and protection of national financial markets. Appendices A-2 and A-3 contain this proposed legislation.

But first, the following Case Study shows in concrete terms how private justice could have made a difference in one instance of massive wrongdoing.

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9** ***A Case Study: Enron

In early 2001, Enron was the seventh largest company in the United States. Within twelve months, it declared bankruptcy, [18] becoming the largest bankruptcy to date in U.S. history. [19] At its peak, in January 2001, Enron's price traded at $83 per share. One year later, in January 2002, Enron stock was trading at 26 cents per share, [20] a plunge of 99%. [21] In December 2001, when it declared bankruptcy, Enron's debts totaled $13.12 billion. [22] Upon bankruptcy, Enron laid off 4,000 employees, [23] who not only lost their jobs but also lost their savings which were invested in 401(k) retirement funds dominated by Enron stock holdings. [24] As of January 2001, about 60% of Enron's 401(k) plan assets were invested in Enron stock.

In October and November 2002, when Enron's stock was plummeting, Enron employees were prevented from trading the Enron stock they held in their 401(k) plans. [25] Their Enron holdings lost over $1 billion in value. [26] At the same time that Enron employees were barred from trading their Enron stock, Enron corporate insiders were unloading their Enron stock and dissipating corporate assets. In the year prior to Enron's bankruptcy, corporate insiders sold a total of 9,447,659 shares of Enron, valued at $130,972,228. [27]

Enron accomplished its stunning financial failure by apparently "cooking the books." It established over 3,000 outside partnerships, about 900 of which were based offshore, where financial records are confidential and untouchable by U.S. regulators. [28] It used these partnerships to "move its debt off its financial statements and out of public scrutiny . . . masking ***10** billions in debt." [29] All the while, it received clean bills of health from its outside auditor, Arthur Anderson, which certified in its last annual statement that Enron's "internal accounting system was 'adequate to provide reasonable assurance as to the reliability of financial statements.'" [30] At the time it gave this opinion, Arthur Anderson was soliciting and receiving lucrative consulting contracts from Enron. [31]

During this same time period, Enron's law firm reviewed warnings raised by an Enron vice-president about the impropriety of hiding the corporate debt on partnership books, but concluded that the issues raised, "d[id] not . . . warrant a further widespread investigation by independent counsel and auditors." [32] Enron Chairman, Kenneth L. Lay, sought this advice on the partnerships from this particular law firm despite the fact that this firm had established the partnerships in question and despite the Enron vice-president's warning that the firm should not review the partnership issue because of its conflict of interest. [33]

As policymakers consider what can and should be done to prevent future "Enrons," an optimally deigned private justice model should be at the top of the list. Reforming existing laws on contributions to 401(k) retirement plans, tax shelters, accounting firms' conflicts of interests, and disclosure requirements for derivatives (the type of financial arrangement Enron was able, legally, to keep off its books) should all be considered. [34] But, there is a limit to what public regulation can do. Humans are too creative for regulators to anticipate all of the ways greed can overcome judgment and morals. Even if that were not the case, the cost, disruption ***11** and injury to a growing and changing economy make massive public regulation unfeasible. Enlisting the resource of inside information: knowledgeable insiders who are willing to alert regulators to malfeasance before or as it is occurring, [35] is the only effective and efficient way to police wrongdoing motivated by economic gain. An effective private justice institutional design can provide this resource. [36]

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*12 II. TYPES OF PRIVATE JUSTICE ACTIONS

This Part provides a brief overview of the major models of private justice existing today in American jurisprudence. As will be seen, while all models profess the same goal of supplementing the public resources available for detecting and deterring public harms, some have additional goals such as making victims whole, [37] luring entrepreneurial attorneys into law enforcement's battle against public harms, [38] and neutralizing the "capture" of regulatory agencies by industry. [39] Only one model, the qui tam provisions of the civil False Claims Act ("FCA"), explicitly seeks to elicit inside information about public harms. [40] The design of the various private justice models are quite different. Some promote class actions, [41] others discourage them. [42] Some models successfully encourage coordination between public and private enforcers; [43] others try but fail; [44] and some do not try at all. [45] Some private justice actions are lucrative for private plaintiffs; [46] others are noticeably stingy. [47] Despite their differences, examination of the various private justice models provides insight into the benefits and problems presented by the private justice ***13** paradigm, and the optimal design of private justice as a regulatory technique.

There are three basic types of private justice actions. "Victim" actions are brought by persons who have been injured or damaged by an actor's conduct. Such actions have been statutorily created, and judicially implied from existing statutes.

"Common good" private justice actions are brought by plaintiffs who have suffered no personal injury but who have been given authority to sue malfeasors because their lawsuits, which bring additional resources to law enforcement's efforts, are viewed as helpful to the common community. Examples include citizen suits, generally available in environmental laws and in some consumer protection statutes, and the civil False Claims Act's qui tam provisions.

"Hybrid" private justice actions are available only to plaintiffs who have been injured but, depending on the extent of the injuries and recoveries, resemble either "victim" or "common good" actions. Many of the "hybrid" actions proceed as class actions.

A. The "Victim" Private Justice Model

1. Description

There are a number of statutes that empower private persons, as well as public prosecutors, to sue those who violate the statutes. To bring one of these private causes of action one must be harmed by the defendant's conduct. [48] These actions are included in statutes such as the Civil Rights Act of 1964, [49] the Electronic Communications Privacy Act, [50] the Consumer Product Safety Act, [51] the American Disabilities Act ("ADA"), [52] and the Federal Tort Claims Act. [53] The ADA's provision is illustrative: "The remedies and procedures set forth in [this statute] are . . . provide[d] to any person who is being subjected to discrimination on the basis of disability in violation of this [statute]." [54]

***14** In addition to statutorily created private causes of action for victims of wrongdoing, there are court-implied private causes of action for those who have been injured by defendants' breaches of statutorily imposed duties. Judicial implication of private causes of action began in 1916 when the handhold on a boxcar gave way as a Texas railroad switchman was climbing down the boxcar. In Texas & Pacific Railway Co. v. Rigsby, the Supreme Court held that Rigsby, the switchman, could bring a suit for damages under the Federal Safety Appliance Act ("FSAA"), even though the statute was a penal offense and provided no explicit cause of action for individuals. [55] The Court reasoned that railway employees were among the intended beneficiaries of the FSAA, which specifically required "secure hand holds"

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on all railroad cars "having ladders." [56] According to the Court: "[where] disregard of . . . the statute . . . results in damage to one . . . for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." [57]

Over the next sixty-plus years, courts liberally implied causes of action under the Securities Exchange Act of 1934, [58] Titles VI [59] and IX [60] of the Civil Rights Act of 1964, the Commodity Exchange Act, [61] the Voting Rights Act, [62] and for persons whose constitutional or federal statutory rights had been abridged by federal law enforcement officials. [63]

By the late 1970s, however, the Supreme Court was reigning in the lower courts' willingness to imply private causes of action, admonishing the courts to "adhere to a stricter standard for the implication of private causes of action." [64]

***15** Whether Congress creates a private statutory cause of action or the courts implying a private cause of action, the rationale has been the same: such actions are available to help those who have been injured by a defendant's breach of statutory duty. With many of the "victim" private justice actions, remedial relief is all that is available. [65] When damages are available, only compensatory damages are allowed [66] except in extraordinary circumstances. [67] Significantly, when these causes of action have been created, there is almost no mention of vindicating the public's rights, supplementing public regulatory efforts, or other similar expressions of serving the common good allowing court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to "vindicate the public interest" allowing court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to "vindicate the public interest" allowing court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to "vindicate the public interest." [68] The emphasis uniformly is on aiding victims. [69] This is ***16** in stark contrast to the rationale given for the "common good" or even the "hybrid" private justice actions discussed later in this Article . [70]

2. Assessment

Although difficult to assess since there is no systematic accounting of the many "victim" private justice actions brought under statutory or common law authority, the "victim" model would appear to be successful in reaching its stated goal of offering victims a venue for redress. Although involving relatively small amounts of money, [71] the "victim" private justice actions do obtain some monetary relief for plaintiffs. For example, the median award in various civil rights private justice actions ranges from approximately $137,000 (employment) to $65,000 (housing) [72]; the median award in tort private justice actions is $141,000. [73]

The courts' lengthy struggle over whether to imply private causes of action for victims provides a rich discourse on the policy and practical ***17** implications of permitting individuals to sue for private injuries resulting from violations of public statutes. The courts have noted the positive role private justice actions can play in supplementing governmental regulatory resources, [74] deterring wrongful conduct, [75] and providing relief for victims who may have no other effective remedy. [76] Courts have also noted how disruptive such actions may be to an already comprehensive enforcement scheme or to the federal-state enforcement balance. [77]

Missing from courts' and Congress' discourse on "victim" private justice actions is any mention of the truly unique contribution private justice can make: supplying inside information of wrongdoing. The obliviousness to this

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contribution should not be viewed as an indication that this role is unimportant; it is, simply, a reflection that the "victim" private justice model is not intended to elicit inside information and that it does not do so on any reliable basis.

B. The "Hybrid" Private Justice Model

A number of private justice models straddle the line between "victim" and "common good" private justice actions, taking on the characteristics of one or the other, depending upon the amount of harm suffered by the plaintiff in the particular case, and the recovery obtained.

"Hybrid" private justice actions are available only for victims of a defendant's violation of the law; thus, they are "victim" private justice actions. As will be seen, however, minimal harm suffices in some of these actions and minimal recovery often is all that is obtained, stretching considerably the notion of "victim." Also, because of the large damage awards these actions sometimes carry, these private justice actions may also serve as "common good" actions. For example, RICO and the Clayton Act, with their treble damages, seek to serve the common good by deterring future violations through large judgments. In addition, the fact that many of these "hybrid" private justice actions are brought as class actions means ***18** such actions serve the common good, or have the potential to do so.[78] Class actions tend to produce large class judgments, which can serve a deterrent purpose. Class actions also tend to provide lucrative compensation for class counsel, which entices private counsel to pursue such cases, thereby supplementing public investigative and prosecutive resources.[79]

Hybrid private justice actions include securities fraud offenses and violations of the Clayton Act,[80] the Computer Fraud and Abuse Act[81] and the Racketeering Influenced and Corrupt Organizations ("RICO") Act.[82] This Section focuses on two hybrid actions: RICO, which is rarely used as ***19** a "common good" action,[83] and securities fraud, which often is so employed.

1. RICO

a. Description

RICO was passed as part of a major crime-fighting bill[84] to protect the public from "parties who conduct organizations affecting interstate commerce through a pattern of criminal activity."[85] Modeled after the Clayton Act,[86] RICO is a criminal statute as well as a civil cause of action. United States Department of Justice ("DOJ") prosecutors may seek criminal indictments for RICO conduct, and if convicted, defendants face substantial prison terms, heavy fines, and forfeiture of "any interest . . . acquired or maintained" in violation of RICO.[87] In addition to criminally prosecuting a defendant, or instead of doing so, the DOJ may bring a civil lawsuit if the federal government has been injured in its "property or business."[88] In addition, "any person" who has been "injured in his property or business" may bring a civil action under RICO.[89] In civil RICO actions, the plaintiffs, whether the DOJ or private persons, must prove the same elements as must be proven in a criminal RICO prosecution, but by a preponderance of the evidence.[90] There are incentives for private plaintiffs to use RICO: treble damages and the award of attorneys fees and costs.[91] Congress gave the following explanation for including the private cause of action in RICO, which interestingly, ***20** highlights the rationales for both the "victim" and the "common good" private causes of action:

> [T]his private cause of action was included as an incentive for victims of organized crime activity to redress wrongful actions against their legitimate businesses. Because of the limited resources available to assist

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> the Government in its fight against organized crime, it was believed that 'private attorneys general' could supplement Government efforts. [92]

There are four types of conduct prohibited by RICO. The gist of all four is using a business to commit crime. [93] Key to all are three concepts: "racketeering activity" (any of the felony offenses listed in the statute); [94] a "pattern" of racketeering activity (at least two "closely related" racketeering activities that demonstrate "continuity" and are committed within a ten-year time period); [95] and "enterprise" (any entity or group of individuals "associated in fact" that affects interstate or foreign commerce). [96] Twenty-five years of jurisprudence in thousands of court opinions have been devoted to delineating these three concepts. Because RICO's reach is broad and at least some of the racketeering activity is broad (mail fraud and wire fraud, for example), RICO covers a wide range ***21** of conduct: organized crime, [97] white-collar crime, [98] and even the protection of abortion rights. [99] RICO has been used to litigate mineral shipments in Kazakhastan, [100] Nigerian banking, [101] baseball playing cards [102] and the rights to domain names. [103]

The four types of conduct prohibited by RICO are: (1) using or investing income derived from a pattern of racketeering activity in an enterprise, [104] (2) acquiring or maintaining control of an enterprise through a pattern of racketeering activity, [105] (3) conducting the affairs of the enterprise through a pattern of racketeering activity, [106] and (4) conspiring to do any of the above. [107] The issues that have dominated RICO jurisprudence in recent years are standing, causation, [108] and sufficiency of pleadings or evidence. [109]

b. Assessment ***22** A survey of all federal appellate decisions in RICO cases rendered between 1999 and 2001, [110] provides a snapshot of contemporary RICO jurisprudence. It reveals that most RICO cases are civil (78%) and most are brought by a single plaintiff or by a fairly small group of plaintiffs. This survey also reveals a dismal rate of success for RICO plaintiffs. Almost 70% of the civil cases resulted in early, decisive victory for defendants where defendants' motions to dismiss or motions for summary judgment were granted by the trial courts, with affirmation on appeal. [111] Plaintiffs were successful in obtaining judgments at trial in 9.6% of the RICO cases surveyed but only one-fourth of those judgments were affirmed on appeal, resulting in a stunningly awful final success rate for RICO plaintiffs: of 145 civil cases, only 2% (3 out of 145), resulted in ultimate, final victory for the plaintiffs. [112]

This lack of success by RICO plaintiffs raises questions about whether RICO's private justice model is working at all. Since so few RICO cases are brought as class actions (23 out of 145, or 15.9%), [113] RICO apparently is not being used often by plaintiffs as a "common good" model of private justice. Additionally, since plaintiffs overall have such a poor record of success on the merits, RICO does not seem to work well when used as a "victim" or "common good" model of private justice. RICO's lackluster performance hurts defendants as well as plaintiffs. RICO defendants incur costs when they devote resources to defending nonmeritorious, if not ***23** frivolous, claims. They also incur reputational damage when named in a serious civil lawsuit, where treble damages are at stake and they are branded as "racketeers." [114] Inappropriate RICO actions also create costs for the judicial system which spends scarce resources to resolve inappropriate actions. Lastly, there is a cost to the general citizenry, whose tax dollars fund the judicial system and whose time is taken up by non-meritorious litigation, whether as jurors or witnesses, or as litigants whose own cases are postponed because of delays in a resource-strapped judicial system.

2. Securities Fraud Private Actions

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a. Description

Of all of the hybrid private justice actions, securities fraud actions may have received the most attention from Congress and commentators concerning their systemic impact on our economy. For this reason, they provide rich terrain for examining the institutional influence of private justice actions.

The Securities Act of 1933 [115] was "designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud, and . . . to promote ethical standards of honesty and fair dealing." [116] The Act strives to do this by requiring publication of certain information about securities before they are offered for sale. [117] The Securities Act expressly lists four private causes of action: § 11, relating to the submission of misleading registration statements; [118] § 12(1), pertaining to the failure to file a ***24** registration statement; [119] § 12(2), covering sales of unregistered securities and false statements or omissions made orally or in a prospectus; [120] and § 15, which expands liability of "controlling" persons for violations of the Securities Act. [121] The Exchange Act of 1934 was passed to further protect investors from unduly speculative investments. [122] It expressly lists four private causes of action: § 9, covering the use of "manipulative devices" that create a misleading impression of trading activity and covering the presentation of information about a stock with the purpose of raising or depressing stock prices; [123] § 16(b), relating to "short-swing" profits (stocks purchased and sold or sold and purchased within a six month time period) by an "insider"; [124] § 18(a), pertaining to the filing of false or misleading documents with the SEC; [125] § 20, applying to the liability of controlling ***25** persons and those who aid and abet violations; [126] and § 29(b), relating to the validity of contracts made in violation of the Act. [127]

In addition to the above express private causes of action, courts have held that an implied private cause of action exists under § 17 of the 1933 Act which prohibits the use of fraudulent or deceptive devices in connection with the sale of securities. [128] The courts have also held that five sections of the 1934 Act [129] imply private causes of action. [130] The most well known and widely used of these is §10(b). [131] Under §10(b) and its implementing Rule 10b-5, [132] it is:

> unlawful in connection with the purchase or sale of any securities . . . to employ any device, scheme or artifice to defraud, make any untrue statement of material fact or omit to state a material fact, or engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

b. Assessment

Concern over vexatious private securities fraud lawsuits and the detrimental impact such suits appear to have had on the securities industry [133] led to significant revisions in these private justice actions in ***26** 1995 with passage of the Private Securities Litigation Reform Act ("PSLRA"). [134] The PSLRA placed limits on abusive discovery, adopted a heightened pleading standard, abolished joint and several liability in favor of a "fair share" rule of proportionate liability, made the awarding of attorneys fees to prevailing parties in "abusive" cases more likely, and imposed various restrictions on the selection of class representative and counsel in class actions. [135]

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Congress placed limits on plaintiffs' discovery in private securities actions after hearing testimony about plaintiffs' counsel who, without any indication of fraud, routinely filed suits as soon as a stock price dipped significantly and then conducted discovery as a fishing expedition, hoping to find fraud. Because of the cost and disruption of responding to such discovery, defendants often settled nonmeritorious cases. [136] In response to these findings, the PSLRA provides that in private securities actions, discovery may commence only after the trial court has ruled on defense motions to dismiss. [137] This restriction was intended to help insure that securities fraud cases were meritorious when filed.

The PSLRA also adopted a heightened pleading standard, [138] making clear that Federal Rule of Civil Procedure ("FRCP" or "Rule") 9(b)--fraud ***27** should be plead "with particularity"--should be interpreted strictly. [139] Together, the delayed discovery rule and the heightened pleading requirement provide some protection for defendants against frivolous or poorly-prepared lawsuits since plaintiffs in these actions must now plead fraud adequately enough to meet both the heightened pleading standard and to overcome a motion to dismiss without conducting any discovery.

The PSLRA further provides that joint and several liability is inapplicable to judgments obtained in private securities fraud actions. Instead, each defendant is liable only for its fair share of the loss. [140] This reform was passed because plaintiffs bringing securities fraud actions apparently were including defendants with deep pockets but little culpability. [141]

The PSLRA institutes a rebuttable presumption that attorneys' fees will be awarded to defendants in "abusive" litigation. [142] Although the ***28** standard for when fees should be ordered under the PSLRA is the same as under FRCP 11, the amount to be paid potentially is much greater. FRCP 11 states that in instances of abusive litigation a court may order sanctions in an amount sufficient to deter repetition of the offending action. [143] Thus, while Rule 11 sanctions may require payment of attorneys' fees, they may not, [144] especially when other sanctions may be more appropriate and easier to administer. [145] Also, whether any sanction should be imposed under Rule 11 is discretionary. [146] In contrast, the PSLRA not only imposes a presumption, albeit rebuttable, that if a complaint violates FRCP 11, sanctions will be imposed, but also specifies that the sanctions will consist of payment of the prevailing party's attorneys' fees and costs incurred in the entire action. [147]

Concerned about "professional plaintiffs" who own a nominal share in many public companies and so qualify to bring a class action securities fraud lawsuit if the stock price dips precipitously or there is other indication of fraud, [148] Congress addressed its last set of reforms in the PSLRA to class action representatives. The PSLRA attempts to discourage "token plaintiff" private actions by requiring courts to presume that the plaintiff with the "largest financial stake in the relief sought" is the appropriate lead plaintiff, [149] and by requiring that the lead plaintiff select lead counsel. [150] The PSLRA also requires that plaintiffs seeking to serve as class representatives certify that they have reviewed the complaint, that ***29** they did not purchase stock at the direction of counsel to qualify as class representative, and that they will not accept payment for serving as class representative. [151] Finally, the PLSRA restricts persons from serving as lead plaintiff more than five times in a three year period [152] and restricts a lead plaintiff's recovery to a pro rata share of the final judgment. [153] Whatever may be the beneficial impact of these class action reforms, they would seem to defeat one of the goals of the securities fraud private action, that of encouraging entrepreneurial attorneys from undertaking securities class actions. [154]

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Both before and after the PSLRA, considerable attention has been devoted to determining whether securities fraud private actions have been successful. Although private securities litigation is widely viewed as "an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action," [155] it is difficult to assess the success of the securities private justice action. By several measures, these cases seem to be successful. They have recruited some talented, entrepreneurial attorneys to assist in the detection, proof and deterrence of fraud in securities markets. [156] Also, many of the filed securities fraud class actions appear to be meritorious, at least if dismissals of cases reflect merit. As compared to RICO cases where almost seventy percent of the cases sampled resulted in dismissal of the case or summary judgment for the defendants, [157] only 5.79% of securities class actions resulted in dismissal ***30** (at least within four years of filing). [158] Additionally, to the extent that the number of cases filed reflects deterrent impact, the securities private actions are successful. From 1987 to 2000, 2,546 securities actions were filed, for an average of 181.8 per year. [159] This compares to 524 environmental citizen suits filed in a comparable time period, for an average of 37.4 per year, [160] and 3,326 qui tam FCA actions, for an average of 237.5 per year. [161]

The settlement of private securities class actions presents interesting data. Whereas most securities class actions (92%) alleged investor losses of over $10 million, the majority (80%) settled for less than $10 million, with median settlements pre-PSLRA of $3.5 million and post-PSLRA of $4.25 million. [162] There could be alternative explanations for these settlement figures, but one must question whether the disparity between alleged loss and settlement reflects the fact that defendants are forced to settle frivolous lawsuits because the cases are too expensive to litigate. If true, it would appear that the PSLRA improved the quality of private securities cases brought since the disparity between the loss alleged and the settlement amount decreased after the PSLRA.

The PSLRA seems to have several clear consequences. There has been a substantial increase of securities class actions filings in state courts ***31** after the PSLRA, [163] and post-PSLRA cases seem to take longer to litigate, presumably because pretrial issues have been added, such as selection of class representative and counsel. [164] It does not yet appear that the PSLRA's goal of encouraging more institutional investors to serve as lead plaintiffs has been achieved. [165] But overall, if lower dismissal rates and a lower disparity in damages sought and awarded are indications of more meritorious cases, it appears that the PSLRA has had a positive impact on securities private actions. More experience is needed to determine if this is in fact true and if other PSLRA goals, such as encouraging more institutional investors to serve as class representatives, have been reached.

As discussed in Part III, not all of the PSLRA's reforms are beneficial when constructing an optimal private justice model, but incorporation of some of its reforms could help to neutralize the disruptive potential of private justice actions.

C. The "Common Good" Private Justice Model

Compared to the "victim," and "hybrid" private justice actions, plaintiffs in "common good" private justice actions need not have been harmed by the defendant's conduct, even minimally. These plaintiffs are given the right to sue on behalf of the party who has been harmed or simply because public harm is threatened. "Citizen suits," included in many environmental and some consumer protection statutes, and the "qui tam" provisions of the False Claims Act, are the major contemporary examples of "common good" private actions.

1. "Citizen Suits"

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Beginning in 1970, [166] and continuing throughout the last quarter of the twentieth century, Congress included citizen suit provisions in most ***32** environmental and some consumer protection statutes so that today, citizen suit provisions exist in over twenty environmental or consumer protection statutes. [167]

A typical citizen suit provision provides that: "any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." [168] Citizen suits epitomize public choice theory, [169] which assumes the following: private initiatives are needed to supplement enforcement efforts by government agencies that do not have the ability or resources to conduct their duties; [170] government agencies have been "captured" by the industries they are to monitor and thus do not vigilantly pursue their given ***33** regulatory mission; and, returning power and participation to the people is a worthy goal in and of itself. [171]

Private resources and vigilance may well be needed to protect the environment. Virtually every expert who has examined the issue of environmental enforcement has concluded that public resources will never be adequate to do so. [172] There are 181,578 square miles of water area in the United States including 78,937 square miles of inland waters, 42,528 square miles of coastal waters and 60,052 square miles of Great Lakes. [173] Each year there are 7,772,037,571 pounds of toxic releases into the air, water and land of the United States. [174] "Forty percent . . . of America's rivers, lakes, and coastal waters currently are unsafe for fishing, swimming or basic recreation." [175] During 2000, there were at least 11,270 days of beach or waterway closings and advisories, forty-eight extended closings and advisories (six to twelve weeks) and fifty permanent closings and advisories (more than twelve weeks) at American water recreation areas. [176]

Moreover, the "capture" theory comes alive as states, which are the front-line in environmental protection, compete with each other for economic development by offering lax environmental enforcement. Apparently some states routinely collude with polluters by issuing token compliance orders solely to preempt citizen suits. [177] Federal environmental law enforcement often fares little better as an effective regulator. According to the Environmental Protection Agency ("EPA") Inspector General, the EPA promotes a "pay to pollute" mentality by issuing low penalties after finding violations. [178] In addition, compliance orders issued by the EPA can be empty gestures. For example, the EPA considers ***34** dischargers in compliance if the discharger is subject to a compliance order even if the pollution is continuing in violation of environmental laws. [179]

a. Description

Citizen suit provisions share the following common characteristics: (1) broad coverage of who may serve as plaintiffs and defendants, (2) the type of conduct at which citizen suits are directed, (3) required notice prior to filing suit, (4) prohibition against citizen suits when a government agency is "diligently pursuing" the problem, (5) rights of intervention, and (6) remedies available.

Most citizen suit provisions specify that "any person" [180] may bring a suit against "any person" who is in violation of the relevant statute. [181] ***35** Some statutes, such as the Clean Water Act, which includes one of the most commonly used citizen suit provisions, require that the plaintiff have an "interest which is or may be adversely affected" by the violation. [182] Plaintiffs seeking greater protection for the environment bring most citizen suits. [183] In 1997, however, the Supreme Court held that those challenging the level of EPA's required environmental protection as excessive also

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qualify as citizen suit plaintiffs. [184] Because of their cost and complexity, well-organized and funded groups bring most citizen suits. [185] Although attorneys' and expert witnesses' fees potentially are available to successful citizen suit plaintiffs, paying the up-front costs can be so prohibitive that only well-funded groups can afford to bring citizen suits. [186]

***36** Most citizen suit statutes provide for two types of lawsuits: suits against regulatory officials, such as the EPA Director or Secretary of the Interior for failure to perform a non-discretionary duty, and suits against dischargers. [187] In the suits against regulatory officials, plaintiffs generally seek injunctions requiring the officials to take certain action, such as like declaring specific acts to be violations of environmental statutes, [188] holding hearings, [189] adopting alternative methods for computing permissible water discharges, [190] revising national ambient air quality standards, [191] or promulgating water quality standards. [192] The rationale for allowing citizen suits against EPA or Interior Department officials arises from public choice's skepticism of governmental agencies' ability or willingness to perform their duties. [193] This "oversight" private justice action is unique among the private justice models. [194] None of the "victim," "hybrid," or other "common good" private justice actions give plaintiffs authority to sue government officials for failure to perform duties.

Citizen suit statutes require that at least sixty days prior to filing suit, the putative plaintiff give notice to the relevant federal and state agencies and to the alleged violator of the plaintiff's intent to sue. [195] This notice requirement is one attempt within the citizen suit model to coordinate private and public resources, goals and direction. Theoretically, such notice gives governmental agencies the opportunity to require compliance ***37** by the violator and gives the violator a chance to comply with the law. [196] However, this notice requirement has not been effective because of its ambiguity [197] and because, in practice, it tends to provide willing agencies an opportunity to collude with industry. [198]

Citizen suits are barred if the responsible governmental agency is "diligently prosecuting a civil action in a court of the United States or a State." [199] The intent of this provision, like that of the notice requirement, is to coordinate private and public enforcement efforts. [200] Like the notice requirement, however, the success of this provision has been limited by the heavy litigation it has spawned [201] and the opportunity it provides for collusion between government regulator and industry. [202] This provision also limits the flexibility of legitimate governmental regulatory efforts, as ***38** when regulators are forced to forego negotiations or administrative actions in favor of filing a lawsuit since a lawsuit is the only governmental action that clearly preempts citizen suits under the "diligent prosecution" provision. [203]

Most environmental citizen suit provisions grant, "as a matter of right," the United States intervention in any citizen suit, [204] and grant citizens intervention in enforcement actions that are filed in a court of the United States. [205] In instances where a citizen suit provision does not provide rights of intervention, parties may intervene, as in any federal judicial matter, if they meet the requirements of Federal Rule of Civil Procedure 24. [206] Rule 24 poses higher hurdles to intervene than do citizen suit intervention provisions, which, as noted, grant intervention as a matter of right. Intervention pursuant to Rule 24 is granted only upon proof that intervention is necessary to protect the applicant's interest. [207]

Almost all citizen suit provisions provide for injunctive relief. [208] In addition, plaintiffs, [209] interveners, [210] and even defendants in some ***39** instances [211] are entitled to recovery of reasonable [212] attorneys fees, costs and expert witness fees. [213] A few citizen suit statutes permit plaintiffs to seek civil penalties, but penalties recovered are payable to the

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U.S. Treasury, not to the private plaintiff bringing and financing the suit.[214] In practice, an additional remedy has evolved. Many settlements in citizen suit cases result in defense payments to private environmental groups.[215] ***40** These payments usually go to funds established by environmental groups for educational efforts, community outreach, research, and even the purchase of land.[216] Many of these payments have been large.[217] In some years, 98% of the total amount recovered in citizen suits has gone to private funds (or state governments).[218]

b. Assessment

Citizen suits have had some success,[219] creating "greater sensitivity to enforcement by various state environmental agencies,"[220] providing needed ***41** resources,[221] deterring future violations,[222] bringing unknown violations to the government's attention,[223] and encouraging dialogue among environmental organizations, the Environmental Protection Agency ("EPA") and dischargers.[224] The EPA and the DOJ, both "strong supporters of the citizen suits as a supplement to government enforcement,"[225] acknowledge the contributions made by citizen suits. According to the EPA: "citizen suit authority [helps overcome] the resource 'squeeze' on government that precludes us from addressing every violation."[226] Also, notes the EPA, citizen suits lead to a greater deterrent effect as "regulatees seek to achieve compliance to avoid not only federal and state prosecution but also to avoid independent citizen actions."[227]

Citizen suit plaintiffs also have greater flexibility in settling cases with dischargers than do public prosecutors. For example, in Sierra Club v. Gypsum,[228] citizens brought suit under the Clean Water Act charging Gypsum with discharging in excess of its NPDES permit.[229] The parties ***42** reached a settlement that, unlike most government-negotiated settlements, did not set a certain date by which compliance must be achieved. Instead, the agreement permitted Gypsum to implement less expensive steps to be followed by more expensive steps only if compliance was not achieved.[230]

Despite these successes, citizen suits have not been as successful as they can be.[231] One major deficiency in the citizen suit regulatory model is that it provides no effective way for anyone: citizens or public regulators, to learn about violations. There are essentially two ways to learn of environmental violations: publicly available discharge reports that are required to be filed by companies, and physical surveillance of discharge sources. Neither avenue is promising.

The required, publicly available data supplied by dischargers contains serious gaps.[232] For starters, the EPA collects discharge information from "major dischargers" but does not collect data from "non-major" dischargers, which is the bulk of NPDES permit holders.[233] In addition, not even all "major" dischargers, notably those covered by the Resource Conservation and Recovery Act ("RCRA"), are required to submit reports.[234] And although there is some monitoring by the EPA and state agencies of the completeness and accuracy of dischargers' self-reporting, resources are too limited to fully monitor dischargers' reliability.[235] Clearly, it would be prohibitively time-consuming and inefficient for government regulators or concerned citizens to review adequately all filed reports trolling for violations. Moreover, filed reports may be falsified.

Conceivably, governmental environment regulators or concerned citizens could physically monitor point sources where illegal discharging is likely. Such an investigative approach, however, is time-consuming and expensive, especially when one considers that experts are needed to test the effluent being discharged. With 181,578 square miles of water area in the United States,[236] forty percent of which is unsafe for recreational use,[237] ***43** and 7,772,037,571 pounds of toxic

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release into the air, land, and water of the United States each year,[238] physical surveillance is not a viable method of detecting violators.

In short, citizen suits fail as effective supplements to public regulation. They fail for at least two reasons: they have no helpful mechanism for identifying violations or violators, and they facilitate collusion between regulators and industry. As discussed below,[239] they also fail to coordinate public and private prosecutive efforts adequately, fail to offer adequate incentives for counsel to represent plaintiffs in citizen suits, and fail to offer an incentive for those willing to disclose inside information about environmental violations.[240]

The inadequacy of the citizen suit private justice model can be seen in the numbers of suits filed and recoveries obtained. From 1987 to 2000, an average of 37.4 citizen suits were filed each year, compared to an annual average of 181.8 securities class actions and 237.5 qui tam FCA actions.[241] Comparing the amount of judgments obtained in citizen suits and qui tam FCA actions is even more dramatic. From 1988 through 2000, qui tam FCA judgments totaled $3.9 billion; judgments in environmental citizen suits totaled $16.6 million, or 0.43 % of the qui tam FCA aggregate amount.[242] Although it is important to remember that the goal of many citizen suits is to obtain remedial relief not monetary judgments, the point is that monetary awards are what attract legal and investigative talent and inside information. As long as the citizen suit model fails to generate significant monetary judgments, it will fail to provide these resources to regulatory efforts.

2. Qui Tam Actions Under the False Claims Act

a. Description

If the capture theory led to citizen suits, diseased mules and defective muskets led to the False Claims Act (FCA).[243] Passed in 1863,[244] the FCA ***44** provided the federal government with a way of combating the fraud suffered by the Union Army when it received deliveries of defective or nonexisting military supplies.[245] Today the FCA is used to combat fraud by any and all federal government contractors. Such contractors include health care providers,[246] defense contractors,[247] and oil and gas companies.[248]

Since 1863, the FCA has included a "qui tam" provision. "Qui tam" comes from the Latin phrase, "qui tam pro domino rege quam pro se ipso in hac parte sequitur" which means he "who pursues this action on our Lord the King's behalf as well as his own."[249] Private parties who allege and prove fraud against the government bring qui tam lawsuits.[250] If successful, these qui tam plaintiffs (known as "relators")[251] collect a percentage of the recovery.[252] The relator need not be personally injured or affected by the defendant's conduct, but is deemed to have standing on the ***45** theory that the federal government, as the injured party, may assign its right to sue to the private plaintiff.[253]

The original FCA, passed in 1863, provided both criminal and civil penalties for its violation.[254] In 1874, the criminal and civil provisions were separately codified.[255] Prior to 1986, the FCA was amended several times[256] in ways that weakened qui tam actions,[257] so that they were rarely and ineffectively used.[258] In 1986, Congress substantially amended the FCA, invigorating qui tam actions.[259] The 1986 amendments increased the amount of recovery a relator could obtain,[260] established a generous ***46** mandatory minimum recovery for relators,[261] and relaxed provisions that had prevented many relators from filing suit.[262] Other amendments made FCA cases easier to prove overall,

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thereby improving all plaintiffs' chances of success. These amendments included relaxing the mens rea requirement, [263] expanding the statute of limitations, [264] and clarifying that ***47** the preponderance burden of proof, rather than a clear and convincing burden of proof, applies to FCA cases. [265] The 1986 amendments also provided a cause of action for relators who suffer retribution from employers for whistleblower activities related to the FCA. [266]

One of the most significant 1986 amendments was alteration of the FCA's "jurisdictional bar" provision. [267] This provision was included in the 1943 FCA amendments in an effort to ensure that relators did not simply file an FCA action that repackages information already available to the government regulators. [268] In Congress' view, a relator is not helping the government much (at least not enough to share in the judgment of the lawsuit) if the government already knows about the fraud the relator is disclosing. [269] Thus, after 1943 and until 1986, when the jurisdictional bar provision was again amended, the FCA jurisdictionally barred qui tam actions if the information included in the relator's lawsuit was known to the United States when the action was brought. [270] The 1986 amendments allow relators to go forward, even if government officials are aware of the fraud at issue, if the relator is an "original source" of the information concerning the fraud. [271] As one might imagine, numerous interpretative ***48** difficulties arise regarding the jurisdictional bar provision, such as how much information must be known to the government before the relator is barred, [272] whether government employees who obtain information as part of their employment can qualify as qui tam relators, [273] what happens when the relator's complaint replicates public information but the relator had an independent source for the information, [274] what a relator must do to qualify as an "original source," [275] and how to determine which relator, among many who file, qualifies under the FCA. [276]

The 1986 amendments made a remarkable difference in the use of the FCA. Before 1986, the DOJ received about six qui tam cases per year. [277] Since the 1986 amendments went into effect, and through October 30, 2000, 3326 qui tam cases have been filed and $4.024 billion has been recovered. [278] Eyeing the success of the 1986-invigorated FCA, states are passing similar statutes covering false claims submitted to state governments. [279]

***49** The procedure for pursuing qui tam FCA actions is unique. Individuals who believe they can prove that others (individuals or fictional entities) have submitted false claims to the federal government may file a qui tam FCA action in federal court. [280] The FCA provides that an action may be brought against "any person" who violates the Act. [281]

The qui tam complaint is sealed and not served on the defendant or made public in any way. The entire action is stayed while the federal government (acting through the DOJ) is notified of the lawsuit by service of a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses." [282] While the complaint remains under seal, the DOJ evaluates the case and determines whether it will intervene. [283] If it enters the case, the DOJ assumes "primary responsibility" for the lawsuit but the relator continues also as ***50** plaintiff. [284] The relator retains certain rights if the government intervenes, including the right to object and be heard on a motion to limit the relator's role, or to dismiss or settle the case. [285] If the federal government elects not to intervene, the qui tam relator may proceed with the action as the sole plaintiff. [286]

If the government intervenes in the lawsuit, the relator is guaranteed at least 15% of the any judgment or settlement and the court can award more--up to 25%. If the government does not join the lawsuit, the relator is guaranteed 25% and could receive up to 30%. Only in cases where evidence is based on publicly disclosed information, or the relator is

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partially at fault for the violations, does the relator get less. [287] Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments, [288] relators' percentages involve substantial sums. [289]

***51** Historically, relators who proceed on their own after the DOJ has declined to intervene as a plaintiff have enjoyed little success. Their cases are dismissed more often and their recoveries are substantially less. [290] The litigational advantages to private plaintiffs of obtaining DOJ intervention are so substantial that the acknowledged goal of any experienced relators' attorney is to obtain the government's intervention. [291] Such intervention is obtained by preparing a thorough, complete, and convincing written statement for the government. [292]

***52** Preparation of this report, delivery of which to the DOJ is statutorily required upon filing of one's sealed complaint, is time-consuming and requires considerable expertise. [293] Such a report should detail applicable reimbursement guidelines and explain how the defendant committed fraud in violation of such guidelines. It should reveal witnesses' identities and anticipated testimony, and describe what records are available to prove not just that fraud was committed, but that it was committed "knowingly."

It is increasingly difficult to obtain DOJ intervention in part because of the explosive growth in FCA private actions over the past decade. [294] Relators filing sealed complaints are competing with each other to obtain DOJ intervention. The relator who has the best chance of achieving DOJ intervention is the one who presents a thorough, well documented and well-conceived report, demonstrating full knowledge of applicable billing regulations and requirements, and tracking the DOJ's guidelines for intervention.

As noted in this Article, [295] if the DOJ joins the relator's lawsuit, the relator and the DOJ both continue as plaintiffs. This dual-plaintiff design provides an efficient way for private litigants to supplement the DOJ's resources throughout the duration of a case. [296] It also provides the DOJ a ***53** mechanism for monitoring and supervising the quality of a relator's activity throughout a case. [297] DOJ's quality-control authority is powerful. Because it has statutory authority to move for dismissal of any inappropriate relator's lawsuit, the DOJ can ensure that inappropriate actions are dismissed before they are made public. [298]

In these ways, the FCA's dual-plaintiff design demands and rewards top-quality work in private justice actions from the beginning through the end of a case.

b. Assessment

The qui tam FCA action contains two features unique to private justice actions that render it extraordinarily successful as a regulatory tool. First, it brings forth inside information. It does so through the damages and penalties provisions and the jurisdictional bar provision. [299] The damages and penalty provisions, coupled with the mandatory percentage allocated for the relator, provide a substantial enough incentive to attract knowledgeable insiders willing to serve as whistleblowers. The jurisdictional bar provision, which disqualifies most of us from serving as relators, ensures that a whistleblower's information is timely and helpful to the government.

Second, the "dual-plaintiff" mechanism, as noted, provides potentially powerful quality control on FCA private actions. It also provides a way for knowledgeable relators to pursue a case while working hand-in-hand with regulators. [300]

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***54** The number of suits filed and monetary judgments obtained, especially when compared to other existing private justice actions, shows that the qui tam FCA private justice model is successful. Between 1987 and 2000, an average of 237.5 qui tam FCA cases were filed annually, compared to 181.8 average annual filings of securities fraud private justice actions and 37.4 average annual filings of environmental citizen suit private justice actions. [301] Moreover, since 1987, there has been a sharp increase per year in qui tam FCA filings compared to relatively flat numbers of filings in securities and citizen suit private actions. [302] The amount of recoveries obtained under the various private justice actions presents a more dramatic comparison, even recognizing that the goal of many citizen suit cases is to obtain remedial relief rather than monetary judgment. From 1988 to 2000, the aggregate amount of judgments obtained in qui tam FCA actions was $3.9 billion compared to $16.6 million from environmental citizen suits (0.43 % of the aggregate qui tam FCA judgments). [303]

Interestingly, more than any other private justice actions, or for that matter, more than most legal actions, the FCA's structure seeks to change social values. Perhaps not by design, but in fact, the FCA elevates the value of protecting the larger community over the value of loyalty to those close at hand. [304]

III. ANALYSIS

A. Strengths of Private Justice

Different private justice models offer different strengths. The "victim" and "hybrid" private justice actions seek to make victims whole, and sometimes do so. [305] However, even when they work well, [306] these actions are inherently limited in their ability to supplement public resources. In comparison, the "common good" private justice actions, ***55** especially the qui tam FCA actions, are capable of producing beneficial resources for public regulators, namely, legal and investigative talent and inside information.

1. The Resource of Legal and Investigative Talent

Economic wrongdoing is difficult to detect and prove. [307] Often, it is hidden within a large organization, buried in paper trails and electronic messages, concealed by false documentation, involves complex and intricate transactions, and has many participants, none of whom may know the full extent of the conduct or even, for some, that there are any improprieties. Reconstruction of the illegality requires sophisticated investigators and attorneys with significant investigative resources and legal skill.

a. "Victim" and "Hybrid" Private Justice Models

The "victim" private justice model, when it provides for payment of attorneys' fees and costs and expert witness fees, and especially when it offers punitive damages, attracts plaintiffs' counsel who can supplement public regulators' prosecutive efforts. Because these cases, by definition, involve one instance of wrongdoing and historically have resulted in minimal recoveries, their impact on overall regulation of complex economic wrongdoing is inherently limited.

The "hybrid" private justice actions have had mixed success in recruiting legal talent who can detect, organize, and bring to fruition cases exposing complex economic wrongs. For example, given the dismal success rate of RICO plaintiffs, [308] it does not appear that Rico attracts quality legal or investigative resources. [309] The securities fraud private ***56** justice

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actions seem to do a better job in attracting legal and investigative talent as judged by the relative number and success of such actions. [310]

Interestingly, some features of the 1995 reform of private securities actions may well discourage the recruitment of private legal and investigative talent, thereby diminishing the future ability of the securities private justice action to bring such legal and investigative talent to public regulatory efforts. The PSLRA requires that courts presume that the plaintiff with "the largest financial stake in the relief sought" is the appropriate lead plaintiff, dictates that the lead plaintiff is responsible for selecting class counsel, restricts the lead plaintiffs' recovery to a pro rata share of the final judgment, and institutes a variety of steps inhibiting counsel's recruitment of professional plaintiffs. Together, these reforms may well discourage some entrepreneurial attorneys from monitoring areas ripe for fraud and initiating and organizing class actions. In fact, it appears that since the PSLRA was passed, private securities litigation has been consolidated to a few plaintiffs' firms. [311] It may be too early to tell whether this consolidation improves the quality of private securities cases or scares away skilled counsel who would beneficially supplement public regulatory efforts.

b. "Common Good" Private Justice Models

(1) Citizen Suit Private Justice Model

The citizen suit "common good" model appears to be one of the least effective existing private justice models in recruiting legal and investigative talent. These actions do not provide enough recovery to entice enough well-qualified attorneys to initiate and organize cases, or otherwise represent plaintiffs. In theory, citizen suit plaintiffs recover costs, attorneys' fees and expert witnesses' fees, but in practice they rarely recover the total expenditure for costs and fees. As one expert noted:

> [F]ee awards in environmental citizen suits have not approached awards in antitrust or securities law cases, either in the hourly ***57** rates allowed or the amounts of awards made. . . . Many such awards have been to public interest group plaintiffs and their attorneys. Despite clear law that awards should not be discounted because they are made in pro bono cases or for legal work done by attorneys in public interest organizations, the disparity may result in part from lingering attitudes that such plaintiffs and their attorneys are to some extent intermeddlers, unworthy of the same level of compensation as plaintiffs' attorneys in more traditional fields of contingent fee practice. [312]

The paltry awards citizen suit plaintiffs receive make it difficult to undertake these cases since they are technical and complex, require significant investigative and pre-trial preparation and expense, and often take years to prepare. [313] As the Environmental Law Institute repeatedly noted in its comprehensive review of citizen suits, it is essential to the success of citizen suits that experienced attorneys handle citizen suits, and have a sufficiently large amount of resources to adequately fund the investigation and legal representation. [314]

More to the point, citizen suit plaintiffs recover no monetary judgments, a percentage of which could be negotiated as attorneys' fees, [315] thereby enhancing the amount available to plaintiffs' counsel. [316] In short, the package of incentives in the citizen suit private justice model is insufficient to attract entrepreneurial attorneys who are able to organize highly complex cases that carry substantial investigative and preparation costs. This fact is brought home in the number of environmental citizen suits filed: an average of 37.4 per year (compared to an average of 181.8 securities class actions filed per year and 237.5 qui tam FCA cases filed per year). [317]

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***58 (2) Qui Tam FCA Private Justice Model**

The qui tam private justice model, by comparison, has proven to be highly effective in recruiting legal talent who have the skill and resources to handle complex, expensive cases. Because of the large recoveries available to private plaintiffs under the FCA through statutorily mandated percentages of large, fixed penalties, private plaintiffs' counsel can receive large fees since their fees tend to be a combination of court-awarded attorneys fees and a percentage of the recovery they negotiated pre-trial with their clients. [318] These large fees are a significant incentive for top legal talent to undertake qui tam plaintiffs' work. As an aside, it should be noted that the large judgments at stake are incentive for defendants to hire top defense counsel, thereby evening up the sides.

The structural design of the qui tam provisions of the FCA also discourages inexperienced or unskilled counsel. As noted earlier, [319] the goal of relators is to convince the DOJ of a case's merit so that the DOJ will intervene and take "primary responsibility" for the case. [320] Relators' counsel does this by presenting to the DOJ, at the time the complaint is filed (under seal), a thorough, well-thought-out, carefully researched report describing exactly how fraud was committed and how it can be proven in the highly complex, regulatory area of government contracting. The demanding nature of this task requires skilled counsel and deters unskilled or inexperienced counsel. Such an undertaking is simply too difficult and time-consuming for inexperienced counsel, especially if--as is almost certain-- counsel is working on a contingency fee basis.

Recent examples demonstrate the formidable legal and investigative resources the FCA brings to the public regulatory efforts. In one qui tam FCA case, six law firms devoted forty lawyers (twenty full time equivalents) to the case, and incurred $1 million in fees and expenses per month while the case was being intensively litigated. [321] In another recent qui tam FCA case, where there were 125 defense attorneys, fifteen relators' attorneys, plus DOJ attorneys, the federal courthouse was not large enough to accommodate the group for docket calls. The defendant, Shell Oil ***59** Company, produced 7,000 banker boxes of records. One of the relators' counsel took responsibility for handling all documents in the case. Doing so required 5,000 square feet of warehouse space (with the record boxes stacked seven feet high). This relator's counsel organized the records so that plaintiffs could respond to any defense request for identification of any record pertaining to any particular claim within thirty days by production of a CD containing the requested records. [322] This case was settled with a recovery to the U.S. Treasury of $400 million and a relator's share of $64 million. [323]

2. The Resource of Information

Although legal and investigative talent are important in detecting and deterring illegal economic activity, inside information is more important. Knowledgeable insiders can produce information about inchoate or on-going malfeasance of which law enforcement is unaware. Such insiders can also save enormous amounts of law enforcement resources by focusing governmental investigations and case preparation. [324] Cutting down on unproductive investigations not only helps law enforcement, but also aids defendants and putative defendants who are spared financial and reputational costs in responding to misguided investigations.

a. "Victim" and "Hybrid" Private Justice Models

The "victim" and "hybrid" private actions are not designed to entice insiders to come forward. There is nothing in either of these private justice models to identify anyone with inside information, to encourage insiders to come forward, to reward insiders for coming forward, or to protect insiders if they do come forward. Granted, if a person injured by a

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defendant's violation of the law happens to be someone with inside information of wrongdoing, such information may well strengthen the plaintiff's case but such a circumstance would be an unanticipated fortuity rather than an intended result.

Moreover, the class action format, used fairly successfully in many of the "hybrid" private justice actions,[325] is, in fact, designed to discourage ***60** knowledgeable insiders from coming forward. Members of a class share in any class judgment proportional to their losses. A class member who incurred the professional and personal risks to reveal inside information[326] regarding the wrongdoing alleged by the class would receive nothing for incurring these risks; all this whistleblower would get is a pro rata share, based upon the amount of stock held. Moreover, the class action model is not designed to induce or reward the insider who may not be a member of the class. Most insiders are present or future employees, or competitors of the wrongdoer. Such individuals are not eligible to participate in a class action unless they happen to gain class status by owning stock in the security at issue.

In short, the "victim" and "hybrid" private justice actions are not designed to bring inside information to public regulators, nor do they.

b. "Common Good" Private Justice Models

(1) Citizen Suit Private Justice Model

Like the "victim" and "hybrid" private justice actions, the citizen suit "common good" private action is not designed to bring forth inside information of wrongdoing. It provides no financial incentive for insiders to come forward with information about environmental violations; as noted, there is scarcely incentive for counsel to undertake these cases.[327]

It is unfortunate that the citizen suit model is defective in this regard because inside information about environmental violations would be quite helpful. It takes little imagination to realize this. Knowledgeable insiders will know when and where illegal discharges are taking place, which discharge reports have been falsified, and what records, witnesses, or physical evidence exists to prove the offenses. Even if dischargers' filed reports are accurate, an insider could identify which reports, among the hundreds of thousands filed, reveal the offenses and what evidence is available to prove the offenses detailed in the reports.

(2) Qui Tam FCA Private Justice Model

***61** In comparison to all other private justice models, the qui tam FCA "common good" private justice action is extremely successful in bringing forth helpful inside information. This action does so through market economics. The FCA's structure recognizes that inside information of wrongdoing is a valuable commodity in regulatory efforts, that there are significant disincentives in coming forward with such information,[328] and that the regulatory world must offer adequate inducement to overcome these disincentives. Three features of the FCA work together to achieve its success in producing helpful inside information: the jurisdictional bar provision which precludes a relator's suit if the government is already aware of the information; the requirement that the reward to a private plaintiff depend on the helpfulness of the plaintiff's information; and the monetary collection and allocation design of the FCA (assessment of large damages and penalties against a culpable defendant, with a significant percentage of the judgment going to the relator).[329] The first and second features help insure that the insider's information is truly helpful to public regulators. The third feature provides the incentive for insiders to come forward by generating a significant bounty for insiders.

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The FCA's design for enticing insiders is necessary if such a resource is to be obtained. It is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one's employer, colleagues and friends. At a minimum, such disclosure disrupts businesses and lives. Quite possibly it leads to an employer's demise, colleagues' and friends' imprisonment or loss of employment, payment of large penalties and attorneys' fees, and shame for all. [330] Whistleblowers describe their experience of coming forward with inside information of wrongdoing as a "nightmare," [331] the equivalent of "setting your hair on fire publicly." [332] ***62** The consequences of coming forward can be severe: job loss or demotion; prejudice from other employers that makes it difficult, if not impossible to find another job; ostracism; family hardships; and stress-related physical and psychological ailments. [333]

Given the nature of commercial transactions, the illegality revealed by a whistleblower may well consist of complex, highly technical violations. This is significant because it will take considerable training and sophistication on the part of a whistleblower to detect any wrongdoing. The insiders who need to be induced to come forward are highly skilled, well-placed in a professional hierarchal ladder, and entrenched in the corporate culture. Such persons likely are insiders in every way: professionally, financially, emotionally, and psychologically. Such persons are likely will be fiercely loyal to their corporation, profession, and colleagues, not to government regulators. In short, these insiders incur a greater professional risk by coming forward than do employees whose skill and corporate position are more fungible. These insiders are likely to take considerable convincing to come forward and reveal wrongdoing. In addition, the technical nature of the wrongdoing at issue, regardless of how destructive of an impact it may have, makes it more difficult for everyone, including a potential insider, to feel the moral outrage that helps to motivate people to come forward. [334]

In short, it is difficult for a knowledgeable person to assume the risks inherent in coming forward, publicly revealing wrongdoing and committing to work with government regulators against friends and colleagues. Of all the private justice actions, only the FCA recognizes the powerful disincentives to providing inside information and provides a mechanism to overcome these disincentives and to obtain such information.

B. Weaknesses of the Private Justice Model

1. Problems Presented

Even when performing optimally, private justice actions present serious systemic problems for targeted businesses, the economy as a whole, regulatory authorities, and the judicial system.

a. Difficulties for Business ***63** It is expensive for a company to respond to a governmental investigation or a private lawsuit alleging fraud or illegality. Company employees will need help gathering records subpoenaed or requested in interrogatories; responding to inquiries of investigators, and in some instances, testifying at hearings or depositions. [335] When a fraud investigation becomes public, business expansions, corporate borrowing, and mergers may be put on hold or lost as opportunities. Stock prices may fall and lay-offs may result.

The experience of Dartmouth-Hitchcock, an academic medical center, demonstrates the hardship businesses can face once they become subject to investigation. The Office of Inspector General, Department of Health and Human Services ("OIG") informed Dartmouth that it was being investigated for improperly billing Medicare for services rendered by medical residents. It was given the choice of conducting its own audit under OIG supervision or paying for OIG to conduct an audit. Dartmouth opted to conduct its own audit. In ten months, after a review of about half of the sampled admissions, and a finding of no billing errors, OIG allowed Dartmouth to terminate its audit. By this point, Dartmouth

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had spent approximately $1.7 million to conduct the audit. During the audit period, planned expansion was delayed because of concerns by Dartmouth's investment banker and credit agency about the audit outcome. [336]

When an investigation or lawsuit is nonmeritorious, the tangible and intangible costs to the targeted company are not only substantial, they are unnecessary. To the extent that private actions are more likely than government actions to be nonmeritorious, they are destructive for industry. The threat of nonmeritorious actions, brought by any one of thousands of possible private attorneys general, creates uncertainty in business planning and causes industry to engage in unnecessarily extensive and expensive preventative programs. Even meritorious actions, if brought separately by public and private enforcers who have not coordinated their efforts, result in unnecessary costs and uncertainty for industry. As William Kovacic has noted in a survey of firms subject to the False Claims Act, such firms ***64** regard the FCA "as a costly, substantial burden of doing business with the government." [337] Kovacic suggests that the FCA "is likely to impede efforts to induce commercial firms to expand their relationships with government purchasing agencies." [338] John T. Boese, foremost expert on the FCA and a respected FCA defense counsel, describes the situation faced by health care providers because of the FCA: "[H]ealth care providers today are expected to operate in an almost Kafkaesque environment, where conventional conduct is made illegal and where the government is permitted broad prosecutorial discretion, the exercise of which is unpredictable and subject to being overruled by both private citizens and other branches of government." [339]

b. Difficulties for Regulatory Agencies

Private justice actions absorb the resources of regulatory authorities. Optimally, regulators review private justice actions, monitor their progress, and intercede when necessary. [340] Regulators also provide guidance for private plaintiffs through dialog and promulgation and clarification of agency guidelines and regulations. Performing these functions absorbs agency time, expertise and oversight, and detracts regulatory agencies from their other duties. [341]

In addition to absorbing regulatory resources, private justice actions can also inhibit regulators' flexibility in dealing with regulated industry. Broad, hortatory, and ambitious guidelines that give regulators flexibility also subject industry to broad liability at the hands of private prosecutors. Broad regulations, directions and other forms of guidance [342] are promulgated with the expectation that prosecutorial discretion will be exercised. [343] Yet plaintiffs in private justice actions have no incentive to exercise discretion. [344] In fact, private justice plaintiffs have every incentive to push theories of liability as far as possible.

***65** NPDES permits issued to polluters specifying the permissible effluent discharges epitomize the problem posed by broad guidelines once private justice is part of a regulatory framework. Before the explosion of citizen suits, NPDES permits were ambitious and required aggressive efforts by industry to comply with the hortatory goals specified in the permits. The expectation was that enforcement discretion would be exercised if the permittee, acting in good faith and with best efforts, were unable to meet the aspirational permit goals. [345] However, industry fears that these ambitious permits expose businesses to citizen suits [346] has, over time, resulted in the issuance of more lenient permits for industry and ironically, greater discharges. [347]

Private justice actions may also make it more difficult for regulators to convince industry to regulate itself since private justice plaintiffs could use industry-generated guidelines to establish liability. The "false certification" cases [348] in health care demonstrate this concern. The theory of fraud in these cases is that a claim that accurately lists and describes

the services for which reimbursement is sought is nevertheless false if the claimant failed to comply with regulations applicable to the services rendered by the claimant. For example, if a nursing home sought reimbursement from Medicare for nursing care that was rendered to a Medicare patient residing at the nursing home, and the claim accurately described the care rendered and sought payment in an appropriate amount, the claim could still be false under the FCA if the nursing care was rendered by a nonlicensed person, was substandard, or otherwise failed to comply with myriad state licensing rules and regulations applicable to Medicare nursing home providers.[349] The theory of fraud in such an instance is that every claim for services implicitly represents that the ***66** services were provided in compliance with applicable rules and regulations,[350] rules and regulations heretofore generated in cooperation with the nursing home industry.

The last way in which private justice actions can interfere with regulatory efforts is by generating harmful precedent that applies to public regulators. Litigation arising from private actions almost certainly will bind regulators who employ the same or similar causes of action or theories. Thus, incompetent, overworked, or inexperienced private counsel, whose interests may diverge from the public interest, may be generating case precedent that restricts government regulators. Examples abound. In H.J., Inc. v. Northwestern Bell Telephone Co., private plaintiffs bringing a class action under RICO litigated an issue fundamental to all RICO cases: what is necessary to prove a "pattern" of racketeering activity.[351] The precedent created in H.J., Inc. is binding on public and private RICO plaintiffs, in all criminal and civil RICO cases. Similarly, private plaintiffs have litigated and created precedent on issues fundamental to the FCA, such as what constitutes a claim,[352] whether the ***67** FCA covers failure to comply with relevant regulations,[353] how damages should be calculated,[354] whether financial loss to the government is an element of the FCA,[355] and whether materiality is an element of the FCA.[356] In the securities field, private plaintiffs have created binding precedent on issues such as the proof of materiality required,[357] and how far the duty of disclosure goes in insider trading cases.[358]

Not only does precedent generated by private litigants bind public regulators, but they lose opportunities to shape the law. When private counsel litigates issues common to public and private regulation, public regulators are unable to do what they do in other cases: coordinate appellate strategy by weeding out cases that present poor facts or have an incomplete record, and file cases in circuits where favorable precedent exists or which present opportunities for creating favorable precedent.[359] Notably, of all of the private justice models, the FCA, with the opportunity it provides for the government to intervene in a case partially--such as on appeal--recognizes this important function of public regulators.

c. Difficulties for the Judicial System

Private justice actions pose a variety of problems for the judicial system. Nonmeritorious private actions consume scarce judicial resources, delay adjudication of other docketed matters, and can breed disrespect for the judicial system. All nonmeritorious cases raise these problems, of course, not just private justice actions, but private justice actions exacerbate these problems by presenting situations that also create separation of powers tensions. More than other types of cases, private justice actions thrust courts into the role of corralling private prosecutors run amuck and ***68** refereeing disputes between private and public prosecutors. To resolve these conflicts, courts must rule upon issues of prosecutive discretion and Executive Branch policy.[360] For example, with the qui tam FCA provisions, courts must determine if the DOJ has proven "good cause" sufficiently to warrant an extension of time to intervene in the relator's case[361] or to join the case after initially declining to intervene.[362] Courts must also resolve disputes between the DOJ and the relator, including whether the relator's involvement should be limited by the court,[363] and whether a case should be dismissed[364] or settled[365] over the relator's objections.

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C. Ways to Address the Problems Presented

All of the problems presented by private justice actions arise when private justice actions are of poor quality or are not in the public interest, or if meritorious, are filed without coordination between private and public regulators. Of all the private justice models currently in use in American jurisprudence, the qui tam FCA model, because of its dual-plaintiff design, has the greatest capacity for alleviating these problems. Even so, the FCA private justice action can be improved by incorporating some aspects of the Private Securities Litigation Reform Act of 1995.

1. The Dual-Plaintiff Design of the FCA and How it Addresses Problems Posed by Private Justice

The FCA requires that private justice litigants give the DOJ extensive information about the case they are filing. The statute also stays the case while the DOJ reviews and investigates the charges made in the suit. This dual-plaintiff design encourages top-quality work early in the case [366] and provides a mechanism for protecting defendants from frivolous allegations.

a. Encourages Top-Quality Work Early in the Case

The FCA's structure and evolving practice encourage private litigants to do a thorough, complete, and well-informed job when preparing their cases for filing. It does so by requiring that relators file a written report ***69** with the government upon filing their lawsuits. As noted previously, [367] when relators file their lawsuits (under seal), they are required to provide the DOJ with a written report of all relevant information and evidence. Based upon its review of this report, the DOJ decides what to do about the case: whether to intervene as plaintiff, seek dismissal of the case, pursue alternative remedies that preclude the relator's lawsuit, or seek court orders limiting the relator's ability to litigate the case. [368] Because the DOJ's intervention exponentially improves a relator's chances of success in a case [369] and because the DOJ has authority to restrict the relator's role [370] or resolve the case to the relator's disadvantage, there is strong incentive for relators' counsel to do top-quality work from the earliest stages of an FCA action. [371]

b. Provides a Mechanism For Regulatory Guidance and Dialog

One of the problems private justice presents for regulators is the cost to regulators of providing guidance to private justice plaintiffs as to applicable governmental policies plaintiffs should be aware of when bringing suit. The FCA's dual-plaintiff design provides a structured way for private justice litigants and regulators to maintain a dialog about regulatory policy, and for regulators to provide case-specific guidance and oversight of private litigants. [372]

c. Allegations Kept Under Seal Protects Defendants' Reputations ***70** As noted in this Article, [373] when relators file their lawsuits they are required to do so under seal. They are also required to provide the DOJ with a report detailing their information and evidence against a defendant. While the matter remains under seal, the DOJ investigates the allegations to determine if it should intervene as plaintiff, seek dismissal of the case, or seek some restrictions on the relator's involvement in the case. The initial secrecy surrounding qui tam complaints and the confidentiality of the reports [374] relators file with the DOJ help to protect defendants from reputational damage and from the costs incurred in responding to a frivolous private action. As Congress noted, "sealing the initial private false claims complaint protects both the Government and the defendant's interests by giving the Government an adequate opportunity to fully evaluate the private enforcement suit." [375]

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As noted earlier, [376] the government also has the opportunity to file an amended complaint before a qui tam FCA lawsuit is made public and before it is served upon defendants. This opportunity to weed out frivolous allegations and refine credible allegations further protects defendants from reputational and financial damage that could result from unfounded or poorly pled private lawsuits.

d. Government's Authority to Move For Dismissal

The last feature of the FCA's dual-plaintiff system that protects against frivolous private actions is the government's statutory authority to move for dismissal of a qui tam action, whether or not the government intervenes in the action. [377] Heretofore, the DOJ has utilized its authority to ***71** seek dismissal of qui tam actions sparingly. There is some logic to this approach. It absorbs government resources to monitor ongoing qui tam cases and to move for dismissal even when dismissal appears warranted. And there is always a chance, however small, that the relator will prevail and collect a judgment, of which at least seventy percent will go to the government. [378] Thus, economically it is advantageous for the government to remain a passive observer in the FCA actions it does not join. However, there are other interests at stake, such as ensuring that qui tam actions further the public interest and protecting the long-term viability of the private justice model. These macro intangible interests would appear to outweigh the government's economic interest in remaining passive in a single case and counsel for aggressive use by the government of its authority to move for dismissal of ill-conceived qui tam actions.

Recently, the government has taken a more aggressive stance in moving for dismissal of qui tam FCA cases. For example, in United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., the Ninth Circuit upheld the government's authority to dismiss an otherwise meritorious qui tam action for public policy reasons. [379] In Sequoia, a number of citrus growers and packinghouses were in noncompliance with regulations promulgated by the Department of Agriculture which limited shipping quotas. At least thirty-four qui tam actions were filed before the Secretary of Agriculture formally suspended the regulations; soon thereafter, a district court held the regulations invalid. [380] The DOJ moved to dismiss all qui tam actions, even those in which it had intervened. The district court granted the DOJ's motion to dismiss and the Ninth Circuit affirmed, noting that the "government ['s] . . . decision to dismiss [is] . . . within the government's prosecutorial discretion." [381]

In another recent case, the DOJ filed a motion to dismiss a qui tam action before the case was unsealed. Here, too, dismissal was sought for public policy reasons. The defendants came forward and made a voluntary disclosure to government officials of the problem alleged in the qui tam complaint. As a noted DOJ qui tam expert explained: "When people come forward and say, 'We have a problem. We want to fix it,' it is not fair to ***72** bring a whistleblower suit. It is important to encourage voluntary disclosure. This was a policy case in favor of voluntary disclosure." [382]

The government's authority to intervene, monitor, and move for dismissal of private justice actions is a powerful, quality-control mechanism. [383] Greater exercise of this authority would minimize the damage created by nonmeritorious or otherwise inappropriate private actions. [384] However, greater exercise by the DOJ of the government's supervisory power over qui tam actions is not without costs. There are at least two problems with the FCA's dual-plaintiff model, both of which would be exacerbated if the DOJ more aggressively exercises its supervisory authority over private justice actions.

***73** The first problem is that tight control by the DOJ over private justice actions will make it harder for private litigants to serve as watchdogs on any propensity by government officials to dawdle, delay, or subvert a case because of overwork,

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lack of expertise, or collusion. To take one example, if DOJ guidelines for prioritizing the qui tam cases in which the DOJ will intervene encourage collusion between industry and government, the qui tam relator will challenge or disregard such guidelines at the risk of an adverse DOJ decision on intervention in the relator's case or even a DOJ motion to dismiss the relator's case.

There are two responses to this concern. First, even with more aggressive monitoring of qui tam actions by the DOJ, a relator will retain significant ability to counter governmental abuse of such prosecutorial discretion. Although historically it has been more difficult for relators to prevail when the DOJ does not intervene, the relator can go forward with the case without the DOJ. [385] More significantly, however, the private justice action cannot be dismissed upon the government's motion without an opportunity for the private plaintiff to be heard publicly in federal court, and without court approval of the dismissal. Unfortunately, while helping to preserve the watchdog role of the private prosecutor, this judicial review immerses the judiciary into reviews of the Executive Branch's exercise of prosecutorial discretion, a hazard for preserving separation of powers. Courts will have to be vigilant in balancing respect for the Executive ***74** Branch's autonomy with giving the relator appropriate discretion to serve as a check on governmental decisions. [386]

In addition, although active supervision of private prosecutors by the DOJ may make it more difficult for private parties to serve as watchdogs on government laxity or corruption, the ability to control the quality of private actions through such supervision may be worth the risk. A viable mechanism for minimizing ill-conceived, frivolous, or vexatious lawsuits is crucial if private justice, as an institutional design, is to flourish. As this and other articles have argued, [387] such a design needs to flourish because it is indispensable to regulation of wrongdoing motivated by economic gain.

The second problem with active oversight of private actions by the DOJ is that such monitoring requires resources. To monitor private justice actions, DOJ attorneys and investigators must review, examine, and investigate allegations presented in complaints. They must also monitor the progress of cases in which the DOJ has declined to intervene but which relators have elected to pursue. Because of the complexity and sophistication of private justice cases, at least those brought under the FCA and those that would be brought under the expanded private justice models I advocate, [388] this review and monitoring will require considerable time and expertise. Whether the extra resources that such careful monitoring of private justice actions will require are worth the public expense depends upon whether we believe private justice is valuable.

2. Improving the FCA's quality control features

As noted earlier, [389] the PSLRA was passed in 1995 to address abuses perceived to exist in the securities fraud class actions. There are four features of the PSLRA that are especially helpful in mitigating problems inherent in private justice actions. These features should be added to the qui tam FCA private justice action to improve its effectiveness.

The requirement that a plaintiff's discovery be delayed until after a ruling on the defense's motion to dismiss, [390] coupled with a heightened ***75** pleading standard, [391] can help to ensure that private justice complaints are meritorious when filed. Additionally, the PSLRA's beefed-up remedy for sanctioning plaintiffs who bring frivolous actions (rebuttable presumption of sanctions, imposition of sanctions for the full defense costs) can further help to ensure that frivolous suits are not filed. [392] Lastly, abolition of joint and several liability in all private justice actions can help to guarantee that private justice plaintiffs target defendants because of their culpability, not because of their assets. Notably, this last feature would help to align the prosecutorial discretion of private enforcers with that of public regulators. [393]

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Including these features in the FCA would not affect the quality of FCA litigation currently conducted by experienced relators' counsel, but would solidify the statutory requirements already in the FCA and the informal practices of reputable FCA practitioners.

Delaying plaintiffs' opportunity to conduct discovery until after a trial court has ruled upon defendants' motion to dismiss, coupled with a heightened pleading standard, will require thorough investigation and well-conceived pleading from the beginning of a case. This will not change ***76** responsible FCA practice. As noted earlier,[394] thorough investigations and well-conceived pleading is already a top priority of experienced relators' counsel. Such attorneys know that intervention by the DOJ in a qui tam action is critical for the success of the action, and that the way to obtain this intervention is to perform quality work on the case from its earliest stages.[395]

Abolition of joint and several liability in FCA cases would emphasize that relators, like public regulators, should choose defendants based upon culpability rather than assets. This emphasis is consistent with existing responsible FCA practice. The FCA's mens rea requirement ("knowingly," as defined in the statute)[396] already precludes a finding of liability without also finding culpability. Abolishing joint and several liability in FCA actions would simply further alert the inexperienced plaintiff that including "deep-pocket" defendants without proof of knowledge, will not be successful.

Grafting the last PSLRA feature onto the FCA--enhanced sanctions for frivolous lawsuits--is a necessary and helpful way to discourage frivolous FCA private justice actions. The success, if not the survivability, of private justice depends upon responsible use of private justice actions. Enhanced sanctions for abusive private justice actions can help to ensure this. As already noted,[397] the PSLRA's sanctions are more formidable than those provided in FRCP 11. Although the standard for when sanctions should be awarded is the same under the PSLRA and FRCP 11, the PSLRA provides that the sanction is presumed, albeit as a rebuttable presumption, in instances of "abusive" litigation. It also provides that the sanction imposed--paying the prevailing party's fees and costs--will be significant.

IV. EXPANSION: WHERE FROM HERE

The qui tam FCA private justice model should be expanded to cover protection of the environment and national financial markets. These areas are appropriate for such an expansion for four reasons. First, both are of such importance that they demand the most productive regulation of wrongdoing possible. As I have argued herein and elsewhere,[398] a public regulatory scheme that incorporates an appropriately designed private ***77** justice paradigm is the only way to regulate economic wrongdoing effectively. Both the environment and national financial markets cry out for effective regulation. When the environment is despoiled, the damage can be permanent or close to it; the remedy, if one exists, almost certainly requires an enormous expenditure of public resources; and too often the consequences of environmental malfeasance are catastrophic for the individuals whose lives are shortened or for the communities that vanish. Similarly, when wrongdoing infects national financial markets, the ripple-effects are immeasurable, not only for those individuals or companies that meet financial ruin, but for the economy as a whole, which reels from the uncertainty that fraud creates. The reliability and integrity of its financial markets is one of the key reasons the American financial industry-- and correspondingly, the country's economic health and stability--flourishes. Repeated or large-scale instances of thievery and fraud in this market undermine its strength.[399]

The second, and related, reason why expansion of the qui tam FCA private justice model is appropriate for protection of the environment and of national financial markets is that the benefit that private justice can bring to these areas is already recognized, and appropriately so. Congress noted it when enacting the private justice actions currently available in these areas. With regard to securities fraud, Congress stated: "Private securities litigation is an indispensable tool . . .

[P]rivate lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee the corporate officers auditors, directors, lawyers and other properly perform their jobs." [400] With regard to environmental protection, Muskie argued successfully that citizens were needed to supplement environmental public regulatory efforts: "citizens can be a useful ***78** instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." [401]

Thus, in both instances, Congress perceived, years ago, that private justice could be of enormous assistance in regulating these areas. The problem is that Congress responded by enacting defective private justice actions. [402] The third reason that environmental protection and protection of national financial markets are appropriate for expansion of the qui tam FCA private justice model is that they require, and always will require, federal government regulation. While the states can be active partners in regulation of wrongdoing in these areas, the interstate impact of environmental and financial wrongdoing demands national regulatory leadership. As I have argued herein and elsewhere, [403] adequate government supervision of private justice actions is essential. Given the national scope of the threats to the American environment and financial markets, federal government supervision of private actions is the only supervision feasible. The fourth and final reason why expansion of the qui tam FCA private justice model is appropriate for the environmental and financial markets is because these two areas have already experimented with private justice, albeit not successfully. Their lackluster experience is both a benefit and a disadvantage. It is a benefit since everyone involved: the industries, the regulators, the private parties who bring private justice actions, the private bar that represents the private parties, has some sense of how to play the game of three-way enforcement. The downside, of course, is that they all, almost certainly, have had bad experiences with private justice. At the risk of being a sunny optimist, however, one could expect that these players, because of their experience, would be well positioned to see and utilize the benefits of an effective private justice model.

For these reasons, the qui tam FCA private justice model, with amendments as suggested in Appendix A, should be expanded beyond its fraud-upon-the-government context to protection of the environment and ***79** protection of national financial markets. Appendix A-2 contains proposed private justice legislation to protect national financial markets. Appendix A-3 contains proposed private justice legislation to protect the environment.

V. CONCLUSION

Private justice is inevitable. Use of private citizens to detect and prove public harms must be a part of any regulatory system that seeks to control sophisticated, economically motivated wrongdoing. Private justice brings resources to public regulators such as entrepreneurial private attorneys who supplement public regulators' efforts. More importantly, however, private justice brings the resource that is indispensable to effective regulation of economic wrongdoing and that is unavailable elsewhere: inside information. Inside information reveals misdeeds about which the government, through its own resources, can never learn; focuses government investigations by identifying relevant and corroborating records, witnesses, and transactions; and overcomes cover-ups, collusion, and concealment. The more complex and interconnected our world, the more essential inside information becomes to effective regulatory efforts. Although vital, the resource of inside information is enormously hard to get. Significant psychological, professional, and societal disincentives exist to dissuade those with inside information from bringing it to public regulators.

By now we have had enough experience with private justice actions to assess their strengths and weaknesses and to determine if it is possible to structure a private justice model that provides benefits without unnecessary disruption to businesses, regulators, the economy as a whole and the judiciary. This Article has reviewed three types of private justice actions: "victim" actions that seek primarily to make the victim of wrongdoing whole, "common good" actions that give

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any person authority to bring suit alleging certain public harms, and "hybrid" actions that have characteristics of both, depending upon the amount of harm suffered in a particular case.

This Article argues that only one existing private justice model, the qui tam action in the FCA, which is a "common good" type of action, is effective. It is effective for two reasons. First, it successfully attracts helpful inside information. It does so by recognizing that inside information is a valuable commodity and by paying adequately for it, and by including features that insure that the inside information delivered is helpful to public regulators. The second reason the qui tam FCA private ***80** justice model is effective is that it contains a dual-plaintiff mechanism. This mechanism allows for government monitoring and control of private actions and for cooperation between public and private regulators. Potentially, this mechanism insures that a private justice action serves the public interest and that the private litigant proceeds professionally, performing quality work. For the qui tam FCA model to reach its potential, it should incorporate the following ameliorative features from the Private Securities Litigation Reform Act of 1995: delayed discovery, a heightened pleading standard, abolition of joint and several liability, and enhanced sanctions for frivolous lawsuits. Additionally, the government should be more aggressive in exercising its existing statutory, supervisory authority over private actions.

This Article further suggests that the qui tam FCA private justice model, as amended, should be expanded beyond its false-claims-upon-the-government context to protection of the environment and protection of national financial markets.

To detect and deter economic wrongdoing effectively, a regulatory system must embrace private justice. Designing a productive private justice model requires an appreciation of the strengths private justice offers and the substantial threats it poses. This Article begins that discussion.

*81 APPENDIX A-1: PROPOSED AMENDMENTS, CIVIL FALSE CLAIMS ACT

31 U.S.C. §3729 ET SEQ.

(Proposed Amendments are shown in italics.)

Sec. 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.--Any person who --

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

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(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that --

***82** (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the harm proven by the plaintiff.

(c) In assessing damages courts should take into consideration the tangible and intangible loss to specific victims as well as the loss to the public and to the economy as a whole.

(d)(1) KNOWING AND KNOWINGLY DEFINED.--For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information --

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information;

or

(C) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

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(2) MISLEADING STATEMENTS AND OMISSIONS.--In any private action arising under this title in which the plaintiff alleges that the defendant --

(A) made an untrue statement of a material fact; or

***83** (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(3) REQUIRED STATE OF MIND.--In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(e) CLAIM DEFINED.--For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(f) EXEMPTION FROM DISCLOSURE.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(g) EXCLUSION.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Sec. 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.--The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS. --

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only ***84** if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

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(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. --

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

***85** (B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as --

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

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(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4)(A) If the Government elects not to proceed with the action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(B) During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat ***86** all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(C) A party aggrieved by the willful failure of an opposing party to comply with paragraph (B) may apply to the court for an order awarding appropriate sanctions.

(5) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(6) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF. --

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information ***87** provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses

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which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of ***88** Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(a) MANDATORY SANCTIONS.--If the court makes a finding under paragraph (4) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(b) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS. --

(A) IN GENERAL.--Subject to subparagraphs (B) and (C), for purposes of paragraph (a), the court shall adopt a presumption that the appropriate sanction --

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.--The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that --

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(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.--If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

***89** (e) DEFENDANT'S RIGHT TO WRITTEN INTERROGATORIES.--In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

(f) CERTAIN ACTIONS BARRED. --

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(g) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.--The Government is not liable for expenses which a person incurs in bringing an action under this section.

***90** (h) FEES AND EXPENSES TO PREVAILING DEFENDANT.--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

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(i) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Sec. 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought --

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea ***91** of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

Sec. 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.--Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

Sec. 3733. Civil investigative demands

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(a) IN GENERAL. --

(1) Issuance and service.--Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person --

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this ***92** section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. --

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall --

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall --

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall --

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(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

***93** (iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION. --

(1) In general.--A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under --

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

***94** (2) Effect on other orders, rules, and laws.--Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

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(c) SERVICE; JURISDICTION. --

(1) By whom served.--Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.--Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS. --

(1) Legal entities.--Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by --

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

***95** (C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.--Service of any such demand or petition may be made upon any natural person by --

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.--A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL. --

(1) Sworn certificates.--The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by --

(A) in the case of a natural person, the person to whom the demand is directed, or

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(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials.--Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as ***96** the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.--Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by --

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS. --

(1) Procedures.--The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.--The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any ***97** other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

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(3) Where testimony taken.--The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony.--When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian.--The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.--Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. --

***98** (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.--Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS. --

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(1) Designation.--The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. --

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

***99** (B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe --

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.--Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to ***100** interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

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(4) Conditions for return of material.--If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and --

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.--In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly --

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon ***101** that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS. --

(1) Petition for enforcement.--Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. --

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed --

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(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. --

***102** (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed --

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.--At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction.--Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title ***103** 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.--The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

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(k) DISCLOSURE EXEMPTION.--Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.--For purposes of this section --

(1) the term "false claims law" means --

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

***104** (6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes --

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

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***105 APPENDIX A-2: PRIVATE JUSTICE CAUSE OF ACTION TO PROTECT NATIONAL FINANCIAL MARKETS**

Section I. Liability

(a) LIABILITY FOR CERTAIN ACTS.--Any person who knowingly violates, causes to be violated or conspires to violate the following:

(1) Sections 11, [404] 12(a) [405] and (b), [406] 15, [407] 17 [408] of the Securities Act of 1933.

(2) Sections 6, [409] 9, [410] 10, [411] 14, [412] 15, [413] 16(b), [414] 18(a), [415] 20, [416] 29(b) [417] of the Exchange Act of 1934.

(3) Title 18, United States Code, Section 1344.

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages which results from the act of that person, except that if the court finds that --

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to ***106** such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages.

(c) In assessing damages courts should take into consideration the tangible and intangible loss to specific victims as well as the loss to the public and to the economy as a whole.

(d)(1) KNOWING AND KNOWINGLY DEFINED.--For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information --

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information;

or

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(C) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(2) MISLEADING STATEMENTS AND OMISSIONS.--In any private action arising under this title in which the plaintiff alleges that the defendant --

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

***107** (3) REQUIRED STATE OF MIND.--In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(e) EXEMPTION FROM DISCLOSURE.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(f) EXCLUSION.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Section II. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.--The Attorney General diligently shall investigate a violation under Section I. If the Attorney General finds that a person has violated or is violating Section I, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS. --

(1) A person may bring a civil action for a violation of Section I for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

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(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

***108** (4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case

the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. --

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as --

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

***109** (iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

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(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4)(A) If the Government elects not to proceed with the action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(B) During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(C) A party aggrieved by the willful failure of an opposing party to comply with paragraph (B) may apply to the court for an order awarding appropriate sanctions.

(5) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence ***110** and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(6) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF. --

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person

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bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil ***111** penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(a) MANDATORY SANCTIONS.--If the court makes a finding under paragraph (4) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(b) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS. --

(A) IN GENERAL.--Subject to subparagraphs (B) and (C), for purposes of paragraph (a), the court shall adopt a presumption that the appropriate sanction --

***112** (i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.--The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that --

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(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.--If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(e) DEFENDANT'S RIGHT TO WRITTEN INTERROGATORIES.--In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant's state of mind at the time the alleged violation occurred.

(f) CERTAIN ACTIONS BARRED. --

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

***113** (B) For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(g) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.--The Government is not liable for expenses which a person incurs in bringing an action under this section.

(h) FEES AND EXPENSES TO PREVAILING DEFENDANT.--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

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(i) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

***114** Section III. Procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Section II of this title may be served at any place in the United States.

(b) A civil action under Section II may not be brought --

(1) more than 6 years after the date on which the violation of Section I is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under Section II, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Section II.

Section IV. False claims jurisdiction

(a) ACTIONS UNDER SECTION II.--Any action under section II may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by Section I occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under Section II.

***115** Section V. Civil investigative demands

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(a) In general. --

(1) Issuance and service.--Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation, pursuant to this statute, the Attorney General may, before commencing a civil proceeding under Section II or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person --

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. --

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall --

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

***116** (ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the government investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall --

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the government investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall --

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(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a government investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional ***117** circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION. --

(1) In general.--A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under --

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws.--Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

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(c) SERVICE; JURISDICTION. --

(1) By whom served.--Any civil investigative demand issued under subsection (a) may be served by a government investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.--Any such demand or any petition filed under subsection (j) may be served upon any person who is not found ***118** within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS. --

(1) Legal entities.--Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by --

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.--Service of any such demand or petition may be made upon any natural person by --

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) PROOF OF SERVICE.--A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service ***119** shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL. --

(1) Sworn certificates.--The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by --

(A) in the case of a natural person, the person to whom the demand is directed, or

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(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the government investigator identified in the demand.

(2) Production of materials.--Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the government investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the government investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.--Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by --

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory ***120** is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS. --

(1) Procedures.--The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.--The government investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

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(3) Where testimony taken.--The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony.--When the testimony is fully transcribed, the government investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form ***121** or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the government investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the government investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian.--The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or government investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.--Upon payment of reasonable charges therefor, the government investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. --

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

***122** (B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.--Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS. --

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(1) Designation.--The Attorney General shall designate a government investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional government investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. --

(A) A government investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any government investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized government investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a government investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, ***123** or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe --

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.--Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

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(4) Conditions for return of material.--If any documentary material has been produced by any person in the course of any government investigation pursuant to a civil investigative demand under this section, and --

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

***124** (B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the government investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.--In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly --

(A) designate another government investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS. --

(1) Petition for enforcement.--Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. --

***125** (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the government investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed --

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(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. --

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any government investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed --

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

***126** (ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.--At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction.--Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

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(6) Applicability of federal rules of civil procedure.--The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.--Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.--For purposes of this section --

(1) the term "government investigator" means any attorney or investigator employed by the Department of Justice who is charged with ***127** the duty of enforcing or carrying into effect any laws listed in Section I(a), or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with an investigation;

(2) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(3) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(4) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(5) the term "product of discovery" includes --

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

***128 APPENDIX A-3: PRIVATE JUSTICE CAUSE OF ACTION TO PROTECT THE ENVIRONMENT**

Section I. Liability

(a) LIABILITY FOR CERTAIN ACTS.--Any person who knowingly violates, causes to be violated or conspires to violate the following:

(1) Act to Prevent Pollution of Ships, 33 U.S.C. § 1901.

(2) Air Pollution Prevention and Control Act, as amended by Clean Air Amendments (CAA) of 1970, 42 U.S.C. § 7401 et seq.

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(3) Water Pollution Prevention and Control Act, known as the Clean Water Act (CWA) of 1972, 33 U.S.C.S. § 1251 et seq.

(4) Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, 42 U.S.C. § 9601 et seq.

(5) Deepwater Ports Act of 1974, 33 U.S.C. § 1501 et seq.

(6) Emergency Planning and Community Right to Know Act (EPCRA) of 1986, 42 U.S.C. § 11001 et seq.

(7) Endangered Species Act, 16 U.S.C. § 1531.

(8) Marine Protection, Research, and Sanctuaries Act (MPRSA) of 1972, 33 U.S.C. § 1401 et seq.

(9) Navigable Waters Act, 33 U.S.C. § 1 et seq.

(10) Noise Control Act (NCA) of 1972, 42 U.S.C. § 4901 et seq.

(11) Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.S. § 1311 et seq.

(12) Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901.

(13) Safe Drinking Water Amendments of 1997, 42 U.S.C. § 300f et seq.

(14) Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq.

(15) Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq.

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages which results from the act of that person, except that if the court finds that --

***129** (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

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(b) In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages.

(c) In assessing damages courts should take into consideration the tangible and intangible loss to specific victims as well as to the present and future public interest.

(d)(1) KNOWING AND KNOWINGLY DEFINED.--For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information --

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information;

or

(C) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(2) MISLEADING STATEMENTS AND OMISSIONS.--In any private action arising under this title in which the plaintiff alleges that the defendant --

(A) made an untrue statement of a material fact; or

***130** (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(3) REQUIRED STATE OF MIND.--In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(e) EXEMPTION FROM DISCLOSURE.--Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(f) EXCLUSION.--This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Section II. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.--The Attorney General diligently shall investigate a violation under Section I. If the Attorney General finds that a person has violated or is violating Section I, the Attorney General may bring a civil action under this section against the person.

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(b) ACTIONS BY PRIVATE PERSONS. --

(1) A person may bring a civil action for a violation of Section I for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the ***131** action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall --

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case

the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. --

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would ***132** interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as --

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(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4)(A) If the Government elects not to proceed with the action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(B) During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

***133** (C) A party aggrieved by the willful failure of an opposing party to comply with paragraph (B) may apply to the court for an order awarding appropriate sanctions.

(5) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(6) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

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(d) AWARD TO QUI TAM PLAINTIFF. --

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 ***134** percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(a) MANDATORY SANCTIONS.--If the court makes a finding under paragraph (4) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, ***135** responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(b) PRESUMPTION IN FAVOR OF ATTORNEYS' FEES AND COSTS. --

(A) IN GENERAL.--Subject to subparagraphs (B) and (C), for purposes of paragraph (a), the court shall adopt a presumption that the appropriate sanction --

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(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.--The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that --

(i) the award of attorneys' fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.--If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(e) DEFENDANT'S RIGHT TO WRITTEN INTERROGATORIES.--In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the ***136** issue of each such defendant's state of mind at the time the alleged violation occurred.

(f) CERTAIN ACTIONS BARRED. --

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

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(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(g) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.--The Government is not liable for expenses which a person incurs in bringing an action under this section.

(h) FEES AND EXPENSES TO PREVAILING DEFENDANT.--In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(i) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and ***137** conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Section III. Procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Section II of this title may be served at any place in the United States.

(b) A civil action under Section II may not be brought --

(1) more than 6 years after the date on which the violation of Section I is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under Section II, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Section II.

Section IV. False claims jurisdiction

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***138** (a) ACTIONS UNDER SECTION II.--Any action under section II may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by Section I occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under Section II.

Section V. Civil investigative demands

(a) In general. --

(1) Issuance and service.--Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation, pursuant to this statute, the Attorney General may, before commencing a civil proceeding under Section II or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person --

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines. --

***139** (A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall --

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the government investigator to whom such material shall be made available.

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(C) If such demand is for answers to written interrogatories, the demand shall --

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the government investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall --

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a government investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

***140** (E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION. --

(1) In general.--A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under --

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

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(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws.--Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which ***141** the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION. --

(1) By whom served.--Any civil investigative demand issued under subsection (a) may be served by a government investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.--Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS. --

(1) Legal entities.--Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by --

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.--Service of any such demand or petition may be made upon any natural person by --

***142** (A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

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(e) PROOF OF SERVICE.--A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL. --

(1) Sworn certificates.--The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by --

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the government investigator identified in the demand.

(2) Production of materials.--Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the government investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the government investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

***143** (g) INTERROGATORIES.--Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by --

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS. --

(1) Procedures.--The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall

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be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.--The government investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken.--The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person ***144** resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony.--When the testimony is fully transcribed, the government investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the government investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the government investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian.--The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or government investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.--Upon payment of reasonable charges therefor, the government investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. --

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the ***145** grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

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(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.--Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS. --

(1) Designation.--The Attorney General shall designate a government investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional government investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. --

(A) A government investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any government investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized government investigator or other officer or employee in connection with the taking of oral testimony under this section.

***146** (C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a government investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe --

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

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(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.--Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

***147** (4) Conditions for return of material.--If any documentary material has been produced by any person in the course of any government investigation pursuant to a civil investigative demand under this section, and --

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the government investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.--In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly --

(A) designate another government investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS. --

(1) Petition for enforcement.--Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in ***148** such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. --

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(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the government investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed --

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. --

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any government investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such ***149** product of discovery. Any petition under this subparagraph must be filed --

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.--At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

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(5) Jurisdiction.--Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.--The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.--Any documentary material, answers to written interrogatories, or oral testimony provided under any ***150** civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.--For purposes of this section --

(1) the term "government investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any laws listed in Section I(a), or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with an investigation;

(2) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(3) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(4) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(5) the term "product of discovery" includes --

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

***151 APPENDIX B-1: SURVEY OF RICO CASES DECIDED BY FEDERAL APPELLATE COURTS 1999-2001**

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***152 APPENDIX B-2: DISPOSITION OF CIVIL RICO CASES, FEDERAL APPELLATE COURTS, 1999-2001**

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***153 APPENDIX C-1: MONETARY JUDGMENTS OBTAINED, QUI TAM, FCA AND ENVIRONMENTAL CITIZEN SUITS, 1988-2000**

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***154 APPENDIX C-2: MONETARY JUDGMENTS OBTAINED, QUI TAM, FCA AND ENVIRONMENTAL CITIZEN SUITS, 1988-2000**

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***155 APPENDIX C-3: MONETARY JUDGMENTS OBTAINED, QUI TAM, FCA AND ENVIRONMENTAL CITIZEN SUITS, 1988-2000**

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***156 APPENDIX C-4: NUMBER OF PRIVATE JUSTICE ACTIONS FILED, 1987-2000**

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***157 APPENDIX C-5: NUMBER OF PRIVATE JUSTICE ACTIONS FILED, 1987-2000**

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***158 APPENDIX C-6: NUMBER OF PRIVATE JUSTICE ACTIONS FILED, 1987-2000**

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***159 APPENDIX C-7: MONIES RECOVERED IN ENVIRONMENTAL CITIZEN SUITS, 1983-2000**

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***160 APPENDIX C-8: MONIES RECOVERED IN ENVIRONMENTAL CITIZEN SUITS, 1983-2000**

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Footnotes

a1 Bainbridge Professor of Law, University of Alabama. Many thanks are due to Dean Ken Randall and the University of Alabama Law School Foundation for their support of my research activities, which include this Article. I would also like to thank the following University of Alabama Law students who provided excellent research assistance on this Article: Kristopher Aungst, Colleen McCullough, Wayne Merchant, Joseph Stutz and Christina Tabereaux; to the following individuals who shared their expertise in critiquing this Article: Susan Appleton, John T. Boese, Mary Cheh, Michael Clark, Jonathan Diesenhaus, Robert Fabrikant, Jack Getman, Russell Mokhiber, Michel Nicrosi, Ellen Podgor, Marc S. Raspanti and Barbara L. Zelner. Lastly, I greatly appreciate the opportunity to present a working draft of this Article to the law faculty of Washington University School of Law. That opportunity demonstrated, once again, that excellent teachers never stop teaching.

1 See Pamela H. Bucy, Information As a Commodity in the Regulatory World, 39 Hous. L. Rev. (forthcoming 2002) (manuscript at 2.3-2.4, on file with the author) [hereinafter Bucy, Information As a Commodity].

2 For sources discussing the difficulty of proving intent in instances of economic wrongdoing, see, for example, Sharon L. Davies & Timothy Stoltzfus Jost, Managed Care: Placebo or Wonder Drug for Health Care Fraud and Abuse?, 31 Ga. L. Rev. 373, 397-99 (1997); Stuart P. Green, Why it's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L.J. 1533, 1614-15 (1997); Peter J. Henning, Individual Liability for Conduct by Criminal Organizations in the United States, 44 Wayne L. Rev. 1305, 1324, 1328-29 (1998); Ellen S. Podgor, Mail Fraud: Redefining the Boundaries, 10 St. Thomas L. Rev. 557, 566-68 (1998); Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 79-80 (1933). Cf. Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 488 (1997).

3 For a discussion of the resource-intensive nature of investigations of economic wrongdoing, see Bucy, Information As a Commodity, supra note 1 (manuscript at 2.39-.49). For a discussion of the constitutional issues raised by private justice, including stress on the separation of powers principle, see Pamela H. Bucy, Private Justice and the Constitution, 69 Tenn. L. Rev. 4 (forthcoming 2002) (manuscript at 12-49, on file with the author) [hereinafter Bucy, Private Justice and the Constitution].

4 For a discussion of the moral and practical damage to the judicial system from prosecution of economic wrongdoing, see Bucy, Information As a Commodity, supra note 2 (manuscript at 2.28-2.29).

5 See, e.g., Richard A. Posner, Optimal Sentences for White-Collar Criminals, 17 Am. Crim. L. Rev. 409, 409-418 (1980).

6 Very little has been done to measure the deterrence impact of private justice actions. One preliminary study of the qui tam provisions of the civil False Claims Act ("FCA") noted that "[d]eterrence... is a difficult, if not impossible, magnitude to actually measure." William L. Stringer, Taxpayers Against Fraud, The 1986 False Claims Act amendments: An Assessment of Economic Impact 32, 35-36 (1996) (finding that the qui tam provisions of the FCA deter fraud, assuming that deterrence can be measured by recoveries in qui tam FCA cases).

7 Judge Jerome Frank employed the term "private Attorney General" in Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), to refer to private persons in whom Congress vests "authority to bring suit... the sole purpose [of which] is to vindicate the public interest." Associated Industries was a coal consumer that brought suit challenging the setting of minimum prices for coal by the U.S. Department of Interior. In ruling that Associated Industries had standing, Judge Frank articulated the "assignment" theory later employed by the Court in Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 777-78 (2000), almost sixty years later with regard to private actions brought under the civil FCA. See also Michael D. Axline, Environmental Citizen Suits § 1.02 (Michie 1995) (referring to "[p]rivate citizen participation in enforcement of the law"); John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 215 & n.1, 217 (1983) [hereinafter Coffee, Private Attorney General] (describing the public attorney general as someone who is seen as "a cliché and a crutch," who is scorned as "champerty and maintenance" by the established bar, and as private lawyers who sue "'to vindicate the public interest'"); Michael S. Greve, The Private Enforcement of Environmental Law, 65 Tul. L. Rev. 339, 339 (1990) (referring to "private law enforcement as a means of attaining public objectives"); David R. Hodas, Enforcement of Environmental Law in a Triangular Federal System, 54 Md. L. Rev. 1552, 1561 (1995) (arguing that "citizen suits as private attorneys general [are needed to] safeguard the enforcement system").
This Article focuses on court proceedings initiated by private attorneys general aimed at public harms. It does not address extra-judicial proceedings such as use of mass media, administrative proceedings, or internal corporate proceedings. For the sake of simplicity this Article focuses on federal private justice actions. There are many state private justice actions, see, e.g., Cal. Gov't Code § 12650-55 (West 1992 & Supp. 2001); Fla. Stat. Ch. 68.081-.092 (Harrison 1994 & Supp. 2000); Mass. Gen. Laws Ann. Ch. 12, § 5A-50 (West 1996 & Supp. 2002); Tex. Hum. Res. Code Ann. § 36.001-.132 (Vernon 2001) (regarding false claims in the health care area only), but they tend to resemble, if not intentionally mimic, federal actions, making a separate discussion of them more repetitive than helpful.

8 See Bucy, Information As a Commodity, supra note 1, (manuscript at 2.9, 2.33, 2.67).

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9 A number of thoughtful articles and books address various private justice actions but little attention has been devoted by policymakers or academics to comparing and contrasting the various private justice actions or to examining the role private justice might play in an overall regulatory scheme.

For analyses of the citizen suit private justice action, see generally Axline, supra note 7; Robert F. Blomquist, Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values, 22 Ga. L. Rev. 337 (1988); Barry Boyer & Errol Meidinger, Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Law, 34 Buff. L. Rev. 833 (1985); Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes (Sept. 1984) [hereinafter E.L.I., Citizen Suits]; Philip H. Gitlen, Private Attorneys General: Let's Do It Right, 2 Alb. L. Envtl. Out. 17 (1995); Greve, supra note 7; Hodas, supra note 7, at 1561; Peter H. Lehner, The Efficiency of Citizen's Suits, 2 Alb. L. Envtl. Out. 4 (1995); Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws, Parts I-III, 13 Envtl. L. Rep. 10309 (1983); 14 Envtl. L. Rep. 10063 (1984); 14 Envtl. L. Rep. 10407 (1984) [hereinafter Miller, Part I, Part II, or Part III].

For analyses of securities fraud private justice actions, see generally Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 Stan. L. Rev. 1487 (1996); James Bohn & Stephen Choi, Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions, 144 U. Pa. L. Rev. 903 (1996); Coffee, Private Attorney General, supra note 7; John C. Coffee, Jr., The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung, 963 PLI/Corp 515 (1996) [hereinafter Coffee, Future of PSLRA]; Patrick J. Coughlin, "The Private Securities Litigation Reform Act of 1995-30 Months Later," Securities Class Action Litigation Under the Private Securities Litigation Act, 1070 PLI/Corp 9 (1998); James D. Cox, Making Securities Fraud Class Actions Virtuous, 39 Ariz. L. Rev. 497 (1997); Edward A. Fallone, Codifying the Private Cause of Action Under a Structuralist Approach, 1997 U. Ill. L. Rev. 71 (1997); Joseph A. Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harv. L. Rev. 963 (1994); Avery Katz, The Effect of Frivolous Lawsuits on the Settlement of Litigation, 10 Int'l Rev. L. & Econ. 3 (1990); Jonathan R. Macey & Geoffrey P. Miller, The Plaintiff's' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1 (1991); Richard M. Phillips & Gilbert C. Miller, The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers, 51 Bus. Law. 1009 (1996); Joel Seligman, The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Law: The Commission's Authority," 108 Harv. L. Rev. 438 (1994).

For analyses of the qui tam provisions of the FCA, see generally J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539 (2000); John T. Boese & Beth C. McClain, Why Thompson Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act, 51 Ala. L. Rev. 1 (1999); Pamela H. Bucy, Civil Prosecution of Health Care Fraud, 30 Wake Forest L. Rev. 693 (1995); Pamela H. Bucy, Growing Pains: Using the False Claims Act to Combat Health Care Fraud, 51 Ala. L. Rev. 57 (1999); Elleta Sangrey Callahan & Terry Moorehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273 (1992); Robert Fabrikant & Glenn E. Solomon, Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry, 51 Ala. L. Rev. 105 (1999); James B. Helmer, Jr., How Great Is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act, 68 U. Cin. L. Rev. 737 (2000); William E. Kovacic, The Civil False Claims Act As a Deterrent to Participation in Government Procurement Markets, 6 Sup. Ct. Econ. Rev. 201 (1998); Patricia Meador & Elizabeth S. Warren, The False Claims Act: A Civil War Relic Evolves Into a Modern Weapon, 65 Tenn. L. Rev. 455 (1998); Richard J. Oparil, The Coming Impact of the Amended False Claims Act, 22 Akron L. Rev. 525 (1989); Ernest A. Phillips, A Proposed Michigan False Claims Act: Resurrecting Qui Tam As a Practical and Effective Weapon to Combat Fraud Against the Government, 9 T.M. Cooley L. Rev. 59 (1992).

10 See Appendices C-1 through C-6.

11 For example, in 2000, the United States collected $1.5 billion in civil fraud recoveries, $1.2 billion of which was collected through private justice actions under the qui tam provisions of the FCA. Press Release, United States Department of Justice (Nov. 2, 2000), available at www.USDOJ.Gov.

As one Department of Justice official explained in 1996: "The recovery of over $1 billion demonstrates that the public-private partnership encouraged by [the FCA] works and is an effective tool in our continuing fight against fraudulent use of public

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funds." Taxpayers Against Fraud, The 1986 False Claims Act Amendments, Tenth Anniversary Report 15 (1986) (quoting Frank W. Hunger, Assistant Attorney General, Civil Division, U.S. Dept. of Justice). Also, Lewis Morris stated:

The False Claims Act has been an essential tool to protect the integrity of the Medicare program....To achieve this goal...of 'zero tolerance' of Medicare fraud and abuse...the Government relies on a number of enforcement options-- criminal, civil, and administrative, as well as educational outreach efforts. Chief among the enforcement tools has been the False Claims Act.

Id. at 15 (testimony of Lewis Morris, Assistant Inspector General, Dep't of Health & Human Services). See also Hearings Before House Comm. on Judiciary, Subcomm. on Immigration and Claims, 105th Cong., 2d Sess. 14 (1998) [hereinafter Subcomm. on Claims Hearings] (testimony of Donald K. Stern, U.S. Attorney, Dist. Mass. and Chair, Attorney General's Advisory Comm., Dep't of Justice) ("[T]he False Claims Act...has been the Department's primary civil enforcement tool to combat fraud."); id. at 25 (testimony of Robert A. Berenson, Director for Health Care Plans and Provides Administration, Health Care Financing Administration, Dep't of Health and Human Services) ("[T]he False Claims Act is an important tool for...law enforcement...to pursue fraud and abuse.").

Ruth Blacker of the American Association of Retired Persons stated:

Congress in recent years [has] expand[ed] statutory authority and income resources to deal with the problem [of heath care fraud and abuse]. However, none of these things are likely to play a more important role in recovering improper payments to in acting as a deterrent than the False Claims Act. Use of the FCA by Federal authorities has become an important tool for fighting fraud and abuse in many programs, including the Medicare program.

Id. at 63 (statement of Ruth Blacker, National Legislative Counsel, American Association of Retired Persons).

12 See Bucy, Information As a Commodity, supra note 1, (manuscript at 2.53-.57).

13 For discussions of the disruptive impact of citizen suits see, for example, Jeanette Austin, Comment, The Rise of Citizen Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Nw. U. L. Rev. 220, 222 (1986); Greve, supra note 7, at 339. Cf. Miller, Part III, supra note 9, at 10427-28 (noting industry arguments but dismissing them as unpersuasive and unwarranted).

For discussions of the disruptive impact of the False Claims Act, see, for example, Beck, supra note 9, at 633-37; Boese & McClain, supra note 9, at 4, 46-50; Pamela H. Bucy, The Path From Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals, 44 St. Louis U. L.J. 3, 46-48 (2000); Fabrikant & Solomon, supra note 9, at 106, 148-61; General Accounting Office, Medicare, Application of the False Claims Act to Hospital Billing Practices 14-15 (1998) (GAO-HEHS 98-195); General Accounting Office, Medicare Fraud and Abuse, DOJ's Implementation of False Claims Act Guidance In National Initiatives Varies 15 (1999) (GAO-HEHS 99-170).

For discussions of the disruptive impact of RICO, see, for example, Oversight on Civil RICO Suits: Hearing Before the Senate Comm. on the Judiciary, 99th Cong., 1-4 (1985). For a discussion of the disruptive impact of securities private actions, see Bohn & Choi, supra note 9, at 979-80; Hodas, supra note 7, at 1623-24; Macey & Miller, supra note 9, at 5-7, 116-18; Phillips & Miller, supra note 9, at 1027-29. Robert F. Blomquist also argues that private enforcement actions have substantial potential to undermine values in the American judicial system. Blomquist, supra note 9, at 340.

14 See Bucy, Information As a Commodity, supra note 1 (manuscript at 2.5-.11).

15 See, e.g., infra Part II.

16 See, e.g., S. Rep. No. 99345, at 1-2 (1985), reprinted in 1986 U.S.C.C.A.N. 5266, 5275 (regarding 1986 amendments to the False Claims Act); H.R. Conf. Rep. No. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 730 (regarding private securities actions); Boyer & Meidinger, supra note 9, at 836-37; Miller, Part I, supra note 9, at 10311 (regarding environmental citizen suits).

17 Bucy, Information As a Commodity, supra note 1 (manuscript at 2.17, 2.19-.21).

18 The Enron Scandal, USA Today, Jan. 22, 2002, at 3B. Enron declared bankruptcy on December 2, 2001.

19 Howard Fineman & Michael Isikoff, Lights Out: Enron's Failed Power Play, Newsweek, Jan. 21, 2002, at 15-16.

20 Id. at 15.

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21 Matt Krantz, Peeling Back the Layers of Enron's Breakdown, USA Today, Jan. 22, 2002, at 1B.

22 The Enron Scandal, supra note 18.

23 Rick Bragg, Enron Employees Lost Jobs, Savings and a Sense of Trust, N.Y. Times, Jan. 20, 2002, at 1.

24 Id.

25 Christine Dugas, Employees' Faith in Enron Cost Them Dearly, USA Today, Jan 22, 2002, at 1B [hereinafter Employees' Faith].

26 Id.

27 During this same time period, corporate insiders bought only 10,000 shares of Enron, valued at $369,800. The Enron Scandal, supra note 18.

28 Id.

29 Krantz, supra note 21.

30 Richard W. Stevenson & Jeff Gerth, Enron's Collapse: The System; Web of Safeguards Fails As Enron Fell, N.Y. Times, Jan. 20, 2002, at 1.

31 Id.

32 Id.

33 Id.

34 See, e.g., Editorial, The Real Enron Scandal, The New Republic, Jan. 28, 2002, at 7; Reed Abelson, Trying Not to Be the Next Enron, Companies Scrutinize Practices, N.Y. Times, Jan. 26, 2002, at B1; Diana B. Henriques & Kurt Eichenwald, A Fog Over Enron, and the Legal Landscape, N.Y. Times, Jan. 27, 2002 at 1. As Newsweek stated, Enron is "the scariest type of scandal: a total system failure. Executives, lenders, auditors and regulators all managed to look the other way while the company ran amok." Fineman & Isikoff, supra note 19, at 18. The Public Company Accounting Reform and Investor Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (Sarbannes-Oxley Act of 2002) was passed in the aftermath of recent accounting scandals to change the way public companies do business. The Act includes a number of reforms, such as the creation of an accounting oversight board to oversee auditors of public companies; the restriction of nonaudit services that outside auditors may provide for their audit clients; the prohibition of certain inside trades; and the creation of new crimes. The Sarbannes-Oxley Act does not, however, include an effective private justice action. See infra note 36.

35 Apparently, there were several Enron insiders informed about Enron's financial house of cards who were willing to raise concerns. Four months before Enron's bankruptcy, an Enron vice-president questioned the propriety of the Enron financial reports. In an anonymous letter to Enron Chairman, Kenneth L. Lay, she noted the massive debt that was being hidden on the books of Enron partnerships and stated, "I am incredibly nervous that we will implode in a wave of accounting scandals." Greg Farrell, Co-workers Say She Put Enron's Future Above Self, USA Today, Feb. 14, 2002, at 1B; Krantz, Peeling Back, supra note 21, at 1B; Matt Krantz, Trouble Grew in Enron's Interlinking Partnerships, USA Today, Jan. 22, 2002, at 2B. The insider who wrote the perceptive letter to Lay was Sherron Watkins. Id. Other insiders who expressed their concerns to Enron bosses about Enron's practice of hiding corporate debt on the books of offshore partnerships included Jeff McMahon, former Enron treasurer who was appointed as Enron president and COO post-bankruptcy. Nine months prior to Enron's declaration of bankruptcy, McMahan expressed his concerns to Jeffrey Skilling, Enron CEO. McMahon was then transferred to another position in Enron. Thomas A. Fogarty & Greg Farrell, Hearings Get Combative, USA Today, Feb. 8, 2001, at 1B. Also, Jordan Mintz, an Enron in-house counsel, set out his concerns in writing seven months before Enron's declared bankruptcy to Andrew Fastow, Enron's CFO and apparent architect of the partnership arrangements. See Kurt Eichenwald & Diana B. Henriques, Web of Details Did Enron in As Warnings Went Unheeded, N.Y. Times, Feb. 10, 2002,

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at 1, 27. Her red flag was not enough. Lay merely referred her concerns to the law firm, noted above, that had established the partnerships, making the questionable accounting possible. The problem was that this insider blew the whistle only internally. Apparently, there were other top-placed Enron employees who were seriously worried about Enron's financial house of cards that questioned superiors. For example, J. Clifford Baxter, an Enron vice-chairman who resigned from Enron seven months before its declaration of bankruptcy, apparently "complained mightily to Skilling [Enron CEO] and all who would listen about the inappropriateness of [Enron's] transactions with LJM [one of the off-shore partnerships where Enron hid its debt]." Ex-Enron Executive Dead in Car, Birmingham News, Jan. 26, 2002 at 1A, 2A. Apparently, "[e]veryone in the executive suite at Enron knew of his complaints." Jim Yardley, Critic Who Quit Top Enron Post is Found Dead, N.Y. Times, Jan. 26, 2002 at 1, B1, B6. Mr. Baxter died, apparently by a self-inflicted gunshot, on January 25, 2002. Colleagues described Mr. Baxter as "anguished over the problems at Enron," id., an "honest" person, id., of "extremely high character... [who] felt horrible" about the events at Enron, and possibly would have blown the whistle if there were a respected mechanism for doing so. Ex-Enron Executive Dead in Car, B'ham News, Jan. 26, 2002, at 1A, 2A. The problem is that there was no such mechanism.

36 The Sarbannes-Oxley Act, see supra note 34, makes it a crime to retaliate against any person who provides information to law enforcement officers about the commission or possible commission of any federal offense. § 1107, amending 18 U.S.C. § 1513. The Act also creates a private cause of action for any employee of a publicly traded company against the company if the company has discharged or discriminated against the person because of the person's "whistleblowing activities." § 1514A, amending 18 U.S.C. § 1513. Available relief includes compensatory damages, back pay, special damages, and "all relief necessary to make the employee whole."
This private justice action is inadequate for two reasons. First, it does not offer enough of a financial reward to entice knowledgeable whistleblowers to come forward. Second, it has no "dual-plaintiff" mechanism to channel private investigative, litigative, and informational resources to public regulatory efforts and provides a way to monitor the quality of the whistleblower's information. See infra Part III.C.I .

37 Examples include Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000E-5(f)(1994), the American Disability Act, 42 U.S.C. § 12101 (1995), the Federal Tort Claims Act, 28 U.S.C. §2680(h) (1994). See infra Part II.B.2; Boyer & Meidinger, supra note 9, at 836 (mentioning briefly such actions).

38 Examples include the securities fraud private causes of action, see infra Part II.B.2, and the qui tam provisions of the FCA, see infra Part II.C.2.

39 The citizen suit provisions of many environmental and some consumer protection statutes were created for this reason. See infra Part II.C.1.

40 31 U.S.C. §§ 3729-33 (2001). See infra Part III.A.1.b.(2).

41 The securities fraud and to a lesser extent, RICO and the Computer Fraud and Abuse Act, promote class actions. See infra Part II.B.

42 The qui tam provisions of the FCA discourage class actions. See infra III.A.1.b.(2).

43 The qui tam provisions of the FCA most successfully encourage this cooperation, see infra Part II.C.2.

44 The citizen suit provisions in many environmental and some consumer protection statutes attempt such coordination but not effectively. See infra text and accompanying note 231-42.

45 The securities fraud "hybrid" private justice actions and the "victim" private justice actions are not designed to coordinate public and private enforcement efforts. See infra text and accompanying note 74-77, 155-65.

46 The qui tam provisions of the FCA, securities fraud private actions, and, to a lesser extent, RICO, and Computer Fraud and Abuse private justice actions, are designed to produce lucrative bounties for the private plaintiff. See infra text and accompanying notes 78-165, 287-89.

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47 The citizen suit provisions in many environmental and some consumer protection statutes, both by design and practice, produce no monetary recoveries for private plaintiffs. See infra text and accompanying notes 208-18.

48 See, e.g., Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305-06 (1986) (referring to §1983 actions); Carey v. Piphus, 435 U.S. 247, 253-54 (1978) (discussing same).

49 42 U.S.C. §§ 1981-2000 (1994).

50 18 U.S.C. § 2520 (2000).

51 15 U.S.C. § 2072 (1997).

52 42 U.S.C. § 12101 (1995).

53 28 U.S.C. § 2680(h) (1994).

54 42 U.S.C. § 12188(a)(1) (1995) (italics supplied) (providing standing for one who "has reasonable grounds for believing that [he or she] is about to be subjected to discrimination").

55 241 U.S. 33, 38-39 (1916).

56 Id. at 37.

57 Id. at 39.

58 See J.I. Case Co. v. Borak, 377 U.S. 426-27, 430-31 (1964) (implying a cause of action under § 14(a) of the Securities Exchange Act of 1934).

59 See Guardian Assn. v. Civil Serv. Comm'n, 463 U.S. 582, 594 (1983) (assuming that there is an implied cause of action, without explicitly holding as such).

60 See Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).

61 See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 356 (1982).

62 See Morse v. Republican Party of Va., 517 U.S. 186, 232-35 (1996). The courts have also declined to imply private causes of action under the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 671(a)(15) (1995), and the Fair Labor Standards Act, 29 U.S.C. § 212 (1999). Suter v. Artist M., 503 U.S. 347, 363-64 (1992) (declining to imply a private cause of action under the Adoption Assistance and Child Welfare Act); Breitweiser v. KMS Indus., Inc., 467 F.2d 1391, 1393 (5th Cir. 1972) (declining to imply a private cause of action under the Fair Labor Standards Act).

63 See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971).

64 Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). The Court began its opinion in Touche Ross with obvious irritation at the lower courts propensity to find implied causes of action: "Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one. During this Term alone, we have been asked to undertake this task no fewer than five times in cases in which we have granted certiorari." Id. at 562.

65 See, e.g., Guardians Assn., 463 U.S. at 582, 602-03 (allowing injunctive relief only in private cause of action implied in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18-20 (1979) (holding that Investment Advisers Act of 1940 includes an implied private cause of action to void a contract that violates the Act but does not include an action for damages because the Court could not find a Congressional intent to bestow a damages remedy, reasoning that "the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf"); Cannon v. Univ. of Chi., 441 U.S. 677, 690, 699, 709 (1979) (finding that a private cause of action exists to enforce Title IX of the Education Amendments to the Civil Rights Act); Newman v.

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Piggie Park Enter., 390 U.S. 400, 401-02 (1968) (holding that injunctive relief only is available in private causes of action implied in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a)(j) (1994)).

66 For example, punitive damages are never permitted under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1994).

67 See, e.g., Smith v. Wade, 461 U.S. 30, 51 (1983) (allowing punitive damages only upon a showing of "callous disregard for the plaintiff's rights, as well as intentional violations of federal law"); 42 U.S.C. § 1981a (1994) (stating that plaintiff must show defendant acted "with malice or with reckless indifference" with regard to plaintiff's rights before punitive damages may be awarded); 42 U.S.C. §§ 12188(b)(2)(c)-(b)(4) (1995) (excluding punitive damages under the Americans with Disabilities Act).

68 When there is such mention, the relief available is so minimal that it provides token protection and little to no deterrent effect. See, e.g., 42 U.S.C. §§ 12188(b)(2)(c)-(b)(4) (1995) (excluding punitive damages under the Americans with Disabilities Act but allowing a court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to "vindicate the public interest."); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (stating that it is appropriate to imply a cause of action for violations of § 14(a) of The Securities Exchange Act of 1934 because doing so would supplement the Securities and Exchange Commission's ability to enforce the laws, but Borak has been limited by the Court to its specific facts). See also Touche Ross & Co. v. Redington, 442 U.S. 560, 577 (1979); Cort v. Ash, 422 U.S. 66, 82 (1975).

69 See, e.g., Cannon, 441 U.S. at 704 (holding that a cause of action should be implied under Title IX of the Education Amendments of 1972 to "provide individual citizens effective protection against those practices [which violate Title IX]"); Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (private cause of action should be implied to protect those the statute is designed to protect); Cort, 422 U.S. at 84-85 (declining to imply a cause of action when the victims have recourse to other avenues of protection, which here, are state remedies.)

70 See supra note 12 . See also Part II.B-C.

71 By comparison, the average recovery for the private plaintiff who brings a qui tam FCA action is $1.1 million, with recoveries reaching as much as $78 million. John T. Boese, Fundamentals of The Civil False Claims Act and Qui Tam Enforcement, ABA Nat'l Institute on Civil False Claims and Qui Tam Enforcement A-3 (2001) [hereinafter Boese, Fundamentals]. The median recovery in a securities fraud class action, post-1995 when the Private Securities Litigation Reform Act was passed is $4.25 million. Mukesh Bajaj, Sumon C. Mazumdar & Atulya Sarin, Securities Class Action Settlements: An Empirical Analysis 10 (2000). However the average member of the class receives only 7% of his/her market losses. Securities Litigation Reform, Hearings Before the House Subcomm. on Telecomms. and Fin., Comm. on Energy and Commerce, 103rd Cong., 105 (1994) (testimony of John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia University School of Law) (noting there is controversy on this issue, citing one study by the National Economic Research Associates, Inc.).

72 Letter from the Office of Justice Programs, U.S. Department of Justice, to Author, Response to FOIA Request OJP FOIA No. 01-00388, (Oct. 30, 2001) (on file with author) (1990-98 Bureau of Justice Statistics Bull., Special Report, Civil Rights Complaints in U.S. District Court). The dollar value of recoveries in these "private justice actions" is listed as approximate since it is possible that in a small percentage of these cases the plaintiff was the federal government rather than a private plaintiff. In 7% of the civil rights complaints (though not judgments), the federal government was either the plaintiff or the defendant. No further specific information is available as to whether the federal government actually served as a plaintiff in cases actually resolved by judgment.

73 Id. (citing 1996-97 Bureau of Justice Statistics Bull., Federal Tort Trials and Verdicts).

74 See, e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 238-39 (1969); Allen v. State Bd. of Elections, 393 U.S. 544, 556-57 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 415-16 (1968); Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 321-22 (3d Cir. 1982).

75 See, e.g., Carlson v. Green, 446 U.S. 14, 21 (1980); Robertson v. Wegmann, 436 U.S. 584, 590-92 (1978); Carey v. Piphus, 435 U.S. 247, 256 (1978).

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76 See, e.g., Davis v. Passman, 442 U.S. 228, 242 (1979); Cannon v. Univ. of Chi., 441 U.S. 677, 706-08 n.41 (1979).

77 See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377-78, 381-83 (1982); Cort v. Ash, 422 U.S. 66, 78 (1975); Breitwieser v. KMS Indus., Inc., 467 F.2d 1391, 1394 (5th Cir. 1972).

78 Because the amount suffered by any one individual victim may be quite small, these private actions are often brought as class actions. Coffee, Private Attorney General, supra note 7, at 217-19.

79 Even though many securities class actions "free-ride" governmental investigative efforts by filing a class action after public agencies have initiated a prosecution, the private securities actions can still supplement public resources. Id. at 222-24. As John C. Coffee has noted, they can do so by "escalating the penalty structure above the modest fine schedules... authorized by law (and nullified by inflation)." Id. at 222-24. They can also "bat clean up for public agencies' efforts." Id. As Coffee has noted, "it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics." Id. at 224-50.

80 15 U.S.C. §§ 12-27, 15(a) (2000) provides:
[A]ny person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
The Clayton Act is aimed at the following restrictive or monopolistic acts: price discrimination (sales of a product at different prices to similarly situated buyers), tying and exclusive dealing contracts (sales on condition that the buyer stop dealing with the seller's competitors), corporate mergers with competing companies, and interlocking directorates (common board members among competing companies). Earl W. Kintner & Joseph P. Bauer, IV Federal Antitrust Law §§ 32.3-.9 (1984 & Supp. 2001).

81 The Computer Fraud and Abuse Act of 1986 ("CFAA"), 18 U.S.C. § 1030 (2000), creates a number of criminal offenses pertaining to improper accessing and use of computers, and computer fraud. Many of the offenses are felonies, some punishable by as much as twenty years imprisonment for repeat offenders. § 1030(g) provides a private cause of action: "Any person who suffers damage or loss by reason of a violation of the section... may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." Because it is a fairly new statute and has been in a near-constant state of revision since first enacted in 1984, the CFAA's private justice cause of action has been used relatively little. One recent case demonstrates its potential as a private cause of action. In Shaw v. Toshiba America Information Systems, Inc., 91 F. Supp. 2d 942, 960-61 (E.D. Tex. 2000), a class action was brought under the CFAA, and the parties settled the action for $2.1 billion with $147.5 million in attorneys' fees. Id. at 960-61. The case centered around the allegation that Toshiba and NEC "designed, manufactured, created, distributed, sold, transmitted, and marketed faulty floppy-diskette controllers ('FDC's') containing allegedly defective microcode."Id. at 945.

82 18 U.S.C. §§ 1961-68 (2000).

83 See infra text accompanying notes 113-14.

84 Organized Crime Control Act of 1970, Title IX, Pub. L. No. 91-452, 84 Stat. 941 (1970).

85 115 Cong. Rec. 9568 (1969), (remarks of Sen. McClellan).

86 See Rotella v. Wood, 528 U.S. 549, 557 (2000). See also Sedima v. Imrex, 473 U.S. 479, 489 (1985).

87 § 1963(a)(1) (2000). Persons convicted of a RICO offense face a maximum term of imprisonment of twenty years per count, § 1963(a), maximum possible fines of $250,000 per count (for individuals) or $500,000 per count (for organizations), §§ 1963, 3571, and forfeiture of any property acquired or maintained in violation of the RICO statute, § 1963(a).

88 § 1964. The Attorney General may institute civil proceedings for damages, § 1964(c), or injunctive relief, § 1964(b).

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89 Id. § 1964(c) provides: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore... and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

90 See, e.g., Liquid Air Corp. v. Rogers, 834 F.2d 1297, 1303 (7th Cir. 1987), overruled by Agency Holding Corp. v. Malley-Duff Assocs., Inc., 483 U.S. 143, 156 (1987) (on other grounds); Cullen v. Margiotta, 811 F.2d 698, 731 (2d Cir. 1987); Wilcox v. First Interstate Bank, 815 F.2d 522, 531-32 (9th Cir. 1987). Cf. Sedima v. Imrex, 473 U.S. 479, 491 (1985) (stating that "we are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under § 1964 (c)" but not ruling on what burden of proof applies in civil RICO cases).

91 § 1964(c).

92 Oversight on Civil RICO Suits: Hearings before the Senate Comm. on the Judiciary, 99th Cong., 2 (1985) [hereinafter Hearings on Civil RICO] (opening Statement of Chairman Strom Thurmond).

93 Pamela H. Bucy, White Collar Crime, Cases and Materials 118 (West 1998) [hereinafter Bucy, White Collar Crime]. Cf. Hearings on Civil RICO, supra note 92, at 381-403 (testimony of Professor G. Robert Blakey); Gerald E. Lynch, RICO: The Crime of Being a Criminal, Parts I and II, 87 Colum. L. Rev. 661, 662 (1987).

94 § 1961(1). RICO includes a lengthy list of approximately one dozen generic, serious state offenses such as murder and kidnapping, and approximately three dozen federal felony offenses including mail fraud, wire fraud, extortion and drug offenses.

95 Id. § 1961(5), provides that: "'Pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." H.J. Inc. v. Northwestern Bell Telephone Co., is the leading case on this point. In H.J. Inc., the Court held that proof of both "relatedness" between the racketeering acts and "continuity" (repeated conduct over a substantial period of time or the threat of continuing conduct) must be shown to prove a "pattern of racketeering activity." 492 U.S. 229, 240-42 (1989).

96 § 1961(4) provides that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." A RICO enterprise may engage in legitimate activity, and may be an informal organization, as long as it functions as a continuing unit. United States v. Turkette, 452 U.S. 576, 583 (1981). In the majority of circuits, a RICO enterprise must have an "ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity." See, e.g., Chang v. Chen, 80 F.3d 1293, 1298 (9th Cir. 1996); Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995). In § 1962(c) RICO cases, the enterprise must be distinct from the person charged. See, e.g., United States v. Goldin Indus., 219 F.3d 1268, 1271 (11th Cir. 2000); Haroco v. Am. Nat'l. Bank & Trust Co., 747 F.2d 384, 400-02 (7th Cir. 1984).

97 See, e.g., United States v. Gotti, 42 F. Supp. 2d 252, 259-66 (S.D.N.Y. 1999); United States v. Local 560, 550 F. Supp. 511, 512-16 (D.N.J. 1982), aff'd, 780 F.2d 267 (3d Cir. 1985); United States v. Gambino, 566 F.2d 414, 416-18 (2d Cir. 1977).

98 See, e.g., In re Managed Care Litig., 135 F. Supp. 2d 1253, 1256-57 (S.D. Fla. 2001); United States v. Philip Morris, Inc., 116 F. Supp. 2d 131, 134-38 (D.D.C. 2000); United States v. Milken, 759 F. Supp. 109, 110-18 (S.D.N.Y. 1990).

99 Palmetto State Med. Ctr., Inc. v. Operation Lifeline, 117 F. 3d 142, 144-45 (4th Cir. 1997); Nat'l Org. for Women, Inc., v. Scheidler, 510 U.S. 249, 252-53 (1994).

100 Concern Sojuzvneshtrans v. Buyanovski, 80 F. Supp. 2d 273, 275-77 (D.N.J. 1999).

101 Southway v. Cent. Bank of Nig., 198 F.3d 1210, 1212-13 (10th Cir. 1999).

102 Major League Baseball Prop., Inc. v. Price, 105 F. Supp. 2d 46, 48-49 (E.D.N.Y. 2000)

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103 Cohen v. Carreon, 94 F. Supp. 2d 1112, 1113-15 (D. Ore. 2000) (rights to "sex.com").

104 § 1962(a). See, e.g., United States v. Vogt, 910 F.2d 1184, 1196 (4th Cir. 1990); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982).

105 § 1962(b). See, e.g., Quick v. Peoples Bank of Cullmon County, 993 F.2d 793, 798 (11th Cir. 1993); United States v. Local 560, 780 F.2d 267, 270 (3d Cir. 1985).

106 § 1962(c). See, e.g., United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 570 (8th Cir. 1996); United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995).

107 § 1962(d). See, e.g., Salinas v. United States, 522 U.S. 52, 63-64 (1997); Beck v. Prupis, 529 U.S. 494, 495 (2000).

108 The Supreme Court's decision in Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992), paved new ground on RICO standing and causation. It holds that a civil RICO plaintiff must show "some direct relation between the injury asserted and the injurious conduct alleged" in order to demonstrate standing to bring a RICO action. Id. at 265-70. Deemed a test of "proximate causation," Holmes has led to the dismissal of many RICO cases. See supra note 92.

109 A survey of the federal appellate decisions in RICO cases during the calendar years 1999-2001 revealed that standing and causation issues arising under Holmes were the most litigated RICO issues in civil cases. Sufficiency of pleading or sufficiency of the evidence of an element either of RICO or of the underlying racketeering activity charged were the next most common issues litigated in these appellate civil RICO decisions. Appendices B-1 and B-2 summarize this data in greater detail. The raw data collected for the survey is on file with the author.

110 The survey herein included all reported and unreported decisions involving RICO actions rendered by the federal appellate courts (U.S. Supreme Court and twelve courts of appeals) from 1999 through 2001. Any survey of a sample of cases, however enlightening, is by definition incomplete. A review of appellate decisions, as a sample of RICO litigation, provides insight into the ultimate success of cases, the issues raised, and the reasoning employed, but it fails to capture information about cases disposed of without appeal.

111 Of the 185 RICO cases decided by the federal appellate courts in the three calendar year time period between 1999 and 2001, 145 (78%) were civil and 40 (22%) were criminal. In nineteen of the civil cases the issue on appeal was collateral to the RICO action (that is, stay of parallel proceedings, sanctions, etc). Of the 124 cases where the court resolved a RICO issue, 99 (79%) resulted in some type of favorable ruling for defendants. Of these 99 rulings, 85 (68%) resulted in favorable final disposition for defendants. See Appendices B-1 and B-2. The raw data collected for this survey is on file with the author.

112 Most of the plaintiff victories were too preliminary to declare a success. Of the 124 civil RICO cases surveyed where there was a resolution of a RICO issue, plaintiffs obtained a reversal of the district court's grant of a defendant's motion to dismiss in thirteen cases, won affirmance of the district court's refusal to grant a defendant's motion to dismiss in one case, and obtained reversal of the district court's grant of summary judgment for defendants in seven cases. In only three cases out of the 124 did the plaintiff obtain final success on RICO charges, in the form of affirmance of the district court's grant of summary judgment in favor of the plaintiff (one case) or verdict for the plaintiff (two cases). See Appendix B. The raw data collected for this survey is on file with the author.

113 Calculated from civil RICO cases decided by federal appellate courts 1999-2001. Raw data is on file with the author.

114 See infra text accompanying notes 351-56.

115 15 U.S.C. § 77(a) (1997 & Supp. 2001).

116 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976).

117 See 1 T.L. Hazen, The Law of Securities Regulation 7 (1990); Larry D. Soderquist, Securities Regulation 2 (3d ed. 1994); L. Robert Brown, The Regulation of Corporate Disclosure § 2.02 (3d ed. 2000).

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118 15 U.S.C. § 77(k). Section 11 of the Securities Act of 1933 expressly provides a remedy for persons who have been injured by material misstatements or omissions in a registration statement filed with the SEC, or in a prospectus distributed to potential purchasers. A registration statement provides comprehensive information about the corporation that is issuing shares to the public for purchase, including a description of the registrant's business, property, and financial condition; and data regarding price and dividends of the equity being offered. 17 C.F.R. § 229 (2001). The issuer's attorneys (both inside and outside counsel) and accountants, and the underwriter's attorneys and accountants prepare the registration statement. A prospectus is "any...notice, circular, advertisement, letter or communication written or [transmitted] by radio or television, which offers any security for sale or confirms the sale of any security." § 77b(a)(10).

119 Id. §§ 12(1), § 77*l*(1). Section 12(1) of the Securities Act of 1933 imposes civil liability for failure to file a registration statement. This Section imposes strict liability. All a plaintiff must prove is that a security was purchased, that the jurisdictional predicate exists (interstate commerce or the mails were used), that a registration statement was required, and that no registration statement was in effect. See Raiford v. Buslease, Inc ., 825 F.2d 351, 354 (11th Cir. 1987); Swenson v. Engelstad, 626 F.2d 421, 424-25 (5th Cir. 1980); Lycan v. Walters, 904 F. Supp. 884, 889 (S.D. Ind. 1995).

120 See § 77*l*(a)(2). Section 12(2) of the Securities Act of 1933, like § 11, applies to misstatements. Unlike the misstatements and omissions in registration statements or prospecti that §11 addresses, however, § 12(2) applies to any misrepresentations or omissions (made orally or in a prospectus) by a seller to an unaware purchaser in connection with an offer or sale of securities. Unlike §12(1), which imposes strict liability, § 12(2) requires proof of at least negligence, that is, that the seller "did not know and in the exercise of reasonable care could not have know, of such untruth or omission." Id.

121 15 U.S.C. § 77(o) (1997).

122 73 Cong. Rec. 2264 (Feb. 9, 1934) (letter to Congress from President Franklin D. Roosevelt); 48 Stat. 881 (1934).

123 15 U.S.C. § 78(i) (1997 & Supp. 2001). A high level of mens rea must be proven before a person is liable for a section 9 violation; the defendant must be shown to have acted "willfully." Id. §78(i)(e).

124 15 U.S.C. § 78(p)(b). For purposes of § 16(b), an insider is a director, officer, or any person who is directly or indirectly the beneficial owner of more than ten per centum of any class of any equity security. Id. at §§ 78(p)(a)-(b). The damages awarded in a § 16(b) action are limited to disgorgement of the short-swing profits realized. Although shareholders, as well as a company, may bring a § 16(b) action, the damages collected (less attorneys' fees for the plaintiff's counsel in some situations) must go to the company. Section 16(b) is a strict liability statute. It is irrelevant what the defendant knew or intended when conducting the short-swing transaction and it is specifically irrelevant whether inside information was used in either part of the transaction. 2 Hazen, supra note 117, at 27.

125 15 U.S.C. § 78(r). To prevail on a § 18 claim, a plaintiff must prove that (1) the statement in question was false and material, (2) the plaintiff relied upon the statement in a purchase or sale of stock, (3) the plaintiff did not know that the statement was false or misleading, and (4) the price at which the plaintiff bought or sold was affected by the statement. 2 Hazen, supra note 117, at 47. See, e.g., Magna Invest. Corp. v. John Doe, 931 F.2d 38, 39 (11th Cir. 1991); Ross v. A.H. Robbins, 607 F.2d 545, 551-53 (2d Cir. 1979); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 211-12 (1976). Any person who prepared the document in question may be liable under § 18. Section 18 is not a strict liability offense--any individual who can show that she acted in good faith and had no knowledge that such statement was false or misleading, will not be liable.

126 See 15 U.S.C. § 78(t)(a).

127 See 15 U.S.C. § 78(c)(c).

128 15 U.S.C. 77(q)(a). See, e.g., Mosher v. Kane, 784 F.2d 1385, 1390-91 (9th Cir. 1986); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978); 2 Hazen, supra note 117, at 53.

129 15 U.S.C. §§ 78(f), 78(i), 78(j), 78(n), 78(o).

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130 See, e.g., Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975); J.I. Case Co. v. Borak, 377 U.S. 426, 430-34 (1964).

131 15 U.S.C. 78(j)(b).

132 17 C.F.R. § 240.10b-5 (1995) (2001).

133 For a discussion of these strengths and weaknesses, see generally Alexander, supra note 9; Bohn & Choi, supra note 9; Coffee, Private Attorney General, supra note 7; Coffee, Future of PSLRA, supra note 9; Coughlin, supra note 9; Cox, supra note 9; Fallone, supra note 9; Grundfest, supra note 9; Katz, supra note 9; Macey & Miller, supra note 9; Seligman, supra note 9.
Congress heard extensive testimony regarding the effectiveness of the private securities action. The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent. These serious injuries to innocent parties are compounded by the reluctance of many judges to impose sanctions under FRCP 11, except in those cases involving truly outrageous misconduct. At the same time, the investing public and the entire U.S. economy have been injured by the unwillingness of the best qualified persons to serve on boards of directors and of issuers to discuss publicly their future prospects, because of fear of baseless and extortionate securities lawsuits.
In these and other examples of abusive and manipulative securities litigation, innocent parties are often forced to pay exorbitant 'settlements.' When an insurer must pay lawyers' fees, make settlement payments, and expend management and employee resources in defending a meritless suit, the issuers' own investors suffer. Investors are always the ultimate losers when extortionate 'settlements' are extracted from issuers.
H.R. Rep. No. 104-369, at 730-31, reprinted in 1995 U.S.C.C.A.N. 730, 736.

134 Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

135 Id. There are other reforms unique to the securities area, for example, the creation of a safe harbor for certain forward-looking statements. 15 U.S.C. § 78u-5(c).

136 The Conference Committee found:
The cost of discovery often forces innocent parties to settle frivolous securities class actions. According to the general counsel of an investment bank, 'discovery costs account for roughly 80% of total litigation costs in securities fraud cases.' In addition, the threat that the time of key employees will be spent responding to discovery requests, including providing deposition testimony, often forces coercive settlements. The House and Senate heard testimony that discovery in securities class actions often resembles a fishing expedition. As one witness noted, 'once the suit is filed, the plaintiff's law firm proceeds to search through all of the company's documents and take endless depositions for the slightest positive comment which they can claim induced the plaintiff to invest and any shred of evidence that the company knew a downturn was coming.'
H.R. Rep. No. 104-369, supra note 133, at 37.

137 15 U.S.C. § 78u-4(b)(3)(B).

138 When the PSLRA was passed, the Second Circuit required a heightened standard: plaintiffs must "allege facts that give rise to a strong inference of fraudulent intent." Shields v. Citytrust Bancorp, 25 F.3d 1124, 1128 (2d Cir. 1994); H.R. Rep. No. 104-369, supra note 133, at 740; Coffee, Future of PSLRA, supra note 9, at 520-21; Coughlin, supra note 9, at 35-53. The PSLRA made this standard mandatory.

139 In the PSLRA, Congress also made clear that FRCP 9(b)'s requirement that fraud should be plead "with particularity" should be interpreted strictly. The plaintiff must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the

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complaint shall state with particularity all facts on which that belief is formed." H.R. Rep. No. 104-369, supra note 133, at 740; 15 U.S.C. §§ 77z-1, 78u-4(b)(1). Further, when scienter is alleged, the plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. 15 U.S.C. §§77z-1, 78u-4(b)(2).

140 Id. §§ 77(k)(f), 78u-4(g).

141 The Conference Committee noted:
One of the most manifestly unfair aspects of the current system of securities litigation is its imposition of liability on one party for injury actually caused by another. Under current law, a single defendant who has been found to be 1% liable may be forced to pay 100% of the damages in the case. The Conference Committee remedies this injustice by providing a "fair share" system of proportionate liability. As former SEC Chairman Richard Breeden testified, under the current regime of joint and several liability, "parties who are central to perpetrating a fraud often pay little if anything." At the same time, those whose involvement might be only peripheral and lacked any deliberate and knowing participation in the fraud often pay the most in damages.
H.R. Rep. No. 104-369, supra note 133, at 736.

142 15 U.S.C. §§ 77z-1(c)(3), 78u-4(c)(3). The PSLRA did two other things that could facilitate more awards to defendants in instances of abusive litigation. The Conference Committee noted:
The Conference Committee recognizes the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims. The Conference Committee seeks to solve this problems by strengthening the application of Rule 11 of the Federal Rules of Civil Procedure in private securities actions...The house hearings on securities litigation reform revealed the need to explicit authority for courts to require undertakings for attorney's fees and costs from parties, or their counsel, or both, in order to ensure the viability of potential sanctions as a deterrent to meritless litigation. Congress long ago authorized similar in private securities actions will be an important means of ensuring that the provision of the Conference Report authorizing the award of attorneys' fees and costs under the Rule 11 will not become, in practice, a one-way mechanism only usable to sanction parties with deep pockets.
H.R. Rep. No. 104-369, supra note 133, at 738-39. The Reform Act also required that courts make a finding in all securities fraud litigation as to whether Rule 11 has been violated. 15 U.S.C. §77q.

143 Fed. R. Civ. P. 11(c)(2).

144 The Advisory Committee Notes to FRCP 11 list factors a court should consider in determining whether to impose sanctions and what sanctions to impose. Charles Alan Wright & Arthur R. Miller, 5A Federal Practice and Procedure § 1336 (2d ed. 1990 & Supp. 2001). A number of these factors would encourage nonmonetary sanctions or sanctions in an amount other than attorneys fees.

145 Other sanctions issued include cautions or reprimands, circulation of a court's FRCP 11 opinion, required representation of pro se plaintiffs, etc. Id.

146 Id.

147 See 15 U.S.C. §§ 77z-1, 78u-4. The presumption that full reimbursement of the injured party's attorneys fees is the appropriate sanction is rebuttable, with proof "that (i) the violation was de minimus; or (ii) the imposition of fees and costs would impose an undue burden and be unjust, and it would not impose a greater burden for the prevailing party to have to pay those same fees and costs." H.R. Rep. No. 104-369, supra note 133, at 738-39.

148 Congress' goal in passing these class action reforms was to encourage institutional investors to seek and be selected by courts as class representatives. Congress sought to discourage professional plaintiffs who own a nominal number of shares in a wide array of public companies. H.R. Rep. No. 104-369, supra note 133, at 731.

149 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I)(bb), 78u-4(a)(3)(B).

150 Id. §§ 77z-1(a)(3)(B)(v); 21D, 78u-4(a)(3)(B)(iii)(v).

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151 Id. §§ 77z-1(a)(2)(A)(i),(ii),(iii), 78u-4(a)(2).

152 Id.§§ 77z-1(a)(3)(B)(vi), 78u-4(a)(3)(B)(6).

153 Id. §§ 77z-1(a)(4), 78u-4(a)(4).

154 Without addressing the merits of the PSLRA's reforms regarding class action plaintiffs and plaintiffs' counsel, it appears that these reforms have discouraged some plaintiff attorneys who heretofore have represented "professional plaintiffs." H.R. Rep. No. 104-369, supra note 133, at 731-34. A study of securities fraud litigation after the PSLRA showed that experienced securities plaintiffs' firms increased their share of securities litigation. For example, prior to the PSLRA, the appearance ratio of Milberg Weiss Bershad Hynes & Lerach, "[t]he dominant plaintiffs' class action law firm," was approximately 31%. By 1998 Milberg Weiss's appearance ratio stood at approximately 59% nationwide and 82% in California. Coughlin, supra note 9, at 19-20. Presumably this is due in part to Milberg Weiss's ability to "finance the delays associated with the slower procedures under the Reform Act." Id. at 20.

155 H.R. Rep. No. 104-369, supra note 133, at 730.

156 See id. Mukesh Bajaj, Sumon C. Mazumadar & Atulya Sarin, Securities Class Action Settlements, An Empirical Analysis 14 tbl.1 (2000). There was a slight decrease of such actions in 1996, the year after passage of the PSLRA, but the number rebounded thereafter, reaching an all-time high in 1998. See also Michael A. Perino, A Census of Securities Class Action Litigation Reform Act of 1995, 1015 PLI/Corp. 1043, 1046 (1997) (reaching the same conclusion that litigation rates have remained stable before and after the PSLRA, but using the number of issuers sued rather than complaints filed).

157 See supra note 111 and accompanying text, and infra Appendix B-2 .

158 Bajaj et. al., supra note 156, at 5. This study was comparing the dismissal rates pre- and post-passage of the PSLRA. The study found that the PSLRA appeared to have enhanced the quality of securities class actions if one measures quality by the percentage of dismissed cases. Looking at the period prior to the effective date of the PSLRA, the study found that 10.89% of securities fraud class actions filed were dismissed (within four years of filing) and 11.24% of cases were dismissed (within five years). Because the Bajaj-Mazumbar-Sarin study was done in 2000, it was too soon after passage of the PSLRA for the study to assess five-year dismissal rates, and thus the Study only looked at four-year dismissal rates. Id. at n.4. The study noted that it is possible that the four-year post-PSLRA reduced dismissal rate is due to other factors such as the delay occasioned by the PSLRA in securities private actions. Kevin P. Roddy & Hagen Berman, "What's New From the Front?" This Litigation Experience of Four and One-Half Years Under the Private Securities Litigation Reform Act of 1995, SF05 ALI-ABA 37, 43 (2000) (discussing how the PSLRA has caused "procedural skirmishing" in securities class actions "adding time and expense" to such cases). See also id. at 52. Nevertheless for purposes of comparison to RICO dismissal rates, either the pre- or post-PSLRA dismissal rates are impressive.

159 Data for securities class actions between 1987 and 1990 are from Class Action Reports, A Review of Class Actions Decisions (Table 4, Securities). Data for securities class actions between 1991 and 2000, are from Stanford law School, Securities Class Action Clearinghouse (Jan. 30, 2002).

160 Letter from the U.S. Department of Justice, Environment and Natural Resources Division, to Author, Response to FOIA Request FOIA-2001-00144 (Oct. 30, 2001) (on file with author).

161 Letter from U.S. Department of Justice, to Author, Response to FOIA Request 145-FOI-6072 (Oct. 30, 2001) (on file with author).

162 Bajaj et. al., supra note 156, at 10.

163 See, e.g., Perino, supra note 156, at 1046, 1048-50. Pamela J. Roberts & Patrick L. Ridinger, The Private Securities Litigation Reform Act of 1995: Reform or Fiction, 9 S.C. Law 41 (1998). This trend of switching from federal to state court may be stymied by passage, in 1998, of the Securities Litigation Uniform Standards Act, Pub. L. 105-353, 112 Stat. 3227 (1998), (codified at 15 U.S.C. § 33), 15 U.S.C. § 77 (1933) amended by 15 U.S.C. § 77p and § 77v (2001), which attempted to vest

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exclusive jurisdiction in federal courts over class actions involving federal securities claims. See, e.g., Lasley v. New Eng. Variable Life Ins. Co., 126 F. Supp. 2d 1236, 1237-38 (N.D. Cal. 1999).

164 Roddy & Berman, supra note 158, at 43, 52.

165 Id. at 44.

166 The first citizen suit provision was enacted in 1970 as part of the Clean Air Act, 42 U.S.C. §7604 (1995 & Supp. 2001). S. Rep. No. 1196, 91st Cong., 36-37 (1970). See generally Miller, Part I, supra note 9, at 10310, n.8 (summarizing the statutory evolution of the citizen suit provisions in the Clean Air Act).

167 See, e.g., Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-19(a) (1998); Endangered Species Act, 16 U.S.C. §§ 1531-40(g) (2000); Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-70 (1986 & Supp. 2001); Water Pollution Prevention and Control Act, known as the Clean Water Act ("CWA") of 1972, 31 U.S.C. §§ 1251-1365 (2001); Navigable Waters Act, 33 U.S.C. §§ 1-1910 (2001); Marine Protection, Research, and Sanctuaries Act ("MPRSA") of 1972, 33 U.S.C. § 1401-15(g) (2001); Deepwater Ports Act of 1974, 33 U.S.C. §§ 1501-15(a) (2001); Act to Prevent Pollution of Ships, 33 U.S.C. §§ 1901-10 (2001); Safe Drinking Water Amendments of 1997, 42 U.S.C. §§ 300f to 300j-8(a) (1991 & Supp. 2001); Noise Control Act ("NCA") of 1972, 42 U.S.C. §§ 4901-11 (1995 & Supp. 2001); Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901, 6972 (1994); Air Pollution Prevention and Control Act, known as the Clean Air Amendments ("CAA") of 1970, 42 U.S.C. §§7401-04 (1995 & Supp. 2001); Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") of 1980, 42 U.S.C. §§ 9601-59 (1995 & Supp. 2001); Emergency Planning and Community Right to Know Act ("EPCRA") of 1986, 42 U.S.C. §§ 11001-046 (1995 & Supp. 2001); Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1311-49(a) (1991 & Supp. 2001).
A few major federal environmental statutes do not contain citizen suit provisions. See, e.g., Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 (1999); Occupational Safety and Health Act ("OSHA") of 1970, 29 U.S.C. § 651 (1999 & Supp. 2001); National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1994 & Supp. 2001); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1986 & Supp. 2001). See, e.g., Magnuson-Moss Act of 1975, 15 U.S.C. § 57(a)(e)(1)(A) (1997); Consumer Product Safety Act of 1972, 15 U.S.C. § 2060(a) (1998).

168 42 U.S.C. § 6972 (1994).

169 Jerry L. Mashaw, Greed, Chaos and Governance 46, 87, 118, 200, 207 (1997).

170 Senator Muskie, the major proponent of the Clean Air Act citizen suit provisions, argued, for example, that citizen suits would motivate agencies to do their jobs and would supplement governmental resources: "I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations of the requirements [of the Clean Air Act]." Nat'l Res. Def. Council, Inc. v. Train, 510 F.2d 692, 723, 727 (1975). Senator Hart agreed: "The basic argument for the provision is plain: namely, the Government simply is not equipped to take court action against the numerous violations of legislation of this type [environmental laws] which are likely to occur." Id. at 728.

171 For one of the early discussions of how a citizen suit model could implement concerns identified in public choice theory, see generally Joseph Sax, Defending the Environment: A Strategy for Citizen Action (1971). See also Boyer & Meidinger, supra note 9, at 836, 843; Lehner, supra note 9, at 4; Miller, Part I, supra note 9, at 10310; Richard B. Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).

172 See Hodas, supra note 7.

173 United States Census Bureau, Statistical Abstract of the United States: 2000, Geography and Environment 227 No. 380 (2000).

174 Toxic Release Inventory, 1999 Executive Summary, Tbl. E-1 (1999).

175 Environmental Working Group, Dishonorable Discharge, Toxic Pollution of America's Waters, 1, 5 (1996); Natural Resources Defense Council, Testing the Waters vi(11th ed. 2001).

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176 National Resources Defense Council, supra note 175 at vi.

177 See Hodas, supra note 7, at 1649. Cf. id. at 1574, 1589.

178 Water Pollution Prevention and Control Act of 1991: Hearings on S. 1081 Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 102d Cong., 687 (1991) [hereinafter S. 1081 Hearings].

179 Hodas, supra note 7, at 1609. According to the EPA, Inspector General penalties issued to violators by both the States and the EPA are so minimal that they "encourage rather than deter non-compliance." S. 1081 Hearings, supra note 178, at 687 (statement of John Martin).

180 See, e.g., Clean Air Amendments, 42 U.S.C. §§ 7604(a), 7602(e) (1995); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9659(a) (1995); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (1995). "Person" is defined in most environmental statutes to include:
individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.
Endangered Species Act, 16 U.S.C. § 1532(13) (2000). See also Clean Air Amendments, Safe Drinking Water Act Amendments, 42 U.S.C. § 300f(12) (1991 & Supp. 2001); Solid Waste Disposal Act, 42 U.S.C. § 6903(15) (1995); 42 U.S.C. §7602(e) (1995); Noise Control Act, 42 U.S.C. § 4902(2) (1995).
There are some statutory variations in the requirements for plaintiffs. For example, the Clean Water Act specifies that "any citizen" is entitled to bring the suit, 33 U.S.C. § 1365(a) (1995), and defines "citizen" as "a person or persons having an interest which is or may be adversely affected." Id. §1365(g). Similarly, the Navigation and Navigable Waters Act requires that the plaintiff must be someone who has an "interest which is, or can be, adversely affected" by the statutory violation, 33 U.S.C. § 1910 (2001). These statutory definitions are reflections of the Supreme Court's ruling in Sierra Club v. Morton, 405 U.S. 727 (1972), which held that an organization has no standing under the citizen suit provisions of environmental statutes unless it represents members who have been injured.Id. at 739. Qualifying injuries include aesthetic, conservational and recreational injuries. Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 209 (4th Cir. 1985).
There has been considerable attention in recent years to the standing requirement for citizen suit plaintiffs. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envt'l Serv., Inc., 528 U.S. 167, 181 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (specifying that relevant injury is to a plaintiff who can show that its members:
(1) [have] suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision
and that relevant injury is not to the environment); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888-89 (1990) (Lujan I) (noting that the adverse effect to "recreational use and aesthetic enjoyment by some members of plaintiff group is within the zone of interest of the relevant citizen suit provisions so as to confer standing but the allegations of adverse effect must be specifically alleged"); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987) (holding that standing does not exist for wholly past violations but does exist when plaintiffs make a good faith allegation of continuous or intermittent violations). In Laidlaw, the Court held that although citizen suit plaintiffs may not sue for wholly past violations, they do have standing to sue for violations "that are ongoing at the time of the complaint and that could continue into the future if undeterred." 528 U.S . at 188.

181 Eligible defendants encompass individuals and fictional entities, including federal and state governmental agencies. Most citizen suit provisions provide that eligible defendants include "any person alleged to be in violation of the provisions of this chapter, or regulations issued hereunder." See, e.g., Act to Prevent Pollution of Ships, 33 U.S.C. § 1910(a)(9) (2001).

182 33 U.S.C. § 1365(a)(g) (1995).

183 The Environmental Law Institute ("ELI"), at the request of the EPA, examined citizen suits brought for alleged violations of environmental laws. The ELI reviewed citizen suits filed and resolved from 1978 through April 30, 1984. E.L.I., Citizen Suits,

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supra note 9, at I-1, I-2. Although dated, ELI's study is the most comprehensive review of citizen suits available. It found that most citizen suits (162 out of 214 CAA citizen suits) had been brought by "a coalition of national regional environmental groups." Id. at vi. See also Roberta J. Borchardt, Lujan v. Defenders of Wildlife: Unwarranted Judicial Interference With Congressional Power and Environmental Protection, 1993 Wis. L. Rev. 1337, 1362-64; Greve, supra note 7, at 341-42, 351 ("The vast majority of private enforcement actions are brought by environmental advocacy groups."). See also Jenny R. Rubin, Rule 68: A Red Herring in Environmental Citizen Suits, 12 Geo. J. Legal Ethics 849, 855-56 (1999).

184 In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court held that those challenging the Endangered Species Act ("ESA") as overly protective had standing to sue under citizen suit provisions just as plaintiffs who sued under such provisions seeking greater environmental protection did. At issue in Spear were regulations limiting water levels in northern Californian lakes and rivers so as to protect two varieties of endangered fish.520 U.S. at 157-58. Plaintiffs, ranchers, and irrigation districts, sued under the citizen suit provisions of the ESA, challenging the restricted water levels as inappropriate. The lower courts dismissed the plaintiffs' suit on the ground that plaintiffs were not within the "zone of interests sought to be protected by the ESA." Id. at 161. Reversing, the Supreme Court held that citizen suit provisions that apply to "any person" are not just for "environmentalists" who assert "underenforcement" of environmental laws but also for those who allege "overenforcement." Id. at 166.

185 See infra note 183.

186 For example:
"An attorney who has brought a number of Clean Water Act citizen suits estimated his litigation costs in terms of staff time. He said that he has used 4-5 full-time lawyers to handle 25 suits, and he 'could probably use 6 or 7.' He noted that he and his associates have expended approximately 3 1/2 lawyer-years on these cases over the last year and a half, with expenses 'in the $25,000 range' and nothing to show for it yet....
[Another] attorney who worked on Clean Air Act [citizen] suits for a national environmental organization noted that it took 4-5 months of work simply to investigate potential violations."
E.L.I., Citizen Suits, supra note 9, at V-25 to V-26.

187 The language of the Navigation and Navigable Waters Act is typical. Suits are authorized "against any person alleged to be in violation of the provisions of this chapter, or regulations issued hereunder [and] against the Secretary [of War] where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary." 33 U.S.C. §1910(a) (2001).

188 See Miccogokee Tribe of Indians v. EPA, 105 F.3d 599, 601 (11th Cir. 1997); Scott v. City of Hammond, 741 F.2d 992, 994-98 (7th Cir. 1984).

189 Miccogokee, 105 F.3d at 601.

190 Scott, 741 F.2d at 994.

191 Am. Lung Ass'n. v. Reilly, 962 F.2d 258, 259 (2d Cir. 1992).

192 Idaho Conservation League v. Browner, 968 F. Supp. 546, 547-49 (W.D. Wash. 1997).

193 See Boyer & Meidinger, supra note 9, at 836-39; Miller, Part I, supra note 9, at 10310; Miller, Part III, supra note 9, at 10425.

194 Such actions may be unique to the environmental area because of the "absolutist" nature of environmental laws which are not fully enforceable even in theory. For example, the Clean Water Act calls for zero discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a) (2001).

195 See, e.g., Id. § 1365(b); Clean Air Act, 42 U.S.C. § 7604(b) (1995). Such notice is not required if the citizen suit is brought against the EPA for failure to perform a non-discretionary duty. A Legislative History of the Water Pollution Control Act Amendments of 1972, 93rd Cong., 1498 (1973).

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196 See Hallstrom v. Tillamook Co., 493 U.S. 20, 29 (1989). See also Boyer & Meidinger, supra note 9, at 849; Robert D. Snook, Citizen Suits After Hallstrom: Can A Plaintiff Avoid Dismissal After Failing to Give Sixty Days Notice?, 13 W. New Eng. L. Rev. 1, 6-8 (1991).

197 See, e.g., Blomquist, supra note 9, at 395-96; Miller, Part II, supra note 9, at 10065-66; Charles S. Steincamp, Citizenship: A Discussion of Environmental Citizen Suits, 39 Washburn L.J. 72, 75 (1999). Numerous issues arise regarding what constitutes adequate notice. See, e.g., Monongahela Power Co. v. Reilly, 980 F.2d 272, 275 (4th Cir. 1992); Wash. Trout v. McCain Foods, Inc., 45 F.3d 1351, 1352-53 (9th Cir. 1995); Cmty. of Cambridge Envt'l Health and Cmty. Dev. Group v. City of Cambridge, 115 F. Supp. 2d 550, 558-59 (D. Md. 2000).

198 According to some citizen suit observers, notice to offenders and enforcers provides the opportunity for collusive tactics that defeat citizen suit jurisdiction. Concerned about attracting businesses by presenting an industry-friendly environment, states have entered compliance orders against the putative defendants named in the sixty-day notice by citizens. The compliance orders allow the company to delay compliance and avoid penalties but suffice under the "diligent prosecution" provision, given EPA's minimal requirements and inability to monitor compliance, in preempting citizen suits. Hodas, supra note 7, at 1622.

199 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. §7604(b)(1)(B) (1995); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659(d)(2) (1995).

200 See Boyer & Meidinger, supra note 9, at 849, 897. See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay, 484 U.S. 49, 60 (1987) (holding that citizen suits are meant to supplement not supplant government action); Derek Dickinson, Is "Diligent Prosecution of an Action in a Court" Required to Preempt Citizen Suits Under the Major Federal Environmental Statutes?, 38 Wm. & Mary L. Rev. 1545, 1553, 1571-82 (1997) (finding that the diligent prosecution provision is to ensure that the agency is acting to protect the public, to prevent duplicate enforcement, and to prevent inconsistent enforcement); Lynn Wright & Steven D. Schell, Clean Water Act Citizen Suits: Litigation Strategies & Defenses, SE 98 ALI-ABA 1087, 1093 (2000) (reasoning that the purpose of diligent prosecution provisions is to prevent duplicate litigation and preserve the government's role as primary enforcer).

201 See Boyer & Meidinger, supra note 9, at 849-50; Miller, Part II, supra note 9, at 10068. Issues litigated include what constitutes "diligent prosecution," see, e.g., Ark. Wildlife Fed. v. ICI Amer., Inc., 29 F.3d 376, 379-81 (1994), whether the "diligent prosecution" had commenced at the time the citizen suit was filed, id., and whether the plaintiff in a citizen suit has met his or her burden of proving lack of diligent prosecution, Williams Pipeline Co. v. Bayer Corp., 964 F. Supp. 1300, 1324 (1997); Friends of the Earth, Inc. v. Laidlaw Envt'l Serv., Inc., 890 F. Supp. 470, 486-87 (D.S.C. 1995).

202 Boyer & Meidinger, supra note 9, at 898-99.

203 Because this provision applies only when the government agency initiates criminal or civil actions in court, it can limit the EPA's, or the relevant agency's, flexibility to deal with polluters by forcing these agencies to initiate court proceedings when they would otherwise pursue informal negotiations or agency proceedings. See Boyer & Meidinger, supra note 9, at 901-02.

204 Safe Drinking Water Act, 42 U.S.C. § 300j-8(c) (1991 & Supp. 2001); Noise Control Act, 42 U.S.C. § 4911(c) (1995); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(4) (1991). For examples of statutes that do not give this right of intervention, see Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427 (1986).

205 See, e.g., CWA, 33 U.S.C. § 1365(b)(1)(B) (2001); SDWA, 42 U.S.C. § 300j-8(b)(1)(B) (1991 & Supp. 2001); CAA, 42 U.S.C. § 7604(b)(1)(B) (1995). For examples of statutes that do not grant the right of intervention, see ESA, 16 U.S.C. § 1540(g) (2000); Ocean Dumping Act, 33 U.S.C. § 1415(g) (2001). Two statutes, the Deepwater Ports Act, 33 U.S.C. § 1516 (2001), and the RCRA, 42 U.S.C. § 7002 (1995), appear to permit intervention of right for citizens in criminal actions filed by the federal government. In addition, EPA regulations require states to permit intervention of right in enforcement proceedings to obtain approval of permits sought under the CWA, RCRA, and SDWA. The "persons" permitted the right of intervention include individuals, fictional entities, and governmental entities.

206 Axline, supra note 7, § 5.02.

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207 FRCP 24 provides for intervention:
when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
Fed. R. Civ. P. 24(a)(2).

208 For example, CERCLA provides that courts:
shall have jurisdiction in [citizen suit] actions... to enforce the standard, regulation, condition, requirement, or order concerned..., to order such action as may be necessary to correct the violation,.... The... court shall have jurisdiction... to order the President or other officer to perform the act or duty concerned.
42 U.S.C. § 9659(c) (1995). Injunctive relief ordered in environmental citizen suits includes mandates to capture and test water runoff, NRDC v. Southwest Marine, Inc., 242 F.3d 1163, 1168-69 (9th Cir. 2001); prevention of the shipping of nuclear rods from Taiwan through a port in Virginia, Sierra Club v. Watkins, 808 F. Supp. 852, 875 (D.D.C. 1991); and termination of future discharge of pollutants in New Jersey Bay, Pub. Interest Research Group v. Star Enter., 771 F. Supp. 655, 669-70 (D.N.J. 1991).

209 CWA, 33 U.S.C. § 1365(d) (2001); CAA, 42 U.S.C. § 7604(d) (1995); CERCLA, 42 U.S.C. § 9659(f) (1995).

210 To obtain an award of attorneys fees, an intervener in a citizen suit must make a "unique contribution" to the litigation. See, e.g., Ala. Power Co. v. Gorsuch, 672 F.2d 1, 4 (D.C. Cir. 1982); Commissioner's Court of Medina Co., 683 F.2d 435, 443 (D.C. Cir. 1982) (interpreting similar provision under the Voting Rights Act); Nat'l Res. Def. Council v. Costle, 8 Envtl. L. Rep. 20881, 20884 (D.D.C. 1978). See generally Miller, Part III, supra note 9, at 10413.

211 Defendants receive attorneys fees if the action brought was obviously frivolous or meant to harass. See Consol. Edison Co. v. Realty Invs. Assocs., 524 F. Supp. 150, 152-53 (S.D.N.Y. 1981); Costle, 8 Envtl. L. Rep., at 20882.

212 The citizen suit provisions do not define "reasonable," but case law developed under the Civil Rights Act, 42 U.S.C. § 1983 (1994 & Supp. 2001), provides guidance that courts use in making awards in citizen suits. League of United Latin Am. Citizens #4553 v. Roscoe Indep. Sch. Dist., 119 F.3d 1228, 1234 (5th Cir. 1997); Watkins v. Fordice, 7 F.3d 453, 457 (5th Cir. 1993). See also Hensley v. Eckerhart, 461 U.S. 424, 433-34 (8th Cir. 1983) (reasoning that the most beneficial method in which to calculate the amount of a reasonable fee is by calculating the number of hours and multiplying that by a reasonable rate.); Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717-20 (5th Cir. 1974).

213 To obtain recovery of fees and costs, a party need not prevail on every claim or issue but need only "substantially prevail." Awards are limited to prevailing or substantially prevailing parties. See 33 U.S.C. § 1365(d) (2001); EPCRA, 42 U.S.C. § 11046(f) (1995); RCRA, 42 U.S.C. § 6972(e) (1995); 42 U.S.C. §9659(f); Ruckelshaus v. Sierra Club, 463 U.S. 680, 684-86 (1983). A favorable consent decree, see, e.g., Citizens Coordinating Comm. on Friendship Heights v. Wa. Metro. Area Transit Auth., 568 F. Supp. 825, 827 (D.D.C. 1983), even obtaining relief that is rendered moot soon thereafter, cf. Nat'l Black Police Ass'n v. D.C. Bd. of Elections, 168 F.3d 525, 528 (D.C. Cir. 1999), may qualify for attorney fee awards. Fees may be awarded against plaintiffs, defendants and interveners. Fees may not be awarded against federal or state governments unless these entities have waived sovereign immunity, which is rarely done.

214 See, e.g., 33 U.S.C. § 1365(a) (2001); 42 U.S.C. § 6972(a) (1995).

215 See generally Karl S. Coplan, Private Enforcement, ALI-ABA, 1037 (June 24, 1996); Marcia R. Gelpe & Janis L. Barnes, Penalties in Settlements of Citizens Suits Under the Clean Water Act, 16 Wm. Mitchell L. Rev. 1025, 1029-32 (1990); Greve, Private Enforcement, supra note 7, at 356; Eileen Gauna, Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice, 22 Ecology L.Q. 1, 47-49 (1995); Joel S. Hirschhorn, Pollution Prevention Comes of Age, 29 Ga. L. Rev. 325, 331 (1995); Leslie J. Kaschak, Supplemental Environmental Projects: Evolution of a Policy, 2 Envtl. L. 465, 471 (1996); David S. Mann, Comment, Polluter-Financed Environmentally Beneficial Expenditures: Effective Use of Improper Abuse of Citizen Suits Under the Clean Water Act?, 21 Envtl. L.J. 175, 175 (1991); Jeffrey G. Miller, Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions, SE 98 ALI-ABA 303, 321 (2000); Ann Powers,

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Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions, CA 37 ALI-ABA 815 (1996); Timothy A. Wilkins & Terrell E. Hunt, Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community As Model for the Congress-Agency Relations, 63 Geo. Wash. L. Rev. 479, 535-36 (1995). Cf. William H. Lewis, Environmentalists' Authority to Sue Industry for Civil Penalties Is Unconstitutional Under Separation of Powers Doctrine, 16 Envtl. L. Rep. 10101, 10101-02 (1986) (discussing constitutionality of private justice actions with some references to payments by defendants to private organizations).

216 See Greve, supra note 7, at 358; Mann, supra note 215, at 178. See, e.g., Sierra Club v. Elec. Controls Design, 909 F.2d 1350, 1354 (9th Cir. 1990) (distinguishing payments to third party environmental groups as pursuant to consent decree from penalties); Pa. Envtl. Def. Found. v. Bellefonte Borough, 718 F. Supp. 431, 436-37 (M.D. Pa. 1989) (stating that pursuant to consent decree, defendant in citizen suit case will contribute $35,000 to a private organization, Trout Unlimited, which will use funds "on projects on Spring Creek that meet the goals of the Federal Clean Water Act."); Nat'l Res. Def. Council, Inc. v. Interstate Paper Corp. (S.D. Ga. 1988), 19 Envtl. L. Rep. 20901 (1989) (approving a consent decree, over the DOJ's objections, which includes payments to the Georgia Conservancy for education of school children). For a strong attack on permitting contributions to private organizations as part of settlements in citizen suits, see Greve, supra note 7, at 341-42, 344, 368 (arguing that allowing such contributions has created a "partisan... environmentalist enforcement cartel").

217 At least the aggregate amount per year appears to be large ($4 million, $1.1 million, $1.5 million). See Appendices C-7 and C-8. The U.S. Department of Justice, Environmental and Natural Resources Division maintains statistics on citizen suits in a way that combines monies paid to state entities and monies paid to credit funds into one category, thus making it impossible, from these statistics, to determine the exact amount of credit funds generated from citizen suits in any one year or any one payment. See Letter from the U.S. Dept. of Justice, Envir. & Nat'l Res. Div., to Author, Response to FOIA Request FOIA-2001-00144 (Oct. 30, 2001); Telephone Conversation with Amy Haskell, Paralegal Specialist (Dec. 6, 2001). Recognizing this limitation, DOJ statistics are still revealing. From 1983 to 1989, there were no payments resulting from citizen suits to anyone except the federal treasury. Id. Payments to other sources (state entities and credit funds) began in 1990 with relatively small amounts and generally remained small (that is, $32,500 in 1990; $0 in 1991 and 1992; $20,000 in 1993). Id. The amounts payable to non-Federal-Treasury sources were exceptional (that is, $4 million in 1994; $1.6 million in 1996). Id.

218 See Appendices C-7 and C-8. Note the caveat about the DOJ statistics, supra note 217.

219 See Daniel Riesel, Environmental Enforcement: Civil and Criminal § 15.01 (LJSP 2000); Jeannette L. Austin, Comment, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Nw. U. L. Rev. 220, 221 (1987); Boyer & Meidinger, supra note 9, at 957-64; E.L.I., Citizen Suits, supra note 9, at V-2; Kerry D. Florio, Comment, Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?, B.C. Envtl. Aff. L. Rev. 707, 709 (2000); Gitlen, supra note 9, at 17; Miller, Part III, supra note 9, at 10424.

220 Lewis, supra note 215, at 10, 101. See Mann, supra note 215, at 176; Gelpe & Barnes, supranote 215, at 1028-29. For example, in Environmental Defense Fund v. Lamphier, two nonprofit organizations brought a citizen suit alleging violations of RCRA by the Lamphiers who owned a farm in Virginia. 12 E.L.R. 20843 (E.D. Va. 1982), aff'd 714 F.2d 331 (4th Cir. 1983). The Lamphiers were notorious because of the water, air and odor pollution they created by burying hazardous wastes on their farm. The State of Virginia intervened, adding claims for damage under Superfund and various pendant state claims. The Lamphiers were found to be in violation after a two-day trial, and the judgment against them was affirmed on appeal. As the ELI noted, in this case, the "plaintiffs obtained their objective" of getting the state to become an active enforcer that ultimately policed the Lamphier site. E.L.I., Citizen Suits, supra note 9, at IV-38.

221 See Environmental Protection Agency, Enforcement in the 1990's Project: Recommendation of the Analytical Workgroups, Rep. No. 22E-2000, 5-48 (Mar. 30, 1990) [hereinafter EPA, Enforcement in the 1990's].

222 See id. at Appendix C, 5-48.

223 See E.L.I., Citizen Suits, supra note 9, at I-5.

224 Id. at V-8.

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225 Miller, Part III, supra note 9, at 822.

226 EPA, Enforcement in the 1990's, supra note 221, at 5-48 (attachment C). Developments after the enactment of the CAA confirmed that citizen suits can be an important supplement to government efforts when, for whatever reason, enforcement actions overall fall. When EPA enforcement efforts fell off in the early 1980s, for example, there was a dramatic increase in citizen suits. E.L.I., Citizen Suits, supra note 9, at III-35, viii. Data surveyed by the Environmental Law Institute showed that when case referrals from EPA Regions to Headquarters fell from 320 referrals in fiscal year 1978 to a low of 93 referrals in fiscal year 1980, id. at iii-23, and administrative orders issued by the EPA fell from 2,139 in fiscal year 1979 to 496 in fiscal year 1983, id. at III-32, citizen suits increased from seven filings in fiscal year 1978 to 132 in fiscal year 1983, id. Even acknowledging the inadequacy of counting cases to account for quality issues, this data indicate that citizen suits filled a gap in enforcement resources.

227 EPA, Enforcement in the 1990's, supra note 221, at 5-48 (appendix C).

228 S093587, 2001 Cal. LEXIS 1229 (2001). See E.L.I., Citizen Suits, supra note 9, at IV-11 to 17.

229 The National Pollutant Discharge Elimination System ("NPDES") was established under the Clean Water Act, 33 U.S.C. § 1342. An NPDES permit authorizes the discharge of pollutants in accordance with conditions specified in the permit.

230 E.L.I., supra note 9, at IV-16.

231 Id. at 1-6, V-2. See also Hodas, supra note 7, at 1655-56.

232 As the ELI noted in its comprehensive review of citizen suits, "The major impediment to wider use of citizen suits under the Clean Air Act and other environmental statutes is the lack of reliable and publicly available data indicating whether a firm is in compliance." E.L.I., Citizen Suits, supra note 9, at viii, IV-7.

233 Hodas, supra note 7, at 1585. Audits by the EPA Inspector General have determined that the EPA does not meet its own data quality pollution programs. Id. at 1605, 1617.

234 42 U.S.C. § 6901 (1995).

235 Hodas, supra note 7, at 1605, 1617.

236 United States Census Bureau, Statistical Abstract of the United States, Geography and Environment, 227 No. 380 (2000).

237 National Resources Defense Council, Testing the Waters vi (2001).

238 Toxic Release Inventory, Executive Summary, Table E-1 (1999).

239 See infra text and accompanying notes 390. See also Section III.A.1.b.(1).

240 See infra text and accompanying notes 332-38.

241 Appendices C-4, C-5, C-6.

242 Appendices C-1, C-2, C-3.

243 132 Cong. Rec. H6482 (daily ed. Sept 9, 1986) (statement of Rep. Berman). According to the 1863 investigation, one thousand mules delivered to the Union army were "unfit for the service, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased." Id. See generally False Claims Act Amendments: Hearings on H.R. 3334 Before the Subcomm. on Admin. Law & Gov't Relations of the House Comm. on the Judiciary, 99th Cong. 1 (1986) [hereinafter Hearings: False Claims Act Amendments]; Note, The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81 (1972) [hereinafter History of Qui Tam]; Beck, supra note 9, at 539.

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244 Act of March 2, 1863, ch. 67, 12 Stat. 696-98.

245 S. Rep. 99-345, reprinted in 1986 U.S.C.C.A.N. 5266, 5273.

246 U.S. Department of Justice fiscal year 2000 statistics indicate that in 1998, 61% of FCA qui tam cases filed involved the U.S. Department of Health and Human Services as the client agency. Boese, supra note 71, at appendix B.

247 S. Rep. No. 345, reprinted in 1986 U.S.C.C.A.N. 5266, 5267.

248 In fiscal year 2000, the second largest category of fraud recoveries ($230 million) came from "companies alleged to have underpaid royalties on such production, including $95 million from Chevron, $56 million from Shell, $32 million from BP Amoco, $26 million from Conoco and $11.9 million from Devon Energy." Press Release, supra note 11.

249 Vt. Agency of Nat'l Res. v. United States ex rel. Stevens, 529 U.S. 765, 768, n.1 (2000); History of Qui Tam, supra note 243, (citing 3 W. Blackstone, Commentaries on the Laws of England 160 (1st Ed. 1768)).

250 31 U.S.C. § 3730 (2001). There are seven types of conduct covered by the False Claims Act, all involving the submission of false claims to the federal government: the conspiracy to do so; the submission of a false statement in support of a claim; or the making, using, or causing to be made or used a "false record or statement to conceal, avoid or decrease an obligation to pay to transmit money or property to the Government. See, e.g., 31 U.S.C. § 3729(a) (2001); Pickens v. Kanawha River Towing, 916 F. Supp. 702, 705 (S.D. Ohio 1996). This is also known as a "reverse false claim."

251 John T. Boese, Civil False Claims and Qui Tam Actions 1-5 (Aspen 2001) [hereinafter, Boese, False Claims]. Boese's treatise is an excellent resource on the False Claims Act.

252 Relators may collect up to 30% of the total recovery, and barring a few limited situations set forth in the FCA, are guaranteed at least 15%. 31 U.S.C. § 3730(d). The recoveries are statutorily set treble damages (with double damages in instances of sufficient cooperation) and civil penalties at amounts of $5500 to $11,000. Id. § 3729(a). The statute specifies penalties of $5,000 to $10,000 but in 1999, the DOJ increased the penalty amount for all claims specified after Sept. 29, 1999 pursuant to the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 64 Fed. Reg.47099-104.

253 In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, (2000), the Supreme Court held "that adequate basis for the relator's suit...is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. Id. at 773. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim.

254 Act of March 2, 1863, at ch. 67, 12 Stat. 696-98 (1863).

255 Rev. Stat. 3490-94 and 5438 (1875). The civil False Claims Act is now found at 31 U.S.C. §§ 3729-3731 (2001). The criminal provisions are found, most notably, at 18 U.S.C. §§ 286, 287, 1001, 1002 (2000).

256 Act of March 2, 1863 at ch. 67, 12 Stat. 696-98 (1863), amended by Rev. Stat. 3490-94 and 5438 (1875), amended by 89 Cong. Rec. S7606 (Sept 17, 1943), codified at 31 U.S.C. §§ 232-35 (1976), recodified at 31 U.S.C. §§ 3729-31, Pub. L. 97-258, 96 Stat. 978 (1982), amended by Pub. L. 99-562, 100 Stat. 3153 (1986), amended by Pub. L. 103-272, 108 Stat. 1362 (1994).

257 For example, the 1943 amendments made it difficult for would-be relators to overcome the jurisdictional bar provision, by prohibiting FCA qui tam lawsuits when federal government personnel are already aware of the false claims even if the putative relator was the one who had informed the federal government about the fraud. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1944). A number of courts also limited use of the FCA in general through their interpretations of the mens rea requirement in the FCA. By 1986, a number of courts had interpreted the FCA's requirement of "knowledge" as necessitating proof of "specific intent to defraud," see United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970), or similarly high standard, see United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959).

258 Boese, False Claims, supra note 251, § 1.03.

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259 Id. § 1.04[H].

260 The 1986 amendments increased damages from double to treble and increased penalties from $2000 per false claim between $5000 and $10,000 per false claim. 31 U.S.C. § 3729 (2001). The FCA provides no guidance on the amount of penalties within this range to be assessed. Most courts hold that, barring constitutional problems under the Eighth Amendment's excessive fine clause, assessment of at least $5000 (now $5500, see supra note 252) is not discretionary. United States v. Cabrera-Diaz, No. Civ. 99-2416, 2000 WL 1015966 (D.P.R. June 23, 2000); United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546, 565 (E.D. La. 1999). But see United States v. Greenberg, 237 F. Supp. 439, 445 (S.D.N.Y. 1965); United States v. Krizek, 909 F. Supp. 32, 33-34 (D.D.C. 1995) (providing two different calculations of the number of claims in the same case for purposes of establishing liability and penalties), rev'd and remanded 111 F.3d 934, 939-41 (D.C. Cir. 1997) (finding insufficient evidence to support the two different standards, but use of two standards implicitly approved). Cf. Hudson v. United States, 522 U.S. 93, 110-11 (1997).
The 1863 FCA gave the relator 50% of any successful judgment. 12 Stat. 698, § 6 (1863) (current version at 31 U.S.C. § 3729 (2001)). The 1943 Amendment reduced this to 10% maximum if the government intervened and 25% if the government did not, with no guaranteed minimum in any case. In addition, there was no provision for attorneys' fees and costs. 89 Cong. Rec. S7606. The 1986 Amendments increased the relator's share, guaranteed a minimum recovery in most cases and provided for attorneys fees and costs. A relator is now guaranteed 15-25% of judgment when the government intervenes, and 25-30% if the government does not intervene. 31 U.S.C. § 3730(d)(1)-(2). The FCA directs the courts to determine the appropriate percentage within the statutory range based upon "the significance of the information and the role of the person bringing the action in advancing the case to litigation." Id. § 3730(d)(1). Legislative history to the Senate version of the 1986 Amendments identifies factors to consider in assessing this percentage. S. Rep. No. 99-345, at 28 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5293. In addition, the DOJ has promulgated factors to consider. DOJ Relator's Share Guidelines, 11 TAF Q. Rev. 17, 19 (Oct. 1997), available at http://www.taf.org./ taf/docs/Oct97qr.pdf. The amount may be reduced to 10% if the FCA case is based on information additional to that provided by the relator. 31 U.S.C. § 3730(d)(3). Any relator who is convicted of criminal conduct arising from his or her role in the FCA violation receives nothing. Id. §3730(a)(3). Reasonable attorneys fees and costs are also to be awarded under the 1986 Amendments. Id. §§3730(d)(1)-(2).

261 Id. § 37309(d)(1)(2).

262 See infra text and accompanying notes 267-76 .

263 Prior to the 1986 Amendments, the FCA required that any violation be committed "knowingly" without defining "knowingly." Some courts interpreted the term strictly to require proof of specific intent. See, e.g., United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970), United States v. Aerodex, Inc. 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962). Others applied a similarly high standard. See, e.g., United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959) (interpreting "knowingly" in the FCA as requiring proof of "guilty knowledge of a purpose on the part of [the defendant] to cheat the Government"). The 1986 Amendments defined "knowingly" to include: "(1) actual knowledge of the information, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information," and further specified that "no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b) (2001). The Conference Committee report explained: "The Committee's interest is not only to adopt a more uniform standard, but a more appropriate standard for remedial actions." S. Rep. No. 345, 99th Cong., 7 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272.

264 Prior to the 1986 amendments, the FCA had a six-year statute of limitations. The 1986 amendments lengthened the statute of limitations to ten years in instances when the government failed to detect the falsity at the time the claims were submitted. Thus, the FCA currently provides that an action may not be brought:
(1) more than 6 years after the date on which the violation of section 3729 is committed, or
(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
whichever occurs last.

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31 U.S.C. § 3731(b). Questions regarding the statute of limitations abound, such as whether the statute begins running on the date the claim is submitted, see, e.g., United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 410 (3d Cir. 1999), or the date on which the claim is paid, see, e.g., United States ex rel. Kriendler & Kriendler v. United Tech. Corp. 985 F.2d 1148, 1156-57 (2d Cir. 1993); whether the statute begins running on the date the government guarantees a debt or when the mortgage or lender (the innocent party) makes a claim for reimbursement, see, e.g., United States v. Rivera, 55 F.3d 703, 707-09 (1st Cir. 1995); United States ex rel. Sanders v. E. Ala. Healthcare Auth., 953 F. Supp. 1404, 1412-13 (M.D. Ala. 1996); the amount of due diligence the government must exercise to toll the statute, see, e.g., United States v. Incorporate Vill. of Island Park, 791 F. Supp. 354, 363-64 (E.D.N.Y. 1992).

265 31 U.S.C. § 3731(c).

266 Id. § 3730(h).

267 Id. § 3130(e)(4):
(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional administrative or Government [sic, should probably be "General"] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

268 Boese, False Claims, supra note 251, § 1.02.

269 Id. Bucy, White Collar Crime, supra note 93, at 725-26.

270 See United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100, 1104-05 (7th Cir. 1984) (discussing the practical impact of this change). In Dean, the State of Wisconsin brought suit as relator against a physician for filing allegedly false Medicaid claims with the state of Wisconsin. The Seventh Circuit dismissed the lawsuit, finding that Wisconsin was jurisdictionally barred because the United States was "in possession" of the information in the lawsuit at the time the case was filed. This was true. The United States knew of Dr. Dean's Medicaid fraud, but only because Wisconsin, which had previously convicted Dr. Dean of Medicaid fraud for the same claims alleged to be false in its qui tam action, had provided information about Dr. Dean's conviction to the Department of Health and Human Resources as required in Medicaid laws. Id. at 1103. Recognizing the unfairness of its decision, the Seventh Circuit concluded its opinion in Dean by suggesting that Congress was the more appropriate body from whom relators should seek relief from an unfair jurisdictional bar provision. Id. at 1103.

271 31 U.S.C. § 3730(e)(4).

272 Compare United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1521 (10th Cir. 1996) (information in files potentially available to the public does not activate the jurisdictional bar provisions) with United States ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1159-60 (3d Cir. 1991) (information that was discovered in unrelated case that is potentially available activates the jurisdictional bar provision).

273 Compare United States ex rel. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990) (finding that government employee with responsibility for uncovering fraud cannot qualify as a qui tam relator) with United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991) (noting that government employee may qualify as a relator).

274 Compare United States v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992) (barring relator if complaint reflects publicly held information even if relator did not rely upon it or base his or her complaint on it) with United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1349 (4th Cir. 1994) (allowing relator's complaint even if it reflects publicly held information if the relator received his or her information elsewhere and did not base his or her complaint on the publicly held information).

275 Compare United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990) (specifying that to qualify as an "original source" relator must provide the information to the person or entity that makes the information public) with

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United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1351 (4th Cir. 1994) (rejecting Second Circuit's position in Long Island as "unpersuasive" and "implausible").

276 Although the FCA provides that the first to file a qui tam action is the only relator who qualifies to bring the lawsuit, 31 U.S.C. § 3730(b)(5), many questions remain, such as what occurs when the initial complaint is broad and vague compared to subsequently filed complaints, and how to handle situations where the initial complaint is dismissed and subsequent complaints survive. See Boese, False Claims, supra note 251, § 4.03[B][2].

277 Steve France, The Private War on Pentagon Fraud, 76 ABA Journal 46, 47 (Mar. 1990).

278 Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-6072 (Oct. 30, 2001) (on file with author).

279 See, e.g., Cal. Gov't Code §§ 12650-55 (West 1992 & Supp. 2001); Fla. Stat. Ann. §§68.081-.092 (Harrison 1994 & Supp. 2000); 740 Ill. Comp. Stat. § 175/1-8 (West 1996); Nev. Rev. Stat. Ann. §§ 357.010-.230 (Michie Supp. 1999); Hawaii Revised Statutes ch. 661 (2000); H.B. No. 543, 140th Gen. Assembly (Del. 2000) (to be codified at Title 6, Subtitle II, Ch. 12 of the Del. Code Ann.). Cf. Tenn. Code Ann. § 56-26-401 (Michie 2001); § 71-5-182 (Michie 1995) (health care only); La. Rev. Stat. Ann. 46 §§ 437.2A-.3 (West 1999) (health care only).

280 31 U.S.C. §§ 3729(a)(A), 3730(b). Typical private plaintiffs (known as "relators") include current or former employees, competitors and competitors' employees, state and local governments, special interest groups (such as "Taxpayers Against Fraud"), attorneys and law firms who discover fraud in the course of representing clients in other matters. Boese, False Claims, supra note 251, § 4.01[B].
There is no requirement that the relator be injured by the defendant's action. In 2000, the Supreme Court addressed the standing issue often raised by FCA defendants. The Court held that qui tam relators have standing under Article III even though they may not have been personally harmed or affected by the defendants' conduct. Recognizing that the federal government, as the damaged party, would have standing, the Court reasoned that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim." Vt. Agency of Nat'l Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 (2000). The Court specifically noted that it was not addressing other constitutional arguments sometimes raised by defendants in FCA cases (separation of powers, appointment clause or "take care" clause arguments).

281 In Stevens, the Court limited the "persons" who may be sued as defendants under the FCA, holding that states and state entities are not "persons" subject to qui tam liability under the FCA. 529 U.S. at 783. Justice Ginsburg noted in a concurring opinion that the Court's opinion leaves open the questions whether the term "persons" includes states or state entities when the federal government (rather than a relator) brings the FCA action. Id. at 780. Also, the Stevens opinion left open the question whether other government entities have sovereign immunity from FCA liability. The lower courts have wrestled with this issue, before and after Stevens. See, e.g., United States ex rel. Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486, 491 (5th Cir. 2001) (finding that municipal entity has Eleventh Amendment immunity); United States ex rel. Graber v. City and State of New York, 8 F. Supp. 2d 343, 349 (S.D.N.Y. 1998) (reasoning that municipality has immunity under FCA because municipalities are immune from punitive damages and, according to Stevens, the FCA is a punitive statute).

282 31 U.S.C. §§ 3730(b)(2)-(3). The written disclosure to the Government by a relator "of substantially all material evidence and information" helps the government focus its evaluation of the relator's claims. United States ex rel. Made in the USA Found. v. Billington, 985 F. Supp. 604, 608 (D. Md. 1997); Boese, False Claims, supra note 251, § 4.04.

283 Boese, False Claims, supra note 251, § 4.05.

284 31 U.S.C.§ 3730(c)(1). This dual-plaintiff system creates interesting dynamics. When the government intervenes, qui tam actions become three-party lawsuits. The co-plaintiffs (the federal government and the relator) are united on some aspects of the litigation (gathering information of fraud, opposing most defense strategies and motions). But the government and relator become pitted against each other when, for example, the government seeks to have the relator jurisdictionally barred, see, e.g., United States ex rel. Fine v. Chevron, 72 F.3d 740, 745 (9th Cir. 1995), or disagrees with the award the relator seeks upon conclusion of the case. See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429-30 (E.D. Pa. 1998); United States v. Gen. Elec., 808 F. Supp. 580, 583-84 (S.D. Ohio 1992).

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285 31 U.S.C. § 3730(c)(2). During the litigation, the relator's role may be restricted by the court "[u]pon a showing by the Government that the unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment," Id. §3730(a)(2)(C), or "[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." Id. § 3730(a)(2)(D). Some relators have successfully objected to proposed settlements between the government and qui tam defendants. See, e.g., Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1165 (S.D. Ohio), dismissed, 848 F.2d 190, 190 (6th Cir. 1988).

286 31 U.S.C. § 3730(c)(3). If the relator proceeds as the sole plaintiff after the DOJ has declined to intervene, the DOJ may request to receive copies of all pleadings filed and deposition transcripts (at the Government's expense). Upon a showing of "good cause," the court may permit the Government to intervene "at a later date." Id. § 3730(c)(3).

287 Id. §§ 3730(d)(1), (3). Note that the qui tam FCA provisions discourage class actions: the more plaintiffs there are, the less each will get of the percentage of a judgment statutorily allocated to relators.

288 For example, recent judgments in FCA qui tam cases include a $875 million settlement from TAP Pharmaceuticals, 55 Healthcare Fin. Mgt. 10 (2002), a $745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a $385 million settlement with National Medical Care, Inc., a $325 million settlement with SmithKline Beecham Clinical Laboratorie, a $325 million settlement with National Medical Enterprises, and a $110 million settlement with National Health Laboratories. Boese, supra note 251, § 1.05[A].

289 Recent relators' awards include $95 million, $44.8 million, $28.9 million, and $18.1 million. 21 TAF Q. Rev. 20-21 (Jan. 2001).

290 For example, the total amount paid to relators, from October 1, 1986 through September 30, 2000, as their statutory share when the government has intervened is $576 million. The total amount paid to relators over this same time period when the government has not intervened is $35.3 million. Only 2.1% (12 out of 570) of qui tam cases in which the government has intervened have been dismissed; 71.1% (1357 out of 1907) of qui tam cases in which the government has not intervened have been dismissed. Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-6072 (Oct. 20, 2001) (on file with author).

291 As one experienced relator's counsel explained: "When evaluating a case and during the beginning stages of representing a whistle blower never forget your initial mission: persuade the government to pursue the case." Mitchell Kreindler, So You Wanna Be a Whistleblower's Lawyer?, Address before the ABA National Institute, The Civil False Claims Act and Qui Tam Enforcement 5 (Nov. 28, 2001).

A large part of the reason relators seek DOJ intervention is the resources the DOJ can bring to a case. DOJ attorneys and agents work with the relevant agency to obtain government records pertaining to the alleged false claims. In the health care field, for example, DOJ and HHS attorneys and agents work with private insurers who contract with the federal government to service Medicare and Medicaid claims, thereby obtaining billing data, longitudinal comparisons, and other helpful interpretations of billing regulations and history that would be available to private parties only through subpoenas or Freedom of Information Act requests, if at all. Robert Fabrikant, Paul E. Kalb, Mark D. Hopson & Pamela H. Bucy, Health Care Fraud, Enforcement and Compliance, Chap 6 (LJSP 2001) (discussing the investigation of health care fraud cases). In addition, the DOJ is authorized by the Health Insurance Portability and Accountability Act ("HIPAA") to issue subpoenas in "any investigation relating to any act or activity involving a federal health care offense." 18 U.S.C. § 3486 (2000 & Supp. 2001). HIPAA subpoenas may require the production of tangible things but not oral testimony. Also, the FCA authorizes DOJ to seek civil investigative demands ("CIDs") which are standard civil investigative tools (interrogatories, documents subpoenas, depositions) before a suit is filed. 31 U.S.C. § 3733 (2001). Moreover, most federal agencies have authority to issue "Inspector General Subpoenas" to investigate, among other things, fraud by government contractors upon that agency. 5 U.S.C. § 6(a) (1987). These subpoenas are quite versatile. They are not subject to the Federal Rules of Civil Procedure (and thus no showing of relevancy is required), or to the secrecy requirements of the grand jury. See, e.g., FTC v. Atl. Richfield, 567 F.2d 96, 104-05 & n.19 (D.C. Cir. 1977); United States v. Fesman, 781 F. Supp. 511, 514 (S.D. Ohio 1991).

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Also, in instances where it appears that criminal violations may have occurred, the DOJ can commence a criminal investigation employing investigative tools such as grants of immunity, 18 U.S.C. §6002 (1994) and the grand jury, with its broad topical and jurisdictional reach. United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991). Upon a "strong showing of particularized need for grand jury materials," information gathered during a criminal grand jury investigation may be disclosed to government attorneys and their assistants who are investigation FCA violations. United States v. Sells Eng'g, 463 U.S. 418, 443 (1985).

292 According to Mitchell Kreindler, an experienced qui tam relators' counsel: "By providing a cohesive, comprehensive and understandable presentation to the government, the relator will increase measurably the chances that the government will be interested in the case." Address by Mitchell Kreindler, supra note 291. Robin Page West, also an experienced qui tam relators' counsel, concurs. She describes the increased risks a relator faces if the government does not intervene: increased chance of assessment to the relator of defendant's attorneys' fees and costs, and successful defense counter-claims against relator. West notes: "Because of these risks, and because a qui tam case is more likely to result in a recovery if the government intervenes, you want to do everything possible to minimize the risk of declination." Robin Page West, Qui Tam Litigation, 28 A.B.A. Litig. 21 (2001).

293 As Kreindler has explained:
The statutory disclosure is mandated by the Act.... This can be done in many ways, but the most effective is to prepare a detailed narrative that references specific exhibits. The narrative should provide information on the background of the parties, describe the relator's involvement in uncovering the scheme, discuss the regulatory and legal background underlying the relator's allegations, address key legal issues implicating the FCA, discuss the government's damages, identify potential witnesses and make suggestions for investigation.... Such a document is not only more persuasive than a stack of raw evidence, but it provides the DOJ with a simple means of communicating the story of the case to other agencies. A well-written statutory disclosure will simplify the government's evaluation of the relator's allegations and help focus its investigation more quickly. Kriendler, supra note 291, at 6.

294 In 1987, thirty-three qui tam FCA cases were filed. In 2000, 336 cases were filed. Of the 3202 qui tam cases filed since 1987, the government has intervened or otherwise pursued 17.8% (570 out of 3202). Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-6072 (Oct. 30, 2001) (on file with author).

295 See supra text and accompanying notes 284 .

296 See, e.g., United States ex rel. Alderson v. Quorum Health Group, 171 F. Supp. 2d 1323, 1330-37 (M.D. Fla. 2001); United States ex rel. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 442-50 (E.D. Pa. 1998) reversed 205 F.3d 97 (3d Cir. 2000) and remanded 114 F. Supp. 2d 352 (E.D. Pa. 2000).

297 See infra Section III.C.1.

298 31 U.S.C. § 3730(c) (2001) gives the Government authority to dismiss an FCA qui tam action "notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."
At least one court has held that the Government does not have unfettered authority to dismiss an FCA qui tam action, and that its decisions are subject to judicial review. United States ex rel. Sequoia Orange Co. v. Sunland Packing Co., 912 F. Supp. 1325, 1340 (E.D. Cal. 1995), aff'd 151 F.3d 1139, 1144-45 (9th Cir. 1998); United States ex rel. Juliano v. Fed. Asset Disposition Assoc., 736 F. Supp. 348 (D.D.C. 1990).

299 This was one of its goals. As noted in the Senate Report accompanying the 1986 Amendments, "[t]he proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. No. 345, 99th Cong., (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266-67.

300 The FCA contains another mechanism to help with quality control, but this mechanism, unlike the dual-plaintiff system, is not unique to the FCA. The FCA provides that parties filing frivolous qui tam actions may be held responsible for defendants' attorneys fees and expenses:

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If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.
31 U.S.C. § 3730(d)(4). See, e.g., United States ex rel. Haycock v. Hughes Aircraft Co., 1996 Nos. 94-55620, 94-55826, WL 612680 (9th Cir. 1996); United States ex rel. Herbert v. Nat'l Acad. of Sci., No. 90-2568, 1992 WL 247587 (D.D.C. 1992).

301 Appendices C-4, C-5, C-6.

302 Appendix C-4.

303 Appendix C-1.

304 See generally George P. Fletcher, Loyalty: An essay on the Morality of Relationships (Oxford University Press 1993) (providing a thoughtful discussion of loyalty).

305 See supra Part II.A-B.

306 See supra Part II.A-B.

307 Kurt Eichenwald, White-Collar Defense Stanch: The Criminal-less Crime, N.Y. Times, Mar. 3, 2002 at § 4, p.3. Cf. Medicare at Risk: Emerging Fraud in Medicare Programs: Hearing Before the Permanent Subcomm. On Investigations, Senate comm. On Governmental Affairs, 105th Cong., 1st Sess., 126-33 (written Statement of Pamela H. Bucy, regarding health care fraud) (pertaining to health care fraud); Pamela H. Bucy, Fraud by Fright, White Collar Crime by Health Care Providers, 67 N.C.L. Rev. 856, 875-81 (1989) (regarding health care fraud).

308 See supra text and accompanying notes 111-12 .

309 This appears to be true despite the incentive structure in RICO (treble damages plus costs and attorneys fees) which would seem substantial enough to attract quality counsel. The reason for RICO's apparent inability to attract quality private counsel may lie in the RICO statute itself. Its complex structure makes it difficult both to attract top legal talent, and for top legal talent to employ the RICO statute appropriately. The RICO elements of "enterprise," "pattern," and many of the underlying "racketeering activities" are difficult to plead and prove. See, e.g., Bessett v. Avco Fin. Serv., 230 F.3d 439, 448 (1st Cir. 2000) (affirmed dismissal of RICO complaint for failure to allege "person" distinct from "enterprise."); Anatian v. Coutts Bank, 193 F.3d 85, 88-89 (2d Cir. 1999) (reversing judgment for plaintiff on RICO counts for failure to prove "pattern").

310 See supra Part III.A.1 . This would appear to be the case even though counsel in securities private actions often "piggy-back" governmental efforts by simply following up government detection of fraud with a private lawsuit. Such duplicative efforts can be helpful to an overall regulatory system, however. Judgments obtained in these private suits enhance the penalty meted out by public agencies, increasing deterrence impact. In addition, it may be an efficient division of labor for public agencies to identify problems and for private counsel to follow up with litigation arising from government investigations. Coffee, Private Attorney General, supra note 7, at 284. Coffee also argues that compensation available to plaintiffs' counsel in private securities fraud actions is not adequate to attract top legal counsel .

311 See supra text and accompanying note 159 .

312 Miller, Part III, supra note 9, at 10422.

313 As Boyer & Meidinger have noted, citizen suits are technical and complex. The fact that counsel experiences delay between incurring litigation costs and ultimate fee recovery "seems to be limiting the number of private firms willing to take on citizen suits and the number of cases those firms are able to handle." See Boyer & Meidinger, supra note 9, at 934-35.

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314 E.L.I., Citizen Suits, supra note 9, at IV-11, IV-13 (noting that successful resolution of citizen suit facilitated by experienced plaintiff's attorney), IV-21 and IV-38 (noting that resolution in citizen suit hampered by inexperienced environmental attorney), V-10 (recognizing importance of good screening of cases by citizen suit plaintiffs).

315 See infra note 316 .

316 While some citizen suit statutes allow private plaintiffs to recover penalties, all penalties go to the U.S. Treasury. See supra notes 208-13. Even if citizen suit plaintiffs obtain defense contributions for private organizations as part of the case settlement, these contributions go to agreed-upon community organizations, not to the plaintiffs.

317 See infra Appendices C-4, C-5, C-6 .

318 For example, in United States ex rel. Taxpayers Against Fraud v. Gen. Elec., relators' counsel and relator agreed that counsel would receive 25% of the relator's share. 41 F.3d 1032, 1036 (6th Cir. 1994). This percentage was in addition to attorney fees and costs awarded by the court pursuant to 31 U.S.C. § 3730(d)(1). The total amount awarded to relator's counsel in this case was $4 million. Id. at 1036.

319 See supra text and accompanying notes 290-92 .

320 31 U.S.C. § 3730(c)(1) (2001).

321 John Phillips, Address before the ABA National Institute on the Civil False Claims Act and Qui Tam Enforcement, Panel: FCA Enforcement in the Post- Stevens World (Nov. 29, 2001).

322 Scott A. Powell, Address before Mealey's Conference, Litigating Whistleblower Cases Under the Qui Tam Provisions of the False Claims Act, Panel on Reports From the Field, Developments on Notable Cases (June 11, 2001).

323 Letter from the U.S. Department of Justice to Author, Response to FOIA Request 145-FOI-6072 (Oct. 30, 2001) (letter on file with the author).

324 Bucy, Information As a Commodity, supra note 1 (manuscript at 2.32-.38).

325 See supra text and accompanying notes 157-62 (discussing success of the class action securities cases in general). Whether the class action device attracts experienced, quality legal talent is hotly debated on many fronts. See, e.g., Bohn & Choi, supra note 9, at 979-82; Macey & Miller, supra note 9, at 1-4, 116-18. Coffee argues that the incentive structure in securities fraud private justice actions is inadequate to attract top legal talent. Coffee, Private Attorney General, supra note 7, at 238. This may well be true, certainly it is when these actions are compared to the incentive structure of the qui tam FCA private justice action, but compared to other private justice actions, securities fraud private actions give much more incentive to legal counsel to undertake such cases.

326 Bucy, Information As a Commodity, supra note 1 (manuscript at 2.39-.49).

327 See supra text accompanying notes 240-41, 313-17.

328 See Bucy, Information As a Commodity, supra note 1 (manuscript at 2.39-.49) . See also House Comm. on the Judiciary, Subcomm. on Immigration and Claims (Apr. 28, 1998) (testimony by Lewis Morris, Assistant Inspector General, U.S. Department of Health and Human Services):
The qui tam provisions of the False Claims Act... have provided the incentive for whistleblowers to overcome the substantial detriment and obstacles to speaking out.... The law is working as intended. Whistleblowers are stepping forward, and billions in false claims are being recovered as a result.

329 See supra text and accompanying note 286-89.

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330 Cf. United States ex rel. Alderson v. Quorum Health Group, 171 F. Supp. 2d 1323 (M.D. Fla. 2001); United States ex rel. Merena v. SmithKline Beechham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000).

331 Address by Thomas Poulton, M.D., relator in United States ex rel. Poulton v. Fletcher Allen Health Care, Mealey, Litigating Whistleblower Cases Under the Qui Tam Provisions of the False Claims Act Conference, June 11, 2001; Address by Scott A. Powell, supra note 322.

332 Whistleblower quoted in N.R. Kleinfield, Whistleblowers Find Satisfaction But Lose Professions, Friends, 99 L.A. Daily J., Nov. 11, 1986, at 66.

333 Bucy, Information As a Commodity, supra note 1, (manuscript at 2.39-.49).

334 Coffee, Future of PSLRA, supra note 9, at 549 (reasoning that the legitimacy of private enforcement is undercut when private justice actions are directed to situations where social harm is unclear).

335 See, e.g., Fabrikant et. al., supra note 291, § 6.05; Pamela H. Bucy, The Path From Regulator to Hunter, 44 St. L. U. L.J. 3, 12-14, 40-48 (2000).

336 General Accounting Services, Rep. No. HEHS 98-174, Medicare Concerns With Physicians at Teaching Hospitals (PATH) Audits 13-14 (1998). In another instance, St. Vincent's Hospital, a suburban hospital in Massachusetts, received a letter from DOJ stating that a government audit indicated that St. Vincent's had submitted false claims to Medicare and was facing $2.6 million in penalties and damages under the False Claims Act. The hospital, which had processed more than 80,000 claims totaling almost $300 million during the period in question, challenged the DOJ's audit, ultimately settling for $19,000.

337 William E. Kovacic, The Civil False Claims Act As a Deterrent to Participation in Government Procurement Markets, 6 Sup. Ct. Econ. Rev. 201, 205 (1998).

338 Id.

339 Boese & McClain, supra note 9, at 50.

340 See supra text accompanying notes 282-86, 290-98 (describing the extensive oversight function the FCA envisions for the DOJ over qui tam actions). Cf. Greve, supra note 7 (discussing the cost in reviewing proposed settlements in citizen suits); Boyer & Meidinger, supra note 9, at 839-43, 907-17 (discussing a variety of problems citizen suits create for regulatory agencies).

341 See, e.g., Stephen Breyer, Regulation and Its Reform 102-14 (1982).

342 See infra text and accompanying notes 370.

343 Greve, supra note 7, at 381.

344 Blomquist, supra note 9, at 410-11; E.L.I., Citizen Suits, supra note 9, at x.

345 Boyer & Meidinger, supra note 9, at 909-12 (describing the EPA's enforcement policy of distinguishing among polluters by their level of "significant noncompliance"; only those in such state were pursued by EPA, insignificant noncompliance was not acted upon by EPA but left industry vulnerable to citizen suits). But see Miller, Part III, supra note 10, at 10427 (explaining industry's argument but dismissing it as outdated and remediable with new permits).

346 Gitlen, supra note 9, at 18-19; E.L.I., Citizen Suits, supra note 9, at x, V-5, V-34. Cf. Hodas, supra note 7, at 1623, 1616.

347 Gitlen, supra note 9, at 18-19; Hodas, supra note 7, at 1623.

348 Recent cases discussing this theory include United States ex rel. Augustine v. Century Health Services, Inc., 289 F.3d 409, 414-16 (6th Cir. 2002); United States v. Southland Mgt. Corp., 288 F.3d 665, 674-79 (5th Cir. 2002).

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349 See, e.g., United States v. Chester Care, No. CIV.A. 98-CV-139 (E.D. Pa. 1998) 1998 U.S. Dist. LEXIS 4836 at *3-4; United States v. N. Health Facilities, Inc., 25 F. Supp. 2d 690, 692-97 (D. Md. 1998). Presumably, payment of the claim must be conditioned, even implicitly, on compliance with the relevant rules or regulations. See, e.g., United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 938 F. Supp. 399, 404-05 (S.D. Tex. 1996).

350 Numerous defense counsel and some academics have attacked this use of the FCA. See, e.g., Boese & McClain, supra note 9, at 36-41; Fabrikant & Soloman, supra note 9, at 105; Dayna Bowen Matthew, Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act, 73 Ind. L.J. 525, 534-46 (2001). Use of this theory of fraud in FCA cases presents interesting questions. On the one hand, failure to deliver a certain quality of service clearly is fraud even if the service is delivered and the correct amount of reimbursement is sought. Giving a nursing home patient a bath is scarcely a service worth paying for if the patient was scalded by hot water or bathed in feces-laden water. On the other hand there are so many thousands of applicable rules and regulations applicable to government contractors that chaos would result if violation of any one or a few would render claims submitted by the contractor false. The fact that private litigants are free to bring lawsuits alleging such violation as fraud in qui tam FCA lawsuits only increases the potential for chaos.

There are two responses to these concerns if the "false certification" theory of fraud is pursued. First, neither the government nor private relators should use this theory except in the most extreme situations. As Mitchell Kreindler, an experienced relator's attorney, stated: "The modern FCA is a toddler.... [Q]ui tam lawyers have a special responsibility to litigate in a manner that protects the Act for future relators." Address by Kreindler, supra note 291, at 9. See also Suzanne E. Durrell, Chief, Civil Division, U.S. Attorney's Office, District of Massachusetts, Address at the ABA National Institute on The Civil False Claims Act and Qui Tam Enforcement (Nov. 29, 2001) ("The lesson for relators and for the government in using the FCA is not to overreach.").

Second, there are incentives for relators to employ the "false certification" theory sparingly. There is little money in most of the "certification" theory of fraud cases, making it unlikely relators will use this theory. In addition, relators will need government employees as witnesses in these cases (to testify to issues of materiality, regulation interpretation, etc.). Such cooperation from government is not likely to be forthcoming in frivolous cases.

351 492 U.S. 229, 232 (1989).

352 See, e.g., Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999).

353 See, e.g., United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1996).

354 See, e.g., United States ex rel. Compton v. Midwest Specialties, Inc., 142 F.3d 296, 304 (6th Cir. 1998).

355 See, e.g., United States ex rel. Pogue v. Am. Healthcorp., 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996). Contra United States ex rel. Berge v. Bd. of Trustees of Univ. of Ala., 104 F.3d 1453, 1458 (4th Cir. 1997).

356 See, e.g., United States ex. rel. Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996).

357 See, e.g., Basic Inc. v. Levinson, 485 U.S. 224, 240-44 (1899) (discussing the "fraud on the market" theory in Rule 10b-5 actions).

358 See, e.g., Moss v. Morgan Stanley Co., 719 F.2d 5, 10-17 (1983).

359 Cf. Sedima v. Imrex Co., 473 U.S. 479, 500-04 (1985) (Marshall, J., dissenting). In his dissenting opinion, Justice Marshall highlights some of the problems caused by empowering private litigants to enforce public laws, such as RICO, even in civil cases: less responsible use of prosecutorial discretion; an inability on the part of the DOJ to rein in private litigants using RICO; and the "strong incentive" for private litigants "to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud." Id. at 504, 502-05.

360 Bucy, Private Justice and the Constitution, supra note 3 (manuscript at 22-27).

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361 31 U.S.C. § 3730(b)(3) (2001).

362 Id. § 3730(c)(3).

363 Id. § 3730(c)(2)(C), (c)(4).

364 Id. § 3730(c)(2)(A).

365 Id. § 3730(c)(2)(B).

366 See supra text and accompanying notes 290-94.

367 See supra text and accompanying notes 280-92 .

368 See supra text and accompanying notes 280-92 .

369 See supra text and accompanying notes 287-91.

370 See supra text and accompanying notes 297-98.

371 Interestingly, the FCA's design of rewarding private plaintiffs who do extensive pretrial work on the case carries a different economic incentive than does the securities fraud "hybrid" private action model which encourages plaintiffs to file a minimally prepared class action lawsuit, and hope for a quick settlement because defendants cannot afford unfavorable publicity or litigation costs. See supra note 119 and accompanying text .

372 There is a tradition of considerable dialog between industry and regulating agencies to develop this guidance. See, e.g, Hearing Before House Subcomm. on Immigration and Claims, 105th Cong., 12-14 (1998) (statement of Donald K. Stern, Chair, U.S. Attorney General's Advisory Comm., Department of Justice) (referring to discussions with health care industry about two of the DOJ's national investigations); id. at 24-25 (statement by Lewis Morris, Assistant Inspector General, Office of Inspector General, Department of Health and Human Services) (referring to efforts at HHS to reach out to industry for feedback); id. at 64 (statement of Ruth Blacker, Member, National legislative Counsel, American Association of Retired Persons) (referring to DOJ's willingness to listen to industry and its resulting revisions of policies for using the False Claims Act). There is a significant amount of publicly available guidance also available to relators or potential relators. See, e.g., Department of Health and Human Services, Office of Inspector General, Advisory Opinions, at http://www.hhs.gov/oig. See also Lewis Morris & Gary W. Thompson, Reflections on the Government's Stick and Carrot Approach to Fighting Health Care Fraud, 51 Ala. L. Rev. 319, 349-54 (1999) (discussing OIG's Advisory Opinions and Fraud Alerts).

373 See supra text and accompanying note 280-82.

374 After the seal is lifted, a number of courts have held that the relator's report filed with the government is discoverable. See, e.g., United States ex rel. Stone v. Rockwell Intern. Corp., 144 F.R.D. 396, 398-99 (D. Colo. 1992) (after finding that the defendant had a "substantial need" for the statement and could not obtain equivalent information elsewhere); Grand ex rel. United States v. Northrop Corp., 811 F. Supp. 333, 337 (S.D. Ohio 1992) (after ordering production of the statement for a U.S. Magistrate's in camera inspection and redaction of the relator's analysis and opinions).

375 S. Rep. No. 99-345, 1986 U.S.C.C.A.N. 5266, 5289-90.

376 See supra text and accompanying note 297.

377 See, e.g., Juliano v. Fed. Asset Disposition Assoc., 736 F. Supp. 348, 350-51 (1990) (rejecting the relator's argument that the government could not proceed in this "hybrid" manner, and reasoning that "the court will not assume that the qui tam provisions of the False Claims Act were intended to curtail the prosecutorial discretion of the Attorney General where the DOJ declined to intervene in part of the relator's case and moved to dismiss other parts). See also Vt. Agency of Nat'l Res. v. Stevens, 529 U.S. 765, 765 (2000); United States ex. rel. Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546 (E.D. La. 1999) (government allowed to intervene for purposes of appeal after declining intervention in the cases); United States v.

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Health Possibilities, 207 F.3d 335, 340-41 (6th Cir. 2000) (after initially declining to intervene, the government was allowed to oppose the settlement negotiated by the relator and the defendant, on the ground that the settlement was not in the public interest).

378 Boese, False Claims, supra note 251, § 4.06.

379 151 F.3d 1139, 1141 (9th Cir. 1998).

380 Id. at 1141-42.

381 Id. at 1143.

382 Address by James Sheehan, Chief of Civil Division, United States Attorney's Office, Eastern District of Pennsylvania, supra note Mealey Conference: Litigating Whistleblower Cases Under the Qui Tam Provisions of the civil False Claims Act, Washington, D.C., June 11, 2001.

383 In comparison to the qui tam FCA private justice action, the "victim" and "hybrid" private justice models generally make no effort to coordinate public and private enforcement. Generally, there is no requirement in these actions that private plaintiffs filing these actions notify the government prior to filing suit, no opportunity for the government to review the claims in the private action before the case becomes public, no mechanism for government monitoring of these actions, and no authority for the government to move for dismissal of inappropriate private actions. There is no effort to integrate private and public prosecutive efforts through intervention or joinder as plaintiffs, and no mechanism such as the diligent prosecution or jurisdictional bar provisions to prevent unnecessary private suits. See, e.g., RICO, 18 U.S.C. §§ 1961-68; securities fraud private actions discussed supra text and accompanying notes 115-65 (no requirements for coordination.) There are exceptions but they are notoriously ineffective. For example, persons who seek to bring a "victim" private justice action under any number of federal employment statutes (i.e., Age Discrimination in Employment Act of 1967, Titles I and V of the Americans with Disabilities Act, the Equal Pay Act) must bring their charge of discrimination to the Equal Employment Opportunity Commission ("EEOC") before filing suit. However, the EEOC has not lived up to its expectations, suffering from overload and backlogs, and from poor data collection procedures.

Or, if there are efforts to coordinate public and private enforcement, they do not work well. The citizen suit "common good" model is a prime example. Citizen suit provisions contain components designed to achieve public private coordination: the sixty day notice requirement, whereby putative plaintiffs notify relevant agencies and the putative defendant(s) of intention to sue; the "diligent prosecution" provision, which bars citizen suits if the responsible agency is diligently prosecuting the offense; and the intervention mechanism whereby the federal government may intervene in enforcement actions. But as noted, see supra Part II.C.1, III.A.1.b, none of these mechanisms effectively coordinate private and public prosecutorial efforts because of their ambiguity and the significant litigation they generate simply to clarify what they mean. Additionally, the notice requirement is unworkable because it sets an unrealistic timetable for regulatory agencies to evaluate an anticipated lawsuit. Lastly, rather than encouraging cooperation between private and public prosecutors, the interplay of these provisions has facilitated collusive agreements between regulating agencies and industry.

384 A number of commentators have argued that the DOJ should be more aggressive in exercising this authority. See, e.g., Boese & McLain, supra note 9, at 49; William E. Kovacic, Whistleblower Bounty Lawsuits As Monitoring Devices in Government Contracting, 29 Loy. L.A. L. Rev. 1799, 1855 (1996); Timothy Stoltzfus Jost & Sharon L. Davies, The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement, 51 Ala. L. Rev. 239, 316-17 (1999).

385 In his historical review of qui tam actions, Randy Beck also recognizes that problems are created by nonmeritorious qui tam actions under the False Claims Act, and suggests as a remedy, that qui tam actions not be permitted to go forward if the DOJ does not intervene. Beck, supra note 9, at 639-40. In her discussion of the use of the FCA in "false certification" cases, Dayna Bowen Matthew urges the same position. Matthew, supra note 350, at 588-89.

This suggestion has several problems. First, the relator's independence is a check on any inadequacies that may exist at the DOJ that prevent a meritorious case from going forward. These inadequacies may be because of "capture" by industry or incompetence, lack of resources, or an inability to perceive what is a fraud at the DOJ. In addition, there are better ways to

control the quality of private actions such as seeking restrictions on the relator's involvement and more aggressive use by DOJ of its authority to move for dismissal. See supra text accompanying notes 378-83 .

In short, giving the DOJ carte blanche to unilaterally make the decision to terminate a relator's case by not intervening, without any public or judicial review, fails to recognize reality: that situations may arise when DOJ attorneys are too overworked, unaware, ill-equipped, untrained, or overcome by political pressures to make the best decision on a case. A public hearing in a court of law where the government must present its reasons for dismissal and demonstrate that dismissal is "rationally related" to "legitimate government interests" avoids these problems. See United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1340 (E.D. Cal. 1995) (adopting and applying the "rational relation to legitimate government interest" standard).

386 For a discussion of United States ex rel. Sequoia v. Sunland Packing House Company, 912 F. Supp. 1325 (E.D. Cal. 1995), see Bucy, Private Justice and the Constitution, supra note 3.

387 Bucy, Information As a Commodity, supra note 1 (manuscript at 2.3-2.5; 2.10-.11); Bucy, Private Justice and the Constitution, supra note 3 (manuscript at 2.51).

388 See infra Part III .

389 See supra text and accompanying notes 133-54 .

390 Given the written summary a private justice plaintiff must prepare and present to the government upon filing a lawsuit under the qui tam FCA private justice model, and the practical reasons for ensuring that this summary is complete and thorough, this requirement would add little as a quality-control measure in most qui tam FCA cases, see supra text and accompanying notes 254-67, but imposing it would add a helpful safeguard against those frivolous qui tam actions still filed by inexperienced qui tam counsel.

391 Qui tam FCA cases will already face a high standard of pleading since they are already bound by Fed. R. Civ. P. 9(b) which requires that fraud be pled "with particularity." The PSLRA made clear that this requirement was to be interpreted strictly, as the Second Circuit--but not all Circuits-- had been doing in securities private justice actions. With this strict view of FRCP 9(b), a plaintiff must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint must state with particularity all facts on which that belief is formed." H.R. Rep. No. 104-369, at 740, reprinted in 1995 U.S.C.A.A.N, 730; 15 U.S.C. § 77z-1 (1997 & Supp. 2001); 15 U.S.C. § 78u-4(b)(1) (1997 & Supp. 2001).

392 Whereas awarding attorneys' fees to the successful party has been long recognized as a way to discourage frivolous or harassing suits while encouraging high quality of suits brought, S. Rep. No. 92-414, 92nd Cong., 81, reprinted in 1972 U.S.C.C.A.N. 3668, 3747 (1972), note the different approaches, especially among private justice actions. For example, both the PSLRA's and citizen suit's fee shifting provisions to that in citizen suits were designed to discourage frivolous or harassing lawsuits, see, e.g., Miller, Part III, supra note 9, at 10413, and become applicable only when the plaintiff is found to have filed a frivolous action. Id. The PSLRA's provision is stronger, however, for it creates a presumption, albeit rebuttable, that sanctions will be imposed against plaintiffs; it also presumes that the appropriate payment is full defense costs.

393 Peter J. Henning, Individual Liability For The Conduct By Criminal Organizations in the United States, 44 Wayne L. Rev. 1305, 1337, 1345, 1349 (1998); Nancy J. King, Portioning Punishment: Constitutional Limits and Excessive Penalties, 144 U. Pa. L. Rev. 101, 188 (1995); Laurie L. Levenson, Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors, 26 Fordham Urb. L. J. 553, 564-65 (1999); Matthew, supra note 350, at 580-82.

394 See supra text and accompanying notes 290-94.

395 See supra text and accompanying notes 290-94 .

396 See supra note 263 .

397 See supra text and accompanying notes 133-54 .

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398 See Bucy, Information As a Commodity, supra note 1 (manuscript at 2.32-.38); supra notes 307, 321-24, 331-34 and accompanying text .

399 See, e.g., Jonathan D. Glater, From Investor Fury, A Legal Bandwagon, N.Y. Times, Sept. 15, 2002, at Section 3, pg. 1 ("Corporate malfeasance and executive greed have undermined the stock market and fleeced investors."); Greg Ip & Michael M. Phillips, Fed Holds Steady Despite Anxieties Among Investors, Wall St. J., June 27, 2002, at A1 ("A month ago, the economic recovery appeared to be moving according to script. Now a crisis of confidence--intensified by WorldCom Inc.'s accounting scandal--is tanking stocks and the U.S. dollar, threatening to push the country back into recession.").
Uncle Sam will have been exposed as Uncle Scam, the bloke who broke our faith in the free market.... The reason would be simple--too many of the top US companies were run by crooks.... The defenders of the system argue the problem with the US is not capitalism but the corruption of it.
George Megalogenis, Cronies' Boom is Phony, The Weekend Australian, July 27, 2002, at 28.

400 Conference Committee Report on the Private Securities Litigation Reform Act of 1995, H.R. Rep. No. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 730.

401 Nat'l Res. Def. Council Inc. v. Train, 510 F.2d 692, 727 (D.C. Cir. 1975) (statement of Senator Muskie). Testimony from former Attorney General Ramsey Clark as follows:
It will be impossible for government enforcement to control all significant acts of pollution....[G]overnment will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity.....If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individuals affected by, or concerned about pollution in his life, the power to stop them through legal process. Far risking an undue or inhibiting interference with Government enforcement, it will provide powerful supplementary enforcement... and an effective and desirable prod to officials to do their duty.

402 See supra Part II.

403 Bucy, Private Justice and the Constitution, supra note 3 (manuscript at 15-20).

404 15 U.S.C. § 77k.

405 15 U.S.C. § 77*l*(a).

406 15 U.S.C. § 77*l*(b).

407 15 U.S.C. § 77*o*.

408 15 U.S.C. § 77q(a).

409 15 U.S.C. § 78f.

410 15 U.S.C. § 78i.

411 15 U.S.C. § 78j.

412 15 U.S.C. § 78n.

413 15 U.S.C. § 78*o*.

414 15 U.S.C. § 78(p)(b).

415 15 U.S.C. § 78(r).

416 15 U.S.C. § 78t(a).

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417 15 U.S.C. § 78(c)(c).

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NUMBER 202 OCTOBER 19, 2016

Electronic Commerce

Small Business Owner's Tax Nightmare Ends With $30,000 Settlement

Jeff Pape's $30,000 false claims nightmare began when his small online business WrestlingGear.com Ltd. sold a $10 jump rope to the Chicago law firm Schad, Diamond & Shedden P.C.

The nightmare ended in February 2014 after four months of litigation, a settlement payable to Illinois and the law firm, legal fees and hundreds of hours of lost productivity for his four-person wrestling equipment company based in Elmhurst, Ill. (*Illinois ex rel. Schad, Diamond & Shedden P.C. v. WrestlingGear.com Ltd.*, Ill. Cir. Ct., No. 13 L 1839, *settlement* 2/5/14).

The law firm, headed by veteran whistle-blower Stephen B. Diamond, determined that WrestlingGear failed to charge tax on shipping and handling charges for the jump rope, triggering a tax deficiency of about 80 cents. The law firm promptly filed suit under the Illinois False Claims Act, accusing Pape and his company of a pattern of conduct that defrauded the state (see related story in this issue).

Pape, a wrestling enthusiast and a certified public accountant, was surprised by the lawsuit. He had studied Illinois' tax regulations and believed he wasn't obligated to collect the tax because customers had the option of picking up their orders from his showroom. But several attorneys who understood Diamond's litigation strategies warned Pape that he might lose his business before he ever got a chance to present his defense to a judge.

''The frustrating part is: I honestly believe I was 100 percent in compliance with the laws. And If I had to work with the Illinois Department of Revenue versus dealing with Mr. Diamond, I could have explained why I was compliant,'' Pape told Bloomberg BNA. ''But under Illinois law, I was going to have to go to court to explain how I was compliant and that was going to cost me thousands and thousands and thousands and thousands of dollars.''

Settle Quickly. Pape's attorney advised him to settle quickly, but the process was neither simple nor quick. Pape had to essentially shut down his business for days at a time over four months to assemble the financial records and other documentation demanded by Diamond.

The process revealed that WrestlingGear failed to remit approximately $4,600 in sales tax to the state over six years, a finding that Pape continues to dispute. The tax deficiency triggered a $9,800 settlement with the state; a $4,200 settlement with Schad, Diamond; $5,000 in attorneys' fees payable to Schad, Diamond; and a $10,000 legal bill for his own defense.

Two weeks after Pape finalized the settlement, the department of revenue commenced a full audit of WrestlingGear. After 15 months and hundreds of additional hours of lost time and productivity, the audit uncovered a few hundred dollars worth of mistakes.

Pape remembers that 19-month stretch as one of the most stressful in his life.

''There are companies avoiding millions and millions of dollars in taxes, and they come after me,'' he said. ''I was paying roughly the correct amount of taxes. It put a tremendous amount of stress on me, my family, my kids.''

BY MICHAEL J. BOLOGNA

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HOUSE OF REPRESENTATIVES—*Tuesday, September 9, 1986*

The House met at 12 noon.

The Chaplain, Rev. James David Ford, D.D., offered the following prayer:

We come before You, O God, with a heart of thanksgiving for all Your good gifts to us, and also with hearts sensitive to the suffering of those victims of violence. So many people have been threatened or held hostage, have been injured or killed, so often good people innocent in their intent.

We pray, gracious God, that Your blessing will be with those who suffer or who know pain or anguish. May Your purposes, O God, be known to all people, that Your Word of peace and respect and dignity be heard in all the world. This we pray. Amen.

THE JOURNAL

The SPEAKER. The Chair has examined the Journal of the last day's proceedings and announces to the House his approval thereof.

Pursuant to clause 1, rule I, the Journal stands approved.

SUNDRY MESSAGES FROM THE PRESIDENT

Sundry messages in writing from the President of the United States were communicated to the House by Mrs. Emery, one of his secretaries.

MESSAGE FROM THE SENATE

A message from the Senate by Mr. Hallen, one of its clerks, announced that pursuant to Senate Resolution 480, 99th Congress, the Secretary of the Senate communicates to the House of Representatives a copy of the answer of Harry E. Claiborne, judge of the U.S. District Court for the District of Nevada, to the articles of impeachment.

[In the Senate of the United States Sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

NOTICE OF FILING

To: Jo-Anne L. Coe, Secretary of the United States Senate, S-221 The Capitol, Washington, D.C. 20510

Please take notice that on this 5th day of September, 1986, the Honorable Harry E. Claiborne, has posted to the Secretary of the United States Senate, an original and thirty copies of his Answer to Articles of Impeachment.

Simultaneous with the posting of the Answer to Articles of Impeachment, the same was served upon the United States House of Representatives through its Special Counsel, Nicholas D. Chabraja, by Federal Express delivery.

Respectfully submitted:

HARRY E. CLAIBORNE,
(By) Oscar B. Goodman, Esq., and Honorable Howard W. Cannon,
Attorneys for Respondent.

[In the Senate of the United States Sitting as a Court of Impeachment]

IMPEACHMENT OF JUDGE HARRY E. CLAIBORNE

ANSWER TO ARTICLES OF IMPEACHMENT

Judge Harry E. Claiborne, by and through his counsel, Oscar B. Goodman, Esq. and the Honorable Howard W. Cannon, Answers The Articles of Impeachment preferred by the House of Representatives:

ARTICLE I

Article I alleges that Judge Harry E. Claiborne willfully and knowingly made a false statement on his 1979 tax return in violation of Section 7206(1) of Title 26, United States Code.

Judge Harry E. Claiborne states that he believed the return to be true and correct as to every material matter.

Judge Harry E. Claiborne states that he had no specific intent to violate the law and that errors contained in his 1979 return were the result of accident, mistake or negligence. Judge Harry E. Claiborne subscribed such return in reliance on Joseph Wright, whom he reasonably believed to be a competent public accountant. Judge Harry E. Claiborne made a full disclosure to such accountant.

First Affirmative Defense

Judge Harry E. Claiborne was deprived of fundamental Due Process of Law in litigating such defenses by the judges specially appointed to hear his case.

Second Affirmative Defense

Judge Harry E. Claiborne was deprived of Due Process of Law by outrageous prosecutorial conduct by members of the Executive Branch who wrongfully procured his indictment and conviction through perjured testimony, intimidation of witnesses and unlawful covert surveillance including a mail cover and at least one burglary of Judge Claiborne's residence.

ARTICLE II

Article II alleges that Judge Harry E. Claiborne willfully and knowingly made a false statement on his 1980 tax return in violation of section 7206(1) of Title 26, United States Code.

Judge Harry E. Claiborne states that he believed the return to be true and correct as to every material matter.

Judge Harry E. Claiborne states that he had no specific intent to violate the law and that errors contained in his 1980 return were the result of accident, mistake or negligence. Judge Harry E. Claiborne subscribed such return in reliance on Jerry D. Watson, whom he reasonably believed to be a competent public accountant. Judge Harry E. Claiborne made a full disclosure to such person.

First Affirmative Defense

Judge Harry E. Claiborne was deprived of fundamental Due Process of Law in litigating such defenses by the judges specially appointed to hear his case.

Second Affirmative Defense

Judge Harry E. Claiborne was deprived of Due Process of Law by outrageous prosecutorial conduct by members of the Executive Branch who wrongfully procured his indictment and conviction through perjured testimony, intimidation of witnesses and unlawful covert surveillance including a mail cover and at least one burglary of Judge Claiborne's residence.

ARTICLE III

Article III alleges that Judge Harry E. Claiborne was convicted of two felony offenses.

First Affirmative Defense

Judge Harry E. Claiborne states that such convictions were wrongfully obtained by the failure and refusal of the Judicial Branch, through the judges specially appointed to preside over his case, to provide fundamental Due Process of Law.

1. Of the three judges specially appointed to review Judge Claiborne's convictions, all judges, including the Honorable Wilbur F. Pell, Senior Circuit Judge for the Seventh Circuit, the Honorable J. Edward Lumbard, Senior Circuit Judge for the Second Circuit and the Honorable Robert H. McWilliams, Senior Circuit Judge for the Tenth Circuit, failed and refused to conduct an independent examination of the material on which the trial court based its rulings, such materials having been sealed by the trial judge and not unsealed or read by anyone from that time through at least the entry of the Honorable Warren Ferguson's, Circuit Judge for the Ninth Circuit, dissenting opinion on December 30, 1985, from the Order of the Ninth Circuit denying a hearing en banc.

2. The failure and refusal of said judges to conduct a proper independent review of the materials on which the trial court based its rulings or to read the briefs on appeal prejudiced Judge Harry E. Claiborne and deprived him of fundamental Due Process of Law. The specially appointed judges set forth critical factual errors in their analysis of the case in their decision reported at 765 F.2d 784 (1985).

3. The trial judge, the Honorable Walter E. Hoffman, failed and refused to provide to Judge Harry E. Claiborne, or his counsel at any meaningful time, critical exculpatory evidence necessary to impeach the false testimony of the prosecution's witness, Joseph Wright; and Judge Hoffman also failed to provide critical evidence which would corroborate the exculpatory testimony of Jerry Watson and Judge Claiborne. Two items of such exculpatory evidence, the existence of which is now known to Judge Claiborne, are:

A. An interview by FBI Special Agent Richard T. Jessinger of Charlotte Travaglia, an employee of Jerry Watson, conducted on or about June 17, 1983. Travaglia's statement corroborates Judge Claiborne's contention at trial that he made full disclosure of this 1980 income to Jerry D. Watson. Travaglia's statement confirms and corrobo-

Civil investigative demands [CID's] are a pre-lawsuit discovery mechanism which allows the Department of Justice to conduct discovery in civil false claims cases, without the expense of first filing a civil fraud case in Federal district court. This CID provision, however, can only be utilized by the Department of Justice if the Attorney General himself approves the issuance of such.

The bill which we are considering today and which is at the desk, is not exactly like the bill which was reported by the full committee on June 10, 1986. Although H.R. 4827, as amended, was reported by the full committee by a unanimous (35-0) rollcall vote, several Members still had reservations about a few provisions contained in the bill. In order to satisfy these reservations, a compromise was reached which includes the following changes to the bill:

First, there is a change to section 3, the qui tam provisions of the bill. In the bill as reported by the committee, the qui tam plaintiffs rights when the Government enters the lawsuit, were based on the rights of mandatory intervention, pursuant to rule 24(a) of the Federal rules of civil procedure. The bill at the desk adopts the standard of intervention to be that of permissive intervention pursuant to rule 24(b) of the Federal rules. The compromise bill also includes language which provides the qui tam plaintiff with the right to notice of any motion to dismiss filed by the Government and a right to a hearing on any such motion.

Second, the administrative remedy (section 7) was deleted in its entirety. The administrative remedy contained in the bill as reported by the committee applied governmentwide and there were numerous concerns with this provision by several Members. Therefore, this provision has been deleted.

Third, in section 3 of the bill, the Contract Disputes Act language is deleted. With the deletion of the administrative remedy, this bill amends only the current False Claims Act. Since the False Claims Act and the Contract Disputes Act of 1978 have coexisted since 1978, it was decided as part of the compromise, to delete this portion of the bill.

As I said earlier, the False Claims Amendments Act of 1986 is a very important piece of legislation. It is important because it is the primary mechanism through which the Government recoups losses suffered through fraud. It is especially important today given the enormous deficit the Government faces today. Perhaps, if the False Claims Act had been clarified and updated 30 years ago, we might not face quite the same deficit we do today. In any event, the modernization of this statute can and should enable the Government to recoup potentially thousands of dollars lost through fraud each year.

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I would note for the record that the administration supports this bill, and, in addition, the Congressional Budget Office indicates that the bill would have a positive impact on our deficit.

Mr. Speaker, I urge my colleagues to support this legislation.

Mr. BROOKS. Mr. Speaker, I support H.R. 4827 as it is presented today and hope that my colleagues will also. This legislation makes important improvements to the False Claims Act of 1863. That act was enacted during the Civil War to stem the massive corruption and abuse occurring in the procurement of union war supplies. Today, it serves as the Government's chief statutory weapon to combat fraud. Except for two relatively minor amendments, however, the False Claims Act has not been revised since its enactment 123 years ago.

Today's bill would make changes to update the False Claims Act in several significant ways. First, it will increase the civil penalties authorized under the current law. The 1863 act provided for a doubling of actual damages, a $2,000 fine and recovery of the cost of the lawsuit. H.R. 4827 will increase these penalties to double actual damages plus consequential damages, a fine from $5,000 to $10,000, and the costs of suit. These increases in the penalties fixed in 1863 are needed to keep the deterrent value of the False Claims Act current and effective in our modern world.

H.R. 4827 also makes changes to the act's original qui tam, or citizen suits, provisions. The False Claims Act contains provisions which allow citizens to bring suits for false claims on behalf of the Government. These "Lincoln" provisions, named after the President, will be strengthened by H.R. 4827. The incentives for citizens to file such suits are increased, the ability of the citizen who brings such a suit to follow through with the litigation is enhanced, and "whistle-blower" protections are provided employees who report fraud and abuse in conjunction with false claims prosecutions.

Further, the Justice Department is given greater investigative powers and tools to ferret out false claims and fraud under provisions of the bill.

Together, these changes will add new force and vigor to the Nation's efforts to stop fraud in Government services and procurements. They are urgently needed in light of the recent indications of massive procurement abuses occurring in the recent military buildup. Along with the changes this bill makes, there are other reforms and ideas pertinent to this problem which merit serious consideration. Today's bill is not a cure-all, but rather an important first step in revising current out-of-date statutory provisions. I hope my colleagues will pass this measure, and I look forward to working with them on further efforts to address the problem of procurement and services fraud which has plagued our Nation to a greater or lesser extent throughout our history.

Mr. BROWN of Colorado. Mr. Speaker, I yield such time as he may consume to the ranking Republican on the Judiciary Committee, the gentleman from New York [Mr. FISH], who is the original sponsor of the administration's initiative in this area.

Mr. FISH. Mr. Speaker, I thank my colleague, the gentleman from Colorado [Mr. BROWN].

Mr. Speaker, I rise in support of the False Claims Amendments Act of 1986. This legislation will greatly enhance the ability of the Federal Government to deal with fraud and waste in Government grant and loan programs and procurement contracts. As the principal sponsor of the administration's original proposals (H.R. 3334; H.R. 3335) on this subject, I believe that we have fashioned a workable, effective compromise and want to express my sincere appreciation to the administration, in particular the Department of Justice, for its expert assistance in this effort.

Mr. Speaker, the False Claims Act is one of the oldest and potentially most effective remedies available to the United States to discourage and respond to the fraudulent misuse of Federal resources. It is the principal statute upon which the Government relies to seek monetary recovery in fraud cases. The statute was first enacted in 1863, at the height of the Civil War. It permits the Federal Government to recover two times the amount of any false or fraudulent claim submitted, plus a $2,000 civil fine. Closely patterned after bills I originally introduced, the amendments contained in H.R. 4827 would make several statutory changes so as to resolve inconsistencies and ambiguities in current case law and strengthen the Government's ability to investigate, litigate, and otherwise resolve fraud cases.

It should be stressed, Mr. Speaker, that we are dealing here with a civil—not a criminal—statute. The False Claims Act is remedial in nature. The reason for my emphasis on this point is that considerable confusion has been prompted by judicial decisions that have treated the False Claims Act as if it were a criminal statute. These decisions have severely hampered the Justice Department and other Federal agencies in their efforts to effectively recover losses incurred as a result of fraud, waste, and abuse. These cases, in part, are the reason why I introduced the administration's package.

Second, while the False Claims Act is not a penal statute, it does have an important deterrent effect. The False Claims Act allows the Government, on behalf of the taxpayer, to recover losses suffered through the submission of fraudulent claims. The double damages remedy has been a part of this law since 1863 and it implicitly contains a significant deterrence element. The double damages recovery, with the accompanying civil fine, is intend-

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ed to be a substantial penalty—to forcefully discourage individuals and companies that do business with the United States from engaging in fraudulent practices. Indeed, Mr. Speaker, the dual purpose of any such law should always be to deter as well as punish fraudulent conduct.

Under current law, the Federal Government is limited to actual damages, which are then doubled under the statutory formula. Section 2 of H.R. 4827 would make consequential damages the measurement standard—thus allowing a recovery for indirect losses that are the result of the fraud as well as actual, direct losses. This is a realistic, fair change which ensures the recovery will reflect actual replacement cost in every instance.

Last, but not least, I feel I must stress that I do not view these legislative proposals as anticontractor in nature. Rather, I view these legislative proposals as protaxpayer. There is no question in my mind but that the responsible representatives of the private sector share our common goals. Specifically, those goals are: First, an efficent Federal procurement process that results in the purchase of quality products and services at fair prices; and second, an effective mechanism for the Government to employ in recovering its losses when victimized by fraud.

Mr. Speaker, allow me to turn to those provisions in the bill that are deserving of special note. To my mind, one of the most important amendments contained in H.R. 4827 deals with the intent standard and the burden of proof in the False Claims Act. The language of the False Claims Act currently provides that the Federal Government need only prove that the defendant knowingly submitted a false claim. However, this statutory standard has been misconstrued by some courts so as to require that the Government prove the defendant had actual knowledge of the fraud and, even, establish specific intent to submit a false claim. See *United States* v. *Mead*, 426 F.2d 118 (9th Cir., 1970). A specific intent standard, Mr. Speaker, is inappropriate in a civil statute and H.R. 4827 would remove the ambiguity created by this case law by defining knowingly as: First, actual knowledge of the information; second, deliberate ignorance of the truth or falsity of the information; or third, acts in reckless disregard of the truth or falsity of the information.

The burden of proof in civil false claims cases is another area where legislative clarification is necessary to resolve ambiguities which have developed in the case law. Some courts have required that the United States prove a violation by clear and convincing, even unequivocal, evidence. *United States* v. *Ueber*, 299 F.2d 310 (6th Cir., 1962). Because the False Claims Act is a civil statute, the traditional "preponderance of the evidence" burden of proof is more appropriate. Consequently, H.R. 4827 specifically provides that the Government must prove its case by a preponderance of the evidence, the ordinary standard in civil litigation.

H.R. 4827 also contains numerous other amendments, which are designed to resolve specific problems which have arisen under the act:

Section 2(a) raises the fixed statutory penalty for submitting a false claim from $2,000 to not less than $5,000 and not more than $10,000. The $2,000 figure has remained unchanged since the initial enactment of the False Claims Act in 1863.

Section 2(a) also amends the act to permit the United States to bring an action against a member of the Armed Forces, as well as against civilian employees. When the act was first enacted in 1863, the military was excluded because the Government then had available more severe military remedies.

Also, as I mentioned earlier, section 2(a) would permit the Government to recover consequential damages it suffers from the submission of a false claim.

Section 2(a) also provides that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the act as if he had submitted a false claim for money or property. This is better known as a reverse false claim. For instance, the manager of HUD-owned property may falsely understate income and/or overstate expenses in order to reduce the rental receipts which must be paid to HUD at the end of each month. The existing failure to cover these reverse false claims is a serious loophole in the present law. The requirement that there must be a strict demand for money or property before an actual claim can exist under the False Claim Act should be broadened. Instead, the concept of claim should cover all those circumstances where the Government suffers a real financial loss, through a fraudulent misrepresentation or statement.

Section 5 amends the statute of limitations to permit the Government to bring an action within 6 years of when the false claim is submitted, the current standard, or within 3 years after the Government learns of the violations, whichever is later.

Section 6 of the bill modernizes the jurisdiction and venue provisions of the False Claims Act to permit the Government to bring suit, not only in the district where the defendant is found, the current standard, but also where a violation occurred. Currently, when multiple defendants live in different districts, the Government may be required to bring multiple suits, a time-consuming process that is wasteful of judicial and litigation resources.

Another important amendment—contained in section 6—is the grant of civil investigative demand [CID] authority to the Department of Justice to aid in the investigation of False Claims Act cases. The CID provisions are patterned after and analogous to the authority already exercised by the Antitrust Division under the Hart-Scott-Rodino Act. 15 U.S.C. 1311-1314. If the Attorney General of the Civil Division believes that a person has access to information relating to a False Claims Act investigation, he may, prior to filing a complaint, require the production of documents, answers to interrogatories; and oral testimony. The standards governing subpoenas and ordinary civil discovery would apply so as to protect against the disclosure of privileged information. The CID could be enforced in district court, like any other subpoena. The use of CID authority in the antitrust context has been upheld as constitutional. *Hyster Company* v. *United States*, 338 F.2d 183 (9th Cir., 1964); *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), aff'd., 325 F.2d 1018 (8th Cir., 1964).

In conclusion, Mr. Speaker, I want to commend subcommittee Chairman DAN GLICKMAN, the ranking Republican TOM KINDNESS, and the other subcommittee members for their hard work in bringing this legislation to the floor. There is no question that Congress must seek out appropriate legislative mechanisms to insure that the taxpayers' money is well spent and protected from fraud and waste. This bill, Mr. Speaker, will accomplish just that.

Mr. BROWN of Colorado. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, the bill we have before us today reflects the work of several Members and reflects major improvements in existing Federal law governing false claims submitted to the United States. Indeed, a 1981 report by the General Accounting Office identified over 77,000 fraud cases in 21 Federal agencies during a 2½ year period, with estimated losses of $150 to $220 million.

With this background in mind, the Judiciary Committee voted in favor of reporting H.R. 4827, the False Claims Act Amendments of 1986. The bill before us today is preferable to the earlier versions in several respects, such as providing somewhat more realistic and constitutionally defensible penalties. Nonetheless, there remain some areas in which further improvements are sorely needed to insure that due process rights are fully honored. In supporting this legislation today, it is my hope that some of these concerns will be addressed in conference.

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Among the primary areas of concern generated by H.R. 4827, which we hope will be corrected in conference, are the following: First, consequential damages should be limited to those which were reasonably foreseeable and proximately caused by prohibited acts; and second, civil investigative demands, if authorized at all, should certainly not extend to written interrogatories.

CONSEQUENTIAL DAMAGES

H.R. 4827, as reported by the Judiciary Committee, amends the False Claims Act, 31 U.S.C. 3729 et seq., to include civil penalties for persons who submit false claims in an amount equal to the consequential damages sustained. In the committee bill, such damages are defined to include those "which the United States would not have sustained but for (A) the commission of any of the [prohibited] acts . . ., or (B) entering into or making any contract or grant as a result, in any material part, of any false statement, record, or claim." Current law, by contrast, has not authorized the imposition of civil penalties based on consequential damages, such as those attributable to the prohibited act. *United States* v. *Aerodex, Inc.*, 469 F. 2d 1003, 1011 (5th Cir. 1972).

As reported by the committee, the definition of consequential damages is far too sweeping. From a fairness standpoint, assessments of damages should be limited to those which were proximately caused by a prohibited act, and which were reasonable foreseeable. Both of these concepts are well defined in the common law and, consequently, can be readily applied by the courts. In the absence of such limitations, persons may be subject to penalties based on highly speculative, attenuated and subjective considerations.

CIVIL INVESTIGATIVE DEMANDS

H.R. 4827, as reported by the committee, grants to the Justice Department, for the first time, authority to issue civil investigative demands [CID] to persons who may be in possession of information relevant to a false claims law investigation, before any civil proceeding is commenced. Demands could extend to documentary material, written interrogatories, and oral testimony. While the need for such authority has not been demonstrated conclusively, the bill reported by the committee as improved by an amendment confining the issuance of CID's to cases personally approved by the Attorney General. However, the committee's failure to adopt an amendment deleting authority for the issuance of written interrogatories was a serious omission.

Written interrogatories may be subject to great abuse and encourage fishing expeditions. The authority to obtain documents pursuant to a civil investigative demand will give the prosecution access to enough information to determine whether a civil action should be brought. At that point, written interrogatories, oral testimony, and the full array of discovery procedures are already available.

Mr. Speaker, we strongly support the goal of cracking down on fraud against the Government. H.R. 4827 can be further improved in conference in order to preserve due process rights and achieve its ultimate goals. Accordingly, I hope House conferees will support efforts to modify the definition of consequential damages, and restrict the scope of civil investigative demands.

With these changes, Mr. Speaker, we will have a bill that can work fairly and efficiently.

Mr. Speaker, I yield such time as he may consumer to the gentleman from Pennsylvania [Mr. GEKAS].

Mr. GEKAS. Mr. Speaker, I thank the gentleman for yielding time to me.

Mr. Speaker, I, too, join in what seems to be unanimous support for the fast clearance of this legislation and for its final adoption by the Congress of the United States.

I suppose there is nothing more vital to the taxpayer, if we heed the daily conversations of the average American citizen, than the horror stories that they hear on a daily basis—and most of them are justified—as to what goes on in several sectors, in fact, in almost all sectors of the Government at one time or another relating to fraud and waste. If there is anything that galls the taxpayer more, I would like to know what it is, than to learn that their taxpayer dollars are wasted in one form or another.

I do not consider this to be a small thing but, rather, a major thrust, and every little bit that we can do, first of all, to eliminate or reduce fraud and waste, and second, to allay the worries of our taxpayers that indeed there might be an attitude in the Congress that pooh-poohs fraud and waste would be a step in the right direction. So these kinds of bills ought to be adopted on a regular basis.

Mr. Speaker, I support the measure, and I commend all those who made it possible for us to have a quick resolution of this issue.

Mr. BROWN of Colorado. Mr. Speaker, I thank the gentleman from Pennsylvania [Mr. GEKAS] for his leadership in this area.

Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

Mr. GLICKMAN. Mr. Speaker, I yield such time as he may consume to the distinguished chairman of our Committee on the Judiciary, the gentleman from New Jersey [Mr. RODINO].

Mr. RODINO. Mr. Speaker, on June 10, 1986, the Judiciary Committee favorably reported H.R. 4827, the False Claims Amendments Act of 1986 to the floor by a unanimous (35-0) rollcall vote. The purpose of this legislation is to amend the existing civil false claims statute in order to strengthen and clarify the Government's ability to detect and prosecute fraud, as well as to recoup damages suffered by the Government as the result of such fraud.

The False Claims Act was originally enacted in 1863 because of reports of widespread corruption and fraud in the sale of supplies and provisions to the Union Government during the Civil War. Unfortunately, fraud is still prevalent today. While fraud has become more sophisticated, the law through which the Government prosecutes fraud and recoups its losses has not followed the same pattern. This law has remained largely unchanged since it was enacted in 1863.

H.R. 4827 updates and clarifies the current law, by defining terms which previously were not defined in the False Claims Act. For example, this statute has never defined the term "claim." Because of this lack of a definition, court interpretations of what constitutes a claim under this statute have varied.

This bill increases the civil penalties for filing a false claim, expands the qui tam or citizen suit provisions of the law and provides the Government with the power to issue civil investigative demands [CID's].

These amendments to the False Claims Act are long overdue. This statute has existed for 123 years but is out of date and no longer an effective tool for prosecution of civil fraud cases. Passage of H.R. 4827, as amended, will make this 123-year-old statute a more effective tool for prosecution of these cases. It will also provide the Government with a more effective tool for the recovery of the dollar losses suffered through fraud.

I particularly wish to commend the gentleman from Kansas and the other members of the Judiciary Committee for accomplishing the task of reaching a compromise acceptable to everyone while maintaining the goal of this legislation.

I urge my colleagues to pass this important legislation.

Mr. GLICKMAN. Mr. Speaker, I thank the chairman of our committee.

Mr. Speaker, before I yield time to the gentleman from California [Mr. BERMAN], I would like to pay a special tribute to the gentleman from Florida [Mr. IRELAND], who has been intimately involved with the qui tam provisions, and that is the part that the gentleman from California [Mr. BERMAN] has been most responsible for. I want to point out that there has been a genuine bipartisan effort in this bill to try to root out and effectively enhance the enforcement of

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fraud against the Government, and so I think the record ought to reflect that at least with respect to this particular issue we have had genuine bipartisan support.

So now, Mr. Speaker, I yield such time as he may consume to my colleague, the gentleman from California [Mr. BERMAN], who basically spearheaded the qui tam provisions of this bill.

Mr. BERMAN. Mr. Speaker, I rise in support of H.R. 4827, the False Claims Amendments Act of 1986.

I want in particular to thank the chairman of our subcommittee, the gentleman from Kansas [Mr. GLICKMAN] for his kind words, and, more importantly, for his leadership in bringing before this body the outstanding bill we are considering today. In a few short months, he has established himself as the House leader on this issue, and has brought this important legislation to the point where it now has an excellent chance of enactment.

Mr. Speaker, I also want to second the gentleman's comments with respect to our friend and colleague, the gentleman from Florida [Mr. IRELAND], as well as our colleague, the gentleman from Iowa [Mr. BEDELL]. Long before this speaker had ever heard of this legislation and this issue, these gentlemen were legislating and pushing in this area, and without their help I am sure we would not be where we are today.

I do not know if it is comforting or not to realize that many of our contemporary problems were shared by our forebearers over a century ago. But it is indeed the case that in the 1860's, President Abraham Lincoln felt obliged to call upon Congress to pass the False Claims Act, in order to crack down on defense contractor fraud.

Instances were uncovered of defense contractors who resold the same horses two and three times to the Union cavalry, and who were paid for muskets but provided boxes of sawdust. There is billions of dollars difference between that fraud and the defense contractor fraud found in our headlines today, but the principle is the same: The U.S. taxpayers are being bilked, and we need all the resources we can obtain to address the problem.

Unfortunately, over the years changes were made in the Abraham Lincoln law which undermined its effectiveness. That is why I joined my colleagues BERKLEY BEDELL and ANDY IRELAND in introducing a false claims amendments bill last year, and why I am so pleased to support the bill before the House today.

I am particularly pleased with the qui tam or citizens suit provisions in the bill. These provisions improve the incentives for citizens with knowledge of fraudulent claims against the Federal Government to go public with the information, and afford such whistleblowers protection against retaliation by their employers.

In particular, H.R. 4827:

Protects plaintiffs and witnesses from being fired, harassed, suspended or demoted.

Allows the plaintiff in a qui tam suit to maintain his or her involvement in the suit even if the United States enters the case, to ensure that the case is effectively prosecuted on its merits.

Prevents a suit from being dismissed on the Government's assertion that it already had the information brought forward by the plaintiff, to ensure that the Government is indeed acting on the information; and

Provides guarantees of adequate monetary awards and attorneys fees for plaintiffs.

Except where an action is based completely on information already known to the Government, the qui tam plaintiff is entitled to at least 15 percent, but not more than 25 percent of the proceeds of the action or settlement, depending on his or her contribution to the prosecution of the action. This guaranteed minimum is a critical incentive and reward for persons who come forward with information, putting themselves at risk on behalf of the Federal Treasury and American taxpayers.

Mr. Speaker, I want to point out that under H.R. 4827, liability for false claims attaches to a person who has actual knowledge of the falsity of a claim, acts in deliberate ignorance of its truth or falsity, or acts in reckless disregard of its truth or falsity. Given the sorry record of hundreds of millions of dollars in fraudulent claims by Federal contractors, persons and entities doing business with the Government must be made to understand that they have an affirmative obligation to ascertain the truthfulness of the claims they submit. No longer will Federal contractors be able to bury their heads in the sand to insulate themselves from the knowledge a prudent person should have before submitting a claim to the Government. Contractors who ignore or fail to inquire about red flags that should alert them to the fact that false claims are being submitted will be liable for those false claims.

H.R. 4827 contains provisions strengthening the Government's hand in prosecuting false claims cases. And in light of Gramm-Rudman and a newfound reliance on private citizens to help right wrongs, the qui tam provisions of the bill are a critically needed supplement—and prod—to Government prosecution. Frankly, whether as a result of a lack of resources or worse, the Department of Justice has not done an acceptable job of prosecuting defense contractor fraud. I look to H.R. 4827 as a critical incentive to self-policing by Government contractors and, barring that, to effective prosecution of false claims.

I note the support for this bill of thousands of business executives and entrepreneurs from large and small businesses across America who belong to Business Executives for National Security [BENS].

And I am particularly delighted to cite the substantial contribution of John Phillips, director of the Center for Law in the Public Interest, based in Los Angeles. John is one of the most knowledgeable people in the country about how the present False Claims Act works—or fails to work. His interest in this issue arose when his office received anonymous calls from potential whistleblowers in defense plants who were aware of illegal practices, but were not sure what they should do with the information. They were fearful that if they went to the Government or their employers with the information, at best nothing would be done, and at worst, they would be fired. The center's research has been instrumental in pointing out the weaknesses of present law, and the need for the bill we have before us today.

Mr. Speaker, I am convinced that only those who cheat the U.S. Government have anything to fear from H.R. 4827. As members of BENS have noted, "the size of our deficit warrants all reasonable congressional actions to recoup the billions of dollars leaking out of the system through fraud." H.R. 4827 is sound, urgently needed legislation, and I urge its adoption.

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Mr. GLICKMAN. Mr. Speaker, I would just conclude by saying that the other body has passed a comparable bill under the leadership of the senior Senator from Iowa. It is indeed possible that this could become law this year.

Mr. BEDELL. Mr. Speaker, I rise in support of H.R. 4827, the False Claims Act Amendments of 1986. As an original cosponsor of legislation sponsored by Congressman ANDY IRELAND to restore the qui tam, or informer, provisions of the civil False Claims Act to their original strength, I am pleased that the bill before us today embodies much of our original bill.

Congressman ANDY IRELAND first introduced legislation in 1983 to restore the Lincoln qui tam law to its original strength. In the 99th Congress, Congressman HOWARD BERMAN of the Judiciary Committee assisted in drafting a superior version of the 1983 bill that contained several new elements. Finally, Congressman DAN GLICKMAN provided the leadership as chairman of the House Judiciary Subcommittee on Administrative Law by holding hearings and bringing a compromise version to the attention of the full House today.

The world's second oldest profession, some say, is stealing from the public purse. More than 100 years ago, during the Civil War,

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President Abraham Lincoln became so frustrated with Government fraud and the failure of his Justice Department to deal with the problem that he pushed Congress to enact the qui tam, or informer, provisions in the False Claims Act. Lincoln fought fraud against the Government by offering persons who knew of fraud a portion of damages recovered by the Government when those persons provided their evidence to the Government or when they brought suit themselves for the Government.

Lincoln's original qui tam law remained in force until 1943, when defense contractors became concerned that it may be used more frequently, and persuaded the Attorney General to push through Congress a qui tam revision that vested almost all discretion with the Justice Department. The one legitimate objection raised at the time was that the qui tam law might encourage parasitic suits by people who really had no original information to share.

What is wrong with current law as enacted in 1943? First, when a citizen files a suit alleging fraud, the Government can decide to take over the case and then sit on it or seek to have it dismissed. Testimony before the House Judiciary Committee this year demonstrates that the current administration may have done exactly that in the Gravitt case. H.R. 4827 prevents this by establishing that the citizen who originally brought the suit may intervene to ensure diligent prosecution even after the Government has taken over the case.

Another problem with current law is that, if the Government decides not to proceed with an action, the court can still dismiss an action brought by a private citizen if the case is based upon "evidence or information the Government had when the action was brought." Clearly, there may be many cases where evidence is somewhere in the hands of some Government official, even if the Government does not have the evidence in organized form or even knows it has the information. H.R. 4827 allows the court to dismiss a citizen's action brought upon evidence previously disclosed under certain circumstances, but also provides that the court shall permit the suit if the Government was aware of the information for 6 months and took no action. This addresses the legitimate concern about parasitic suits.

Third, under current law a citizen who risks bringing suit cannot be sure of receiving any portion of damages recovered, and has few legal protections against the crudest forms of reprisals through loss of employment, et cetera. H.R. 4827 establishes specific minimum and maximum percentages of damages that citizens shall receive depending on their contribution to a successful case. In addition, the bill provides "whistleblower protections" to qui tam plaintiffs who suffer reprisals.

At a more fundamental level, some people may question whether it is right for the Government to encourage informers and to give them standing to bring suit in court on behalf of the Government. But during my years in Congress, people have told me that they have reported fraud to the proper authorities but that no one seemed interested and nothing was done. Even if the authorities are interested, they are overwhelmed by work already. Also, in many cases, the authorities will not prosecute for political reasons. In my opinion, citizen informer suits will bring more fraud to light, recover more damages for the taxpayers, and ultimately prevent much fraud by creating a far less cavalier attitute toward stealing from the public purse.

I think that my experiences cause me to have a generally balanced approach to this issue. During the last Congress, my Small Business Subcommittee was very involved in the passage of two Federal procurement reform laws, the Procurement Reform Act of 1984 (Public Law 98-525) and the Small Business and Federal Procurement Competition Enhancement Act of the 1984 (Public Law 98-577). I believe that these and more recent laws go a long way toward improving the procurement process. However, my experience tells me that we cannot legislate common sense or integrity, and that, as in Abe Lincoln's time, the Justice Department has neither the political will nor the resources to always enforce the all of the laws. We need some mechanism that uses informer suits.

However, I am also a small businessman, and I understand the dangers involved. We must be careful not to add to the legal burdens of the vast majority of honest business persons who give the Government the best product they can at the best price. I am pleased to note that H.R. 4827 provides that a defendant can receive expenses and lawyers' fees from the plaintiff if the court finds that a suit is clearly vexacious, frivolous or brought solely for purposes for harassment. Second, H.R. 4827 provides that a civil False Claims Act suit may not be brought by the Government in order to intimidate a small business out of filing a good faith action against the Government under the Contract Disputes Act of 1978.

While I believe that the bill is as balanced as possible, it will be important for Congress to oversee its implementation closely to ensure that this balanced congressional intent is respected.

I urge the House to pass this bill today and the Congress to quickly agree on legislation for the President's signature.

Mr. STARK. Mr. Speaker, I am in strong support of the False Claims Amendments Act. My colleague from Kansas and the rest of the Judiciary Committee are to be commended for bringing to the floor a bill that serves notice that the Federal Government will no longer be an easy mark for would-be cheats and frauds.

H.R. 4827 wisely and judiciously reforms the incentives facing Government contractors and employees to discourage strongly the temptation to defraud and to encourage those who see or suspect fraud to report it to the Government. It also improves the procedures under which fraud cases are handled to facilitate prosecution. The deletion of the military exemption will allow the Government to recoup losses suffered from fraud in military contracts; and the improvements in whistleblower protections are among the strongest parts of the bill.

One section that I am particularly happy to support is the qui tam provision, which allows a private citizen to sue on behalf of the Government and to share in the award if the action is successful. This section goes a long way toward restoring teeth to a law that was basically defanged in 1943 and rendered useless. I believe it is good policy to encourage citizens to help ensure that their tax dollars are spent well and to pressure the Government to follow through on cases raised by those citizens. I am very pleased to see something that I have worked on with Mr. BERMAN and other Members for nearly 2 years finally realized.

While the False Claims Amendments Act does accomplish many positive things, I don't believe we should stop here. In the next Congress I would like to see the committee return to this area to develop a framework providing for an administrative remedy to certain small-dollar cases and to further refine and strengthen the qui tam provisions. The citizens of this country do not mind paying taxes if they think that all are paying their fair share and that their money is not being wasted. The tax reform bill which will come to the floor soon brings more fairness to the revenue side; I believe that H.R. 4827 will improve confidence in the expenditure side.

Mr. GLICKMAN. Mr. Speaker, I have no further requests for time, and I yield back the balance of my time.

The SPEAKER pro tempore (Mr. MONTGOMERY). The question is on the motion offered by the gentleman from Kansas [Mr. GLICKMAN] that the House suspend the rules and pass the bill, H.R. 4827, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

Mr. GLICKMAN. Mr. Speaker, I ask unanimous consent that the Committee on the Judiciary be discharged from further consideration of the Senate bill (S. 1562) to amend the False Claims Act, and title 18 of the United State Code regarding penalties for false claims, and for other purposes, and ask for its immediate consideration.

The Clerk read the title of the Senate bill.

The SPEAKER pro tempore. Is there objection to the requst of the gentleman from Kansas?

Mr. BROWN of Colorado. Reserving the right to object, Mr. Speaker, I would reserve the right to object for the purpose of asking the gentleman from Kansas to explain the measure, and I yield to the gentleman for that purpose.

Mr. GLICKMAN. Mr. Speaker, it is my intention to take up the Senate companion bill and engage in the normal legislative action, which is to strike the language of S. 1562 and insert the House-passed text which we just passed today and send it back to the other body.

Mr. BROWN of Colorado. Mr. Speaker, I thank the gentleman, and I withdraw my reservation of objection.

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The SPEAKER pro tempore. Is there objection to the request of the gentleman from Kansas?

There was no objection.

The Clerk read the Senate bill, as follows:

S. 1562

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3729 of title 31, United States Code, is amended by—

(1) inserting "(a)" before "A person";

(2) striking out "$2,000," and inserting in lieu thereof "$10,000, unless the court finds:

"(A) the defendant furnished officials of the United States responsible for investigating false claims violations with all information known to such defendant about such violation within 30 days after the date on which the defendant first obtained the information;

"(B) the defendant fully cooperated with any Government investigation of such violation; and

"(C) at the time the defendant furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title, with respect to such violation, and the defendant did not have actual knowledge of the existence of an investigation into such violation;

in which case the court may assess not less than $5,000, or unless the court finds that the defendant is a partnership, corporation, association, or organization, the annual gross receipts of which did not exceed $1,000,000 at the time the action was brought, and which had not more than 80 employees at the time the action was brought, and the court finds the assessment of $10,000 will result in substantial hardship under the circumstances for the defendant, in which case the court may assess not less than $5,000;

(3) striking out "2 times the amount of damages" and inserting in lieu thereof "3 times the amount of damages unless the court finds the provisions of paragraphs (A) through (C), in which case the court may assess not less than 2 times the amount of damages, in addition to the amount of the consequential damages";

(4) striking out "not a member of the armed forces of the United States" the first place it appears;

(5) striking out "or" at the end of clause (5);

(6) striking out the period in clause (6) and inserting in lieu thereof "; or"; and

(7) adding at the end thereof the following:

"(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

"(b) Consequential damages as used in subsection (a) shall include damages which the United States would not have sustained but for—

"(1) the doing or commission of any of the acts prohibited by subsection (a); or

"(2) having entered into or made any contract or grant as a result of any material part of any false statement,

and which were reasonably foreseeable to the defendant at the time the alleged fraud was committed or at the time of the submission of the claim or statement.

"(c) For purposes of this section, the terms 'knowing' and 'knowingly' mean the defendant—

"(1) had actual knowledge;

"(2) acted in deliberate ignorance of the truth or falsity of the information; or

"(3) acted in reckless disregard of the truth or falsity of the information;

and no proof of specific intent to defraud is required.

"(d) For purposes of this section, 'claim' includes any request or demand whether under a contract or otherwise for money or property which is made to a contractor, grantee, or other recipient if the Government provides any portion of the money or property which is requested or demanded or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

"(e)(1) The Attorney General or his designee may apply for provisional relief to any district court having jurisdiction pursuant to section 3732 whenever he has reasonable cause to believe this section or section 3730, or 3731 may have been violated. If the court finds there is a reasonable likelihood that the United States will prevail after trial on the merits of its claims, the court shall enjoin the defendant from taking any action which the court, in the exercise of its discretion, finds reasonably likely to hinder or delay the United States in the collection of any judgment which may be obtained in such action.

"(2) In addition, the court may from time to time make such other orders as it deems appropriate, including requiring the defendant to post security for judgment, to seek the prior approval of the court before making any transfer without adequate and full consideration, paying an antecedent debt which has matured more than thirty days prior to the date of payment, or otherwise engaging in any transaction not in the usual and regular course of the defendant's business. Except as provided in this section, such application and proceedings by the Attorney General shall be governed by Rule 65 of the Federal Rules of Civil Procedure.

"(f) Any information furnished pursuant to clauses (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.".

SEC. 2. Section 3730 of title 31, United States Code, is amended to read as follows:

"§ 3730. Civil actions for false claims

"(a) The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

"(b)(1) Except as provided in subsection (e), a person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. An action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.

"(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government under Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence.

"(3) The Government may, for good cause shown, move the court for stays and for extensions of the time during which the complaint shall remain under seal. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon him pursuant to Rule 4 of the Federal Rules of Civil Procedure.

"(4) Before the expiration of the initial 60-day period or any stays obtained, the Government shall—

"(A) proceed with the action, in which case the action shall be conducted only by the Government; or

"(B) notify the court that it declines to take over the action, in which case the action shall be conducted by the person bringing the action.

"(5) Where a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

"(c)(1) If the Government proceeds with the action, the action is conducted solely by the Government and it shall not be bound by an act of the person who initiated the action. If he so requests, the person bringing the action shall be served with copies of all pleadings filed in the action, shall be supplied with copies of all deposition transcripts (at his expense), and shall be permitted to file objections with the court and petition for an evidentiary hearing to object to any proposed settlement or to any motion to dismiss filed by the Government. The court may grant such an evidentiary hearing only upon a showing of substantial and particularized need. The person bringing the action may move the court for leave to conduct the action in the name of the United States if, after making its election to take over the suit, the Government does not proceed with the action with reasonable diligence within six months or such reasonable additional time as the court may allow after notice.

"(2) If the Government elects not to proceed with the action, the action shall be conducted by the person who initiated the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at its expense). Where a person proceeds with the action in the name of the United States pursuant to subsection (b), the court may nevertheless permit the Government to intervene and proceed with the action by its own attorneys at a later date upon a showing of good cause.

"(3) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to it, including, but not limited to, any administrative civil money penalty proceeding.

"(d)(1) If the Government proceeds with the action, including any proceeding pursuant to subsection (c)(3), the person bringing the action may receive an amount the court decides is reasonable. The amount may not be less than 10 percent, nor more than 20 percent, of the proceeds of the action or settlement of a claim and shall be paid out of those proceeds.

"(2) If the Government does not proceed with an action, the person bringing the action or settling the claim may receive an amount the court decides is reasonable for

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collecting the civil penalty and damages. The amount may not be less than 20 percent, nor more than 30 percent, of the proceeds of the action or settlement and shall be paid out of those proceeds.

"(3) The amount awarded under this section shall be in the discretion of the court, taking into account—

"(A) the significance of the information provided to the Government;

"(B) the contribution of the person bringing the action to the result obtained; and

"(C) whether the information which formed the basis for the suit was known to the Government.

"(4) Where the persons brought an action based primarily on disclosures of specific information relating to allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media, the court may award such sums as it deems appropriate, not to exceed 10 percent of the recovery and taking into account the significance of the information and the role of the person in advancing the case to litigation.

"(5) In addition to any other amounts awarded by the court, the court may also award the person bringing the action reasonable attorney fees and other expenses. The Government shall not be liable for the expenses or legal fees a person incurs in bringing or defending an action under this section.

"(6) If the Government does not proceed with the action and it is litigated by the person bringing the action, the court shall award to the defendant its reasonable attorney fees and expenses if the defendant prevails in such action and the court finds that the claim of the person bringing the action was clearly frivolous, vexatious, or brought for purposes of harassment. In cases where it appears that the person is bringing an action which is frivolous, vexatious, or brought for purposes of harassment, the court shall require such assurances that payment of legal fees and expenses will be made, if such are awarded, as it deems appropriate before allowing the action to proceed.

"(7) After any final judgment is issued in any action brought under this section, or any alternate remedy available to the Government, any person who brought an action under subsection (b) shall have 60 days to petition the court for any award to which he is entitled under this section.

"(e)(1) No court shall have jurisdiction over an action brought by a former or present member of the armed services under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

"(2) No court shall have jurisdiction over an action brought against a member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

"(3) For purposes of this subsection, 'senior executive branch official' means those officials listed in section 201(f) of Appendix IV of title 5.

"(4) In no event may a person bring an action under this section based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

"(5)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

"(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.

"(f) The district courts shall have jurisdiction over any action brought under State law for the recovery of funds paid by State or local governments where such action grows out of the same transaction or occurrence as an action brought under this section.

"(g) The Attorney General or his designee is authorized to make payments from Department of Justice appropriations for information or assistance leading to a civil or criminal recovery under this section, section 3729, or sections 3731 through 3734, known as the False Claims Act or under section 286, 287, or 1001 of title 18. Any such payment shall be at the discretion of the Attorney General or his designee.

"(h) In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

SEC. 3. Section 3731 of title 31, United States Code, is amended by—

(1) inserting before the period at the end of subsection (b) the following: "or within three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, whichever occurs last"; and

(2) inserting after subsection (b), the following new subsections:

"(c) In any action brought under this section or section 3729, 3730, 3732, or 3733, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

"(d) Notwithstanding any contrary provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action brought by the United States pursuant to this section or section 3729, 3730, 3732, or 3733.".

SEC. 4. Subchapter III of chapter 37 of title 31, United States Code, is amended by adding at the end thereof the following:

"§ 3732. False claims jurisdiction

"(a) The district courts of the United States, including such courts for Puerto Rico, the Virgin Islands, Guam, and any territory or possession of the United States, shall have jurisdiction over any action commenced by the United States under this section, or under section 3729, 3730, 3731, 3733, or 3734. Venue of any such action shall be proper in any district in which any defendant, or in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act prescribed by such sections is alleged by the United States to have occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the district court and served at any place within the United States, Puerto Rico, the Virgin Islands, Guam, any territory or possession of the United States, or in any foreign country.

"(b) The United States Claims Court shall also have jurisdiction of any such action if the action is asserted by way of counterclaim by the United States. The United States may join as additional parties in such counterclaim all persons who may be jointly and severally liable with such party against whom a counterclaim is asserted by reason of having violated this section, or section 3729, 3730, 3731, or 3733, except that no cross-claims or third-party claims shall be asserted among such additional parties unless such claims are otherwise within the jurisdiction of the United States Claims Court.".

SEC. 5. Subchapter III of chapter 37 of the title 31, United States Code is further amended by adding at the end thereof the following:

"§ 3733. Civil investigative demands

"(a) For purposes of this section, the term—

"(1) 'False Claims Act law' means—

"(A) this section and sections 3729 through 3731 of this title, commonly known as the False Claims Act; and

"(B) any Act of Congress enacted after this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to any false claim, bribery, or corruption of any officer or employee of the United States;

"(2) 'False Claims Act investigation' means any inquiry conducted by any False Claims Act investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of any provision of the False Claims Act law;

"(3) 'False Claims Act investigator' means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any False Claims Act law or any officer or employee of the United States acting under direction and supervision of such attorney or investigator in connection with a False Claims Act investigation;

"(4) 'person' means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision;

"(5) 'documentary material' includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product or discovery;

"(6) 'custodian' means the custodian, or any deputy custodian, designated by the Attorney General; and

"(7) 'product of discovery' includes without limitation the original or duplicate of any deposition, interrogatory, document, thing, result of an inspection of land or other property, examination, or admission obtained by any method of discovery in any judicial or administrative litigation or action of an adversarial nature, any digest, analysis, selection, compilation, or any derivation thereof, and any index or manner of access thereto.

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"(b)(1)(A) Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have any information relevant, and not otherwise reasonably available, to a False Claims Act investigation, he may, prior to the institution of a civil proceeding, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying, to answer in writing written interrogatories, to give oral testimony concerning documentary material or information, or to furnish any combination of such material, answers, or testimony. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and notify the person to whom such demand is issued of the date on which such copy was served.

"(B) Notwithstanding the provisions of section 510 of title 28, the Attorney General may not authorize the performance of any function of the Attorney General vested in him pursuant to this paragraph, by any other officer, employee, or agency.

"(2)(A) Each such demand shall state the nature of the conduct constituting the alleged violation of a False Claims Act law which is under investigation, and the applicable provision of law.

"(B) If such demand is for production of documentary material, the demand shall—

"(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

"(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection, and copying; and

"(iii) identify the False Claims Act investigator to whom such material shall be made available.

"(C) If such demand is for answers to written interrogatories, the demand shall—

"(i) set forth with definiteness and certainty the written interrogatories to be answered;

"(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

"(iii) identify the False Claims Act investigator to whom such answers shall be submitted.

"(D) If such demand is for the giving of oral testimony, the demand shall—

"(i) prescribe a date, time, and place at which oral testimony shall be commenced;

"(ii) identify a False Claims Act investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

"(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

"(iv) notify the person receiving the subpoena of the right to be accompanied by an attorney and any other representative; and

"(v) describe the general purpose for which the subpoena is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the subpoena.

Any such demand which is an express demand for any product of discovery shall not be returned or returnable until twenty days after a copy of such demand has been served upon the person from whom the discovery was obtained.

"(E) The date prescribed for the commencement of oral testimony pursuant to a civil investigation demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstance are present which warrant the commencement of such testimony within a lessor period of time.

"(F) Any official before whom oral testimony under this section is to be taken shall exclude from the place where the testimony is to be taken all persons except the person giving the testimony, the attorney and any other representative for the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government, and the person giving the testimony, and any stenographer taking such testimony.

"(G) The Attorney General shall not authorize a second demand for oral testimony to a person unless such person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not authorize the performance of any function vested in him under this subparagraph, by any other officer, employee, or agency, notwithstanding section 510 of title 28.".

"(c)(1) No such demand shall require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

"(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

"(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section and sections 3729 through 3731.

"(2) Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which may be invoked to resist discovery of trial preparation materials to which the person making such disclosure may be entitled.

"(d)(1) Any such demand may be served by any False Claims Act investigator, or by any United States Marshal or Deputy Marshal, at any place within the United States.

"(2) Any such demand or any petition filed under subsection (k) may be served upon any person who is not found within the United States, in such manner as the Federal Rules of Civil Procedures prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such court would have if such person were personally within the jurisdiction of such court.

"(e)(1) Service of any such demand or of any petition filed under subsection (k) may be made upon a partnership, corporation, association, or other legal entity by—

"(A) delivering an executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

"(B) delivering an executed copy thereof to the principal office or place of business of the partnership, corporation, or entity to be served; or

"(C) depositing such copy in the United States mails, by registered or certified mail, return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

"(2) Service of any such demand or of any petition filed under subsection (k) may be made upon any natural person by—

"(A) delivering an executed copy thereof to the person to be served; or

"(B) depositing such copy in the United States mails by registered or certified mail, return receipt requested, addressed to such person at his residence or principal office or place of business.

"(f) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(g) The production of documentary material in response to a demand served pursuant to this section shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(h) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath unless it is objected to, in which event the reasons for the objection shall be stated in lieu of any answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any materials are not furnished, they shall be identified and reasons set forth with particularity for each.

"(i)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the tes-

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timony of the witness. The testimony shall be taken stenographically and transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

"(2) The False Claims Act investigator conducting the examination shall exclude from the place where the examination is held all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any other stenographer taking such testimony.

"(3) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the False Claims Act investigator conducting the examination and such person.

"(4) When the testimony is fully transcribed, the False Claims Act investigator or the officer shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine the transcript and the transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the False Claims Act investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days after his being afforded a reasonable opportunity to examine it, the officer or the False Claims Act investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reason, if any, given therefor. A refusal to sign or an unreasonable absence shall be deemed to be an acknowledgment of its accuracy and an affirmation of its contents.

"(5) The officer shall certify on the transcript that the witness was sworn in by him and that the transcript is a true record of the testimony given by the witness, and the officer or False Claims Act investigator shall promptly deliver it or send it by registered or certified mail to the custodian.

"(6) Upon payment of reasonable charges therefor, the False Claims Act investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of his testimony.

"(7)(A) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be properly made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not by himself or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, the False Claims Act investigator conducting the examination may petition the district court of the United States pursuant to subsection (k)(1) for an order compelling such person to answer such question.

"(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

"(8) Any person appearing for oral examination pursuant to a demand served under this section shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

"(j)(1) The Attorney General, or his authorized designee shall designate a False Claims Act investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional False Claims Act investigators as he determines from time to time to be necessary to serve as deputies to such officer.

"(2) Any person upon whom any demand under subsection (b)(1) for the production of documentary material has been served shall make such material available for inspection and copying to the False Claims Act investigator designated therein at the principal place of business of such person, or at such other place as such False Claims Act investigator and such person thereafter may agree and prescribe in writing, or as the court may direct pursuant to subsection (k)(1) on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may, upon written agreement between such person and the custodian, substitute copies for originals of all or any part of such material.

"(3)(A) The False Claims Act investigator to whom any documentary material, answers to interrogatories, or transcripts of oral testimony are delivered shall take physical possession thereof, and shall transmit them to the custodian who shall be responsible for the use made thereof and for the return of documentary material pursuant to this section.

"(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any authorized official or employee of the Department of Justice or any authorized officer or employee of the United States acting under the direction and supervision of an attorney or investigator of the Department of Justice in connection with any False Claims Act investigation, under regulations promulgated by the Attorney General. Notwithstanding subparagraph (C) of this subsection, such material, answers, and transcripts may be used by any such person in connection with the taking of oral testimony pursuant to this section.

"(C) Except as otherwise provided in this section, while in the possession of the custodian, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material, answers, or transcripts, and, in the case of any product of discovery produced pursuant to an express demand for such material, of the person from whom the discovery was obtained, by any individual other than an authorized official or employee of the Department of Justice, or an authorized officer or employee of the United States acting under the direction and supervision of an attorney or investigator of the Department of Justice in connection with any False Claims Act investigation. Nothing in this section is intended to prevent disclosure to either body of the Congress or to any authorized committee or subcommittee thereof, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure to any other agency of the United States shall be allowed only upon application, made by the custodian to a United States district court, showing substantial need for use by such agency in furtherance of its statutory responsibilities.

"(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

"(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by an authorized representative of such person; and

"(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or his counsel.

"(4) Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case, grand jury, or proceeding as such attorney determines to be required. Upon the completion of any such case, grand jury, or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(5) If any documentary material has been produced in the course of any False Claims Act investigation by any person pursuant to a demand under this section, and—

"(A) any case or proceeding before any court or grand jury arising out of such investigation, or any proceeding before any Federal administrative or regulatory agency involving such material, has been completed, or

"(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies thereof furnished to the custodian pursuant to paragraph (2) of this subsection or made by the Department of Justice pursuant to paragraph (3)(B) of this subsection) which has not passed into the control of any court, grand jury, or agency

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through the introduction thereof into the record of such case or proceedings.

"(6) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced under any demand issued pursuant to this section, or of the official relief of such custodian from responsibility for the custody and control of such material, answers or transcripts, the Attorney General or his authorized designee shall promptly (A) designate another False Claims Act investigator to serve as custodian of such material, answers, or transcripts, and (B) transmit in writing to the person who produced such material, answers, or testimony notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have, with regard to such material, answers or transcripts, all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred prior to his designation.

"(k)(1) Whenever any person fails to comply with any civil investigative demand served upon him under subsection (b) or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section.

"(2)(A) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any False Claims Act investigator named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such False Claims Act investigator a petition for an order of such court, modifying or setting aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending.

"(B) The time allowed for compliance with the demand, in whole or in part, as deemed proper and ordered by the court shall not run during the pendency of such petition in the court, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

"(3) Within twenty days after the service of any express demand for any product of discovery upon, or at any time before, the return date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any False Claims Act investigator named in the demand, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any False Claims Act investigator named in the demand and upon the recipient of the demand, a petition for an order of such court modifying or setting aside those portions of the demand requiring production of any such product of discovery. Such petition shall specify each ground upon which the petitioner relies in seeking such relief and may be based upon any failure of such portions of the demand to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of such petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

"(4) At any time during which any custodian is in custody or control of any documentary material, answers to interrogatories delivered, or transcripts of oral testimony given by any person in compliance with any such demand, such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

"(5) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

"(6) To the extent that such rules may have application and are not inconsistent with the provisions of this section, the Federal Rules of Civil Procedure shall apply to any petition under this subsection.

"(7) Any documentary material, answers to written interrogatories, or oral testimony provided pursuant to any demand issued under this section and sections 3729 through 3731 shall be exempt from disclosure under section 552 of title 5.".

SEC. 6. (a) Subchapter III of chapter 37 of title 31, United States Code, is further amended by adding at the end thereof the following:

"§ 3734. Whistleblower protection

"Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms or conditions of such employment by his employer because of the good faith exercise by such employee on behalf of himself or others of any option afforded by this Act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Act, shall be entitled to all relief necessary to make him whole. Such relief shall include reinstatement with full seniority rights, backpay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney fees. In addition, the employer shall be liable to such employee for twice the amount of backpay and special damages and, if appropriate under the circumstances, the court shall award punitive damages.".

(b) The table of sections for chapter 37 of title 31, United States Code, is amended by adding at the end thereof the following new items:

"3732. False claims jurisdiction.

"3733. Civil investigative demands.

"3734. Whistleblower protection.".

SEC. 7. (a) Section 286 of title 18, United States Code, is amended by striking out "$10,000" and inserting in lieu thereof "$1,000,000 notwithstanding the provisions of section 3623,".

(b) Section 287 of title 18, United States Code, is amended by striking out "$10,000, or imprisoned not more than five years" and inserting in lieu thereof "$1,000,000, or imprisoned for not more than ten years, or both, notwithstanding the provisions of section 3623".

SEC. 8. This Act and the amendments made by this Act shall become effective upon the date of enactment.

MOTION OFFERED BY MR. GLICKMAN

Mr. GLICKMAN. Mr. Speaker, I offer a motion.

The Clerk read as follows:

Mr. GLICKMAN. moves to strike out all after the the enacting clause of the Senate bill, S. 1562, and to insert in lieu thereof the text of H.R. 4827, as passed by the House.

The motion was agreed to.

The Senate bill was ordered to be read a third time, was read the third time, and passed.

The title of the Senate bill was amended so as to read: "An Act to amend title 31, United States Code, with respect to the fraudulent use of public property or money."

A motion to reconsider was laid on the table.

A similar House bill (H.R. 4827) was laid on the table.

GENERAL LEAVE

Mr. GLICKMAN. Mr. Speaker, I ask unanimous-consent that all Members may have 5 legislative days in which to revise and extend their remarks on the legislation just concluded.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Kansas?

There was no objection.

PERMISSION FOR COMMITTEE ON RULES TO FILE A RULE ON H.R. 5484, OMNIBUS DRUG BILL OF 1986

Mr. WRIGHT. Mr. Speaker, I have a unanimous-consent request. I have discussed this request with the minority leader.

I ask unanimous consent that the Committee on Rules may have until midnight tonight to file a rule to ac-

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ARTICLE:A CONSTITUTIONAL DEFENSE OF QUI TAM

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I. Introduction

The False Claims Act (FCA), [1] which Congress originally enacted in 1863, [2] is the government's primary litigative tool for combating fraud **[*382]** against the federal government. [3] Among other things, the FCA permits a private

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[1] Act of March 2, 1863, ch. 67, ***12 Stat. 696,*** reenacted Rev. Stat. 3490-3494, 5438 (1875 ed.) (codified at 31 U.S.C. 231-235, recodified at 31 U.S.C. 3729-3731 (1982)).

[2] S. Judiciary Comm., False Claims Amendments Act of 1986, S. Rep. No. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266.

[3] Id. For scholarly discussion of constitutional issues involving the FCA, see Sean Hamer, Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act, ***6 Kan. J.L. & Pub. Pol'y 89 (1997);*** Peter M. Shane, Returning Separation-of-Powers Analysis to Its Normative Roots: *The Constitutionality of Qui Tam Actions and Other Private Suits to Enforce Civil Fines, 30 Env. L. Rep. 11081 (2000);* James T. Blanch, Note, The Constitutionality of the False Claims Act's Qui Tam Provision, 16 Harv. J.L. & Pub. Pol'y 701 (1993); Evan Caminker, Comment, The Constitutionality of Qui Tam Actions, *99 Yale L.J. 341 (1989);* Frank A. Edgar, Jr., Comment, "Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act, 27 Idaho L. Rev. 319 (1990); Robert E. Johnston, Note, 1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution, *62 Geo. Wash. L. Rev. 609 (1994);* Thomas R. Lee, Comment, The Standing of Qui Tam Relators Under the False Claims Act, *57 U. Chi. L. Rev. 543 (1990);* Ara Lovitt, Note, Fight for Your Right to Litigate: Qui Tam, Article II, and the President, *49 Stan. L. Rev. 853 (1997);* John P. Robertson, Comment, The False Claims Act, *26 Ariz. St. L.J. 899 (1994).*

For scholarly discussion of other issues raised by the FCA, see J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, *78 N.C. L. Rev. 539 (2000);* John T. Boese, When Angry Patients Become Angry Prosecutors: Medical Necessity Determinations, Quality of Care and the Qui Tam Law, *43 St. Louis U. L.J. 53 (1999);* Anna Mae Walsh Burke, Qui Tam: Blowing the Whistle for Uncle Sam, *21 Nova L. Rev. 869 (1997);* Elletta Sangrey Callahan, Double Dippers or Bureaucracy Busters? False Claims Act Suits by Government Employees, *49 Wash. U. J. Urb. & Contemp. L. 97 (1996);* Elletta Sangrey Callahan & Terry Morehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273 (1992); Anthony L. DeWitt, Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act, *65 UMKC L. Rev. 30 (1996);* Jill E. Fisch, Class Action Reform, Qui Tam, and the Role of the Plaintiff, 60 Law & Contemp. Probs. 167 (1997); Patrick W. Hanifin, Qui Tam Suits by Federal Government Employees Based on Government Information, 20 Pub. Cont. L.J. 556 (1991); James B. Helmer, Jr., How Great is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act, *68 U. Cin. L. Rev. 737 (2000);* James B. Helmer, Jr. & Robert Clark Neff, Jr., War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation, 18 Ohio N.U. L. Rev. 35 (1991); Major John C. Kunich, Qui Tam: White Knight or Trojan Horse, 33 A.F. L. Rev. 31 (1990); Ann M. Lininger, The False Claims Act and Environmental Law Enforcement, *16 Va. Envtl. L.J. 577 (1997);* Patricia Meador & Elizabeth S. Warren, The False Claims Act: A Civil War Relic Evolves into a Modern Weapon, *65 Tenn. L. Rev. 455 (1998);* Frederick M. Morgan, Jr. & Julie Webster Popham, The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the Federal False Claims Act, *24 Ohio N.U. L. Rev. 163 (1998);* John R. Munich & Elizabeth W. Lane, When Neglect Becomes Fraud: Quality of Care and False Claims, *43 St. Louis U. L.J. 27 (1999);* Dan D. Pitzer, The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth, 7 Tex. Int'l L.J. 415 (1972); Marc S. Raspanti & David M. Laigaie, Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act, *71 Temp. L. Rev. 23 (1998);* Adam G. Snyder, The False Claims Act Applied to Health Care Institutions: Gearing Up for Corporate Compliance, 1 DePaul J. Health Care L. 1 (1996); Gary W. Thompson, A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door, *27 Pub. Cont. L.J. 669 (1998);* Major David Wallace, Government Employees as Qui Tam Relators, Army Law., Aug. 1996, at 14; Harvinder S. Anand, Note, Competing Relators and Competing Objectives under the False Claims Act: Barring Subsequent Claims Should Look Beyond the Plain Language of Section 3730(b)(5), *28 Pub. Cont. L.J. 89 (1998);* Edmund C. Baird, III, Note, The Use of Qui Tam Actions to

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individual (an "informer" [4]) to bring suit under the FCA in the **[*383]** name of the United States government against an individual or entity (a "defendant") who the informer believes has defrauded the government. [5] This type of suit is known as a "qui tam" suit - from a Latin phrase meaning "one who brings the action as well for the king as for himself." [6] **[*384]** Once the suit is filed, the government then has the option of intervening in the suit, which it may exercise within sixty days. [7] If the government intervenes, it takes control of the suit from the informer; [8] if the government declines to intervene, the informer may continue to prosecute the suit with her own resources. [9] After sixty days, the government may intervene only if it shows the court "good cause." [10] If the suit is successful (regardless of whether it ultimately was prosecuted by the government or the informer), the informer is entitled to an award of up to thirty percent of the proceeds or settlement, plus costs and attorneys' fees. [11]

Enforce Federal Grazing Permits, *72 Wash. U. L.Q. 1407 (1994);* Troy D. Chandler, Comment, Lawyer Turned Plaintiff: Law Firms and Lawyers as Relators Under the False Claims Act, *35 Hous. L. Rev. 541 (1998);* Lisa Estrada, Note, An Assessment of Qui Tam Suits by Corporate Counsel Under the False Claims Act: United States ex rel. Doe v. X Corp., *7 Geo. Mason L. Rev. 163 (1998);* Susan G. Fentin, Note, The False Claims Act - Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of *31 U.S.C. 3730*(e)(4), *17 W. New Eng. L. Rev. 255 (1995);* Gretchen L. Forney, Note, Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act, *82 Minn. L. Rev. 1357 (1998);* Christopher C. Frieden, Comment, Protecting the Government's Interest: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions, *47 Emory L.J. 1041 (1998);* Kaz Kikkawa, Note, Medicare Fraud and Abuse and Qui Tam: The Dynamic Duo or the Odd Couple?, *8 Health Matrix 83 (1998);* Michael Lawrence Kolis, Comment, Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act, *7 Admin. L.J. Am. U. 409 (1993);* Mary DuBois Krohn, Comment, The False Claims Act and Managed Care: Blowing the Whistle on Underutilization, *28 Cumb. L. Rev. 443 (1997);* Frank LaSalle, Comment, The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture, *28 Akron L. Rev. 497 (1995);* Paul W. Morenberg, Comment, Environmental Fraud by Government Contractors: A New Application of the False Claims Act, *22 B.C. Envtl. Aff. L. Rev. 623 (1995);* Valerie R. Park, Note, The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?, *43 Stan. L. Rev. 1061 (1991);* Carolyn J. Paschke, Note, The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, its History and its Unique Position to Influence the Health Care Industry, *9 J.L. & Health 163* (1994-95); Christopher P. Perzan, Note, Research and Relators: The False Claims Act and Scientific Misconduct, 70 Wash. U. L.Q. 639 (1992); Lisa Michelle Phelps, Note, Calling off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions, *51 Vand. L. Rev. 1003 (1998);* Francis E. Purcell, Jr., Comment, Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression, *42 Cath. U. L. Rev. 935 (1993);* K<um a>ra Nicole Schmidt, Note, Privatizing Environmental Enforcement: The Bounty Incentives of the False Claims Act, 9 Geo. Int'l Envtl. L. Rev. 663 (1997); Kent D. Strader, Comment, Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs Be Allowed in False Claims Act Cases?, *62 U. Cin. L. Rev. 713 (1993);* Virginia C. Theis, Note, Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act, *28 Pub. Cont. L.J. 225 (1999);* Note, The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81 [hereinafter History and Development].

[4] A qui tam plaintiff is frequently referred to as a "relator."

[5] *31 U.S.C. 3730*(b)(1) (1994).

[6] The full phrase in Latin is "qui tam pro domino rege quam pro se imposo sequitur." 3 William Blackstone, Commentaries 160-61 (1st ed. 1768); *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 746 n.3 (9th Cir. 1993);* ***Bass Anglers Sportsman's Soc'y of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302, 305 (S.D. Tex. 1971).***

[7] *31 U.S.C. 3730*(b)(2).

[8] Id. 3730(c)(1).

[9] Id. 3730(c)(3).

[10] Id.

[11] Id. 3730(d)(1)-(2).

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Despite the FCA's long history, its constitutionality is still open to question. [12] Because the qui tam informer herself suffers no injury, she would appear at first blush to lack the "injury in fact" [13] required to create Article III standing. [14] The statute raises separation of powers issues by effectively redistributing prosecution and enforcement powers from the executive branch to informers. The "good cause" requirement, and limitations on the government's ability to dismiss or settle a qui tam action, arguably permit the judicial branch to encroach on executive authority by giving federal courts control over whether the government may intervene in, and terminate, a qui tam action. The prosecutorial powers exercised by informers in pursuing qui tam actions raise the issue of whether informers must be appointed in conformity with the Appointments Clause.

The Supreme Court, in a 2000 opinion, resolved the standing issue by holding that the FCA effectively makes a partial assignment of the federal government's claim to the informer, giving the informer a sufficient stake in the outcome to create Article III standing. [15] In doing so, however, the Court expressly left the other issues open. [16] Recent **[*385]** scholarship has argued that the qui tam provisions of the FCA are unconstitutional. [17] The importance of the constitutional issues raised by qui tam goes far beyond the significance of the qui tam action itself; the issues go to the heart of how power is allocated among the three branches of the federal government.

This Article provides a constitutional defense of the FCA qui tam action. Part II discusses the history of qui tam actions and describes the FCA statutory scheme in detail. Part III examines the Article III standing issue, first sketching the general contours of the standing doctrine, then applying that doctrine to the FCA qui tam action. Part IV analyzes the Article II issues. It first discusses the three Article II provisions that have been used to challenge FCA qui tam actions: the separation of powers doctrine, the Take Care Clause, and the Appointments Clause. It then applies these provisions to the three characteristics of qui tam that have come under Article II attack: the restrictions on the executive branch's prosecutorial powers, the delegation of prosecutorial powers to unappointed citizens, and the delegation of other prosecutorial powers to the judicial branch. Part V steps beyond the doctrinal analysis and argues that two unique features of qui tam give especially strong weight to the argument for constitutionality: its dispersal of power among the citizenry rather than among other branches of government, and its existence at the time the Constitution was framed.

II. The Nature of Qui Tam Suits

A. History

The history of qui tam has been extensively chronicled, [18] so its history will be only briefly recounted here. Qui tam actions had their genesis in Roman criminal law, which permitted prosecution by private citizens and offered, as a reward for successful prosecution, a portion of the defendant's property. [19] Early English laws containing qui tam

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[12] Because the FCA was seldom used prior to the 1986 Amendments, infra notes 49 and 57 and accompanying text, it was not subjected to serious constitutional challenge until that time. Lovitt, supra note 3, at 859.

[13] See *Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).*

[14] See, e.g., Blanch, supra note 3, at 767 (concluding that FCA qui tam informers lack Article III standing to sue).

[15] *Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 777-78 (2000).*

[16] Id. at 1865 n.8. While most courts to date have held the FCA constitutional, a Fifth Circuit panel recently created a split in the circuits by holding that the FCA violates separation of power principles by unconstitutionally encroaching on executive authority. The Fifth Circuit's panel decision has been vacated pending en banc review. *Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999),* reh'g en banc granted, *196 F.3d 561 (5th Cir. 1999).*

[17] See, e.g., Blanch, supra note 3; Lovitt, supra note 3.

[18] See, e.g., Beck, supra note 3, at 549-608; Pitzer, supra note 3; History and Development, supra note 3.

[19] Beck, supra note 3, at 566; O.F. Robinsin, The Criminal Law of Ancient Rome 100 (1995); 10 The Cambridge Ancient History 402 n.19 (2d ed. 1996).

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provisions included an a.d. 695 law that prohibited labor on the Sabbath [20] and the 1318 Statute of York, which established price controls for certain consumer goods. [21]

[*386] The latter statute illustrates why qui tam provisions were particularly popular with Parliament and the Crown at this point in English history. Merchandise affected by the statute often was sold by local government officials, who then had a financial disincentive to enforce the statute. [22] Moreover, there was no police force or other public entity that could be relied upon to enforce the statute. [23] The statute therefore provided that merchandise sold in violation of the statute was to be confiscated, permitted private citizens to sue for enforcement, and rewarded successful claimants with a third of the confiscated merchandise. [24]

By the early 1400s, qui tam provisions were appearing in a wide variety of statutes. [25] Many of these statutes regulated labor [26] and commercial activity. [27] Others regulated the performance of public functions. [28] For example, some statutes authorized private suits against public officials who accepted bribes. [29]

Qui tam legislation fell into disfavor in the early 1600s. [30] This was due in large part to abuses by the informers, such as fraudulent prosecutions [31] and extortion. [32] Qui tam legislation experienced a **[*387]** resurgence in the 1700s and early 1800s, [33] but fell off in the late 1800s. [34] In 1951, Parliament abolished the qui tam action entirely. [35]

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[20] The Laws of the Earliest English Kings 3, 27 (F.L. Attenborough ed. & trans., 1963).

[21] Beck, supra note 3, at 567-68.

[22] Id.

[23] 4 W. S. Holdsworth, A History of English Law 355 (1924); 2 Leon Radzinowicz, A History of English Criminal Law and its Administration from 1750, at 33-167 (1956).

[24] Beck, supra note 3, at 568.

[25] Id. at 570-73.

[26] See, e.g., Statute of Labourers, 23 Edw. 3 (1349) (Eng.); Statute of Labourers, 25 Edw. 3 (1350) (Eng.). Collectively, these two statutes attempted to reverse the wage inflation that had resulted from labor shortages caused by the plague.

[27] See, e.g., 34 Hen. 6, c. 7 (1455) (Eng.) (limiting the number of attorneys in certain counties and cities); 22 Edw. 4, c. 3 (1482) (Eng.) (restricting the import of silk); 22 Edw. 4, c. 4 (1482) (Eng.) (restricting the price of bows). For a more extensive list of statutes, see Beck, supra note 3, at 571-72 n.156.

[28] See, e.g., 15 Rich. 2, c. 4 (1391) (Eng.) (permitting suit against public officials who failed to enforce a rule concerning measurement of grain); 20 Hen. 6, c. 5 (1442) (Eng.) (permitting suit against certain public officials who engaged in business related to their public duties).

[29] See, e.g., 34 Edw. 3, c. 8 (1360) (Eng.) (permitting suit against jurors who accepted bribes).

[30] Beck, supra note 3, at 587-90.

[31] Id. at 581-83; see also 22 Acts of the Privy Council of England 1591-92 at 404, 404-05 (John Roche Dasent, C.B., ed., Mackie & Co. 1901) (authorizing continued imprisonment of informer for having given false information in an entry dated Apr. 25, 1592).

[32] See 4 Holdsworth, supra note 23, at 356. Often, an informer and a defendant would reach a settlement between themselves without informing the government or giving the government any share of the settlement. Beck, supra note 3, at 580-81.

[33] Beck, supra note 3, at 591.

[34] Id. at 601.

[35] Common Informers Act, 1951, 14 & 15 Geo. 6, c. 39 (Eng.); 480 Parl. Deb., H.C. (5th ser.) (1950) 2041. But see Beck, supra note 3, at 605 n.353 (noting that the abolition of the qui tam action in England was not completely effectuated until 1957).

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In the meantime, however, the qui tam concept had been introduced to America. Prior to the American Revolution, several colonies passed statutes authorizing qui tam suits. [36] Immediately after the framing of the Constitution, the First Congress enacted several statutes containing qui tam provisions. [37] Over the next hundred years, Congress enacted seven qui tam statutes. [38] Today, four qui tam statutes, all enacted more than a hundred years ago, [39] remain on the books. [40]

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[36] See, e.g., Act for the Restraining and Punishing of Privateers and Pirates, 1st Assemb., 4th Sess. (N.Y. 1692), reprinted in 1 Laws of the Colony of New York 279, 281 (1894) (permitting informers to sue for, and receive share of, fine imposed on officers who neglect their duty to pursue smugglers and pirates).

[37] See Act of March 1, 1790, ch. 2, 3, 1 Stat. 101, 102 (allowing informer to sue for, and receive half of fine for, failure to file census return); Act of July 5, 1790, ch. 25, 1, ***1 Stat. 129*** (extending same to Rhode Island); Act of July 20, 1790, ch. 29, 1, 4, 1 Stat. 131, 131-33 (allowing private individual to sue for, and receive half of fine for, carriage of seamen without contract or illegal harboring of runaway seamen); Act of July 22, 1790, ch. 33, 3, ***1 Stat. 137, 137-38*** (allowing private individual to sue for, and receive half of goods forfeited for, unlicensed trading with Indian tribes); Act of March 3, 1791, ch. 15, 44, 1 Stat. 199, 209 (allowing person who discovers violation of spirits duties, or officer who seizes contraband spirits, to sue for and receive half of penalty and forfeiture, along with costs, in action of debt); cf. Act of April 30, 1790, ch. 9, 16, 17, ***1 Stat. 112, 116*** (allowing informer to conduct prosecution, and receive half of fine, for criminal larceny or receipt of stolen goods).

In addition, several statutes provided a bounty but did not expressly provide a cause of action. See, e.g., Act of July 31, 1789, ch. 5, 29, 1 Stat. 29, 44-45 (giving informer full penalty paid by customs official for failing to post fee schedule); Act of August 4, 1790, ch. 35, 55, 1 Stat. 145, 173 (same); Act of July 31, 1789, ch. 5, 38, 1 Stat. 48 (giving informer quarter of penalties, fines, and forfeitures authorized under a customs law); Act of September 1, 1789, ch. 11, 21, 1 Stat. 55, 60 (same under a maritime law); Act of August 4, 1790, ch. 35, 69, 1 Stat. 145, 177 (same under another customs law); Act of September 2, 1789, ch. 12, 8, 1 Stat. 65, 67 (providing informer half of penalty upon conviction for violation of conflict-of-interest and bribery provisions in Act establishing Treasury Department); Act of March 3, 1791, ch. 18, 1, ***1 Stat. 215, 215*** (extending same to additional Treasury employees); Act of February 25, 1791, ch. 10, 8, 9, ***1 Stat. 191, 195-96*** (providing informer half or fifth of fines resulting from improper trading or lending by agents of Bank of United States); cf. Act of August 4, 1790, ch. 35, 4, 1 Stat. 145, 153 (apportioning half of penalty for failing to deposit ship manifest to official who should have received manifest, and half to collector in port of destination). The Supreme Court has suggested, in dictum, that "statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue." United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943).

[38] These statutes, in chronological order, are: (1) Act of February 20, 1792, ch. 7, 25, 1 Stat. 232, 239 (providing that informer could sue for penalties under postal statute and keep half), reenacted Act of March 3, 1845, ch. 43, 17, 5 Stat. 732, 738; (2) Act of March 22, 1794, ch. 11, 2, 4, 1 Stat. 347, 349 (providing that individual could prosecute on government's behalf for slave trading), reenacted Act of March 26, 1804, ch. 38, 10, ***2 Stat. 283, 286;*** Act of March 2, 1807, ch. 22, 3, 2 Stat. 426, 426; Act of March 4, 1909, ch. 321, 254-57, 35 Stat. 1088, 1138-40; (3) Act of July 6, 1797, ch. 11, 20, ***1 Stat. 527, 532*** (providing that informer received half of penalties related to duties on paper products--unclear whether informer could sue), adopted Act of February 28, 1799, ch. 17, 5, ***1 Stat. 622, 623*** (same for penalties involving altering stamp duties); (4) Act of May 3, 1802, ch. 48, 4, 2 Stat. 189, 191 (providing that individual could prosecute on government's behalf for employment of other than a "free white person" in postal service); (5) Act of August 5, 1861, ch. 45, 11, 12 Stat. 292, 296-97 (providing that individual could sue import assessor acting without taking oath, and keep half the fine); (6) Act of July 8, 1870, ch. 230, 39, 16 Stat. 198, 203 (providing that individual could sue on government's behalf for unlawful contracting with Indians), reenacted Act of May 21, 1872, ch. 177, 3, 17 Stat. 136, 137. The First Congress's statute regarding unlawful trading with Indians was also reenacted. Act of March 1, 1793, ch. 19, 12, 1 Stat. 329, 331; Act of May 19, 1796, ch. 30, 18, 1 Stat. 469, 474; Act of March 30, 1802, ch. 13, 18, 2 Stat. 139, 145; Act of June 30, 1834, ch. 161, 27, 4 Stat. 729, 733-34.

[39] Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000).

[40] In addition to the FCA, see 25 U.S.C. 81 (1994) (providing cause of action and share of recovery against a person contracting with Indians in an unlawful manner); id. 201 (providing cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. 292(b) (1994) (providing cause of action and share of recovery against a person falsely marking patented articles). In addition, several statutes provide a bounty, but not an express cause of action. See, e.g., 18 U.S.C. 962 (1994) (providing for forfeiture to informer of share of vessels privately armed against friendly nations); 46 U.S.C. 723 (1994) (providing for forfeiture to informer of share of vessels removing undersea treasure from the Florida coast to foreign nations).

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[*388] The most notable American qui tam statute, the FCA, was enacted in 1863 to "stop[] the massive frauds perpetrated [against the Union Army] by large [defense] contractors during the Civil War." [41] The rationale for adding a qui tam provision to the statute would have sounded familiar to a fifteenth-century member of Parliament: Congress believed that many public officials were active participants in the corruption and therefore were unlikely to enforce the law diligently. [42] Congress wanted to give defense industry functionaries a strong incentive to inform on fraudulent defense contractors, [43] and create an enforcement mechanism that was **[*389]** independent of the Department of Justice officials who often were part of the problem.

The FCA prohibits the submission of false claims to the United States government. [44] In its original form, it provided for double damages, [45] imposed a $ 2,000 mandatory civil penalty for each false claim submitted, [46] and entitled informers to one-half of the damages and penalties awarded as the result of a successful suit. [47] It required the informer to bear all of the costs of bringing the lawsuit, and permitted the government to take over the suit at any time and for any reason. [48]

Very few individuals prosecuted FCA cases between 1863 and 1930, largely because of the decline in military spending following the Civil War and the obscurity of the FCA in general. [49] Beginning in the 1930s, however, the New Deal and World War II greatly expanded the role of the federal government in the national economy, and commensurately expanded the opportunities for unscrupulous contractors to defraud the government. [50] Unfortunately, some FCA informers, like their English predecessors from the 1600s, abused the statute. The FCA's language did not require an informer's suit to be based on independently-acquired information, [51] and in 1943 the Supreme Court ruled that an informer could sue based on information contained in public criminal indictments. [52] As a result, whenever a criminal indictment was issued, informers who had heard of the indictment through the news media would rush to file suits and claim qui tam awards. [53] These "parasitic" suits did nothing to encourage

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[41] *United States v. Bornstein, 423 U.S. 303, 309 (1976);* see also *United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1497 (11th Cir. 1991);* H.R. Rep. No. 37-2, 2d Sess., pt. ii-a at xxxviii-xxxix (1862); 1 Fred Shannon, The Organization and Administration of the Union Army 1861-1865, at 54-55 (1965) (quoting Tomes, Fortunes of War, 29 Harper's Monthly 228 (1864)) ("For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.").

[42] See Note, Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions, 67 Nw. U. L. Rev. 446, 453 n.32 (1972).

[43] Blanch, supra note 3, at 703-04; see also Cong. Globe, 37th Cong., 3d Sess. 956 (1863) (remarks of Sen. Howard) ("I have based the [enforcement provisions of the FCA] upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.").

[44] *31 U.S.C. 3730*(a) (1998). A "false claim" involves presenting to the government a "false or fraudulent claim for payment or approval." Id. 3729(a)(1).

[45] False Claims Act, ch. 67, 3, ***12 Stat. 696, 698 (1863).***

[46] Id.

[47] Id. 6. Awards available to qui tam plaintiffs today are codified as amended at *31 U.S.C. 3730*(d) (1998).

[48] Id.

[49] John T. Boese, Civil False Claims and Qui Tam Actions 1-9 to 1-10 (1993).

[50] Id. at 1-10; Lovitt, supra note 3, at 856-57.

[51] Blanch, supra note 3, at 704.

[52] *United States ex rel. Marcus v. Hess, 317 U.S. 537, 545-46 (1943).*

[53] *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 n.3 (N.D. Cal. 1989).*

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meritorious suits, and only served to decrease the proceeds that the government otherwise could recover on its own. [54]

In 1943, Congress responded by amending the FCA. One change prohibited qui tam actions based on public information. [55] Another change **[*390]** reduced the award that an informer could recover to up to ten percent of any judgment obtained when the government took over an action and up to twenty-five percent when it did not. [56] Collectively, these changes all but eliminated the use of the FCA qui tam. [57]

In the mid-1980s, however, as in the 1930s, the defense budget was rising, and the public was outraged by reports of $ 400 hammers and $ 600 toilet seats. [58] Congress, finding that procurement fraud was "on a steady rise," [59] again turned to the qui tam action as a mechanism for inducing persons involved in the procurement process to "blow the whistle" on fraud. [60]

The response, in 1986, was a new set of amendments to the qui tam provisions of the FCA. [61] These amendments, which immediately and significantly increased the number of qui tam suits filed, [62] made four important changes. [63] First, Congress increased the financial incentive for informers to bring suit, and increased the financial penalties imposed on successfully prosecuted defendants. An informer's share of the judgment was raised to a range between fifteen and thirty percent, plus reasonable expenses and attorney's fees. [64] The mandatory penalty was raised to between $ 5000 and $ 10,000 per claim, and damages were increased from double to triple the actual losses. [65]

Second, the 1986 Amendments removed the bar against qui tam actions based on information already known by the government, and replaced it with prohibition of actions based on "publicly disclosed" information. [66] The 1943 ban on parasitic suits was very broad; it **[*391]** prohibited qui tam suits based on any public information, even if the

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[54] See generally *United States ex rel. Wisconsin v. Dean, 729 F.2d 1100, 1103-06 (7th Cir. 1984);* Blanch, supra note 3, at 704.

[55] *Newsham, 722 F. Supp. at 609;* S. Rep. No. 99-345, at 12 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5277.

[56] S. Rep. No. 99-345, at 12 (1986).

[57] See Boese, supra note 49, at 11-12.

[58] Michael Waldman, Time to Blow the Whistle?, Nat'l L.J., Mar. 25, 1991, at 13; Lovitt, supra note 3, at 857.

[59] S. Rep. No. 99-345, at 2.

[60] Id. at 5-6.

[61] See False Claims Amendments Act of 1986, *31 U.S.C.A. 3729*-3731 (West Supp. 2000).

[62] See Hamer, supra note 3, at 91 ("The 1986 Amendments caused a massive increase in qui tam lawsuits."); Lovitt, supra note 3, at 854, 859. Nearly 3000 qui tam suits were filed between 1986 and 2000, and the United States recovered more than $ 3.5 billion pursuant to those cases. Press Release, Justice Department Recovers Over $ 3 Billion in Whistleblower False Claims Act Awards and Settlements, Feb. 24, 2000, available at *http://www.usdoj.gov/opa/pr/2000/February/079civ.htm.</NT2>*

[63] The 1986 amendments also made several changes to the FCA that did not directly affect the qui tam provisions. For example, Congress changed the requisite mental state for violating the FCA from knowledge to recklessness. *31 U.S.C. 3729*(b)(3) (1998). Similarly, Congress changed the burden of persuasion in a qui tam case from "clear and convincing evidence" to "preponderance of the evidence." See S. Rep. No. 345, at 6-7.

[64] *31 U.S.C. 3730*(d)(1)-(2).

[65] Id. 3729(a).

[66] Id. 3730(e)(4)(A)-(B); see also Robertson, supra note 3, at 908-11 (discussing the "publicly disclosed" restriction).

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original source of the information was the qui tam informer herself. [67] This made it difficult for the government to investigate criminal fraud, because anyone with knowledge of fraud had an incentive to hide that knowledge from the government for fear that a public criminal indictment would erase a prospective qui tam action. [68] Congress therefore created an exception that lifted the prohibition entirely if the qui tam informer was the "original source" of the information that later became public. [69]

Third, Congress in the 1986 Amendments added a whistleblower protection provision to prevent discharge or discrimination against employees who bring qui tam actions against their employers. [70] Fourth, Congress decreased the authority of the executive branch to take over a qui tam suit, and commensurately increased the informer's control of the suit. [71] The relative authority of the executive branch and the informer over a qui tam suit will be discussed in more detail in the next section.

B. The FCA Statutory Scheme

The FCA authorizes both the attorney general and private persons to bring civil actions to enforce the Act. [72] The roles of these parties vary considerably depending on how the suit is initially filed and how the Department of Justice (DOJ) responds (or does not respond) shortly after suit is filed.

If the DOJ learns on its own of an FCA violation, the DOJ may sue the violator. [73] This does not implicate the qui tam provisions of the statute. No qui tam informer is involved, and the DOJ can conduct the litigation as it sees fit. [74] Moreover, once the DOJ files suit, a would-be **[*392]** informer may not later bring an action based on the same underlying facts. [75]

If the suit is brought by a private person, however, things are more complicated. The statute provides that any person may bring a civil action "for the person and for the United States Government" to recover damages and penalties. [76] Though initiated by a private person - the informer - a qui tam action is "brought in the name of the Government." [77] The United States is considered the real party in interest, [78] with the informer functioning as the

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[67] Blanch, supra note 3, at 705.

[68] Id.

[69] *31 U.S.C. 3730*(e)(4)(A); see also *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 n.4 (N.D. Cal. 1989);* Robertson, supra note 3, at 908-11 (discussing the "original source" exception). The statute defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." *31 U.S.C. 3730*(e)(4)(B).

[70] Id. 3730(h).

[71] Lovitt, supra note 3, at 858; see also S. Rep. No. 99-345, at 25-26 (noting that the amendments give the informer a "more direct role not only in keeping abreast of the Government's efforts and protecting his financial stake, but also in acting as a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason"). See generally *31 U.S.C. 3730*(b), (c).

[72] *31 U.S.C. 3730.*

[73] Id. 3730(a).

[74] Blanch, supra note 3, at 706.

[75] *31 U.S.C. 3730*(e)(3).

[76] Id. 3730(b)(1).

[77] Id.

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government's attorney. [79] Thus, qui tam suits are brought "for the person" only in the sense that the informer may earn, as a reward, the statutory bounty. [80]

To initiate a qui tam action, the informer files a complaint with a federal district court. This complaint is filed in camera, and is kept under seal by the court for at least sixty days. [81] The informer also must send a copy of the complaint to the DOJ, and must include all material information that formed the basis of the complaint. [82] Within that sixty-day window, the DOJ then must decide, and so inform the court, whether it wants to intervene and take over the suit, [83] or whether it will not intervene, in which case the informer may conduct the suit on her own. [84] The DOJ may, "for good cause shown," move the court for an extension **[*393]** of the sixty-day examination period, [85] but the legislative history of the statute indicates that courts should not liberally grant such an extension. [86]

If the DOJ elects to intervene, the DOJ has "primary responsibility for prosecuting the action." [87] This includes the right to control discovery, admissions, and the presentation of evidence. [88] The informer, however, retains the right to "continue as a party to the action." [89] She may, for example, participate fully at trial, calling and cross-examining witnesses. [90]

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[78] See, e.g., *United States ex rel. Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1995)* ("It is the government, and not the individual relator, who is the real plaintiff in a qui tam suit."); *United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 720 (9th Cir. 1994)* ("It is clear … that in a qui tam action, the government is the real party in interest."); *United States ex rel. Kreindler v. United Techs. Corp., 985 F.2d 1148, 1154* (2d Cir.) ("The government remains the real party in interest … in the [qui tam] suit."), cert. denied, ***508 U.S. 973 (1993);*** *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 48 (5th Cir. 1992)* (noting "the United States must be the real plaintiff in this suit").

[79] See, e.g., *United States v. B.F. Goodrich, 41 F. Supp. 574, 575 (S.D.N.Y. 1941); Minotti v. Wheaton, 630 F. Supp. 280, 282-83 (D. Conn. 1986); United States ex rel. La Valley v. First Nat'l Bank of Boston, 625 F. Supp. 591, 594 (D.N.H. 1985).* This is why the pleadings in FCA qui tam cases usually list the United States as plaintiff "ex rel." the qui tam informer. Blanch, supra note 3, at 706 n.25.

[80] Caminker, supra note 3, at 353; see also 132 Cong. Rec. H6482 (daily ed. Sept. 9, 1986) (noting the bounty "is a critical incentive and reward for persons who come forward with information, putting themselves at risk on behalf of the Federal Treasury and American taxpayers").

[81] *31 U.S.C. 3730*(b)(2).

[82] Id.

[83] Id. 3730(b)(4)(A).

[84] Id. 3730(b)(4)(B).

[85] Id. 3730(b)(3).

[86] The report of the Senate Judiciary Committee provides:

Extensions will be granted … only upon a showing of "good cause". The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, "good cause" would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint … . … . The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the qui tam litigation.

S. Rep. No. 99-345, at 24-25.

[87] *31 U.S.C. 3730*(c)(1).

[88] See *Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 518,* reh'g en banc granted, *196 F.3d 561 (5th Cir. 1999).*

[89] *31 U.S.C. 3730*(c)(1).

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The DOJ, once it has intervened, may end the litigation or limit the participation of the informer in several ways. First, the DOJ may dismiss the action "notwithstanding the objections of the person initiating the action," but only after the informer has received notice and an opportunity for a hearing on the dismissal motion. [91] Second, the DOJ may settle with the defendant, again "notwithstanding the objections of the person initiating the action," but only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." [92] Third, the DOJ may request that the court limit the informer's participation if the DOJ shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." [93] Fourth, the defendant may request that the court limit the informer's participation, upon a showing that unrestricted participation "would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense." [94] Thus, if the DOJ elects to intervene during the sixty-day examination period, it assumes primary **[*394]** control of the case, but it does not get the degree of control that it would have had if it had originally filed the case itself. [95]

If within the sixty-day examination period the DOJ elects not to proceed with the action, or does nothing at all, then "the person bringing the action shall have the right to conduct the action." [96] The DOJ's involvement is very limited. First, it may receive, at its own expense, all pleadings and deposition transcripts. [97] Second, the DOJ may ask the court to stay discovery for an extendable sixty-day period upon a showing that discovery "would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." [98] Third, the attorney general's written consent is required before the informer voluntarily dismisses the action. [99]

In cases where the DOJ initially elects not to take over the action, the DOJ may subsequently re-enter the action upon a showing to the court of "good cause." [100] However, this intervention may not limit "the status and rights of the person initiating the action." [101] These provisions have given rise to three unresolved issues. First, how heavy is the DOJ's burden to show good cause? Most courts interpret the statute as imposing a relatively light burden; this interpretation avoids or minimizes the constitutional problem of judicial interference with executive prosecutorial authority. [102] Second, once the DOJ has intervened, does it control the litigation in the same way as if it had intervened within the sixty-day examination period, or is its role more limited? [103] Third, once the DOJ has intervened, under what circumstances, if any, may the DOJ dismiss the action? [104]

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[90] *Riley, 196 F.3d at 518.*

[91] *31 U.S.C. 3730*(c)(2)(A).

[92] Id. 3730(c)(2)(B).

[93] Id. 3730(c)(2)(C).

[94] Id. 3730(c)(2)(D).

[95] Blanch, supra note 3, at 707.

[96] *31 U.S.C. 3730*(b)(4)(B).

[97] Id. 3730(c)(3).

[98] Id. 3730(c)(4). This stay is available whether or not the DOJ intervenes. Id.

[99] Id. 3730(b)(1); *Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 159 (5th Cir. 1997).*

[100] *31 U.S.C. 3730*(c)(3).

[101] Id.

[102] See, e.g., *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 756 (9th Cir. 1993).*

[103] Compare *Kelly, 9 F.3d at 752* (noting "when the government intervenes late in the action, a fair interpretation of the statute is that the government has a similar degree of control over the litigation as if it had intervened at the start"), with *Riley v. St. Luke's*

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[*395] Whether the DOJ elects to intervene in the action determines not only the relative authority of the executive branch and the informer over how the action is litigated, but also how the award or settlement is divided. If the DOJ has intervened, the informer receives between fifteen and twenty-five percent of the proceeds. However, if the court finds that the action was based primarily on information of which the informer was not the original source, the informer's award is limited to no more than ten percent. [105] In actions in which the DOJ has not intervened, the informer receives between twenty-five and thirty percent of the proceeds. [106] Regardless of whether the DOJ has intervened, the informer also receives an amount for reasonable expenses, attorneys' fees, and costs, awarded against the defendant rather than taken out of the proceeds. [107] However, an unsuccessful informer in a case in which the government has not intervened may be ordered to pay the defendant its reasonable attorneys' fees and expenses if the court finds that the informer's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." [108] If the government decides to pursue its claim in some forum other than an FCA suit, such as an administrative action, the informer has the same rights in that action as she would have in a judicial FCA suit. [109]

III.

The Article III Standing of Qui Tam Informers

The qui tam provisions of the FCA implicate four constitutional provisions or doctrines: the standing doctrine, the separation of powers doctrine, the Take Care Clause, and the Appointments Clause. As one commentator has noted, these disparate constitutional doctrines are "merely different doctrinal lenses through which commentators and courts look at the central problem with qui tam: Someone other than the executive branch is litigating in the name of the United States." [110] This structure has led to considerable doctrinal confusion of the Article II issues. [111]

[*396] While the Article III standing doctrine has separation of powers overtones, [112] it also functions as an independent doctrine in its own right. This, together with the fact that it is the only constitutional issue regarding qui tam that the Supreme Court has resolved to date, justifies its separate analysis. The basic issue is whether the informer, who herself has not been injured by the defendant, has a sufficient stake in the litigation to create Article III standing.

Episcopal Hosp., 196 F.3d 514, 518 (noting if the government intervenes late, the informer "retains primary control over the case, despite the government's intervention"), reh'g en banc granted, *196 F.3d 561 (5th Cir. 1999).*

[104] See *Juliano v. Fed. Asset Disposition Ass'n, 736 F. Supp. 348, 349-51 (D.D.C. 1990)* (government may move for dismissal of a qui tam action without actually intervening in the case), aff'd, ***959 F.2d 1101 (D.C. Cir. 1992);*** *Kelly, 9 F.3d at 753 n.10* (expressing approval of the Juliano approach); Blanch, supra note 3, at 708:

It seems fair to conclude that it would severely "limit the status and rights' of the qui tam relator if the DOJ later intervened and dismissed or settled the suit. It thus appears that unless the DOJ initially intervenes during the 60-day period, it loses all power to dismiss or settle the suit, even if it can show good cause why it should be allowed to intervene at a later date.

Id.; see also *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325 (E.D. Cal. 1995)* (holding government may move to dismiss for good cause).

[105] *31 U.S.C. 3730*(d)(1).

[106] Id. 3730(d)(2).

[107] Id. 3730(d)(1), (2).

[108] Id. 3730(d)(4).

[109] Id. 3730(c)(5).

[110] Lovitt, supra note 3, at 859 n.51.

[111] See infra Part IV.

[112] See infra note 119 and accompanying text.

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A. General Contours of the Standing Requirement [113]

Article III of the United States Constitution limits federal judicial power to "cases or controversies." [114] The standing doctrine emanates from this case or controversy requirement. [115] Unless a plaintiff has standing, there is no Article III case or controversy, and federal courts are incapable of acting on the dispute. [116]

The Supreme Court has articulated three purposes for the standing doctrine. The first is the assurance of truly adverse litigants, [117] so that "legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." [118] The second is separation of powers: the standing doctrine **[*397]** prevents the judicial aggrandizement of power at the expense of the other branches of government. [119] The third is federalism: standing requirements keep federal courts from meddling in areas of law that should be left to state or local governments. [120]

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[113] See generally William A. Fletcher, The Structure of Standing, *98 Yale L.J. 221 (1988);* Richard J. Pierce, Jr., Is Standing Law or Politics?, *77 N.C. L. Rev. 1741 (1999);* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: Standing As a Judicially Imposed Limit on Legislative Power, *42 Duke L.J. 1170 (1993);* John G. Roberts, Jr., Article III Limits on Statutory Standing, *42 Duke L.J. 1219 (1993);* Cass R. Sunstein, Standing and the Privatization of Public Law, *88 Colum. L. Rev. 1432 (1988)* [hereinafter Sunstein, Standing and the Privatization of Public Law]; Cass R. Sunstein, What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III, *91 Mich. L. Rev. 163 (1992)* [hereinafter Sunstein, What's Standing After Lujan?]; Eric R. Claeys, Note, The Article III, Section 2 Standing Games: A Game-Theoretic Account of Standing and Other Justiciability Doctrines, *67 S. Cal. L. Rev. 1321 (1994);* Craig R. Gottlieb, Comment, How Standing Has Fallen: The Need to Separate Constitutional and Prudential Concerns, *142 U. Pa. L. Rev. 1063 (1994);* Christopher J. Sprigman, Comment, Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis, *59 U. Chi. L. Rev. 1645 (1992);* Note, Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd, *112 Harv. L. Rev. 1741 (1999).*

[114] U.S. Const. art. III, 2.

[115] See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).*

[116] See, e.g., *Allen v. Wright, 468 U.S. 737, 751 (1984).*

[117] See, e.g., *Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 772 (2000); Baker v. Carr, 369 U.S. 186, 204 (1962);* see also Mark V. Tushnet, The Sociology of Article III: A Response to Professor Brilmayer, 93 Harv. L. Rev. 1698, 1706 (1980).

[118] *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).*

[119] *Vt. Agency of Natural Res., 529 U.S. at 771* (noting the Article III standing requirement is "a key factor in dividing the power of government between the courts and the two political branches"); *Allen, 468 U.S. at 760* (recognizing without standing, judges would become "virtually continuing monitors of the wisdom and soundness of Executive action") (quoting *Laird v. Tatum, 408 U.S. 1, 15 (1972)); Lujan, 504 U.S. at 577* (eliminating Article III's standing requirement "would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department'") (quoting *Massachusetts v. Mellon, 262 U.S. 447, 489 (1923)); Flast v. Cohen, 392 U.S. 83, 95 (1968)* ("[The standing doctrine defines] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."). But see *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 n.4 (1998)* ("Our standing jurisprudence, … though it may sometimes have an impact on Presidential powers, derives from Article III and not Article II.").

[120] See, e.g., *City of L.A. v. Lyons, 461 U.S. 95, 112 (1983)* (noting equitable relief must be limited by federalism concerns); *Rizzo v. Goode, 423 U.S. 362, 379 (1976)* (same); *O'Shea v. Littleton, 414 U.S. 488, 499-502 (1974)* (indicating federalism counsels refusal to interfere with state court proceedings); see also Gene R. Nichol, Jr., Abusing Standing: A Comment on Allen v. Wright, *133 U. Pa. L. Rev. 635, 652 (1985)* (characterizing these three cases as "federalism decisions masquerading under the standing heading").

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The Supreme Court has articulated a three-part test for Article III standing. [121] First, there must be an "injury in fact" that is both (a) concrete and particularized and (b) actual and imminent rather than conjectural or hypothetical. [122] Second, there must be a causal connection between the injury and the defendant's (not a third party's) conduct. [123] Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a decision favorable to the plaintiff. [124]

In addition to this three-part test, the Court has identified two "prudential" limitations to standing which, though not required by Article III, nonetheless limit the types of cases over which federal courts will exercise jurisdiction. The first is when the injury is a "generalized grievance" shared in equal measure by all or a large class of citizens, [125] such as when a taxpayer sues to redress an injury to the U.S. Treasury. [126] **[*398]** The second is when the plaintiff rests her claim to relief on the legal rights of a third party, as opposed to asserting her own legal rights. [127]

The Court has stated that Congress may, by statute, waive the prudential standing limitations, [128] but not the Article III standing limitations. [129] However, the Court also has repeatedly stated that generalized injuries do not satisfy the Article III injury in fact requirement. [130] This has blurred the distinction between Article III and prudential standing requirements, and left some commentators wondering whether the prudential requirements are really just Article III requirements in drag. [131]

B. Application to Qui Tam

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[121] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 180-81 (2000).*

[122] *Vt. Agency of Natural Res., 529 U.S. at 771; Lujan, 504 U.S. at 560; Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).*

[123] *Vt. Agency of Natural Res., 529 U.S. at 771; Lujan, 504 U.S. at 560; Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976).*

[124] *Vt. Agency of Natural Res., 529 U.S. at 771; Lujan, 504 U.S. at 561.*

[125] *Warth v. Seldin, 422 U.S. 490, 499 (1975).*

[126] *Valley Forge Christian Coll., 454 U.S. at 485 n.20* (holding taxpayer injury is insufficiently personal to satisfy Article III standing); *Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974)* (Article III prohibits taxpayers from suing to redress injury "held in common with all members of the public.").

[127] *Valley Forge Christian Coll., 454 U.S. at 474; Warth, 422 U.S. at 499; McGowan v. Maryland, 366 U.S. 420, 429-30 (1961)* (holding that defendants, convicted of selling products in violation of state Sunday closing laws, lack standing to assert religious freedom rights of customers); *Tileston v. Ullman, 318 U.S. 44, 46 (1943)* (per curiam) (denying a physician the right to assert the claims of his patients when the physician claimed that a statute forbidding him from advising patients regarding contraception would endanger their lives). The Court has articulated a two-part test for when litigants may assert the claims of third parties. First, the litigant must have a sufficiently close relationship to the person whose rights she seeks to assert. *Singleton v. Wulff, 428 U.S. 106, 114-16 (1976).* Second, the third party must be unable to assert her own rights. *Id. at 115-16.* See generally Henry P. Monaghan, Third Party Standing, *84 Colum. L. Rev. 277 (1984).*

[128] *Warth, 422 U.S. at 501.*

[129] *Valley Forge Christian Coll., 454 U.S. at 488 n.24.*

[130] See, e.g., *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)* (indicating injury must be "particularized, … [meaning] personal and individual"); *Warth, 422 U.S. at 501* (noting injury must be "distinct and palpable"); *Schlesinger, 418 U.S. at 221* (stating injury must be "concrete").

[131] See, e.g., Blanch, supra note 3, at 711-12.

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The Article III standing problem with qui tam suits is that informers have not suffered any "injury in fact." [132] The only injuries raised in qui tam suits are injuries to the federal treasury resulting from false claims against the United States. [133] Qui tam informers do not suffer harm, at least not beyond the generalized type of harm suffered by all other **[*399]** taxpayers. Therefore, the argument goes, qui tam informers lack Article III standing, and the FCA's qui tam provisions, by granting standing to uninjured parties, are unconstitutional. [134]

Prior to the Supreme Court's 2000 ruling that qui tam informers have standing to sue under the FCA, [135] courts and commentators had advanced four arguments as to why standing of qui tam informers was proper. The first was that qui tam informers have standing simply because Congress, through the FCA, said so. [136] Just as Congress may authorize the Department of Justice or another executive or independent agency to act on behalf of the United States, [137] Congress may authorize a citizen to accomplish the same result. [138] The problem with this argument, however, is that the Court has held that Article III does not permit Congress to grant standing to persons who have not suffered particularized injury. [139]

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[132] *United States ex rel. Riley v. St. Luke's Episcopal Hosp., 982 F. Supp. 1261, 1268 (S.D. Tex. 1997)* (holding that qui tam informers lacked standing), rev'd in pertinent part and aff'd on other grounds, *196 F.3d 514,* reh'g en banc granted, *196 F.3d 561 (5th Cir. 1999);* Caminker, supra note 3, at 380 ("The Article III challenge to the qui tam concept contends that qui tam plaintiffs lack standing because they have not suffered an injury in fact sufficiently "distinct and palpable' to be judicially cognizable."); Blanch, supra note 3, at 712 ("It is difficult to conceive of circumstances in which [qui tam informers] would have suffered [an injury].").

[133] See *Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000)* ("It is beyond doubt that the [qui tam] complaint asserts an injury to the United States.").

[134] See *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993)* (holding that qui tam informers have Article III standing, but discussing the argument contra).

[135] *Vt. Agency of Natural Res., 529 U.S. at 774.*

[136] *United States ex rel. Woodard v. County View Care Ctr., 797 F.2d 888, 893 (10th Cir. 1986)* ("The statute of course eliminated any standing problem."); ***United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977)*** (concluding a qui tam informer has standing simply because the FCA "clearly accords" such standing); Caminker, supra note 3, at 382.

[137] See Griffin B. Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L. Rev. 1049, 1057 (1978) (noting that thirty-one administrative agencies are authorized to litigate on behalf of the United States).

[138] *United States ex rel. Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1213 (7th Cir. 1995):*

When [the United States government] acts in a prosecutorial fashion, it usually does so through attorneys within the Department of Justice, or one of its executive agencies … . That Congress should enlist a private party, instead of one of the government's more common representatives, to champion the government's case should not change [the fact] that the United States, as the represented party, has been injured.

Id.; Caminker, supra note 3, at 382.

[139] *Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992)* (""Individual rights' … do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public."); see also Blanch, supra note 3, at 715 ("It is clearly wrong to assert baldly that Congressional authorization of qui tam suits in the FCA by itself "eliminates any standing problem.'") (quoting *Woodard, 797 F.2d at 893).* Of course, this begs the question of why DOJ attorneys have more of a "personal stake" in the outcome of FCA litigation than a qui tam informer. Caminker, supra note 3, at 382-83.

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The second argument favoring qui tam standing is conceptually very similar to the first: that the FCA creates an assignment to the informer of the government's interest in the action. [140] Under this theory, the FCA's qui tam provisions operate as "an enforceable unilateral contract, the **[*400]** terms and conditions of which are accepted by the [informer] upon filing the qui tam suit." [141] If the government declines to intervene in the suit, the informer "effectively stands in the shoes of the government." [142] Since the government clearly has been injured by the defendant's alleged fraud, the informer, through the government, has standing. [143]

The conceptual distinction between an impermissible grant of Article III standing and a permissible assignment of such standing seems a distinction worthy of Thomas Aquinas, particularly since it has become so well-established that Congress may create enforceable legal rights where none existed before. [144] Nonetheless, there is Supreme Court precedent for "representational standing" on the part of assignees. [145] Moreover, lower federal courts routinely find that fraud claims are assignable, [146] and many courts have held that the assignment theory gives qui tam informers standing to sue under the FCA. [147]

The third argument advanced as to why qui tam informers should have standing was that the informer's statutory entitlement to a share of the recovery (the informer's "bounty") gives the informer a concrete personal stake in the litigation. [148] The problem with this argument, **[*401]** however, is that the informer's interest in the litigation arises

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[140] See, e.g., *United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1098 (C.D. Cal. 1989)* ("The [FCA] essentially creates, by legislative fiat, a de facto assignment of a portion of the government's interest in the action.").

[141] Lee, supra note 3, at 564.

[142] *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993).*

[143] Id.

[144] See, e.g., *Goldberg v. Kelly, 397 U.S. 254 (1970).*

[145] *Poller v. Columbia Broad. Sys., 368 U.S. 464, 465 (1962); Automatic Radio Mfg. Co. v. Hazeltine Research, 339 U.S. 827, 829 (1950); Hubbard v. Tod, 171 U.S. 474, 475 (1898);* see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 531 (1995)* (ruling on suits by subrogee); *Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 288 (1993)* (same).

[146] See, e.g., *AmeriFirst Bank v. Bomar, 757 F. Supp. 1365, 1370-71 (S.D. Fla. 1991)* (finding 10b-5 claims assignable); *Fed. Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 266-68 (E.D. Cal. 1987)* (finding bank's actions for fraud and malpractice assignable to FDIC); ***In re Nat'l Mortgage Equity Corp., 636 F. Supp. 1138, 1152-56 (C.D. Cal. 1986)*** (finding RICO treble damage claims assignable). But see Small v. Sussman, No. 94-*C-5200, 1995 WL 153327, at 10* (N.D. Ill. Apr. 5, 1995) (finding 10b-5 claims not assignable).

[147] See, e.g., *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993); United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148* (2d Cir.), cert. denied, ***508 U.S. 973 (1993);*** United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc., No. 98-C-5551, 2000 WL 690250, at 4 (N.D. Ill. May 25, 2000); *Wilkins ex rel. United States v. Ohio, 885 F. Supp. 1055, 1058 (S.D. Ohio 1995); United States ex rel. Givler v. Smith, 775 F. Supp. 172, 180-81 (E.D. Pa. 1991); United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 618-20 (C.D. Cal. 1989).*

[148] See, e.g., *United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1098 (C.D. Cal. 1989)* ("To the extent that the plaintiff must have a personal stake in the outcome of the litigation to succeed on traditional standing theories, … the statute provides him one by virtue of the statutory bounty."); *Truong, 728 F. Supp. at 619 n.7* ("To the extent that the relator must have a "personal stake' in the outcome of the litigation, the bounty to which he is entitled if victorious is sufficient."). This seemed to be precisely what the Lujan Court had in mind when it stated: "Nor, finally, is [this] the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit, by providing a cash bounty for the victorious plaintiff." *Lujan, 504 U.S. at 572-73;* see also Sunstein, What's Standing After Lujan?, supra note 113, at 232 ("Standing seems perfectly appropriate [when Congress has provided] a financial bounty to victorious citizen

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not from the defendant's misconduct, but rather from the structure of the litigation itself. [149] The argument also begs the question of whether a concrete personal stake in the litigation suffices to establish Article III standing when the informer is not among those injured by the defendant. [150]

The fourth argument for qui tam standing was a historical one, and can be divided into three sub-arguments. The first is that because qui tam actions were authorized in several statutes enacted by the First Congress, [151] and because many members of the First Congress participated in drafting the Constitution, [152] the Framers must not have perceived any Article III violation by qui tam actions. [153] However, the Supreme Court, on other occasions, has invalidated statutes passed by the First Congress. [154] The second historical argument points to Supreme Court dicta that has seemed to indicate that qui tam actions present no standing problems. [155] But this dicta antedates the development of the **[*402]** modern standing doctrine, [156] and therefore is of dubious authority. [157] The third historical argument is simply that "the long history of the FCA is probative of the fact that courts have had ample opportunity to invalidate the FCA." [158] But the Court has stated on previous occasion that a long history does not, by itself, make a statute constitutional. [159]

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litigants."). But see Blanch, supra note 3, at 723-24 ("It seems ludicrous that any court would hold that the potential for an enormous and highly desirable financial windfall could satisfy a constitutional requirement that is premised on personal injury.").

[149] See *Diamond v. Charles, 476 U.S. 54, 70 (1986)* (deciding where an intervenor sought to appeal a decision on the merits in effort to avoid paying the opponents' attorneys' fees; standing was improper because "the fee award is wholly unrelated to the subject matter of the litigation").

[150] See *Sierra Club v. Morton, 405 U.S. 727, 734* ("Tthe "injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."); *id. at 738* ("Tthe party seeking review must himself have suffered an injury.").

[151] See supra note 37 and accompanying text.

[152] See *Bowsher v. Synar, 478 U.S. 714, 723-24 (1986)* (stating that because many members of the First Congress had taken part in framing the Constitution, that body's legislative decisions inform the meaning of the Constitution).

[153] See, e.g., *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 615 (N.D. Cal. 1989).*

[154] See, e.g., *Marbury v. Madison, 5 U.S. 137 (1803)* (holding that section 13 of the Judiciary Act, a statute passed by the First Congress, was unconstitutional); *Wallace v. Jaffree, 472 U.S. 38, 100 (1985)* (Rehnquist, J., dissenting) (finding federal aid to sectarian schools is unconstitutional despite fact that First Congress granted similar aid); *Marsh v. Chambers, 463 U.S. 783, 814 n.30 (1983)* (Brennan, J., dissenting) (cautioning reliance on historical arguments and referring, by way of example, to First Congressional statute requiring public whipping of slaves).

[155] See, e.g., *Flast v. Cohen, 392 U.S. 83, 120 (1968)* (Harlan, J., dissenting); *Priebe & Sons, Inc. v. United States, 332 U.S. 407, 418 (1947)* (Frankfurter, J., dissenting); *United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 (1943)* (stating that qui tam actions "have been frequently permitted by legislative action, and have not been without defense by the courts") (footnotes omitted); *Marvin v. Trout, 199 U.S. 212, 225 (1905)* (opining that "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 for hundreds of years in England, and in this country ever since the foundation of our Government").

[156] For a thorough discussion of the development of modern standing doctrine, see Sunstein, Standing and the Privatization of Public Law, supra note 113.

[157] *United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 618-20 (C.D. Cal. 1989);* Blanch, supra note 3, at 719-20; Lee, supra note 3, at 549.

[158] *United States ex rel. Burch v. Piqua Eng'g, Inc., 803 F. Supp. 115, 117 n.2 (S.D. Ohio 1992);* see also United States v. Gen. Contractors, Inc., Nos. C-89-397-RJM, 1990 WL 455191, at 4 (E.D. Wash. Dec. 4, 1990) ("The concept of qui tam is so deeply rooted in the nation's history that it is most improbable that any court today could divine some infirmity of constitutional magnitude which would not have been equally apparent many decades, if not centuries, ago.").

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In Vermont Agency of Natural Resources v. United States ex rel. Stevens, [160] the Supreme Court held that qui tam informers have Article III standing. [161] The Court rejected the argument that qui tam informers have standing as the statutorily authorized agent of the United States government. The Court pointed out that the FCA gives an informer more than a mere right to retain a fee out of the recovery; the informer also is a party in her own right, may remain a party even after the government intervenes, and is entitled to a hearing before the government dismisses or settles the case. [162] The Court also rejected the argument that standing was conferred through the statutory bounty. [163] While this created a "concrete private interest in the outcome of [the] suit," [164] it was insufficient to create Article III standing because it was unrelated to the injury in fact that had been suffered only by the United States government. [165] As the Court pointed out, a bystander who has bet on the outcome of qui tam litigation has a stake in the outcome, but clearly has no Article III standing. [166]

[*403] The Court relied instead on the assignment and history theories of qui tam standing. The Court interpreted the FCA as creating a partial assignment of the government's damages claim. [167] Assignors, the Court held, have "representational standing" to assert claims resulting from the assignor's injury in fact. [168] The injury in fact suffered by the government - the fraud alleged as the basis of the FCA suit - therefore suffices to confer standing on the qui tam informer. [169]

The Court next recounted a brief history of qui tam actions, beginning with a discussion of English qui tam statutes, and ending with a discussion of American statutes passed by the colonies and the First Congress. [170] The fact that the Court ended its historical discussion with the First Congress indicates that it was persuaded by the first historical argument in favor of standing discussed above. [171] The Court concluded its discussion of standing by finding that the history of the qui tam action, "when combined with the theoretical justification for [informer] standing … leaves no room for doubt that a qui tam [informer] under the FCA has Article III standing." [172]

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[159] *Marsh v. Chambers, 463 U.S. 783, 790 (1983)* ("Standing alone, historical patterns cannot justify contemporary violations [of the Constitution.]"); *Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)* ("It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."); see also *Truong, 728 F. Supp. at 618* ("The fact that qui tam statutes date back to the time of the First Congress is not independent evidence of their constitutionality.").

[160] *529 U.S. 765 (2000).*

[161] *Id. at 775.*

[162] *Id. at 771-72.*

[163] *Id. at 772-73.*

[164] *Id. at 772* (quoting *Lujan, 504 U.S. at 573).*

[165] Id.

[166] Id.

[167] Id. at 773 & n.4.

[168] Id. at 773.

[169] Id. at 774.

[170] Id. at 774-78.

[171] Id. at 777-78 ("We think this history well nigh conclusive with respect to the question before us here: whether qui tam actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'") (quoting *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998)).*

[172] Id. at 778.

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The Court cautioned, however, that "in so concluding, we express no view on the question whether qui tam suits violate Article II, in particular the Appointments Clause of 2 and the "take Care' Clause of 3." [173] Justices Stevens and Souter, dissenting from the majority's holding that the FCA does not subject a state or state agency to liability, argued that this history also is "sufficient to resolve the Article II question." [174]

IV. Qui Tam and Article II

Doctrinal analysis of the application of Article II to qui tam is an awful mess. This is because courts and commentators have attempted to organize their opinions and articles by reference to specific constitutional provisions. Most analyses of Article II and qui tam are, therefore, divided into two or three parts: separation of powers, Appointments Clause, and perhaps the Take Care Clause. [175]

[*404] There are two problems with this approach. First, there is no single constitutional provision that provides for the separation of powers. Instead, the Constitution separates powers through its basic structure, [176] which "divides all power conferred upon the Federal Government into "legislative Powers,' "the executive Power, and "the judicial Power.'" [177] Second, all of the Article II arguments that relate to the constitutionality of qui tam are separation of powers arguments. [178] These arguments are simply subsets of the broader argument that qui tam unconstitutionally takes power away from the executive branch and gives it to the judicial branch and to unappointed citizens.

This Article takes a different approach. First, this Article will discuss the constitutional provisions implicated by qui tam under the umbrella of a separation of powers analysis. Then, it will discuss the ways that qui tam arguably runs afoul of these provisions. It concludes, however, that the qui tam provisions of the FCA are constitutional.

[*405]

A. Separation of Powers [179]

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[173] Id. at 778 n.8.

[174] Id. at 801 (Stevens, J., dissenting).

[175] See, e.g., *Burch ex rel. United States v. Piqua Eng'g, Inc., 145 F.R.D. 452 (S.D. Ohio 1992);* *United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989);* *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989).*

[176] *INS v. Chadha, 462 U.S. 919, 946 (1983);* Blanch, supra note 3, at 748.

[177] *Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992)* (citing U.S. Const. art. I, 1, art. II, 1, art. III, 1).

[178] Blanch, supra note 3, at 747-48; Lovitt, supra note 3, at 859 n.51. Moreover, as discussed supra note 119 and accompanying text, the Article III standing doctrine is at least partly grounded in the separation of powers.

[179] See generally Bruce Ackerman, The New Separation of Powers, *113 Harv. L. Rev. 633 (2000);* Rebecca L. Brown, Separated Powers and Ordered Liberty, *139 U. Pa. L. Rev. 1513 (1991);* Jay S. Bybee, Advising the President: Separation of Powers and the Federal Advisory Committee Act, *104 Yale L.J. 51 (1994);* Steven G. Calabresi & Joan L. Larsen, One Person, One Office: Separation of Powers or Separation of Personnel?, *79 Cornell L. Rev. 1045 (1994);* Stephen L. Carter, From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers, 1987 BYU L. Rev. 719, 720-25, 775-80; William N. Eskridge, Jr., Relationships Between Formalism and Functionalism in Separation of Powers Cases, *22 Harv. J.L. & Pub. Pol'y 21 (1998);* Michael A. Fitts, The Foibles of Formalism: Applying A Political "Transaction Cost" Analysis to Separation of Powers, *47 Case W. Res. L. Rev. 1643 (1997);* Bruce Ledewitz, The Uncertain Power of the President to Execute the Laws, *46 Tenn. L. Rev. 757, 804-06 (1979);* Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, *77 Minn. L. Rev. 1283 (1993);* Burt Neuborne, Formalsim, Functionalism, and the Separation of Powers, *22 Harv. J. L. & Pub. Pol'y 45 (1998);* Robert J. Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, *81 Cornell L. Rev. 393 (1996);* Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory, *41 Duke L.J. 449 (1991);* Peter M. Shane, Presidents, Pardons, and

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1. generally

The framers of the Constitution separated powers among three governmental branches because they feared the tyrannical power of a strong executive such as a king. [180] The Supreme Court has repeatedly stressed the importance of the separation of powers principle. For example, in Mistretta v. United States, the Court stated that "this Court consistently has given voice to, and has reaffirmed, the central judgment of the framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." [181]

At the same time, however, the Court also has consistently recognized that "the Constitution by no means contemplates total separation" of the three branches of government. [182] This has yielded **[*406]** decisions that seem both unpredictable and unprincipled. [183] As Justice Scalia noted in Lujan, "separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts." [184] The problem, of course, is that in the hard cases that reach the Supreme Court, there often is no such common understanding. For example, the Court has held that Congress may not retain sole removal power over an officer who performs executive functions, [185] may not limit the president's authority to remove principal executive officers, [186] may not place its members on boards and commissions that exercise executive powers, [187] may not retain a legislative veto over administrative decisions, [188] may not give Article I bankruptcy judges the power to hear tort

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Prosecutors: Legal Accountability and the Separation of Powers, *11 Yale L. & Pol'y Rev. 361 (1993);* Timothy T. Hui, Note, A "Tier-ful" Revelation: A Principled Approach to Separation of Powers, *34 Wm. & Mary L. Rev. 1403 (1993);* Matthew Thomas Kline, Comment, The Line Item Veto Case and the Separation of Powers, *88 Cal. L. Rev. 181, 195-210 (2000).*

[180] *Myers v. United States, 272 U.S. 52, 293 (1926)* (Brandeis, J., dissenting); Gordon S. Wood, The Creation of the American Republic 1776-1787 at 521 (1969).

[181] *488 U.S. 361, 380 (1989);* see also *Freytag v. Comm'r, 501 U.S. 868 (1991); Morrison v. Olson, 487 U.S. 654, 693 (1988)* ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches."); *Buckley v. Valeo, 424 U.S. 1, 124 (1976)* (""The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.").

[182] *Buckley, 424 U.S. at 121;* see also *Mistretta, 488 U.S. at 380* (noting the separation of powers principle does not require a "hermetic division" among the branches); *Morrison, 487 U.S. at 693-94* (stating the Court has "never held that the Constitution requires that the three branches of Government "operate with absolute independence"') (quoting *United States v. Nixon, 418 U.S. 683, 707 (1974)).*

[183] Charles Fried, Order and Law: Arguing the Reagan Revolution - A Firsthand Account 158-70 (1991); Carter, supra note 179, at 720-25, 775-80; Kline, supra note 179, at 195-96; see also *Mistretta, 488 U.S. at 426* (Scalia, J., dissenting):

Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much - how much is too much is to be determined, case-by-case, by this Court.

Id. (citation omitted).

[184] *Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).*

[185] *Bowsher v. Synar, 478 U.S. 714 (1986).*

[186] *Myers v. United States, 272 U.S. 52 (1926).*

[187] *Buckley, 424 U.S. 1; Metro. Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, Inc., 501 U.S. 252 (1991).*

[188] *INS v. Chadha, 462 U.S. 919 (1983).*

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and contract claims, [189] and may not encroach on the Supreme Court's power to interpret the Constitution. [190] On the other hand, the Court has held that Congress may place the Federal Sentencing Commission within the judicial branch, [191] may vest considerable prosecutorial discretion over criminal proceedings against high-ranking executive officers in a court-appointed independent counsel, [192] may grant the General Services Administration control over Richard Nixon's presidential papers, [193] and may grant the Commodity Futures Trading Commission jurisdiction over state-law counterclaims in administrative hearings. [194]

Commentators have described the Court's schizophrenic decisions as a product of its vacillation between two fundamentally different **[*407]** approaches to the separation of powers issue. [195] The "formalist" approach, favored by Justice Scalia, focuses almost exclusively on constitutional text and on an "original understanding" [196] of what the constitutional framers intended by the text. [197] Formalists favor a strict separation of powers; powers are not shared and do not overlap among the branches unless the Constitution so specifies. [198]

Functionalists, on the other hand, believe that ""formalistic and unbending rules' in the area of separation of powers may "unduly constrict Congress' ability to take needed and innovative action.'" [199] Changing conditions, such as the rise of the administrative state, [200] create the need for a more flexible approach to the structure of government. [201]

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[189] *N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).*

[190] *City of Boerne v. Flores, 521 U.S. 507 (1997).*

[191] *Mistretta, 488 U.S. 361.*

[192] *Morrison, 487 U.S. at 693.*

[193] *Nixon v. Adm'r of Gen. Servs., 433 U.S. 425 (1977).*

[194] *Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).*

[195] Peter L. Strauss, Formal and Functional Approaches to Separation-of-Powers Questions - A Foolish Inconsistency?, *72 Cornell L. Rev. 488 (1987)* (coining the terms "formalism" and "functionalism"). See generally Brown, supra note 179, at 1522-31; Eskridge, supra note 179; Fitts, supra note 179; Neuborne, supra note 179; Redish & Cisar, supra note 179.

[196] For a discussion of why a conclusive description of the Framers' "original understanding" of the Constitution often is elusive, see Lawrence Lessig & Cass R. Sunstein, The President and the Administration, *94 Colum. L. Rev. 1, 38-70 (1994).*

[197] Commentators sympathetic to the formalist position include Fried, supra note 183, at 132-71; Geoffrey P. Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41; Stephen L. Carter, Comment, The Independent Counsel Mess, *102 Harv. L. Rev. 105 (1988).*

[198] *Morrison, 487 U.S. at 697* (Scalia, J., dissenting) (arguing the Framers "viewed the principle of separation of powers as the absolutely central guarantee of a just Government"); Lovitt, supra note 3, at 864.

[199] *Bowsher, 478 U.S. at 763* (White, J., dissenting) (quoting *Schor, 478 U.S. at 851);* see also *Bowsher, 478 U.S. at 774, 776* (White, J., dissenting):

Realistic consideration … reveals that the threat to separation of powers conjured up by the majority is wholly chimerical … . The majority's [reliance] on rigid dogma … [and] unyielding principle to strike down a statute posing no real danger of aggrandizement of congressional power is extremely misguided and insensitive to our constitutional role.

Id. (citation omitted).

[200] See, e.g., Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty, *145 U. Pa. L. Rev. 759 (1997);* Colin S. Diver, Statutory Interpretation in the Administrative State, *133 U. Pa. L. Rev. 549 (1985);* Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, *89 Colum. L. Rev. 452 (1989);* Gary Lawson, The Rise and Rise of the Administrative State, *107 Harv. L. Rev. 1231 (1994);* Peter B. McCutchen, Mistakes,

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[*408] Functionalists are much less likely than formalists to find that separation of powers principles have been violated. [202]

Despite this Janus-like approach to the separation of powers doctrine, there are two circumstances under which the Court is likely to find that separation of powers principles have been violated. The first is when one branch of government "aggrandizes" power, either by exceeding its constitutionally defined power [203] or by enlarging its power at the expense of another branch that has a better constitutional claim to that power. [204] An example is INS v. Chadha, [205] where the Court invalidated a statute giving the House of Representatives a legislative veto over decisions made by the executive branch. This veto, the Court ruled, violated the Bicameralism and Presentment Clauses [206] by treating a resolution passed by one house as if it were a bill that had been passed by both houses and signed by the president. [207]

The second circumstance under which the Court may find that separation of powers principles have been violated is when one branch of government diminishes the powers assigned to another branch, even if the first branch does not assume any of those powers itself. [208] For example, in Myers v. United States, the Court held that, pursuant to the Appointments Clause, Congress could not limit the president's authority to remove a postmaster. [209] The anti-diminution principle, however, is less developed and less stringent than the anti-aggrandizement principle, and thus aggrandizement presents the strongest argument in favor of a separation of powers violation. [210] For example in Mistretta, the Court **[*409]** explained that "it is the concern of encroachment and aggrandizement that has

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Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, *80 Cornell L. Rev. 1 (1994);* Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State, *95 Colum. L. Rev. 749 (1995);* Edward L. Rubin, Law and Legislation in the Administrative State, *89 Colum. L. Rev. 369 (1989).*

[201] See *Chadha, 462 U.S. at 1002-03* (White, J., dissenting) (arguing that in striking down the legislative veto in the context of the administrative state that the Court has sanctioned, the Court has made it more difficult to insure that fundamental policy decisions would be made by elected officials rather than appointed administrative officials).

[202] Kline, supra note 179, at 201.

[203] See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)* (holding that the president did not have the power to seize the nation's steel mills, even during a wartime emergency).

[204] A. Michael Froomkin, The Imperial Presidency's New Vestments, *88 Nw. U. L. Rev. 1346, 1368 (1994)* ("In Myers, Buckley, Chadha, Bowsher, and Metropolitan Airports, separation of powers was violated by Congress seeking to reserve an executive power for itself.").

[205] *462 U.S. 919 (1986).*

[206] U.S. Const. art. 1, 7.

[207] *Chadha, 462 U.S. at 956-58.*

[208] *Clinton v. Jones, 520 U.S. 681, 701 (1997)* (stating that "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties") (quoting *Loving v. United States, 517 U.S. 748, 757 (1996)); Mistretta v. United States, 488 U.S. 361, 382 (1989)* (noting the separation of powers doctrine can be violated by "provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch").

[209] *272 U.S. 52 (1926).*

[210] See *Morrison v. Olson, 487 U.S. 654, 694 (1988)* ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); *Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986)* (finding the case raised no question of congressional aggrandizement but instead raised question of whether Congress impermissibly undermined role of judicial branch).

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animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" [211]

2. take care [212]

Article II, Section 3 of the Constitution provides that the president "shall take Care that the Laws be faithfully executed." [213] Commentators generally agree [214] that at least one purpose of the clause was to make it clear the president cannot arbitrarily suspend the enforcement of laws enacted by Congress. [215] Beyond this, however, relatively little is known **[*410]** about the original meaning of the Take Care Clause, [216] and there similarly are relatively few cases in which the Supreme Court has discussed its breadth. [217]

The clause is at the center of "one of the oldest debates in American constitutional law": [218] whether Congress has the power to structure much of the executive branch, or whether a "unitary executive" is in charge of all administration of federal law. One view is that the Take Care Clause, in conjunction with the Vesting Clause, gives

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[211] *Mistretta, 488 U.S. at 382.*

[212] See generally Steven G. Calabresi, The Vesting Clauses as Power Grants, *88 Nw. U. L. Rev. 1377 (1994);* Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, *104 Yale L.J. 541, 582-85, 616-22 (1994);* Martin S. Flaherty, The Most Dangerous Branch, *105 Yale L.J. 1725, 1792-94 (1996);* Froomkin, supra note 204; A. Michael Froomkin, Still Naked After All These Words, *88 Nw. U. L. Rev. 1420 (1994);* Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, *61 U. Chi. L. Rev. 123, 145 n.75 (1994);* Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, *81 Iowa L. Rev. 1267 (1996);* Lessig & Sunstein, supra note 196; Robert J. Reinstein, An Early View of Executive Powers And Privilege: The Trial of Smith and Ogden, 2 Hastings Const. L.Q. 309, 320-21 n.50 (1975); Peter M. Shane, The Separation of Powers and the Rule of Law: The Virtues of "Seeing the Trees", *30 Wm. & Mary L. Rev. 375, 380 (1989);* John R. Martin, Note, Morrison v. Olson and Executive Power, 4 Tex. Rev. L. & Pol. 511, 518-20 (2000).

[213] U.S. Const. art. II, 3.

[214] There is less agreement on the issue of whether, and if so under what circumstances, a President may refuse to enforce laws that arguably violate the Constitution or usurp Constitutionally-delegated Executive authority. See Calabresi & Prakash, supra note 212, at 621-22; Frank H. Easterbrook, Presidential Review, *40 Case W. Res. L. Rev. 905 (1990);* Lawson & Moore, supra note 212, at 1286-88; Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, *83 Geo. L.J. 217, 267 (1994).*

[215] Calabresi & Prakash, supra note 212, at 583-84; Lawson & Moore, supra note 212, at 1313 ("The most important, if not the sole, aspect of this [the Take Care Clause's] limitation is to make clear that "the executive Power' does not include a power analogous to a royal prerogative of suspension."). Calabresi & Prakash explain:

One can well imagine why the Framers might have wanted to forbid the President from exercising the ancient English royal power to suspend laws. Such a power is much more potent than even an absolute veto over laws recently passed by Congress. An absolute veto, i.e., one incapable of being overridden, provides only the sitting President the opportunity to block legislation from becoming law. A suspending power, on the other hand, permits any President to nullify laws enacted during and prior to his taking office.

Calabresi & Prakash, supra note 212, at 584 n.161. The Founders had to counter not only centuries of English history, but also the writings of John Locke. See John Locke, Second Treatise on Civil Government 160 (1689) (noting the executive power includes a prerogative "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it").

[216] John R. Labovitz, Presidential Impeachment 133-34 (1978). For thorough discussions of the clause's meager history, see Lessig & Sunstein, supra note 196, at 61-70; Calabresi & Prakash, supra note 212, at 582-85, 589-90, 616-22.

[217] *Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 524,* reh'g en banc granted, *196 F.3d 561 (5th Cir. 1999).*

[218] Calabresi & Prakash, supra note 212, at 544.

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the president exclusive authority over all executive powers. [219] It is the president, and no one else, who is given the authority to execute the laws. [220] Moreover, this duty implies (or assumes) that the president has the power to perform his constitutional obligation to execute the law. [221]

The other view [222] envisions a much more limited role for the president. Advocates of this view point out that, unlike the other power clauses of Article II, the Take Care Clause is expressed as a duty rather than a power. [223] The clause "(as originally understood) obliges the president to follow the full range of laws that Congress enacts, both (a) laws regulating conduct outside the executive branch, and (b) laws **[*411]** regulating execution by regulating conduct within the executive branch." [224] Congressional authority for (b) derives, under this reading, from the Necessary and Proper Clause. [225]

The Supreme Court decisions interpreting the Take Care Clause generally seem to follow the functionalist approach. [226] In Nixon v. Administrator of General Services, [227] Congress had directed an executive branch official - the administrator of general services (AGS) - to take custody of and archive President Nixon's presidential papers and tape recordings. [228] In rejecting a constitutional challenge to Congress' direction, the Court held that the limited screening undertaken by the AGS did not violate the president's expectation of confidentiality and privacy and thus did not constitute anything other than "a very limited intrusion" into the domain of the executive branch. [229] The closest the Court came to articulating a standard that might guide future cases was its pronouncement that Congress may not disrupt "the proper balance between the coordinate branches [by] preventing the Executive

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[219] See generally Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, *105 Harv. L. Rev. 1153 (1992);* David P. Currie, The Distribution of Powers After Bowsher, 1986 Sup. Ct. Rev. 19; Harold J. Krent, Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government, *85 Nw. U. L. Rev. 62, 72-82 (1990);* Lawson, supra note 200; Lee S. Liberman, Morrison v. Olson: A Formalist Perspective on Why the Court Was Wrong, *38 Am. U. L. Rev. 313 (1989);* Thomas W. Merrill, The Constitutional Principle of Separation of Powers, 1991 Sup. Ct. Rev. 225 (1991); Miller, supra note 197; Redish & Cisar, supra note 179; Henry P. Monaghan, The Protective Power of the Presidency, *93 Colum. L. Rev. 1, 3, 16 (1993);* Carter, supra note 197; Saikrishna Bangalore Prakash, Note, Hail to the Chief Administrator: The Framers and the President's Administrative Powers, *102 Yale L.J. 991 (1992).*

[220] Calabresi & Prakash, supra note 212, at 582.

[221] Id. at 583 ("The duty-imposing language of the Take Care Clause makes sense if the President has already been given a grant of the executive power by the [Vesting] Clause.").

[222] See generally Froomkin, supra note 204; Ledewitz, supra note 179; Morton Rosenberg, Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive, *57 Geo. Wash. L. Rev. 627 (1989);* A. Michael Froomkin, Note, In Defense of Administrative Agency Autonomy, *96 Yale L.J. 787 (1987).*

[223] See, e.g., Lessig & Sunstein, supra note 196, at 62.

[224] Id. at 69.

[225] Id. at 68-69.

[226] But see *Printz v. United States, 521 U.S. 898 (1997)* (discussed infra at notes 236-38 and accompanying text). Printz, though decided on federalism rather than separation of powers or Take Care Clause grounds, takes a formalist approach to the Take Care Clause.

[227] *433 U.S. 425 (1977).*

[228] *Id. at 433-34.*

[229] *Id. at 451.*

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Branch from accomplishing its constitutionally assigned functions." [230] This, of course, begs the question of what degree of congressional disruption is necessary before the "proper balance" is disrupted. Because the Court held that Congress's action was constitutional, [231] the opinion sheds some light on what Congress can do, but provides little guidance on what Congress cannot do. [232]

Similarly, in Commodity Futures Trading Commission v. Schor, [233] the Court rejected a constitutional challenge to Congress's authorization of the CFTC to entertain state law counterclaims in reparation proceedings. [234] The Court stated that an act of Congress is unconstitutional if it "impermissibly undermines" the powers of the Executive. [235] This, as in Nixon, begs the question of what is permissible and what is not, and the rest of the Schor opinion offers little guidance on this issue.

[*412] Printz v. United States, [236] though decided on federalism rather than separation of powers or Take Care Clause grounds, [237] may provide some guidance. The Court, in an opinion authored by Justice Scalia, struck down Brady Act provisions that required state officials to execute federal law by conducting background checks on gun purchasers. In doing so, the Court stated:

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, 3, personally and through officers whom he appoints … . The Brady Act effectively transfers this responsibility to thousands of [state law enforcement officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive - to insure both vigor and accountability - is well-known. That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws. [238]

Morrison v. Olson [239] is the Court's most thorough analysis of the Take Care Clause and its relationship to the separation of powers doctrine. Morrison is also the case most closely applicable to constitutional issues raised by qui tam statutes. In Morrison, the Court considered a constitutional challenge to the Ethics in Government Act (EGA) of 1978. [240] This statute was enacted in the wake of Watergate to facilitate the investigation and prosecution of high-ranking executive branch officials who violated federal criminal laws. [241] The EGA required the attorney

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230 *Id. at 443.*

231 Id.

232 Blanch, supra note 3, at 751.

233 *478 U.S. 833,* (1986).

234 *Id. at 858-59.*

235 *Id. at 856-57.*

236 *521 U.S. 898 (1997).*

237 *Id. at 935* ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

238 *Id. at 922* (citations omitted).

239 *487 U.S. 654 (1988).*

240 Pub. L. No. 95-521, *92 Stat. 1824 (1978)* (codified as amended in scattered sections of 2, 5, 18, 28, and 29 U.S.C.).

241 *Morrison, 487 U.S. at 660.*

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general, upon receipt of information "sufficient to constitute grounds to investigate" [242] potential violations of these laws, to conduct a preliminary investigation, after which she would report to a "Special **[*413]** Division" of the U.S. Court Appeals for the District of Columbia. [243] If the attorney general found that there were "reasonable grounds to believe that further investigation or prosecution [was] warranted," then her report would be accompanied by an application for the appointment of an independent counsel to investigate the matter further. [244] The Special Division then would appoint an independent counsel and define the independent counsel's prosecutorial jurisdiction. [245] Once this was done, the EGA granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice." [246]

The EGA provided three different circumstances under which an independent counsel's tenure would end. First, if the independent counsel notified the attorney general that the investigation or prosecution was complete, the independent counsel's office would terminate. [247] Second, if the attorney general found that the independent counsel's investigation or prosecution was complete, the independent counsel's office would terminate. [248]

The constitutional rub lies in the third circumstance under which an independent counsel's tenure would end. Prior to the completion of the investigation and prosecution, the independent counsel could be removed "only by the personal action of the Attorney General and only for good cause, physical disability [or] mental incapacity." [249] If the attorney general removed an independent counsel prior to the completion of the investigation and prosecution, the attorney general was to submit a report to the Special Division and to the Judiciary Committees of both houses of Congress, specifying the factual basis and ultimate grounds for removal. [250] The independent counsel then could seek judicial review in the United States District Court for the District of Columbia, which was authorized to reinstate the independent counsel or to grant "other appropriate relief." [251]

In the suit, Theodore Olson, the subject of an independent counsel's investigation and prosecution, claimed that the investigatory and prosecutorial powers given pursuant to the EGA to Alexia Morrison, the independent counsel, were executive, and therefore vested in the president alone. Justice Scalia, dissenting, agreed. From Scalia's formalist **[*414]** perspective, the issue was an easy one: the Constitution gives executive power only to the president; the independent counsel exercises executive power; the president lacks control over the independent counsel; therefore, the statute creating the independent counsel must be unconstitutional. [252]

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[242] Id.

[243] *Id. at 661.*

[244] Id.

[245] Id.

[246] *Id. at 662* (quoting ***28 U.S.C. 594***(a)).

[247] *Id. at 664.*

[248] Id.

[249] *Id. at 663* (quoting ***28 U.S.C. 596***(a)(1)).

[250] Id.

[251] *Id. at 663-64* (quoting ***28 U.S.C. 596***(a)(3)).

[252] *Id. at 697-715* (Scalia, J., dissenting); Lessig & Sunstein, supra note 196, at 14-15.

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The majority, in an opinion authored by Justice Rehnquist, agreed that the independent counsel exercised executive [253] functions largely independent of the executive branch. [254] Nonetheless, the Court rejected the constitutional challenge. First, the Court held that the independent counsel is an inferior officer under the Constitution, and, thus, the appointment by the judicial branch is not "incongruous" with the normal functions of the judiciary. [255] Second, the Court found that the duties conferred by the EGA on the Special Division were within the purview of the judiciary's Article III jurisdiction. [256] Finally, the Court held that, despite the limits on the president's removal power, the president retained "sufficient control" over the independent counsel to ensure that the president is able to perform his constitutionally-assigned duties. [257] This final holding is the most important one for present purposes.

The Court pointed to six circumstances that warranted a finding that the president, through the attorney general, retained sufficient control over the independent counsel. First, the attorney general controls the initiation of litigation, since an independent counsel is not appointed unless and until the attorney general requests one. [258] Second, the attorney general can remove the independent counsel upon a showing of good cause. [259] Third, the independent counsel's jurisdiction is fixed by a special court based on facts submitted by the attorney general. [260] Fourth, the independent counsel is required to follow Justice Department policies whenever possible. [261] Fifth, there is no danger of congressional aggrandizement of power since Congress retains no control or supervision of the independent counsel. [262] Sixth, the judicial branch does not encroach on executive power since the Special Division's power to appoint the counsel and define the counsel's jurisdiction "are not **[*415]** supervisory or administrative, nor are they functions that the Constitution requires be performed by officials within the Executive Branch." [263]

The test that comes out of Morrison, then, is whether the executive branch retains "sufficient control" over executive functions such that it is able to perform its duties under the Take Care and Vesting Clauses. Lower courts considering the constitutionality of qui tam analyze the Take Care Clause issue by comparing the qui tam incursions on executive power to the EGA incursions on executive power that the Court upheld in Morrison. [264] Before turning to that analysis, however, there is one further constitutional provision implicated by qui tam: the Appointments Clause.

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253 *Morrison, 487 U.S. at 691.*

254 *Id. at 696.*

255 *Id. at 670-77.* This Appointments Clause issue will be discussed in more detail in the next section. See infra Part IV.A.3.b.

256 *Morrison, 487 U.S. at 677-85.*

257 *Id. at 685-96.*

258 *Id. at 696.*

259 Id.

260 Id.

261 Id.

262 *Id. at 694.*

263 *Id. at 695.*

264 See, e.g., *United States ex rel. Truong v. Northrup Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).*

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3. the appointments clause [265]

The Appointments Clause provides:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. [266]

[*416] This bifurcated approach to appointments gives the president (with the advice and consent of the Senate) the power to appoint "officers," and gives Congress apparent [267] plenary power to allocate the appointment of "inferior officers." This division of the appointments power serves two purposes.

First, it helps effectuate the much broader separation of powers scheme discussed above. [268] The framers viewed the appointment power as "the most insidious and powerful weapon of eighteenth-century despotism." [269] Similarly, the Supreme Court has noted that "the Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" [270] The requirement that two branches cooperate in the appointment of principal officers limits the opportunity for one branch to capture an important office and imposes caution and deliberation before appointment. [271]

The second purpose served by the division of the appointments power is that the division fosters political accountability in the appointment process. Alexander Hamilton explained:

The blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate, aggravated by the consideration of their having counteracted the

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[265] See generally Steven Breker-Cooper, The Appointments Clause and the Removal Power: Theory and Seance, *60 Tenn. L. Rev. 841, 844-53 (1993);* Michael J. Gerhardt, Toward a Comprehensive Understanding of the Federal Appointments Process, *21 Harv. J.L. & Pub. Pol'y 467 (1998);* Michael J. Gerhardt, Putting Presidential Performance in the Federal Appointments Process in Perspective, *47 Case W. Res. L. Rev. 1359 (1997);* Ronald C. Kahn, Presidential Power and the Appointments Process: Structuralism, Legal Scholarship, and the New Historical Institutionalism, *47 Case W. Res. L. Rev. 1419 (1997);* Eric J. Konecke, The Appointments Clause and Military Judges: Inferior Appointment to a Principal Office, 5 Seton Hall Const. L.J. 489, 493-511 (1995); John C. Yoo, The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause, *15 Const. Comment 87, 96-117 (1998);* Nick Bravin, Note, Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence, *98 Colum. L. Rev. 1103 (1998);* Andrew Owen, Note, Toward A New Functional Methodology in Appointments Clause Analysis, *60 Geo. Wash. L. Rev. 536 (1992);* Edward Susolik, Note, Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and Rule of Law, *63 S. Cal. L. Rev. 1515 (1990).*

[266] U.S. Const. art. II, 2, cl. 2.

[267] See infra notes 330-45 and accompanying text.

[268] Bravin, supra note 265, at 1110.

[269] Wood, supra note 180, at 79, 143; see also *Freytag v. Comm'r, 501 U.S. 868, 883 (1991).*

[270] *Ryder v. United States, 515 U.S. 177, 182 (1995)* (quoting *Freytag, 501 U.S. at 878);* see also *Buckley v. Valeo, 424 U.S. 1, 125-26 (1976):*

The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States,' but the drafters had a less frivolous purpose in mind … . We think that the term "Officers of the United States' as used in Art. II … is a term intended to have substantive meaning.

Id.

[271] Bravin, supra note 265, at 1110.

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good intentions of the executive. If an ill appointment should be made, the executive, for nominating, and the Senate, for approving, would participate, though in different degrees, in the opprobrium and disgrace. [272]

[*417] While there was vigorous debate at the Constitutional Convention over the wording of the Appointments Clause, [273] the framers were concerned primarily with the dispersal of power [274] and with whether Congress or the president would have the authority to appoint. [275] The paucity of debate over the meaning of the clause as it was adopted has given rise to disagreement as to how the clause should be interpreted. As with the separation of powers doctrine generally, there is both a formalist and a functionalist camp. [276] Formalists tend to look at the appointee and ask whether the particular mode of appointment violates the overall structure of a strictly-applied separation of powers. [277] Functionalists tend to ask whether there are countervailing checks and balances that can be used to justify and permit the appointment at issue. [278]

Two interpretive issues [279] have dominated the Appointments Clause cases. The first is the distinction between principal officers, inferior officers, and non-officers. The second is whether, with regard to inferior officers, there are any implicit limitations on

whether Congress has absolute discretion to choose the entity to whom it should give the appointment power, as a literal reading of the constitutional text would seem to indicate, or whether there is an "implicit' constitutional limitation on its choice, which is premised on the "congruity,' from a separation of powers perspective, between the designated appointor and the purported appointee. [280]

a. Principal officers, inferior officers, and non-officers

The Constitution itself offers no guidance on how to distinguish principal officers, inferior officers, and non-officers. As the Morrison Court pointed out, "the line between "inferior' and "principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." [281] Until recently, Supreme Court precedent was not much help either. [282]

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[272] The Federalist No. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also Joseph Story, Commentaries on the Constitution of the United States 562 (Ronald D. Rotunda & John E. Nowak eds., 1987) ("If [the president] should … surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favour.").

[273] The Anti-Federalist Papers and the Constitutional Convention Debates 125-27 (Ralph Ketcham ed., 1986).

[274] See supra notes 269-72 and accompanying text.

[275] Louis Fisher, Constitutional Conflicts between Congress and the President 28-29 (1985).

[276] Susolik, supra note 265, at 1545.

[277] See, e.g., *Morrison v. Olson, 487 U.S. 654, 703-15 (1988)* (Scalia, J., dissenting).

[278] See, e.g., *id. at 685-96.*

[279] Susolik, supra note 265, at 1539.

[280] Id.

[281] *Morrison, 487 U.S. at 671.*

[282] Bravin, supra note 265, at 1114 ("Until recently, the Court determined officer status by circular reasoning, analogy, and ad hoc balancing."); Owen, supra note 265, at 537 (arguing that the lack of concrete criteria in Appointments Clause cases leads to ad hoc classifications).

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[*418] In the 1867 case of United States v. Hartwell, [283] the Court held, on two grounds, that a treasury clerk was an officer. First, the Court reasoned that because the clerk had been appointed in conformity with Article II, he must be an officer. [284] Second, the Court concluded that he was an officer because his position contained the "tenure, duration, emolument, and duties" consistent with officer status. [285]

Eleven years later, the Court held in United States v. Germaine that a surgeon appointed by the United States Commissioner of Pensions was not an officer. [286] Again, the Court proceeded along two lines of reasoning. First, the Court reasoned that since the surgeon had not been appointed in conformity with either part of the Appointments Clause, he was neither a principal nor an inferior officer, but instead an "agent." [287] Of course, using this logic, no congressionally authorized appointment would ever be struck as unconstitutional. [288] In its second line of reasoning, the Court concluded that the surgeon was not an officer because of the "occasional" and "intermittent" nature of his employment; [289] "ideas of tenure, duration … and duties" were important to deciding officer status. [290]

At issue in the 1890 case of Auffmordt v. Hedden [291] was a statute that provided that an importer dissatisfied with a custom official's valuation of imported goods could get a second opinion from a merchant appraiser, who was a private businessperson selected for the particular re-appraisal. [292] The second opinion was final and binding on the importer as well as the United States. [293] The Court reasoned that because the merchant appraiser's "position was without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily," he was not an "officer" under either part of the Appointments Clause. [294]

[*419] In the 1898 case of United States v. Eaton, the Court considered the status of a Bangkok missionary who had been assigned to take charge of the local American consulate until the new consul general arrived. [295] The Court held that a subordinate officer who is "charged with the performance of the duty of [a] superior for a limited time and under special and temporary conditions … is not thereby transformed into the superior and permanent official." [296]

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283 *73 U.S. (6 Wall.) 385 (1867).* At issue in the case was whether the clerk could be prosecuted under a statute that pertained only to officers.

284 *Id. at 393-94.*

285 *Id. at 393.*

286 *99 U.S. 508, 511 (1878).* At issue in the case was whether the surgeon could be prosecuted under a statute that pertained only to officers.

287 *Id. at 510-12.*

288 Bravin, supra note 265, at 1115.

289 *Germaine, 99 U.S. at 512.*

290 *Id. at 511.*

291 *137 U.S. 310 (1890).*

292 *Id. at 312.*

293 Id.

294 *Id. at 327.*

295 *169 U.S. 331, 331-32 (1898).*

296 *Id. at 343.*

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In Buckley v. Valeo, [297] one issue before the Court was the constitutionality of Congress's decision, in the Federal Election Campaign Act (FECA), [298] to retain for itself the power to appoint members of the Federal Election Commission (FEC). [299] The duties of FEC members included the filing and prosecution of civil suits to enforce the FECA. [300] Because the appointments conformed to neither the Principal nor the Inferior Officer Clauses, [301] the only way the appointments would be constitutional would be if the FEC members were not officers at all, but instead were merely employees or agents. [302] The Court stated that an officer is "any appointee exercising significant authority pursuant to the laws of the United States." [303] The Court held that the FEC's enforcement powers satisfied this test:

We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section. [304]

The Court therefore held that the FEC members had been appointed unconstitutionally. [305]

As discussed above, [306] one of the holdings of Morrison v. Olson [307] was that an independent counsel is an inferior officer. If the Court had found that the independent counsel was a principal officer, it almost **[*420]** certainly would have found the statute unconstitutional because of the counsel's appointment by the judiciary. [308] In holding that the counsel was an inferior officer, the Court articulated four factors to consider when distinguishing principal from inferior officers. [309] The first was the executive branch's ability to remove the appointee. While the independent counsel was not "subordinate" to the attorney general (and thereby to the president) because of the discretion given her by the EGA, nonetheless "the fact that she can be removed [(albeit only for cause)] by the Attorney General indicates that she is to some degree "inferior' in rank and authority." [310]

The second factor that the Court used to determine that the independent counsel was an inferior officer was the limited scope of her duties (though she could exercise all the powers of the Department of Justice and the attorney

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297 *424 U.S. 1 (1976).*

298 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, *86 Stat. 3 (1972),* amended by Pub. L. No. 93-443, *88 Stat. 1263 (1974).*

299 *Buckley, 424 U.S. at 126-27.*

300 Id. at 109-11.

301 Id. at 126-27.

302 Id. at 126 n.162, 137.

303 Id. at 126.

304 Id. at 140.

305 Id.

306 See supra note 255 and accompanying text.

307 *487 U.S. 654 (1988).*

308 Susolik, supra note 265, at 1553.

309 *Morrison, 487 U.S. at 671-72;* Bravin, supra note 265, at 1116.

310 *Morrison, 487 U.S. at 671.*

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general). [311] Third, the Court characterized the independent counsel's jurisdiction as "limited," despite the EGA's provision for the expansion of that jurisdiction. [312] Fourth, the Court characterized the tenure of the independent counsel as "limited" and "temporary," even though the EGA permits investigations and prosecutions to run to the indefinite date of completion. [313]

Freytag v. Commissioner [314] arose out of a tax shelter case that was tried before a special trial judge. The taxpayers argued that the appointment of special trial judges by the chief judge of the tax court violated the Appointments Clause. A threshold issue was whether special trial judges were "officers" who must be appointed in conformance with the Appointments Clause. Holding that trial judges are inferior officers, [315] the Court distinguished trial judges from special masters "who are hired by Article III courts on a temporary, episodic basis." [316]

The tax commissioner argued that the tax court is a "department" of which the chief judge is "head," such that the chief judge is empowered to make the appointments pursuant to the inferior officer part of the Appointments Clause. The Supreme Court rejected this argument, ruling that executive "department heads" within the meaning of the Appointments Clause should be confined essentially to cabinet-level positions. [317] Otherwise, the Court reasoned, the appointment power would be too widely diffused within the executive branch:

[*421]

The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government … . The Framers recognized the dangers posed by an excessively diffuse appointment power and rejected efforts to expand that power. [318]

Nonetheless, the Court upheld the method by which the trial judges were appointed, finding that the tax court, as an Article I legislative court, is a "court of law" within the meaning of the Appointments Clause. [319]

In the 1997 decision of Edmond v. United States, [320] Justice Scalia, who had dissented in Morrison, wrote the majority opinion. At issue was the validity of the appointment of two civilian members of the Coast Guard Court of Criminal Appeals by the secretary of transportation. [321] If they were principal officers, then their appointment would

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311 Id.

312 *Id. at 672.*

313 Id.

314 *501 U.S. 868 (1991).*

315 *Id. at 882.*

316 *Id. at 881.*

317 *Id. at 888.*

318 *Id. at 885.*

319 *Id. at 890-92.*

320 *520 U.S. 651 (1997).*

321 *Id. at 653.*

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violate the Appointments Clause because they had not been appointed by the president and confirmed by the Senate. [322]

Stating that Morrison's four-factor balancing test had failed to "set forth a definitive test for whether an office is "inferior' under the Appointments Clause," [323] the Court articulated a new test:

Whether one is an "inferior" officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase "lesser officer." Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that "inferior officers" are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." [324]

Applying the test to the Coast Guard civilian judges, the Court noted that they could be removed without cause, that their decisions were reversible, and that they were supervised by both the judge advocate **[*422]** general and the Court of Appeals for the Armed Forces. [325] Based on this, the Court concluded that the civilian judges "had no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers," [326] and that, therefore, the civilian judges were "inferior" officers. The fact that the judges were limited neither in tenure nor jurisdiction were irrelevant to the Court's decision. [327]

Thus, following Edmond, the test for distinguishing principal from inferior officers appears to be whether the appointee is supervised by a higher-ranking officer, and whether that supervision is a function of removability and reversability. The test for distinguishing inferior officers from non-officers seems to be the Buckley test of whether the appointee "exercises significant authority pursuant to the laws of the United States" [328] and the Germaine/Auffmordt examination of whether the position is permanent and salaried.

b. Congress's power to vest the appointment of inferior officers

The second issue that frequently arises under the Appointments Clause is whether, with regard to inferior officers, there are any implicit limitations on Congress's power to decide who will exercise the appointment power. The constitutional text contains no such limitation. [329] However, the Court has on occasion indicated that there is an implied constitutional requirement that Congress vest the appointment power in the governmental branch most appropriate for the particular appointment.

The Court first encountered this issue in the 1839 case of Ex Parte Hennan. [330] In that case, the Court upheld Congress's decision to vest the appointment of judicial clerks in the federal courts. Along the way, the Court stated

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322 *Id. at 655-56.*

323 *Id. at 661.*

324 *Id. at 662-63.*

325 *Id. at 664-65.*

326 *Id. at 665.*

327 See *id. at 666.*

328 *Buckley v. Valeo, 424 U.S. 1, 126 (1975).*

329 Susolik, supra note 265, at 1546-47.

330 *38 U.S. (13 Pet.) 133 (1839).*

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that "the appointing power here designated … was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged. The appointment of clerks of courts properly belongs to the courts of law." [331] This language indicates the Court's approval of Congress's decision to vest the appointment in the most appropriate branch, but does not indicate whether it is a constitutional requirement.

Forty years later, in Ex Parte Siebold, [332] the Court seemed to reverse course. At issue was a federal statute that required circuit court judges to **[*423]** appoint "purely executive" supervisors of elections. [333] The Court upheld the delegation of the appointment power to the judicial branch. Even though it might be "usual and proper to vest the appointment of inferior officers in that department … to which the duties of such officers appertain," the Court nonetheless concluded that there was "no absolute requirement to this effect in the Constitution." [334] The Court also recognized that "it would be difficult in many cases to determine to which department an office properly belonged." [335]

Nearly a hundred years later, in Buckley v. Valeo, [336] the Court appeared to reverse course yet again. Buckley struck down a statute that allowed Congress to appoint FEC officials. Finding that these officials were executive officers, the Court stated that since the president "is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws." [337]

Finally, in Morrison, the Court ignored Buckley and instead followed Siebold. Holding, as discussed above, that Congress acted constitutionally when it vested in the judicial branch the power to appoint special prosecutors, [338] the Court found that the Appointments Clause contemplated "no limitation on interbranch appointments." [339] Quoting the language from Siebold discussed above, [340] the Court stated that neither the text nor the history of the Appointments Clause provided any support for the position that interbranch delegation was to be prohibited. [341] But then the Court backpedaled a bit, stating that Congress's power to make interbranch appointments is not

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[331] *Id. at 137.*

[332] *100 U.S. 371 (1879).*

[333] *Id. at 377.* The issue arose when former supervisors of elections challenged their convictions for criminal election fraud violations under statutes whose violations depended on the supervisors' status as federal officers; the defendants challenged their convictions on the ground that because their appointments were unconstitutional, the defendants were not federal officers. Id.

[334] *Id. at 397;* see also Ken Gormley, An Original Model of the Independent Counsel Statute, *97 Mich. L. Rev. 601, 613 (1998).*

[335] *Ex Parte Siebold, 100 U.S. at 397.*

[336] *424 U.S. 1 (1976).*

[337] Id. at 135 (quoting *Myers v. United States, 272 U.S. 52, 117 (1926)).*

[338] See supra note 255 and accompanying text.

[339] *Morrison v. Olson, 487 U.S. 654, 673 (1988).*

[340] *Id. at 674;* see supra notes 332-35 and accompanying text.

[341] *Morrison, 487 U.S. at 674-75.*

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"unlimited"; [342] that Congress cannot make an interbranch appointment if that appointment "has the potential to impair the constitutional functions assigned to one of the branches." [343]

[*424] The only thing consistent about the Supreme Court's case law on this issue is the Court's inconsistency. Of the four cases on point, two seem to indicate that Congress may vest the appointment of inferior officers in any branch it wishes; the other two seem to indicate that Congress is under a constitutional obligation to vest the appointment in the branch the function of which is most commensurate with the appointee's duties. The cases provide little analysis and suggest no meaningful way to distinguish them; there is no discernable trend in either reasoning or outcome. In short, the issue is "unsettled and indeterminate." [344]

B. Application to Qui Tam

Constitutional challenges to the qui tam action have focused on three characteristics of the action. The first is the restriction on the executive branch's prosecutorial powers. The second is the redistribution of these prosecutorial powers to private, unelected, unappointed citizens. The third is the power given to the judicial branch to permit executive branch intervention in a qui tam action only for "good cause" when intervention is sought more than sixty days after the action is filed. Each of these will be discussed in turn.

1. restrictions on the executive branch's prosecutorial powers

Qui tam imposes three restrictions on the executive branch's power to control the prosecution of a qui tam case. [345] First, it divests from the executive branch the power to control whether the case is filed at all. Second, it cedes much control over the litigation from the executive branch to the qui tam informer. Third, it restricts the executive branch's ability to terminate the litigation.

a. Prosecutorial discretion

The qui tam action compromises the executive branch's power over prosecutorial discretion because the qui tam informer has the power unilaterally to decide to initiate suit. [346] This transfer of power is mitigated somewhat by the executive branch's concurrent power to initiate suit; [347] its absolute right, within sixty days, to intervene and take over the suit; [348] and its conditional right (upon a showing of good cause) to intervene after **[*425]** sixty days. [349] Nonetheless, the bottom line is that the qui tam statute divests the executive branch of the absolute right to control the initiation of litigation.

Supreme Court cases such as Buckley v. Valeo [350] have intimated that prosecutorial discretion may be an "inherently executive" function, and that divesting the executive branch of this power could be an unconstitutional

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[342] *Id. at 675.*

[343] *Id. at 675-76.*

[344] Susolik, supra note 265, at 1549.

[345] *United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).*

[346] *31 U.S.C. 3730*(b) (1998).

[347] Id. 3730(a).

[348] Id. 3730(b)(4)(A).

[349] Id. 3730(c)(3).

[350] *424 U.S. 1, 138 (1976);* supra notes 297-305, 336-37 and accompanying text (referring to initiation of lawsuits on behalf of the United States as part of the President's "take care" duties).

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violation of the separation of powers doctrine, the Take Care Clause, or the Vesting Clause. [351] Recently, pointing to evidence that prosecutiorial duties may have been performed outside the executive branch in the late 1700s, some scholars have questioned whether the founders considered prosecution to be a purely executive function. [352] Other scholars, however, have reached the opposite conclusion. [353]

Commentators have identified two policy reasons that might justify the executive branch's retention of absolute discretion over prosecutorial matters. The first is that the executive branch, as a politically accountable entity, is in a better position than private citizens to assess whether prosecution of a particular suit is in the overall best interests of the government. [354] The government might, for example, wish to delay prosecution of one case until it has established a favorable precedent with another case; it might believe that prosecution would interfere with important national security or foreign policy interests; [355] or it might conclude that a technical violation of the FCA does not warrant suit, as when the defendant has taken steps to remedy the situation. [356] However, Congress, by enacting the qui tam statute, has already made the policy judgement that the government's interest in vigorous prosecution of fraud outweighs the practical pitfalls of dispersing control over the initiation of **[*426]** suit. [357] Moreover, the same could be said of other statutes with citizen-suit provisions. [358]

A second policy reason for consolidating prosecutorial power in the executive branch is to protect defendants from frivolous prosecutions. [359] Political accountability constrains executive branch officials from overzealous or oppressive prosecutions; [360] internal constraints have a similar effect. [361] One commentator has warned that "granting self-interested private citizens an unfettered right to bring suit under the FCA creates an enormous potential for abuse." [362] But the potential for abuse in qui tam actions is no greater than in other private civil actions; [363] in both situations, our judicial system assumes that the cost of bringing suit, [364] and the existence of various procedural devices designed to weed out frivolous suits, [365] adequately protects defendants.

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[351] See, e.g., *Heckler v. Chaney, 470 U.S. 821, 832 (1985)* ("The decision of a prosecutor in the Executive Branch not to indict … has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."); *United States v. Nixon, 418 U.S. 683, 693 (1974)* (stating, in dicta, that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *The Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1869)* ("Public prosecutions … are within the exclusive direction of the district attorney."). Many of these cases, however, involved criminal rather than civil prosecutions.

[352] See, e.g., Lessig & Sunstein, supra note 196, at 14-23; Stephanie A.J. Dangel, Note, Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent, *99 Yale L.J. 1069 (1990).*

[353] See, e.g., Calabresi & Prakash, supra note 212, at 658-62.

[354] See Caminker, supra note 3, at 359-67; Lovitt, supra note 3, at 869-76.

[355] Caminker, supra note 3, at 360-61, 365; Lovitt, supra note 3, at 874.

[356] See Lovitt, supra note 3, at 874.

[357] Caminker, supra note 3, at 365-66.

[358] See, e.g., Toxic Substances Control Act, *15 U.S.C. 2619* (1998); Endangered Species Act Amendments of 1982, *16 U.S.C. 1540*(g) (1998); Clean Water Act, *33 U.S.C. 1365* (1998).

[359] Blanch, supra note 3, at 757-58; Caminker, supra note 3, at 368-74.

[360] Caminker, supra note 3, at 368.

[361] Id. ("Resource scarcity discourages the initiation of frivolous proceedings; requirements of personal disinterest discourage the malevolent or self-interested use of power; and the repetitive nature of discretionary decisions builds experience, both for each prosecutor and within her community.").

[362] Blanch, supra note 3, at 757.

[363] Caminker, supra note 3, at 367.

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Morrison v. Olson [366] is helpful but not dispositive on the issue of whether FCA qui tam provisions unconstitutionally deprive the executive branch of the right to control the initiation of litigation. In Morrison, the independent prosecutor had unilateral authority, once appointed, to initiate prosecution [367] (and the Court conceded this authority as a core executive function); [368] the attorney general had no control over the decision to initiate litigation. In this sense, the attorney general has far more control over the initiation of FCA qui tam litigation than she does over EGA litigation, since with the former she has (1) a concurrent power, **[*427]** with the informer, to initiate litigation; (2) an absolute right, within sixty days, to intervene and take over the suit; and (3) a conditional right to intervene after sixty days. Since the Morrison Court upheld EGA provisions that imposed greater restrictions on prosecutorial initiation than those imposed by the FCA, this would tend to indicate that the FCA restrictions pass constitutional muster.

There is, however, one sense in which the attorney general has more control over the initiation of EGA litigation than she does over the initiation of FCA qui tam litigation. The EGA provides that an independent prosecutor may only be appointed upon the recommendation of the attorney general. [369] This gives the executive branch absolute formal (if not practical) [370] control over the process that might eventually lead to prosecution. [371] On the whole, the similarities between Morrison and qui tam, together with the attorney general's right to intervene in a qui tam action, augur for a conclusion that no constitutional violation exists.

b. Control over litigation

In addition to constricting the executive branch's power to control the initiation of a case, qui tam also imposes limitations on the executive branch's power to conduct the litigation as the executive branch sees fit. There are three such limitations. [372] First, if the attorney general elects not to intervene, the qui tam informer directs the prosecution, which nonetheless proceeds in the government's name. [373] Second, if the government, after sixty

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[364] In a qui tam action brought under the FCA in which the government chooses not to intervene, the informer is responsible for the costs of prosecuting the litigation. *31 U.S.C. 3730*(b)(4)(B) (1998); see also *United States ex rel. Givler v. Smith, 775 F. Supp. 172, 178 (E.D. Pa. 1991).* Moreover, at the end of litigation, the court may award the defendant attorneys fees if the defendant prevails and the action "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." *31 U.S.C. 3730*(d)(4).

[365] See, e.g., *United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084 (C.D. Cal. 1989)* (suggesting summary judgment under Rule 56 and attorney sanctions under Rule 11 should suffice to protect defendants from "loose cannon" qui tam plaintiffs).

[366] *487 U.S. 654 (1988);* supra notes 239-64, 306-13 and accompanying text.

[367] ***28 U.S.C. 594***(a), 594(a)(9) (1998).

[368] *487 U.S. at 691.*

[369] See *id. at 696* ("No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds "no reasonable grounds to believe that further investigation is warranted' is committed to his unreviewable discretion.").

[370] See *id. at 701-02* (Scalia, J., dissenting) (arguing that political pressures often would force the attorney general to recommend an independent counsel).

[371] Blanch, supra note 3, at 757; Lovitt, supra note 3, at 870.

[372] *United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).*

[373] See supra notes 76-79, 96 and accompanying text.

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days, decides to intervene, it may do so only upon showing the court "good cause." [374] Third, if a dispute arises at any time between the government and the informer as to the conduct of the suit, the government must ask the court to limit the informer's participation; [375] the government lacks the authority to do so unilaterally.

These limitations pale in comparison to the limitations at issue in Morrison. The Ethics in Government Act, once the independent counsel was appointed, gave that independent counsel plenary authority to **[*428]** conduct the litigation; [376] the DOJ was denied the opportunity to participate in the litigation in any way. [377] By contrast, the FCA gives the government a sixty-day absolute right to intervene and take over the litigation, a qualified right to intervene after that, and an opportunity (upon judicial approval) to limit the informer's participation in the litigation. If Morrison set the benchmark, then it is difficult to see how the FCA could fail to pass constitutional muster. [378]

An argument can be made that the good-cause limitation on intervention in the FCA is more onerous than the EGA requirement that the attorney general have good cause before removing the independent counsel. [379] The FCA, for example, requires a showing of good cause to a court before intervention; under the EGA, the good cause showing only had to be made after the independent counsel had been removed, if she sought judicial review. Likewise, there is some indication that the good cause requirement may be a heavier burden under the FCA than it is under the EGA. [380] Upon a showing of good cause, the independent counsel could be removed; the FCA gives the government no commensurate power to remove a qui tam informer. [381]

On the other hand, under the EGA, good cause was necessary any time the attorney general wished to remove the independent counsel; under the FCA, the right to intervene is absolute for the first sixty days of litigation. Moreover, once an independent counsel is removed, the judicial branch has the authority to appoint a replacement, and the attorney general has no right to participate in the appointment. [382] In light of the government's right to intervene and control FCA litigation, contrasted with the inability of the government to participate in an independent counsel prosecution in any way, it seems reasonable to conclude that the FCA restrictions on the executive branch's ability to control the prosecution of qui tam litigation is constitutional.

c. Termination of litigation

FCA qui tam provisions restrict the executive branch's control of qui tam suits in a third way: by limiting the government's ability to settle or dismiss a suit. If the government intervenes, it can only dismiss the suit over the objection of the informer following a hearing and the approval of **[*429]** the court, [383] and it can only settle the suit over the objection of the informer if it can convince the court that the settlement is fair and reasonable. [384] These

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[374] *31 U.S.C. 3730*(c)(3) (1998).

[375] Id. 3730(c)(2)(C), (D).

[376] ***28 U.S.C. 594***(a) (1998).

[377] Blanch, supra note 3, at 760.

[378] But see id. at 760-62 (distinguishing Morrison on the basis that under the EGA, there was a "pragmatic imperative" that independent counsels not be subject to the control of the very officials they were responsible for investigating and prosecuting).

[379] Id. at 762-65.

[380] See supra note 86 and accompanying text.

[381] *31 U.S.C. 3730*(c)(1) (1998).

[382] See *Truong, 728 F. Supp. at 622.*

[383] *31 U.S.C. 3730*(c)(2)(A).

[384] Id. 3730(c)(2)(B).

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restrictions are significantly less onerous than the restrictions placed on the attorney general by the EGA. [385] Moreover, other statutes similarly constrain the executive Branch's ability to dismiss suits. [386]

If the government does not intervene, then it is unclear whether, and if so under what circumstances, the government may dismiss the suit. [387] By one view, the government would have no authority whatever to terminate the suit. [388] This is similar to, and perhaps slightly more onerous than, the EGA statute, which gave the attorney general the power to remove (with good cause) the independent counsel, even though this removal would not affect any pending suits and the judicial branch could thereafter appoint a replacement. [389] Most courts, albeit in dicta, have interpreted the FCA as giving the government the right to move for dismissal even if the government has not intervened in the case. [390] This interpretation would give the government far more control over the termination of litigation in an FCA qui tam case than the EGA gave the government in the termination of litigation initiated by independent counsels.

The FCA imposes significant constraints on the authority of the executive branch to litigate qui tam suits. It limits prosecutorial discretion; it gives, under some circumstances, control over the litigation to qui tam informers; and it restricts the ability of the executive branch to end the litigation. Nonetheless, these restrictions are on the whole less onerous than the EGA restrictions that passed constitutional muster in Morrison. The restrictions imposed by the FCA on the executive **[*430]** branch's ability to litigate qui tam suits therefore does not create a constitutional violation.

2. delegation of prosecutorial powers to citizens

FCA qui tam informers are not appointed in conformance with the Appointments Clause. They are not nominated by the president and confirmed by the Senate, as the Appointments Clause requires of principal officers; nor has Congress vested their appointment in the president, courts, or cabinet heads, as the Appointment Clause requires of inferior officers. Nonetheless, when a qui tam informer files suit, she does so in the name and on behalf of the United States. [391] The constitutional issue, therefore, is whether unappointed qui tam informers wield so much governmental power that they must be appointed in accordance with the Appointments Clause.

Some commentators who have argued that qui tam violates the Appointments Clause have focused [392] on the holding in Buckley v. Valeo [393] that the FEC members had been unconstitutionally appointed because only persons

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[385] Blanch, supra note 3, at 765.

[386] See, e.g., *Fed. R. Crim. P. 48(a)* (allowing the government to file dismissal of indictment, information, or complaint only with leave of court); *15 U.S.C. 16*(e) (allowing the court to enter a consent judgment proposed by the government in an antitrust action only if it is in the public interest). But see Lovitt, supra note 3, at 883:

[These] provisions allow for judicial review only after the government has initially decided that a case has sufficient merit to proceed, and so the government has already exercised its prosecutorial discretion to initiate suit. Under the FCA, however, a court must review the government's dismissal before the government has decided that the relator's case is worthy.

Id. (footnote omitted).

[387] See supra note 104 and accompanying text.

[388] See, e.g., Blanch, supra note 3, at 766.

[389] See supra notes 249-51 and accompanying text.

[390] See, e.g., *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 753 n.10 (9th Cir. 1993); Juliano v. Fed. Asset Disposition Ass'n, 736 F. Supp. 348, 349-51 (D.D.C. 1990),* aff'd, ***959 F.2d 1101 (D.C. Cir. 1992).***

[391] See supra notes 76-80 and accompanying text.

[392] See, e.g., Blanch, supra note 3, at 737-47.

[393] *424 U.S. 1 (1976).*

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who are "Officers of the United States" can have "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights." [394] Other commentators have focused on the policy implications of giving prosecutorial powers to citizens who are not politically accountable and who have a direct financial stake in the outcome of the litigation. [395]

The latter argument is easy to answer: Congress made the policy choice, when it passed the FCA, that the benefits of vigorous enforcement of laws prohibiting fraud against the government outweigh the drawbacks of dispersing prosecutorial power among the public. The former argument is more difficult to rebut because of the seemingly straightforward language of Buckley. Nonetheless, courts and commentators have found three grounds upon which to distinguish Buckley from FCA qui tam suits.

The first is that the primary concern of the Buckley Court was that Congress had aggrandized its own power, at the expense of the executive branch, by retaining for itself the power to appoint FEC members. [396] There is no shortage of language in Buckley disapproving of Congress' aggrandizement of the appointment power. [397] Because qui tam informers **[*431]** are essentially self-appointed rather than appointed by Congress, [398] the argument goes, the anti-aggrandizement principle does not apply, and Buckley does not prohibit qui tam. [399]

There are two problems with this approach. First, this is not the only way to interpret Buckley. [400] There is also plenty of language in Buckley indicating that the FEC members were unconstitutionally appointed simply because they wielded too much power to be classified as non-officers. [401] Second, Myers [402] and Freytag [403] indicate, respectively, that the Court is as concerned with the diminution and dispersal of the appointment power as it is with the aggrandizement of that power. [404]

A second basis upon which Buckley has been distinguished is closely related to the first. The argument is that Buckley is primarily concerned with the allocation of the appointment power among the three branches, and that the

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[394] Id. at 140.

[395] See, e.g., Lovitt, supra note 3, at 876-79.

[396] See supra note 204 and accompanying text.

[397] See, e.g., *Buckley, 424 U.S. at 129* ("The debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."); *id. at 139* (noting that Congress may not ""enforce [the laws] or appoint the agents charged with the duty of such enforcement"") (quoting *Springer v. Gov't of the Phil. Islands, 277 U.S. 189, 202 (1928));* id. at 124-31 (discussing congressional aggrandizement).

[398] See *United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 613 (N.D. Cal. 1989);* Blanch, supra note 3, at 737; Lovitt, supra note 3, at 878.

[399] See, e.g., *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 759 (9th Cir. 1993); United States ex rel. Givler v. Smith, 775 F. Supp. 172, 179 (E.D. Pa. 1991); United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 623 (C.D. Cal. 1989);* cf. *Morrison v. Olson, 487 U.S. 654, 693-94 (1988)* (noting that despite Congress' power to request that attorney general apply for appointment of independent counsel, "Congress retained for itself no powers of control or supervision over an independent counsel" and therefore the statute "simply does not pose a "danger of congressional usurpation of Executive Branch functions'") (quoting *Bowsher v. Synar, 478 U.S. 714, 727 (1986)).*

[400] See, e.g., Blanch, supra note 3, at 738-42.

[401] See supra notes 303-05 and accompanying text.

[402] *272 U.S. 52 (1926)* (discussed supra at note 209 and accompanying text).

[403] *501 U.S. 868 (1991)* (discussed supra at notes 314-19 and accompanying text).

[404] See Blanch, supra note 3, at 741-42.

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Buckley rationale therefore does not apply when power is given to private parties. [405] On this rationale, lower courts consistently have upheld the constitutionality of citizen-suit provisions in the face of **[*432]** Appointments Clause challenges. [406] However, this basis for distinguishing Buckley has the same limitations as the first: it is far from settled whether this is a fair reading of Buckley, and Myers and Freytag indicate that the Court may be equally concerned with the dispersal of the appointment power.

The third basis upon which Buckley has been distinguished is that the FEC members at issue in Buckley were appointed to an established office with "primary responsibility" [407] for enforcing the Ethics in Government Act. [408] Qui tam informers, on the other hand, hold no established position, [409] have no formal duties, [410] receive no federal salary, [411] serve for no specified term, [412] litigate with their own resources (absent government intervention), [413] and their enforcement authority extends only to the fraud case of which they have unique [414] knowledge. [415] Some lower courts have concluded from this that qui tam informers are not "officers" under the Appointments Clause, but instead are better classified as "agents" of the United States, [416] as suggested by the

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[405] See, e.g., *United States ex rel. Truong v. Northrop Corp., 728 F. Supp. 615, 623-24 (C.D. Cal. 1989);* see also Neil Kinkopf, Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors, *50 Rutgers L. Rev. 331, 373-74 (1998)* ("If Buckley discovered the applicability of the Appointments Clause to assignments to nonfederal actors, the Court quickly forgot about it. Since deciding Buckley, the Court has reviewed and upheld still more federal assignments of significant authority to nonfederal actors without mentioning the Appointments Clause."); cf. Lovitt, supra note 3, at 877 ("The case law is sparse, but some authority argues that private citizens cannot exercise executive power."); id. at 876-79 (reviewing case law).

[406] See, e.g., *Del. Valley Toxics Coalition v. Kurz-Hastings, Inc., 813 F. Supp. 1132 (E.D. Pa. 1993)* (upholding constitutionality of citizen suit provisions of Emergency Planning and Community Right-To-Know Act); Atl. States Legal Found., Inc. v. Whiting Roll-Up Door Mfg. Corp., No. 90-*CV-1109S, 1993 WL 114676, at 9-11* (W.D.N.Y. Mar. 31, 1993) (same); *Atl. States Legal Found. v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1419-20 (N.D. Ind. 1990)* (upholding the constitutionality of citizen suit provisions of Clean Water Act); *Natural Res. Def. Council v. Outboard Marine Corp., 692 F. Supp. 801, 815 (N.D. Ill. 1988)* (same); *Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620 (D. Md. 1987)* (same); see also The Constitutional Separation of Powers Between the President and Congress, Memorandum for the General Counsels of the Federal Government from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice 26-27 (May 7, 1996) (concluding that enforcement of federal laws by private individuals under the citizen suit provisions of the Clean Water Act does not violate the Appointments Clause), available at *http://www.usdoj.gov/* olc/mem_ops.html; Caminker, supra note 3, at 375 (noting qui tam informers are "like citizens litigating conventional private rights of action").

[407] *Buckley, 424 U.S. at 140.*

[408] Caminker, supra note 3, at 375.

[409] *Truong, 728 F. Supp. at 623.*

[410] Id.

[411] *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 759 n.21 (9th Cir. 1993);* *Truong, 728 F. Supp. at 623.*

[412] *Kelly, 9 F.3d at 759 n.21;* *Truong, 728 F. Supp. at 623.*

[413] *31 U.S.C. 3730*(b)(4)(B) (1998).

[414] Id. 3730(e)(4)(A)-(B).

[415] *Kelly, 9 F.3d at 755 n.15* ("The "jurisdiction' of a relator seems necessarily limited by the terms of the False Claims Act and the facts of the particular case."); *id. at 758* ("The relator's responsibility only extends to a single case.").

[416] *United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1094 (C.D. Cal. 1989);* *Truong, 728 F. Supp. at 623;* see also *Kelly, 9 F.3d at 759 n.21* ("[A] relator "is not appointed by Congress, receives no federal salary, and serves for

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Germaine [417] and Auffmordt [418] cases. **[*433]** Regardless of whether qui tam informers are properly classified as agents, [419] the basic point of Germaine and Auffmordt seems to be that if there is no position, there need be no appointment. [420] This seems a legitimate basis upon which to distinguish Buckley: FEC members held a specified position, with statutorily-specified duties, general jurisdiction over a specified subject, and a federal salary. Qui tam informers have none of these.

Moreover, it seems inaccurate to characterize qui tam informers as having "primary responsibility" for enforcement of the FCA, even if informers are viewed collectively rather than individually. The attorney general has concurrent power to initiate suit under the FCA and, by doing so, jurisdictionally bars an informer from bringing an action based on the same underlying facts. [421] Even if the informer files suit first, the government has the unconditional right, within sixty days, to intervene and take control of the suit, and a conditional right to intervene after that. [422] A better interpretation of the statute would be that the attorney general has "primary responsibility" for enforcing the FCA, and that informers play a supplemental, albeit important, role.

3. delegation of prosecutorial power to judicial branch

The third characteristic of the qui tam action that has attracted constitutional challenge is its distribution of some executive functions to the judicial branch. There are two mechanisms through which the FCA does this. The first is by permitting the executive branch to intervene in a qui tam action, after sixty days and a judicial finding of good cause. [423] The second [424] is by permitting the executive branch to dismiss a qui tam action only following a hearing and the approval of the court, [425] and by permitting the executive branch to settle a qui tam action over the objection of the informer only if it can convince the court that the settlement is fair and reasonable. [426] The issue is whether these **[*434]** mechanisms unconstitutionally permit the judicial branch to encroach on executive branch authority. [427]

The issue is basically a variation on the theme discussed above: [428] whether these mechanisms trammel on the executive branch's power to exercise prosecutorial authority. [429] Here, however, the argument is not just that an arguably "inherently executive" power is being taken away from the executive branch, but also that that power is

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no specified term.' These factors distinguish relators from "officers.'") (citation omitted); Caminker, supra note 3, at 375-76 ("Qui tam plaintiffs ought to be considered executive agents and not officers subject to the dictates of the appointments clause.").

417 *99 U.S. 508 (1878);* supra notes 287-91 and accompanying text.

418 *137 U.S. 310 (1890);* supra notes 292-95 and accompanying text.

419 For an argument that qui tam informers are not properly classified as agents, see Blanch, supra note 3, at 742-44.

420 See Caminker, supra note 3, at 375 ("Individual qui tam litigants are merely one-shot actors rather than tenured repeat players involved in the ongoing implementation of Federal law.").

421 *31 U.S.C. 3730*(e)(3) (1998).

422 See supra notes 81-104 and accompanying text.

423 See *United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 756 (9th Cir. 1993).*

424 See Lovitt, supra note 3, at 879-83.

425 *31 U.S.C. 3730*(c)(2)(A).

426 Id. 3730(c)(2)(B).

427 *Kelly, 9 F.3d at 755-56.*

428 See supra Part IV.B.1.

429 *Id. at 756.*

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being given to the judicial branch. In the words of one commentator, "Is it consistent with the constitutional separation of powers for Article III judges - judges who must sit as neutral umpires in FCA cases - to exercise the inherently executive power of deciding" when the government may intervene late and when the government should be permitted to dismiss the action? [430]

In one sense, the issue is analogous to the line of cases in which the Court has considered whether the Appointments Clause imposes any implicit limits on Congress's power to authorize interbranch appointments of inferior officers. This line of cases is not directly applicable, however, because, as discussed above, qui tam informers are not appointed in conformance with the inferior officer part of the Appointments Clause. [431] Another semi-analogous line of cases is the line of separation of powers cases in which one branch of government (usually Congress) aggrandizes power at the expense of another branch. Again, the analogy is not perfect. In the qui tam context, Congress is not seeking to retain any power for itself; it instead is taking power away from the executive branch and giving it to the judicial branch (and the "non-branch" of private citizens). [432]

There are several reasons why these qui tam provisions do not necessarily violate separation of powers principles. First, as noted above, there is some question as to whether the retention of absolute prosecutorial powers is "inherently executive." [433] Second, courts have interpreted the FCA judicial oversight provisions, such as the good cause requirement, narrowly in order to minimize or avoid the constitutional issue (though there is some question as to whether these interpretations are correct). [434] Third, other statutes similarly constrain the executive branch's ability to dismiss suits. [435]

Fourth, and perhaps most persuasive, the extent of judicial branch involvement in a qui tam action is no greater than that in the special **[*435]** counsel provisions approved by Morrison. [436] In Morrison, the Court held that Congress did not encroach on executive power by vesting power in a special federal court to decide whom to appoint as an independent counsel, by giving the special court the power to define the independent counsel's jurisdiction, by giving the special court the power to terminate the office of independent counsel, or by giving the special court the power to review the attorney general's decision to remove an independent counsel. [437] In contrast, in a qui tam action, the judicial branch plays no role in the selection of qui tam informers or the definition of their jurisdiction, and the judicial branch has no independent authority to remove a qui tam informer (though either the executive branch or the defendant may ask that the court limit the informer's involvement). [438] Moreover, in Morrison, the attorney general could remove the independent counsel only for good cause, and even that would not terminate the investigation or prosecution. [439] In contrast, under the FCA, the government's power to intervene is absolute for sixty days, and only thereafter subject to the good cause requirement. [440] Comparing the qui tam provisions of the FCA to the independent counsel provisions upheld in Morrison presents the strongest argument as to why judicial branch involvement in qui tam actions does not violate separation of powers principles.

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[430] Lovitt, supra note 3, at 879.

[431] See supra note 391 and accompanying text.

[432] *Kelly, 9 F.3d at 750.*

[433] See supra notes 352-53 and accompanying text.

[434] See supra notes 86, 102 and accompanying text.

[435] See supra note 387 and accompanying text.

[436] *Kelly, 9 F.3d at 756.*

[437] See supra notes 239-64 and accompanying text.

[438] See supra notes 93-94 and accompanying text.

[439] See supra notes 249-51 and accompanying text.

[440] See supra notes 81-104 and accompanying text.

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V. Beyond the Doctrinal Mold

The above analysis suggests that there is a firm doctrinal justification for upholding the constitutionality of the FCA qui tam provisions. The doctrinal justification distinguishes cases like Morrison and Buckley, and demonstrates that qui tam actions pose less of a threat to the constitutional structure than did the congressional actions struck down or upheld in those cases. However, there are two unique features of qui tam actions that justify treating them differently than the other constitutional cases. First, because qui tam disperses power among the citizens rather than concentrating it in the hands of a single political branch, the principles underlying the separation of powers doctrine are not threatened as they are when, for example, Congress seeks to retain the power constitutionally apportioned to another branch. Second, qui tam actions are different because they have a unique and extensive history.

[*436]

A. Power to the People

Nearly all of the Article II cases discussed in Part IV involved efforts by Congress either to aggrandize power for itself or to vest power inappropriately in another branch of government. For example, in Morrison, Congress gave the judicial branch significant authority related to the independent counsel; [441] in Buckley, Congress retained for itself the power to appoint members of the FEC. [442] Even in Freytag, in which the Court cautioned against the dispersal of the appointment power, the constitutional issue was which branch would wield the power to appoint trial judges for tax cases. [443]

Instead of vesting primary or concurrent responsibility for the enforcement of a statute in one of the three branches of government, [444] qui tam provisions disperse that responsibility among the citizens. Some commentators have argued that this is a bad idea because it decreases political accountability for actions taken in the name of the government: [445] the president must stand for election, whereas qui tam informers do not. While this argument is not without merit, it overlooks the fact that political accountability is neither the only nor the most important value served by the separation of powers doctrine.

The primary purpose of the separation of powers doctrine was to preserve liberty [446] by dispersing federal power among the three branches. James Madison wrote that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." [447] Similarly, Justice Brandeis, dissenting in Myers v. United States, [448] wrote:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable

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[441] See supra notes 239-64 and accompanying text.

[442] See supra notes 297-99 and accompanying text.

[443] See supra notes 314-19 and accompanying text.

[444] As discussed above, see supra Part IV.B.3, the FCA does give some power that ordinarily would be exercised by the executive branch to the judicial branch. Nonetheless, the primary transfer of power is from the executive branch to qui tam informers.

[445] See, e.g., Harold J. Kent & Ethan G. Shenkman, Of Citizen Suits and Citizen Sunstein, *91 Mich. L. Rev. 1793, 1820-21 (1993);* Lovitt, supra note 3, at 874-75.

[446] See, e.g., Susolik, supra note 265, at 1536, 1560, 1564.

[447] The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

[448] *272 U.S. 52 (1926).*

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friction incident to the **[*437]** distribution of the governmental powers among three departments, to save the people from autocracy. [449]

While this purpose may be subverted by the aggrandizement of or misallocation of power to one of the governmental branches, it is not seriously threatened by a dispersal of power among the citizens. In a qui tam action, the true party in interest is the citizenry - we are, after all, a "government of the people, by the people, [and] for the people." [450] The executive officials who would be exclusively responsible for prosecuting FCA actions absent the qui tam provisions are merely the representatives of the people. The FCA empowers citizens to enforce the FCA directly, rather than indirectly through their executive branch representatives. This dispersal of power among the citizens is not only consistent with, but affirmatively promotes, the purpose of the separation of powers doctrine.

Myers and Freytag, of course, cautioned against the diminution and diffusion of the appointment power. Implicit in the Freytag Court's analysis was the fear that Congress would weaken the executive branch by diffusing executive powers within the executive branch; if power is too diffuse, then it is not effectively wielded. In Myers, the diminution of executive power was more direct. In both cases, the Court was concerned that by weakening the executive branch, Congress would upset the balance of powers among the branches.

The qui tam action, rather than limiting executive power, as in Myers, or diffusing power within the executive branch, as in Freytag, instead allocates power from the executive branch to the citizenry. The net effect, as in both Myers and Freytag, is to weaken somewhat the power of the executive branch. However, Myers and Freytag should be understood as standing for the proposition that Congress' ability to diffuse power should not be unlimited; if Congress were to attempt to privatize all federal law enforcement, for example, that certainly would be cause for constitutional concern. Transferring power from a branch of government to the citizenry raises fewer constitutional concerns, and should receive less judicial scrutiny, than transfers of power from one branch to another.

The qui tam action, therefore, should be analogized to citizen suit provisions, [451] private suits, [452] and corporate shareholder derivatives. It **[*438]** disperses power instead of concentrating it. While Freytag cautions against such a dispersal of power, dispersal to the citizenry should receive less constitutional scrutiny than interbranch transfers of power. Viewed through this lens, particularly in light of the conclusion in Part IV that the power transferred by qui tam is far from absolute, qui tam should easily pass constitutional muster.

B. History

As discussed previously, qui tam has a long history. It existed at the time the Constitution was framed, and was incorporated into several statutes enacted by the First Congress. As Cass Sunstein has pointed out, "there is no evidence that anyone at the time of the framing believed that a qui tam … action produced a constitutional doubt." [453] This is likely due to the fact that the framers primarily were concerned with preventing the aggregation of power into a single person or branch of government; a statutory provision that dispersed power among the citizenry simply did not pose the kind of threat to individual liberty that the unchecked power of a monarchy did. The existence of qui

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[449] Id. at 293 (Brandeis, J., dissenting).

[450] President Abraham Lincoln, Address at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), in The Norton Anthology of American Literature 1579 (Nina Baym et al. eds., 4th ed. 1994).

[451] Sunstein, What's Standing After Lujan?, supra note 113, at 175-77. There are, of course, two key differences between qui tam suits and citizen suits. First, the defendant in a qui tam suit is a private defendant, while the defendant in a citizens' suit usually is the government. Second, a qui tam informer whose suit is successful is entitled to money paid to himself, while the plaintiff in a citizens' suit is not. These distinctions, however, should make no constitutional difference. Id. at 176-77.

[452] Id. at 231 n.300.

[453] Id. at 176. Sunstein's argument is that the framers' assumption that qui tam was constitutional is an indication that the Court's requirement for an "injury in fact" to create Article III standing is incorrect. Id.

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tam at the time the Constitution was framed, and its use by the First Congress, is powerful evidence that the framers did not believe that qui tam violated separation of powers principles.

VI. Conclusion

Qui tam is over seven centuries old. It existed in the American colonies prior to the Revolution, and was part of several statutes enacted by the First Congress. It has been an integral part of the FCA for nearly a hundred and forty years. Despite its impressive pedigree, it now is being subject to serious constitutional challenge.

This challenge has come under Articles II and III. The Article III challenge concerns the standing doctrine, and the issue has been whether qui tam informers, who themselves suffer no injury, have standing to sue under the statute. The Supreme Court recently resolved this issue by holding that qui tam informers have such standing.

In doing so, however, the Court expressly reserved the Article II issues. These issues involve the restriction of some of the executive branch's prosecutorial powers, the delegation of some of these powers to unappointed citizens, and the delegation of other such powers to the **[*439]** judicial branch. These issues go to the heart of the division of powers within our Constitutional scheme. They do not, however, warrant the conclusion that the qui tam provisions of the FCA are unconstitutional.

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

PEOPLE *EX REL.* SCHAD, DIAMOND & SHEDDEN, P.C.,	)	
Relator-Appellant,	)	No. 122487
v.	)	
MY PILLOW, INC.,	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on the March 21, 2018, there was electronically filed and served upon the Clerk of the above court the Motion for Leave to File Brief of *Amicus Curiae* Illinois Chamber of Commerce in Support of Appellee My Pillow, Inc., and Brief of *Amicus Curiae* Illinois Chamber of Commerce, and that on the same day, a pdf of same was e-mailed to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that he will send to the above court thirteen copies of the *Amicus* Brief bearing the court's file-stamp.

/s/ David S. Ruskin
David S. Ruskin

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ David S. Ruskin
David S. Ruskin

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