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BRINGING ROGUES TO JUSTICE: THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT

By Joel Androphy

Benjamin Franklin said it best: "There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government."[1]

I. A Typical Situation

Sam Snitch walks into your office with a story about fraud against the federal government. Mr. Snitch has evidence that a large government contractor has been billing the government for services not performed, double-billing the government for services rendered, and falsifying documents in order to get paid. His story is reliable and supported by documentation. Four questions should immediately surface in your mind: (1) What does this mean? (2) What do I do? (3) What do I have to prove? (4) What are the pitfalls?

This article will assist you in answering these questions. It will guide you through the process of filing a qui tam action while explaining the requirements and difficulties you may face. Since many qui tam cases can be filed in more than one district or circuit, relators have an opportunity to be more selective about their forum for pursuit.

II. What Does This Mean?

A. The False Claims Act[2]

Attempting to curb a rash of fraud against the government, Congress passed a law that created incentives for private individuals to report persons engaged in fraud against the government. President Lincoln signed the law, called the False Claims Act,[3] (FCA or The Act) on March 2, 1863.

Also known as the "Informer's Act" or "Lincoln's Law,"[4] the original FCA prohibited various acts designed to fraudulently obtain money from the government. Congress initially adopted the FCA with the intention of combating fraud against the United States Army during the Civil War.[5] Although the legislative history of the Act focused specifically on fraud committed by military contractors, the Act applied to fraud committed by all Government contractors.[6] Under the original FCA, defendants were subject to both civil and criminal penalties. There was a $2000 fine for each fraudulent claim in addition to a penalty of double the government's actual damages.[7] Under the 1863 Act, private individuals known as "relators"[8] could pursue this remedy through a "qui tam" action, and the informer was entitled to half the total recovery.[9] The term "qui tam" refers to the Latin expression "qui tam pro domino rege quam pro se ipso in hae parte sequitur," which means, "who sues on behalf of the King as well as for himself."[10] The justification for allowing qui tam litigation was to encourage citizens to report wrongdoing against the government, wrongdoing that---absent the qui tam provisions---would likely go unnoticed. In short, the government hoped that economic incentives would promote private enforcement of federal legislation.

B. Recent Amendments to the FCA

Over the years, Congress has amended the FCA twice. The most recent amendments occurred in 1986 and constitute the most extensive changes to the Act since its creation. They were designed to "promote incentives for whistleblowing insiders [but also to] prevent opportunistic plaintiffs."[11] As one court put it, "Congress wanted to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud."[12] The new

changes created greater incentives, both financial and procedural, for private citizens to "blow the whistle" against unlawful conduct.

The key changes to the FCA consist of the following:

_ Congress significantly increased the potential financial recovery available to qui tam plaintiffs. A successful relator's share is now "at least 15 percent, but not more than 25 percent of the proceeds of the action," when the government intervenes, as well as reasonable expenses and attorneys' fees;[13]

_ In an action in which the government declines to intervene, the relator's share is now "not less than 25 percent and not more than 30 percent of the proceeds of the action," as well as reasonable expenses and attorneys' fees;[14]

_ Congress increased the penalty provisions of the FCA to a minimum of $5000 and a maximum of $10,000 for each violation, plus treble the government's actual damages;[15]

_ Congress eliminated the old bar against cases about which the government already possessed information;[16]

_ Congress restored the normal civil action "preponderance of the evidence" standard of proof;[17]

_ Congress eliminated the need to prove specific intent and made defendants liable for acting in "deliberate ignorance" or "reckless disregard" of the truth;[18]

_ Congress lengthened the statute of limitations from six years to ten years; and[19]

_ Congress created a cause of action for any employee who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" as a result of involvement in a qui tam suit.[20]

Because of the new amendments, the FCA has become a splintered paddle for those who defraud the federal government. The 1986 amendments have resulted in a dramatic increase in the number of qui tam actions filed and the amounts recovered by relators. Since 1986, approximately 3000 qui tam cases have been filed under the FCA and almost $3 billion has been recovered.[21] The average recovery in a successful qui tam case is $5.8 million, with $1 million as the average relator's

award.[22] Thanks to the new amendments, the price of defrauding the government is rising, the likelihood of being caught is increasing and the ensuing consequences are more severe.

III. What do you do?

A. Filing The Complaint

Procedurally, as relator's counsel, you should quickly investigate Mr. Snitch's claims and file suit in federal court because of the "first to file" jurisdictional bar.[23] It is important to be the first to file suit based on two different jurisdictional bars, the combined effect of which is that only the first relator to file may maintain an action based on a set of "facts" or "allegations or transactions."[24]

The complaint is filed *in camera* and is kept under seal for at least sixty days.[25] In addition to the complaint, a relator must provide a written disclosure statement that contains "substantially all material evidence and information the person possesses."[26] During the sixty day time period, the Department of Justice ("DOJ") has the opportunity to investigate the claim and review the supporting evidence and materials.[27] In practice, it is not uncommon for investigations to proceed for one to two years before the government completes its investigation and/or the seal is lifted by the court.[28]

During the period that complaint remains under seal, the DOJ has a number of options. It can elect to join the lawsuit,[29] decline to join the lawsuit,[30] move to dismiss the action,[31] or attempt to settle the action prior to a formal investigation.[32]

B. Government Intervention

Under the statute, if the government elects to join the lawsuit, it has primary responsibility for prosecuting the case and can limit the relator's role.[33] However, if the government intervenes, the FCA allows the relator to continue participating in the litigation subject to certain enumerated

conditions.[34] For example, the court may limit the number of witnesses the relator may call, the length of the witnesses' testimony, or the length of the relator's cross-examination.[35] All of these limitations are discretionary, and the court may impose them if the private citizen's participation in the case would be repetitious, irrelevant, or harassing to the government's prosecution.[36]

The FCA also contains several additional provisions that limit the relator's role in the litigation. For example, the FCA allows the government to intervene at any time in the lawsuit upon a showing of "good cause."[37] The Act also allows the DOJ to stay discovery when the relator's actions "would interfere with the government's investigation or prosecution of a criminal or civil matter arising out of the same facts."[38] The Act also permits the government to pursue the action through an alternative remedy such as administrative relief.[39]

If the government decides to intervene in your case, you should still participate in the investigation and subsequent litigation. As stated earlier, the FCA provides a relator's share of at least 15 percent, even if you do nothing more than file the action in federal court and allow the government to prosecute the case. However, it would be a grave mistake to idly sit back and watch potential profits slip away. Congress intentionally created a larger award of up to 25 percent for relators who actively assist in the investigation.

Mr. Snitch should assist the government by:

- Providing additional information as it develops;
- Collecting relevant documents and presenting them, with detailed explanation, to government investigators;
- Observing and reporting ongoing fraudulent activity by the potential defendant.

You should assist the government by:

- Participating in drafting subpoenas and other documents;

_ Participating in reviewing and categorizing documents;

_ Researching anticipated legal issues.

This type of assistance will work to your advantage when you are asked to justify the amount of your award. The FCA provides that your share will vary depending on a determination of "the extent to which the person substantially contributed to the prosecution of the action."[40] Therefore, you should carefully document the time spent by Mr. Snitch reviewing documents and meeting with government agents. You should also keep an accurate record of the documents you turn over to the government and maintain accurate billing records to avoid or minimize problems when the defendant challenges your fee petition. Taking these steps will put you in the best position to maximize your recovery if the government decides to intervene.

C. The Government Declines to Intervene

Statistically, the government intervenes in only 21.6 percent of all qui tam cases filed.[41] Given these statistics, you should work from the perhaps disheartening assumption that the government is not going to intervene in your case.[42]

If the government elects not to intervene, you have the right and obligation to litigate your case.[43] The government's role will be limited to receiving copies of deposition transcripts and pleadings filed during the course of litigation.[44] However, in order to receive transcripts and pleadings, the government is required to request the documents and pay for their production.[45]

When the government declines to intervene in your case, the DOJ will send you a standard declination letter outlining your duties and responsibilities in continuing the prosecution of your case. After you receive the declination letter and the seal is lifted, you have 120 days to serve the defendant.[46]

Now that you know that the government will not be participating in your case, it is time to assess the resources you will need to effectively prosecute your case. As we will discuss later in the article, this is the time where the defendant will seek to dismiss your case. The defendant will likely move to dismiss your case on multiple grounds including failure to state a claim,[47] failure to plead with particularity,[48] jurisdictional bars,[49] and the constitutionality of the qui tam provisions.[50]

Questions you need to ask yourself at this time:

_ Do I need additional lawyers to help with litigation?

_ How many depositions do I plan on taking and will there be additional costs for travel?

_ What is the anticipated discovery schedule for taking depositions?

_ What volume of documents do I anticipate receiving during the discovery process and how do I plan to manage the documents?

_ What are the anticipated costs of copying and reviewing the documents?

All of these questions should be answered prior to serving the unsealed complaint. Answering these questions will assist you in deciding whether you have enough manpower, money, and legal resources to prosecute this case on your own, or whether you need additional counsel to increase your chances of success.

IV. What Do You Have to Prove?

Now that you know the process of filing a qui tam case, it is time to address the key question: "What do I have to prove to win?" As a general rule, the FCA subjects an individual or company to liability for "knowingly" submitting or causing the submission of a false claim.[51] The FCA covers a broad range of misconduct potentially harmful to the federal treasury. The Supreme Court held that "the Act was intended to reach all types of fraud, without qualification, that might result in

financial loss to the government.[52] The Court noted that the "statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the government to pay out sums of money."[53]

Virtually all FCA cases are filed under subsection (a)(1) and (2) of section 3729.[54] Regardless of what section the case is brought under, all of the causes of action listed in section 3729(a) include three common elements that must be established to prove a violation under the Act:[55]

1. a "claim" must be presented to the Government by the defendant, or the defendant must "cause" a third party to submit a "claim";
2. the claim must be made "knowingly;" and
3. the claim must be "false" or "fraudulent."

A. Determining Whether a "Claim" Has Been Submitted to the Government.

1. Statutory Definition

The Supreme Court addressed the definition of "claim" under the Act three times before the 1986 amendments. In each case, the Court strictly construed the term to encompass only those situations in which a demand or request was made for payment of money or property of the United States.[56] Congressional disapproval of the restricted definition of the term "claim" led Congress to statutorily define the term in the 1986 amendments.

Now, section 3729(c) provides:

> for the 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.[57]

Thus, a claim under the Act now encompasses virtually all demands or requests that cause the disbursement of federal funds. Essentially, any action by the claimant which has the purpose and effect of causing the United States to pay out money it is not obligated to pay, or any action which intentionally deprives the United States of money it is lawfully due, are properly considered "claims" within the meaning of the FCA.[58] Thus, because of the 1986 amendments, the FCA applies to more types of misconduct and is therefore brandished more frequently.

2. Judicial Interpretation of "Claim"

After the 1986 Amendments, numerous appellate courts have construed the term "claim" broadly. Courts have consistently refused to limit "claims" to demands for money or property. For example, false representations of compliance with federal regulations incorporated into government contracts, certifications that result in the government assuming a party's obligations, false progress reports in construction contracts, and proof of loss claims submitted to a federal insurance program to recover property damages have all been characterized as claims under the FCA.[59]

B. Definition of "Knowingly"

1. Statutory Definition

Regarding the level of intent required to prove a violation, Congress also added a provision that defined the meaning of "knowingly."[60] Now, section 3729(b) makes clear that "no proof of specific intent to defraud" is required to prove a violation; a defendant will be liable if you demonstrate that he or she "knowingly" submitted a false claim.[61]

"Knowingly" is defined as:

(1) Actual knowledge of the false information;
(2) Acts in deliberate ignorance of the truth or falsity of the information; or
(3) Acts in reckless disregard of the truth or falsity of the information.[62]

Thus, you are not required to prove that the defendant actually intended to submit false claims under the Act.[63] Rather, you can establish liability by simply proving deliberate ignorance or reckless disregard for the truth of the claims.[64] However, mere negligence and "innocent mistakes" are not sufficient to establish liability under the FCA.[65]

2. Judicial Interpretation of "Knowingly"

A prime example of a court applying the scienter requirement is the case of United States v. Lorenzo.[66] In that case, Dr. Lorenzo and several other dentists were performing oral cancer screenings as part of their standard patient examinations.[67] After performing these procedures, Dr. Lorenzo and other dentists employed by his company decided to bill the cancer screenings to Medicare as "limited consultations."[68] However, Medicare regulations specifically state that "limited consultations" do not include procedures performed during routine screenings.[69] The court held the doctors liable under the FCA because their claims were submitted in "reckless disregard" of the truth.[70] The court stated that the doctors should have known of the Medicare regulations concerning "limited consultations" and even without that knowledge, they violated the statute.[71]

C. Determining Whether a Claim is "False" or "Fraudulent"

In contrast to the terms "claim" and "knowingly," the terms "false" and "fraudulent" are not defined in the FCA. When falsity is an issue, the question usually centers around the interpretation of a government regulation, contract, or law. Courts have held that a claim cannot be "false" if submitted pursuant to a reasonable interpretation of vague statutory language.[72] For example, in United States v. Adler, the Eighth Circuit held that, to be actionable, a statement must be false under all reasonable interpretations.[73] Therefore, a defendant can defeat a finding of falsity by proving its conduct was reasonable under one interpretation of the law.[74]

Another good example of the application of the term "falsity" is the case of United States v. Napco International.[75] In that case, a government contractor purchased American made military supplies from an Israeli corporation. The government claimed that the Arms Control Export Act required contractors to purchase items from American companies and not from foreign companies. The contractor, however, read the statute to allow procurement from other entities so long as the "items" were of American origin.[76] The court held that because the statute was ambiguous and the defendants reasonably believed that the Export Act did not apply, their claims were not false or fraudulent under the FCA.[77] Therefore, because Congress decided not to define "falsity" in the 1986 Amendments, the determination of whether the defendant in your case submitted a false claim will depend on the court's interpretation of the statute you are suing under.

V. What are the Pitfalls?

A. Statutory Problems You May Face

1. Former or Present Member of the Armed Forces

The FCA prohibits only one class of individuals from becoming relators. According to the Act, if Mr. Snitch is a "former or present member of the Armed Forces asserting claims against another member of the Armed Forces" he is precluded from asserting a claim.[78] As a general rule, typical relators may include corporate entities, former and current employees of a corporation, state and local governments, attorneys, interest groups and government employees.

2. Public Disclosure Bar

As mentioned earlier, the 1986 amendments to the FCA enlarged the ambit of the Act by allowing a relator, in certain circumstances, to file a suit based on information that the government already had in its possession.[79] As a means of ensuring this broader grant of prosecutorial authority

did not cause “parasitic lawsuits,” Congress created a jurisdictional bar to a relator bringing an action "based upon" information defined as "publicly disclosed" unless the relator is the "original source" of the information.[80]

a. What Type of Disclosed Information will Trigger the Bar?

Courts have held that the disclosure must reveal allegations of fraud or the fraudulent nature of the transactions involved.[81] Mere disclosure of the general subject matter of the fraudulent conduct will be insufficient to trigger the exception.[82]

b. What Is a "Public Disclosure"?

The statute specifically limits the types of forbidden "public disclosures" to those made in a criminal, civil or administrative hearing, in a congressional, administrative or General Accounting Office report, or from the news media.[83] Although the majority of courts have held this list to be exhaustive,[84] courts are divided as to the definition of these categories.[85] The broader the court interprets these types of disclosures, the more likely the jurisdictional bar will apply to your case. If, however, the terms are narrowly construed, the applicability of the jurisdictional bar is restricted. This of course will depend on which jurisdiction your case is in and how that circuit defines the term "public disclosure.”[86]

c. What Does The Act Mean By "Based Upon"?

Even if a "public disclosure" occurred, the jurisdictional bar is still not triggered unless your suit is "based upon" the public disclosure. Due to the nebulous nature of the phrase “based upon,” there is, not surprisingly, a split among the circuits that labored to carve the contours of the phrase.[87] The Fourth and Seventh Circuits both held that a qui tam action should be permitted to proceed unless the allegations in the relator's lawsuit are actually "derived from" a prior public disclosure.[88]

Under this test, if Mr. Snitch was aware of the public disclosure prior to filing his lawsuit and he actually derived the substance of his action from the prior disclosure, then his suit would be barred.

On the other hand, six other circuits have taken the position that "based upon" means "supported by" or "substantially similar to."[89] Under this interpretation, if there is any identity between Mr. Snitch's Complaint and the content of a prior public disclosure, the jurisdictional bar precludes his lawsuit. Unlike the rule adopted by the Fourth and Seventh Circuits, this rule regards Mr. Snitch's independent knowledge of the public disclosure as irrelevant.

d. What Does The Act Mean By "Original Source?"

Even if your suit is "based upon" prior "public disclosures", Mr. Snitch may still recover provided he is an "original source" of the information.

Section 3730(3)(4)(B) of the FCA defines "original sources" as follows:

> 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.

Whether Mr. Snitch has "direct and independent knowledge" will depend on the facts of your case. Mr. Snitch will have "direct knowledge" if he can show that he had first hand knowledge of the alleged fraud, and that he obtained this knowledge through his own efforts unmediated by anything else. For example, in United States *ex rel.* Lamers v. City of Green Bay, a relator who watched the schedule upon which a city bus line operated, and matched his own observations against representations made by the city in its federal grant applications was considered an original source under the FCA.[90] As long as Mr. Snitch obtained his knowledge absent any outside influence **and** his knowledge is not dependent upon public disclosure, he will be considered an "original source" of the information and the jurisdictional bar will not apply.

B. Constitutional Issues

1. Does Mr. Snitch Have Article III Standing?

Article III, section 2 of the United States Constitution confines federal jurisdiction to the adjudication of "cases and controversies" in which the plaintiff has standing to maintain the suit.[91] To establish Article III standing, a plaintiff must meet three basic requirements. First, the plaintiff must demonstrate a "concrete injury in fact" that is not "conjectural or hypothetical."[92] Second, there must be a "traceable connection" between the defendant's conduct and the plaintiff's injury.[93] And third, the plaintiff must demonstrate that the requested relief will have a "substantial likelihood" of remedying the injury.[94] This first of these three elements, the "injury in fact" requirement, has been a key topic of debate concerning qui tam litigation.

In a qui tam case, relators, who occupy the exalted position of informants, are not "injured" by the defendant's conduct. Rather, the government is the party injured when a defendant commits fraud. The relator's interest in the suit is the percentage he will recover and it is contingent on the case succeeding. Historically, however, an interest of this kind has been insufficient to establish standing under Article III.[95]

The Supreme Court resolved this issue on May 22, 2000 in Vermont Agency of Natural Resource v. United States *ex rel.* Stevens.[96] In Stevens, the Supreme Court, in an attempt to alleviate conflict among the circuits, held that qui tam relators have Article III standing, regardless of their lack of injury.[97] The Court pointed out that a qui tam relator's interest in the case, although contingent on victory, is still enough to constitute a "concrete private interest in the outcome of the suit." Even though a qui tam plaintiff's rights have not suffered an invasion, the right he seeks to vindicate is enough to satisfy Article III.

The Court found support for its decision in the history of the Act and in the quasi assignor/assignee type relationship between the relator and the government that the Act created.[98] The Court held that a qui tam plaintiff is the equivalent of an assignee and therefore has standing to assert the injury suffered by the assignor, the government.[99] The Court concluded that the FCA effectively creates a partial assignment of the government's damages to the relator, thereby giving him standing to assert that claim.[100] Though the Court had never explicitly recognized this concept of "representational standing," it noted that it had "routinely entertained [such] suits."[101]

2. Does The Eleventh Amendment Preclude Qui Tam Litigation Against States?

Finding in Stevens that a relator possessed standing, the Supreme Court turned to consider whether a state was a "person" subject to qui tam liability under the FCA and, if so, whether the Eleventh Amendment bars such a suit. Beginning and concluding with the statutory issue, the Court applied the "longstanding interpretive presumption that 'person' does not include the sovereign."[102] The Court held that "the text of the original statute does less than nothing to overcome the presumption that States are not covered."[103]

The Court found three major reasons to support its textual conclusion. First, the Court examined section 3733 of the Act, which permits the Attorney General to issue investigative demands, and noted that the term "person" did in fact include states. However, the Court held that the absence of an express definition of the term "person" to include states in section 3729 suggests that Congress intended to exclude States from liability.[104]

Second, the Court found that the treble damages and civil penalties imposed under the FCA "are essentially punitive in nature" and that such liability is inconsistent with the "presumption

against imposition of punitive damages on governmental entities."[105] And third, the court noted that other "sister" statutes do not include states under the definition of "person."[106]

Although the Court in Stevens failed to address the Eleventh Amendment issue and decided the case on purely textual grounds, the Court did express in dicta "serious doubt" that the FCA qui tam provisions could pass Eleventh Amendment scrutiny. One court recently took the Stevens dicta and ran with it. In United States *ex rel.* Garibaldi v. Orleans Parish School Board,[107] the Fifth Circuit recently held that local governments are immune from suit under the FCA.

3. Take Care Clause and Doctrine of Separation of Powers

On May 25, 2001, the full Fifth Circuit, in a 11-2 decision, reversed a panel decision in the case of Riley v. St Luke's Episcopal Hospital, which held that the qui tam provisions of the FCA were unconstitutional under Article II.[108] The en banc opinion held that the qui tam provisions of the FCA did not violate the Take Care Clause and the Doctrine of Separation of Powers for two separate reasons.[109] First, the court considered the historical importance of the FCA and noted that "it is logically inescapable that the same history that was conclusive on the Article III question in Stevens with respect to qui tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question" presented by the Riley case.[110] The court opined that the history of the Act, although not definitive, was a "touchstone illuminating" the qui tam provisions constitutionality.[111]

Second, the Fifth Circuit found Morrison, the primary case upon which the Riley panel majority relied to analyze the constitutionality of the qui tam provisions of the FCA under Article II, to be inapplicable to the Riley case. According to the Court, the Ethics in Government Act, at issue in Morrison, assigns an independent counsel to act as the United States itself, while the qui tam provisions merely allow a private citizen to bring a lawsuit in the name of the government.[112] In

addition, an independent counsel undertakes functions relevant to criminal prosecution, whereas relators are simply civil litigants.[113] "Thus, because the independent counsel provisions at issue in Morrison and the qui tam provisions central to Riley involve two different types of lawsuits, the Executive must wield two different types of control in order to ensure that its constitutional duties under Article II are not impinged."[114]

Furthermore, the Court held that "the Executive retains significant control over litigation pursued under the FCA by qui tam relators."[115] Even in cases where the government does not intervene, there are a number of control mechanisms present in the qui tam provisions of the FCA so that the Executive nonetheless retains a significant amount of control over the litigation. Specific examples of this control include the Government's power to veto FCA settlements proposed by relators, the Government's prerogative to intervene in a FCA lawsuit at any point, the Government's unilateral power to dismiss a qui tam suit, the Government's authority to request copies of the pleadings and deposition transcripts, and the power to seek alternative relief such as administrative proceedings.[116]

Thus, the Court concluded that "any intrusion by the qui tam relator in the Executive's Article II power is comparatively modest, especially given the control mechanisms inherent in the FCA to mitigate such an intrusion and the civil context in which qui tam suits are pursued."[117] With this opinion, the Court temporarily removed the dark cloud of suspicion over qui tam suits in the Fifth Circuit. Whether the Supreme Court grants certiorari in this case will ultimately determine the status of qui tam suits in all Courts.

VI. Conclusion

In closing, evaluating and filing a qui tam case necessitates a number of individual but interrelated steps. Evaluating the case requires you to investigate the facts, consider the legal obstacles, and follow the procedural requirements of the FCA. However, as this article illustrates, this evaluation process is no simple matter. Of course, as in most complex cases, knowledge and experience will be the only true way to master the intricacies of qui tam litigation.

Qui tam litigation is an effective means by which to punish those who defraud the United States government and the sureties of that government, the American taxpayers. By providing monetary incentives for reporting acts of fraud against the government, the qui tam provisions expose frauds that would otherwise slip through the cracks. Viewed in this manner, diligent and legitimate pursuit of qui tam actions should result in a heightened quantum of accountability, both for the government and those who do business with it. Hopefully, this article will further the attainment of this worthy goal.

Special thanks to John Venza and Buffey Klein for their editorial contributions.

1. *James B. Helmer Jr., Ann Lugbill & Robert Clark Neff Jr., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION xiii (1994).*

2. *31 U.S.C § 3729-3733 (1994).*

3. *See* Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 at 696-699 (1863) (current version at 31 U.S.C. §§ 3729-3733 (1994)).

4. *See* United States *ex rel.* Graber v. City of New York, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998).

5. *See* United States *ex rel.* Dunleavy v. County of Delaware, 123 F.3d 734, 738 (3d Cir. 1997) (discussing history of qui tam provisions of False Claims Act).

6. *See* Act of Mar. 2, 1863, §§ 1, 3, 6.

7. *See id*. § 3.

8. *See* Act of Mar. 2, 1863, §§ 1, 3, 6; *see also* 31 U.S.C. § 3730(d); United States *ex rel.* Foulds v. Texas Tech Univ., 980 F. Supp. 864, 866 (N.D. Tex. 1997).

9. *See* Act of Mar. 2, 1863, §§ 1, 3, 6.

[10.] *BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).*

[11.] *United States ex rel.* Lujan v. Hughes Aircraft Co., No. 00-055328, 2001 WL 277805, at *5 (9th Cir. Mar. 22, 2001).

[12.] *United States v. Bank of Farmington, 166 F.3d 853, 858 (7th Cir. 1999) (citing S. Rep. No. 99-345, at 2 U.S. Code Cong. & Admin. News 1986, pp. 5266-5267).*

[13.] *See* 31 U.S.C. § 3730(d).

[14.] *See id.*

[15.] *See* 31 U.S.C. § 3729(a). The only exception to the imposition of treble damages involves the voluntary disclosure of all information, by the violator, relating to a violation of the FCA within 30 days of obtaining the information as well as full cooperation by the government. In such a case, the court has discretion to award no less than twice the damages sustained by the government.

[16.] *See* 31 U.S.C. § 3730(e)(4). However, if the information was "publicly disclosed," the relator must prove he was the "original source of the information" before he can proceed with the case.

[17.] *See* 31 U.S.C. § 3731(c); *see also* United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990).

[18.] *See* 31 U.S.C. § 3729(b).

[19.] *See* 31 U.S.C. § 3731(b). Under the old statute, an action had to be brought within six years of the date on which the alleged violation was committed. Now, the government, or the qui tam relator acting on his own behalf, must bring the action within six years of the submission of the false claim, or within three years after the government should have learned of the facts underlying the claim, but in no event longer than ten years.

[20.] *31 U.S.C. § 3730(h).*

[21.] *Qui Tam Statistics* (1999), *at* http://www.taf.org/taf/docs/qtstats99.html.

[22.] *Id.*

[23.] *Although the FCA does not limit jurisdiction to federal courts, 28 U.S.C. § 1355 confers original jurisdiction "exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress." 28 U.S.C. § 1355 (1994). Therefore, because the FCA makes individuals who defraud the Government liable "for a civil penalty," section 1355 seems to apply. But see* United States *ex rel.* Hartigan v. Palumbo Bros., 797 F. Supp. 624, 632-33 (N.D. Ill. 1992) (holding that state courts have concurrent jurisdiction with the federal courts); United States *ex rel.* Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370, 374-75 (S.D. Tex. 1994).

[24.] *31 U.S.C. § 3730(b)(5) & (e)(4). Most courts have interpreted the "first to file" bar embodied in section 3730(b)(5) as precluding suits, the underlying "material facts" of which have previously been alleged in a separate action. See, e.g.*, United States *ex rel.* Lujan v. Hughes Aircraft Co., No. 00-55328, 2001 WL 277805, at *6 (9th Cir. Mar. 22, 2001).

[25.] *See* 31 U.S.C. § 3730(b)(2).

[26.] *See id.* The written disclosed statement is only provided to the Attorney General, and not filed with the court.

[27] *See id.*

[28] *See* 31 U.S.C. § 3730(b)(3).

[29] *See* 31 U.S.C. § 3730(b)(4)(A).

[30] *See* 31 U.S.C. § 3730(b)(4)(B).

[31] *See* 31 U.S.C. § 3730(b)(1). The action may only be dismissed if the court and the Attorney General give written consent to the dismissal and reasons for consenting. *See also* 31 U.S.C. § 3730(c)(2)(A). The Government must provide the relator with the motion to dismiss as well as an opportunity for a hearing on the motion.

[32] *See* 31 U.S.C. § 3730(c)(2)(B). The Government may only settle the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

[33] *See* 31 U.S.C. § 3730(c)(1).

[34] *See* 31 U.S.C. § 3730(c)(2).

[35] *See id.*

[36] *See* 31 U.S.C. § 3730(c)(2)(C)(i-iii).

[37] *See* 31 U.S.C. § 3730(c)(3).

[38] *See* 31 U.S.C. § 3730(c)(4).

[39] *See* 31 U.S.C. § 3730(c)(5).

[40] *See* 31 U.S.C. § 3730(d)(1).

[41] *As of November of 1999, the DOJ has intervened in or otherwise pursued 462 cases and declined 1,673. Qui Tam Statistics* (1999), *at* http://www.taf.org/taf/docs/qtstats99.html.

[42] *Since the 1986 amendments, qui tam payouts are, on average, ninety-two percent smaller when the government opts not to intervene. W. Jay DeVecchio, Qui Tam Actions: Some Practical Considerations*, S.F.28 A.L.I.-A.B.A. 527, 537 (2000).

[43] *See* 31 U.S.C. § 3730(c)(3).

[44] *See* 31 U.S.C. § 3730(c)(3).

[45] *See* 31 U.S.C. § 3730(c)(3).

[46] *FED. R. CIV. P. 4(m).*

[47] *FED. R. CIV. P. 12(b)(6).*

[48] *FED. R. CIV. P. 9(b).*

[49] *See supra* Part III.A and *infra* part V.A.2.

[50] *See infra* Part V.B.

[51] *See* 31 U.S.C. § 3729(a).

[52] *United States v. Neifert-White Co., 390 U.S. 229, 233 (1968).*

[53] *Id.*

[54] *John T. Boese, 21 QUI TAM: BEYOND GOVERNMENT CONTRACTS (1993).*

[55] *See* 31 U.S.C. § 3729(a).

[56] *See* United States v. Cohn, 270 U.S. 339 (1926); United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943); United States v. McNinch, 356 U.S. 595 (1958).

[57] *See* 31 U.S.C. § 3729(c).

[58] *See* United States v. Neifert-White Co., 390 U.S. 228, 233 (1968); *see also* United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995); United States v. Richard Dattner Architects, 972 F. Supp. 738, 747 (S.D.N.Y. 1997).

[59] *United States ex rel.* Fallon v. Accudyne Corp., 880 F. Supp. 636 (W.D. Wis. 1995); United States *ex rel.* S. Prawer & Co. v. Fleet Bank, 24 F.3d 320 (1st Cir. 1994); United States v. Plywood Prop. Assoc., 928 F. Supp. 500 (D.N.J. 1996); Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (1994).

[60] *See* United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962) (requiring actual knowledge).

[61] *See* 31 U.S.C. § 3729(b).

[62] *See id.*

[63] *See* United States v. Oakwood Downriver Med. Ctr., 687 F. Supp. 302 (E.D. Mich. 1988).

[64] *See* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991).

[65] *See* United States *ex rel.* Mazzola v. C.W. Roen Constr. Co., 183 F.3d 1088 (9th Cir. 1999); *see also* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991).

[66] *See* United States v. Lorenzo, 768 F. Supp. 1127 (E.D. Pa. 1991).

[67] *See id.* at 1130-31.

[68] *See id.*

[69] *See id.*

[70] *See id.* at 1132.

[71] *See id.*

[72] *See* United States v. Adler, 623 F.2d 1287, 1289 (8th Cir. 1980); *see also* United States v. Race, 632 F.2d 1114 (4th Cir. 1980).

[73.] *See* Adler, 623 F.2d at 1289.

[74.] *See* United States v. Anderson, 579 F.2d 455, 460 (8th Cir. 1978).

[75.] *See* United States v. Napco Int'l, 835 F. Supp. 493 (D. Minn. 1993).

[76.] *See id.*

[77.] *See id.*

[78.] *31 U.S.C. § 3730(e)(1).*

[79.] *See* DeVecchio, *supra* note 42, at 532.

[80.] *31 U.S.C. § 3730 (e)(4)(A); United States v. Bank of Farmington, 166 F.3d 853, 858 (7th Cir. 1999).*

[81.] *See*, *e.g.*, United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654-56 (D.C. Cir. 1994).

[82.] *See*, *e.g.*, United States *ex rel.* Precision Co . Koch Indus., Inc., 971 F.2d 548, 553 (10th Cir. 1992).

[83.] *Id.*

[84.] *See*, *e.g.*, United States *ex rel.* LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1990).

[85.] *See infra* note 86.

[86.] *The Fourth Circuit has held that information "based upon" public disclosure is synonymous with information "derived from" the public disclosure. Grayson v. Advanced Mgmt. Tech., Inc., 221 F.3d 580, 582 (4th Cir. 2000). Further, for purposes of the public disclosure bar, a "civil hearing" includes the filing of a civil complaint, an "administrative hearing" includes the filing of an administrative complaint, and a putative relator's knowledge is direct is he obtained it through his own exertions, absent any intervening agency. Id*. at 583. His knowledge is independent if it does not depend on the public disclosure. *Id*.

The D.C. Circuit has concocted a formula for when a "public disclosure" has occurred:

> [I]f *X* + *Y* = *Z*, *Z* represents the allegation of fraud and *X* and *Y* represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of *X* and *Y* must be revealed, from which readers or listeners may infer *Z*, i.e., the conclusion that fraud has been committed.

United States *ex rel.* Settlemire v. Dist. of Columbia, 198 F.3d 913, 918 (D.C. Cir. 1999) (alterations and emphasis in original) (quoting United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994)).

The Sixth Circuit also employs this formula, and the Eighth Circuit agrees with its basic premise; namely, that the core elements of fraud must be publicly disclosed for the bar to apply. United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 331 (6th Cir. 1998); United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1512 (8th Cir. 1994).

The Third Circuit has held that a public disclosure is a disclosure that "reveal[s] both the misrepresented facts and the true state of facts so that the inference of fraud may be drawn." United States *ex rel.* Mistick PBT v. Hous. Auth. of the City of Pittsburgh, 186 F.3d 376, 385 (3d Cir. 1999). The Third Circuit has also held that information obtained in discovery, be it filed or unfiled, constitutes publicly disclosed information that will trigger the jurisdictional bar. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991). *But see* United States v. Bank of Farmington, 166 F.3d 853, 860 (7th Cir. 1999) (suggesting that only discovery actually filed constitutes a public disclosure); United States *ex rel.* Springfield

Terminal Ry. Co. v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994) (same).

While the Fifth Circuit holds that only *filed* discovery triggers the bar, it also holds that a qui tam action based in anyway, in whole *or part*, on information publicly disclosed is subject to the bar. Fed. Recovery Serv., Inc. v. United States, 72 F.3d 447, 450-51 (5th Cir. 1995).

The Eleventh Circuit has strictly construed the language of section 3730(e)(4)(A) so as to limit the instances in which the jurisdictional bar will apply. *See*, *e.g.*, United States v. NEC Corp., 931 F.2d 1493, 1499-1500 (11th Cir. 1991) ([W]e will not give the [public disclosure bar] a broader effect than which appears in its plain language.").

For the Second Circuit, the relevant inquiry concerns the "[p]otential accessibility by those not a party to the fraud . . . ." United States *ex rel.* Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (quoting with approval United States *ex rel.* John Doe v. John Doe Corp., 960 F.2d 318, 319 (2d Cir. 1992)). The Ninth Circuit focuses on "whether the content of the disclosure consisted of the 'allegations or transactions' giving rise to the realtor's claim, as opposed to 'mere information.'" A-1 Ambulance Serv., Inc., 202 F.3d 1238, 1243 (9th Cir. 2000) (quoting Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473 (9th Cir. 1996)). Further, so long as the "material elements" of the fraud are in the public domain, the bar will apply. A-1 Ambulance, 202 F.3d at 1243.
Lastly, the First Circuit appears to read the jurisdictional bar narrowly, strictly adhering to and narrowly interpreting the disclosures listed in § 3730(e)(4)(A). *See*, *e.g.*, United States *ex rel.* LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990).

87. *Lamenting over the amorphous "based upon" language, one court of appeals commented, "The inescapable conclusion is that the qui tam provision does not reflect careful drafting." United States ex rel.* Mistick PBT v. Hous. Auth. of the City of Pittsburgh, 186 F.3d 376, 388 (3d Cir. 1999).

88. *United States v. Bank of Farmington, 166 F.3d 853, 863 (7th Cir. 1999); United States ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348-49 (4th Cir. 1994), *cert. denied*, 513 U.S. 928 (1994).

89. *United States ex rel.* Mistick v. Hous. Auth. of the City of Pittsburgh, 186 F.3d 376, 386 (3d Cir. 1999), *cert. denied*, 2000 WL 286689 (2000); United States *ex rel.* Jones v. Horizon Healthcare, 160 F.3d 326, 332-33 (6th Cir. 1998); United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Florida, Inc., 19 F.3d 562, 567 (11th Cir. 1994); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 652-54 (D.C. Cir. 1994); United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1994).

90. *United States ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1017-18 (7th Cir. 1999).

91. *See* U.S. CONST. art. II, § 2, cl. 2; *see also* Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).

92. *See* Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992).

93. *See* Stevens, 529 U.S. at 771; *see also* Lujan, 504 U.S. at 559-61.

94. *See* Stevens, 529 U.S. at 771; *see also* Lujan, 504 U.S. at 559-61.

95. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 486 (1982); see also* Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 107 (1998).

96. *See* Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000).

97. *See* Stevens, 529 U.S. at 778.

[98] *Id.* at 772-78.

[99] *Id.* at 773.

[100] *Id.* at 774.

[101] *Id.* at 773-74 (citing Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 465 (1962); Auto. Radio Mfg. Co. v. Hazeltine Research Sys., Inc., 339 U.S. 827, 829 (1950); Hubbard v. Tod, 171 U.S. 474, 475 (1898)).

[102] *Stevens, 529 U.S. at 780.*

[103] *Id.* at 782.

[104] *Id.* at 783-84.

[105] *Id.* at 784-86.

[106] *Id.* at 786.

[107] *United States ex rel.* Garibaldi v. Orleans Parish Sch. Bd., Nos. 99-30550, 99-30668, 2001 WL 246350, at *1 (5th Cir. Mar. 28, 2001). While the Fifth Circuit found in Garibaldi that local governments are immune from suit under the FCA, it did not base its decision on Eleventh Amendment grounds. *Id.* at 5. Thus, while Garibaldi may counsel against subjecting governmental entities to FCA penalties, it should not be cited for the pure proposition that the FCA does not pass Eleventh Amendment scrutiny.

108. Riley v. St Luke's Episcopal Hosp., 196 F.3d 514 (5th Cir. 1999), rev'd, No. 97-20948, 2001 WL 568727 (5th Cir. Mat 25, 2001).

109. Riley v. St Luke's Episcopal Hosp., No. 97-20948, 2001 WL 568727 (5th Cir. Mar. 25, 2001) (The Court further held that the provisions do not violate the Appointments Clause because qui tam plaintiffs are not officers of the government. Qui tam plaintiffs do not draw a government salary and are not required to demonstrate their fitness for public employment. Consequently, the Court held that the constitutional requirements associated with government offices do not apply.)

110. Id. at * 1.

111. Id.

112. Id. at * 2.

113. Id. at * 3.

114. Id.

115. Id. at * 2

116. Id; see supra Part III. B

117. Id.