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# The Role of Qui Tam Actions Under the False Claims Act in Preventing and Deterring Fraud Against Government

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# THE ROLE OF QUI TAM ACTIONS UNDER THE FALSE CLAIMS ACT IN PREVENTING AND DETERRING FRAUD AGAINST GOVERNMENT

DR. CARL PACINI\* & MICHAEL BRET HOOD\*\*

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## I. INTRODUCTION

The Federal False Claims Act<sup>1</sup> (FCA) was enacted in 1863 to protect the federal government from fraud perpetrated by unscrupulous Civil War contractors. Today, the law is aimed at those responsible for the \$100 billion or more fraudulently diverted every year from federal healthcare, defense, and other programs.<sup>2</sup> This means that up to ten percent of the entire federal

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<sup>1</sup> 31 U.S.C. §§ 3729-3733 (2006).

<sup>2</sup> See Peter Sinton, *Whistle-Blowing Gaining Steam: Employees Have Gotten Millions for Exposing Fraud at Work*, S. F. CHRON., Aug. 11, 1997, at E1.

budget is lost annually due to fraud. "In addition to . . . monetary losses, fraud also . . . erodes public confidence and raises questions about the government's ability to manage its programs."<sup>3</sup> For example, fraud may result in a threat to national security, such as when a defense contractor certifies defective equipment as meeting required standards.<sup>4</sup>

The current version of the FCA makes liable "[a]ny person who . . . knowingly presents or causes to be presented . . . a false or fraudulent claim [to the U.S. government] for payment or approval."<sup>5</sup> The law also imposes liability for making "false record[s] or statement[s] designed] to conceal, avoid, or decrease an obligation to pay or transmit money or property to the [United States] Government."<sup>6</sup>

Many FCA violations involve submission of false information while presenting payments to the federal government. Below is a sample list of false claims that have been submitted to the U.S. government:

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<sup>3</sup> J. Morgan Phelps, *The False Claims Act's Public Disclosure Bar: Defining the Line Between Parasitic and Beneficial*, 49 CATH. U.L. REV. 247, 247 (1999).

<sup>4</sup> *Id.* at 247 n.5.

<sup>5</sup> § 3729(a)(1)(2006).

<sup>6</sup> § 3729(a)(2) (2006). Sections 3729(a)(1)-(2) are the most frequently used provisions of the FCA. [need supporting citation]. Section 3729(a) states in relevant part:

Any person who—

- (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or 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;
- (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 . . .

§ 3729(a).

- Alleged health care fraud at a hospital (e.g., *U.S. v. Rogan*<sup>7</sup>—involving alleged falsification of annual reports to Medicare);
- Alleged health care fraud committed by a doctor<sup>8</sup>
- Submission of false proof of loss claims to the Federal Emergency Management Agency (FEMA) after Hurricanes Katrina, Rita, and Wilma during 2005;<sup>9</sup>
- Submission of false claims to receive reimbursements (e.g., *U.S. v. Aker Philadelphia Shipyard, Inc.*<sup>10</sup>—involving alleged submission of false claims to receive training subsidies from the Department of Labor);
- Billing twice for the same work (e.g., *Al Munford, Inc. v. U.S.*<sup>11</sup>—involving allegations that a construction company submitted dual claims for building and repairing washracks at Fort McClellan, Alabama);
- False negotiation, including defective pricing and bid rigging (e.g., *U.S. v. Erlich*<sup>12</sup>—involving intentional overstatement of construction costs on a federally insured mortgage on a housing project);
- False certification of entitlement for benefits;<sup>13</sup> and
- Submission of non-reimbursable expenses for reimbursement (e.g., *U.S. v. Dyncorp*<sup>14</sup>—involving alleged submission of request

<sup>7</sup> See, e.g., *United States v. Rogan*, 2005 U.S. Dist. LEXIS 26034 (N.D.Ill. Oct. 27, 2005) (involving alleged falsification of annual reports to Medicare).

<sup>8</sup> See generally, e.g., *United States v. Cabrera-Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000) (involving alleged false claims submitted to Medicare for anesthesia services).

<sup>9</sup> Mary Vallis, *Katrina Spirit Drowns in Fraud: False Claims, Bribery: Charges Add to Frustration of U.S. Charities*, National Post, Dec. 4, 2006, at A3.?

<sup>10</sup> See, e.g., *United States ex rel. Gibbons v. Aker Phila. Shipyard, Inc.* 2006 U.S. Dist LEXIS 5172 (E.D. Pa. 2006) (involving alleged submission of false claims to receive training subsidies from the Departments of Labor and Defense).

<sup>11</sup> See generally, e.g., *Al Munford, Inc. v. United States*, 34 Fed. Cl. 62 (1995) (involving allegations that a construction company submitted dual claims for building and repairing washracks at Fort McClellan, Alabama).

<sup>12</sup> See generally, e.g., *United States v. Erlich*, 643 F.2d 634 (9th Cir. 1981) (involving intentional overstatement of construction costs on a federally insured mortgage on a housing project).

<sup>13</sup> Kayhan Fatemi & Matthew J. Lankenau, *False Claims on Public Projects: Don't Bet Your Business On It*, Aace Int'l Trans. CDR01.1., available at [http://www.ibec.org.br/Downloads/false\\_claims\\_on\\_public\\_projects\\_dont\\_bet\\_your\\_business\\_on\\_it.pdf](http://www.ibec.org.br/Downloads/false_claims_on_public_projects_dont_bet_your_business_on_it.pdf).

<sup>14</sup> See generally, e.g., *United States ex rel. Longest v. Dyncorp*, No. 6:03-cv-816-Orl-31JGG, 2006 U.S. Dist. LEXIS 1838 (M.D. Fla. Jan. 9, 2006) (involving alleged submission of request for reimbursement of non-reimbursable expenses under federal contracts to provide cocaine eradication assistance).

for reimbursement of non-reimbursable expenses under federal contracts to provide cocaine eradication assistance).

Private citizens (rather than government attorneys) using a unique characteristic of the FCA known as the qui tam action are allowed to challenge FCA violations.<sup>15</sup>

A qui tam plaintiff, also referred to as a qui tam relator, or a whistleblower, is a private citizen who files a civil lawsuit against an alleged fraudster on behalf of himself and the U.S. government. If the government does not pursue the actions, the relator pursuing the case is entitled to “not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement.”<sup>16</sup> In addition, the qui tam plaintiff is entitled to collect from the defendants the reasonable attorneys’ fees, and expenses incurred from pursuing the claim.<sup>17</sup> In the event that the defendant retaliates against the plaintiff, the plaintiff “shall be entitled to all relief necessary to make the [plaintiff] whole.”<sup>18</sup> If the federal government intervenes in the lawsuit initiated by the qui tam relator, the latter is still entitled to “at least 15 percent but not more than 25 percent of the proceeds of the action or settlement.”<sup>19</sup> Because the FCA’s damages and penalty provisions tend to generate large dollar settlements and judgments, relators’ recoveries can involve substantial sums.<sup>20</sup>

The FCA qui tam provision contains two features that make it quite successful as a regulatory and external corporate governance tool. First, the law facilitates dissemination of inside information of fraud. Complex financial crimes often cannot be detected without the assistance of those

<sup>15</sup> “Qui tam” is a term derived from the Latin phrase “qui tam pro domino rege quam pro 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 1262 (7th ed. 1999).

<sup>16</sup> 31 U.S.C. § 3730(d)(2) (2006).

<sup>17</sup> *Id.*

<sup>18</sup> § 3730(h).

<sup>19</sup> § 3730(d)(1).

<sup>20</sup> James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claim Acts*, 80 TUL. L. REV. 465, 475 (2005). For example, SmithKline Beecham “agreed to pay \$325 million to the government for filing false claims with Medicare, Medicaid, and other health care agencies . . . .” *SmithKline Beecham to Pay \$325 Million for Health Care Fraud*, DAILY REC. (Baltimore), Feb. 25, 1997, at 2. Also, “[t]he University of Illinois settled a lawsuit for \$2.3 million after a transplant surgeon blew the whistle on unnecessary liver transplant practices . . . in defrauded Medicare and Medicaid reimbursements.” Emily Umbright, *Transplant Scam Costs University of Illinois \$2.3 Million*, ST. LOUIS COUNTIAN, Nov. 25, 2003, at 1. And even “[t]he Boeing Co. agreed to pay \$2.5 million to the U.S. Army and \$1.4 million to a former employee to settle a fraud lawsuit involving an allegedly defective part in its Apache attack helicopter.” Ed Taylor, *Boeing Agrees to Settle Fraud Lawsuit Involving Army, Apache Helicopter Part*, E. VALLEY TRIB. (Mesa), May 17, 2003, at 1.

who have knowledge of them. However, convincing people to inform or turn on their employers, co-workers, and partners is not an easy task.<sup>21</sup> Second, the statute provides a means for knowledgeable qui tam plaintiffs to supplement the strained resources of government attorneys and investigators.<sup>22</sup> Without the help of whistleblowers, the government would discover few fraudulent transactions and thus, would not be able to secure many recoveries at all.<sup>23</sup>

Citizen involvement has made a significant contribution to the effort to pursue those who defraud the federal government. Between 1987 and 2003, over 4,200 qui tam lawsuits were initiated that resulted in the recovery of over \$7.8 billion.<sup>24</sup> Despite such recoveries, many law enforcement officers, regulators, lawyers, auditors, forensic accountants, investigators, financial managers, academics and others remain uninformed or underinformed about the FCA as an external corporate governance tool,<sup>25</sup> the steps in and elements of a qui tam claim, limitations of a qui tam action, whistleblower protection, and the role of qui tam litigation as a weapon in the fight against fraud. This article provides an overview of the FCA and analyzes some of the challenges faced by qui tam litigants and the financial crime experts who assist them.

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<sup>21</sup> Phelps, *supra* note 3, at 248. "A survey of approximately 5000 federal government employees reveals that 69% of them believe that they have had direct knowledge of illegalities and failed to report them." *Id.* at n.14.

<sup>22</sup> Barger, Jr. et al., *supra* note 20, at 475-76.

<sup>23</sup> Phelps, *supra* note 3, at 249.

<sup>24</sup> See Fried, Frank, Harris, Shriver & Jacobson LLP, *Qui Tam FCA Statistics* (Nov. 20, 2003), <http://www.friedfrank.com/quitam/fcastats.htm>.

<sup>25</sup> The concept of corporate governance has been defined in many ways. See, e.g., Elletta S. Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177, 179 (2002) ("Potential corporate claimants include shareholders and employees, as well as constituencies slightly more removed from the corporation, such as creditors, suppliers, and society at large."); Timothy Fort & Cindy Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Possible Worlds*, 33 VAND. J. TRANSNAT'L L. 829 (2000) (arguing that good governance practices balance the needs for efficiency and profit with equitable treatment of corporate constituencies); Oliver Hart, *Corporate Governance: Some Theory and Implications*, 105 ECON J. 678 (1995) (arguing that governance invokes consideration of the relationships between capital providers and top management); Carl Pacini et al., *Corporate Governance and the Market Impact of the Financial Services Modernization Act of 1999 on Bank Returns and Trading Volume*, 29 J. ECON. FIN. 46 (2005) ("Corporate governance deals with mechanisms by which stakeholders of a corporation exercise control over corporate insiders and management so that their interests are protected. The need for corporate governance stems from agency problems created by separation of ownership and control and the inability to write complete contracts for all possible future contingencies.").

## II. FILING A QUI TAM SUIT

A qui tam relator or plaintiff who sues under the FCA does so both in an individual capacity and on behalf of the U.S. government. The legal claim must be brought in the name of the U.S. government. "By allowing the relator to bring the action 'in the name of the Government' and by allowing the relator to receive a percentage of the proceeds that the government recovers, the legislature left no doubt that the relator is acting on behalf of the government."<sup>26</sup> A copy of the complaint and written disclosure of substantially all material evidence and information possessed by the qui tam plaintiff must be filed in camera and a copy sent to the Department of Justice (DOJ).<sup>27</sup>

### A. *The Disclosure Statement*

The disclosure statement is one of the most vital documents a qui tam plaintiff prepares when initiating an FCA claim. The government must be provided with a "written disclosure of substantially all material evidence and information" that serves as a basis for the lawsuit.<sup>28</sup> "The purpose of the written disclosure requirement 'is to provide the United States with enough information on alleged fraud to be able to make a well reasoned decision on whether it should participate in the filed lawsuit or allow the relator to proceed alone.'"<sup>29</sup>

Legal authority is scarce on what suffices as a legally sufficient disclosure statement. Moreover, existing legal authority on the issue is far from consistent. One group of federal decisions adheres to the position that the disclosure statement should contain only the relevant facts without much detail. For example, in *United States ex rel. Burns v. A.D. Roe Co., Inc.*,<sup>30</sup> the court found that the disclosure statement is simply a recitation of factual information and does not contain any mental impressions, opinions or conclusions. A second group of federal opinions recommends that a

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<sup>26</sup> *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26 (D.D.C. 2002) (quoting 31 U.S.C. § 3730 (2000)).

<sup>27</sup> 31 U.S.C. § 3730(b)(2) (2006).

<sup>28</sup> *Id.*

<sup>29</sup> *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 555 (C.D. Cal. 2003) (quoting *United States ex rel. Woodward v. Country View Care Center, Inc.*, 797 F.2d 888, 892 (10th Cir. 1986)).

<sup>30</sup> 904 F. Supp. 592 (W.D. Ky. 1995); see also *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1346 (E.D. Mo. 1996) ("The written disclosure statement should simply contain all the relevant factual information in [the relator's] possession at the time he filed suit."); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830 (N.D. Ill. 1993).

disclosure statement should contain facts, legal theories, analysis, and opinion.<sup>31</sup> The view that supports inclusion of more than mere facts is more closely aligned with the purpose of section 3730(b)(2) of the FCA. “[T]he disclosure statement distills often complex facts and law into a narrative statement intended to inform the government of the nature of the claims the relator asserts on its behalf.<sup>32</sup> Since the government is inundated with many qui tam cases, it is essential for the qui tam plaintiff to prepare a thorough disclosure statement.

The qui tam relator serves his own best interest by producing a disclosure statement that is thorough but not overdone. Inadequate disclosure increases the probability that the government may decline to intervene or move to dismiss the lawsuit. Also, a qui tam plaintiff is typically awarded less money while incurring substantially more expense when the government does not join the legal action. In sum, an adequate disclosure statement involves a balancing act for the qui tam relator:

A relator preparing a disclosure statement today, however, is in a bind. In one sense it is in the relator’s selfish best interest to make his or her disclosure statement as complete, well-organized, and persuasive as possible. Otherwise, the relator runs the risk that the government may decline to intervene (in which case the expense and burden of prosecuting the action alone may be prohibitive for the relator), or that the government may move to dismiss the action on one of the grounds enumerated in the statute. The inadequacy of the relator’s disclosure is one such ground for dismissal.... On the other had, it is also in the relator’s selfish best interest to avoid full and candid discussion [of] the strengths or weaknesses of his or her claims in a disclosure statement....<sup>33</sup>

### B. *Complaint Under Seal*

Once a qui tam plaintiff initiates a lawsuit by filing a complaint in camera, the complaint and any accompanying material remain under seal for a minimum of 60 days.<sup>34</sup> The purpose of this requirement is to provide the federal government with enough information on the alleged fraud to make

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<sup>31</sup> See generally, e.g., *United States ex rel. Grand v. Northrop Corp.*, 811 F.Supp. 333 (S.D. Ohio 1992) (acknowledging the possibility that the disclosure statement at issue might contain legal analysis and opinion in addition to facts).

<sup>32</sup> *United States ex rel. Bagley*, 212 F.R.D. at 556.

<sup>33</sup> *Id.* at 557-58.

<sup>34</sup> 31 U.S.C. § 3730(b)(2) (2006).



an informed decision on whether to intervene or participate in the lawsuit or permit the qui tam relator to proceed alone.<sup>35</sup> These procedural requirements are so important that a relator's failure to comply warrants dismissal of the lawsuit.

In *Erickson ex rel. United States v. American Institute of Biological Sciences*,<sup>36</sup> Dr. James Erickson, the qui tam relator, was an employee of the Agency for International Development (AID). From 1982 to 1987, he served as a technical officer for the AID Malaria Project, a program aimed at producing a malaria vaccine.<sup>37</sup> AID contracted with the defendant, American Institute of Biological Science (AIBS).<sup>38</sup> In his qui tam lawsuit, Erickson alleged, among other things, that funds were diverted to Swiss bank accounts and used to pay for employees' personal entertainment and travel expenses.<sup>39</sup> Erickson had the complaint served on the defendant before ordered by the district court and failed to keep the complaint under seal for at least 60 days.<sup>40</sup> The district court ruled that failure to comply with the procedural requirements put in place by Congress warranted dismissal of the action.<sup>41</sup> The relator's "failure to comply with the filing and service provisions irreversibly frustrate[d] the congressional goals . . . [of preventing] alleged wrongdoers from being tipped off that they were under investigation . . . and [of protecting] the defendant's reputation from unfounded public accusations."<sup>42</sup>

The FCA provides for a 60-day investigatory period in which the complaint shall remain under seal<sup>43</sup> and allows the government to petition the court for an extension for "good cause shown."<sup>44</sup> The legislative history of the FCA shows that courts are to construe "good cause" narrowly,<sup>45</sup> but,

<sup>35</sup> See *id.*

<sup>36</sup> 716 F.Supp. 908, 910 (E.D. Va. 1989).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 911.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 912. (citations omitted).

<sup>43</sup> 31 U.S.C. § 3730(b)(2) (2006).

<sup>44</sup> § 3730(b)(3)

<sup>45</sup> According to a report issued by the Senate Judiciary Committee:

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. S. Rep. No. 99-345, at 24-25 (1986), as reprinted in 1986

in practice, it is not uncommon for government reviews of FCA filings to take one to two years.<sup>46</sup> One reason for a longer period is that the government may conduct a criminal investigation, if it is warranted, to obtain hard evidence using a variety of investigative techniques, including search warrants or undercover operations.<sup>47</sup> While the lawsuit is under seal, the government can exercise a number of options to further its investigatory goals, which, in effect, could enhance the qui tam relator's chance of success.

First, the government can decide to join the civil lawsuit.<sup>48</sup> If the government intervenes then it assumes primary responsibility for pursuing the lawsuit.<sup>49</sup> In this instance, the government may not eliminate the relator's right to continue as a party to the lawsuit, however, it is not bound by any of the qui tam plaintiff's decisions and may pursue the case as it sees fit.<sup>50</sup> Factors that help the government determine whether to intervene or not depend on regional factors as well as national strategies. In criminal investigations, most regulatory and criminal agencies maintain certain loss thresholds, which exist for informal cost/benefit analysis to make decisions on how to best deploy available government assets. Loss thresholds vary from one office to another and while a qui tam lawsuit with a certain designated loss might be appealing to an agency in Des Moines, Iowa, the same lawsuit might have no appeal in Los Angeles, California. On occasion, agencies issue national strategies to combat certain types of fraud that are prevalent throughout the nation. In these instances, loss thresholds may be ignored to adhere to national strategy.

When the government intervenes, the qui tam plaintiff may continue to participate in the litigation subject to certain conditions. If the government wishes to limit the qui tam relator's participation, the trial court may restrict the number of witnesses the relator may call, the duration of the witnesses' testimony, and/or the length of the relator's cross-examination.<sup>51</sup> The FCA also permits the trial court to stay discovery for up to 60 days when the qui tam plaintiff's actions would interfere with the government's investigation.<sup>52</sup> The government is allowed to pursue the action through an alternative

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U.S.C.C.A.N. 5266, 5289-90.

<sup>46</sup> Joel M. Androphy & Mark A. Corroero, *Federal Qui Tam (False Claims) Litigation: The Government's Watchdog*, 42 HOUS. LAW. at 18, 19 (2005).

<sup>47</sup> See Bauman & Rasor Group, Inc., *Coordination with the Government and the Government Investigation*, <http://www.quitam.com.potatt4.html> (last visited Feb. 11, 2007).

<sup>48</sup> § 3730(b)(4)(A)

<sup>49</sup> § 3730(c)(1).

<sup>50</sup> *Id.*

<sup>51</sup> § 3730(c)(2)(C).

<sup>52</sup> § 3730(c)(4).

remedy such as administrative relief.<sup>53</sup> If the government pursues such an alternative remedy then the qui tam plaintiff retains the same legal rights as in the initial action.<sup>54</sup> Despite these potential limitations, the qui tam plaintiff should still participate in the lawsuit because the FCA provides to the relator a share of at least 15 percent of any damages assessed.<sup>55</sup> Statistically, the government elects to intervene in about 18 percent of all qui tam cases filed.<sup>56</sup>

Government intervention does not guarantee that a relator's case will be brought to a judicial conclusion. Throughout the investigation, the government maintains the right to decline to pursue the matter further if it is found that there is a lack of sufficient evidence to support the allegations or if government finds facts that are contradictory to the disclosure statement filed in the qui tam action.

When the government intervenes, the relator relinquishes a great deal of control to determine the outcome of the lawsuit. Government investigators rarely provide information to the relator concerning any new facts or evidence uncovered in any investigation. The passage of time without updates, especially for a relator in a whistleblower-type situation, may be disconcerting because some investigations take years before findings are presented to an appropriate judicial body. Often the relator is left to wonder what, if any, progress has been made to support the allegations made in the complaint.

A second alternative available to the government is not to participate in the lawsuit. If the government notifies the court that it will not intervene then the qui tam relator has the right to conduct the lawsuit.<sup>57</sup> The government retains only the right to receive copies of all pleadings filed in the action and all deposition transcripts, but at its own expense.<sup>58</sup> When the government declines to intervene, the qui tam plaintiff receives a standard declination letter that outlines duties and responsibilities to continue pursuit of the case. After receipt of the letter and removal of the seal (by the court), the qui tam relator has 120 days to serve the defendant with the complaint.

If the government subsequently decides to intervene in the lawsuit, it may do so only upon a showing of "good cause."<sup>59</sup> It is unclear how

<sup>53</sup> § 3730(c)(5).

<sup>54</sup> *Id.*

<sup>55</sup> See § 3730(d)(1).

<sup>56</sup> See Taxpayers Against Fraud Education Fund, The False Claims Act Legal Center, *Qui Tam* Statistics, <http://www.taf.org/statistics.html> (last visited Feb. 11, 2007).

<sup>57</sup> § 3730(c)(3).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

substantial a showing the government must produce to satisfy the “good cause” requirement. Few cases exist in which the government has tried to reenter a qui tam action after an initial declination to intervene.<sup>60</sup> None of these cases explains what limitation the statute places on the government’s discretion.<sup>61</sup>

A third option open to the government is to intervene and settle the FCA action over the qui tam relator’s objections. The power to settle the suit, however, appears to depend on intervention by the government during the initial 60-day investigatory period.<sup>62</sup> A court may accept a settlement if it is “fair, adequate, and reasonable under all the circumstances.”<sup>63</sup> Of course, a qui tam relator is still entitled to 15 to 25 percent of the settlement proceeds.

A fourth alternative available to the government is to dismiss the lawsuit. If the relator objects, the suit may be dismissed only after the government has notified the qui tam plaintiff and the court has granted the relator a hearing on the issue.<sup>64</sup> In *United States ex rel. Sequoia Orange Co. v. Baird Neece Packing Corp.*,<sup>65</sup> the Ninth Circuit ruled that although the FCA is silent regarding the circumstances under which the government may dismiss a qui tam action, the decision to dismiss is analogous to a matter within the government’s prosecutorial discretion. “The [FCA] grants the relators an opportunity for a hearing on the motion to dismiss, but does not specify any conditions under which the relator may block the motion.”<sup>66</sup> “[T]he function of a hearing when the relator [objects to dismissal of a qui tam action] is simply to give the relator a formal opportunity to convince the government not to end the case.”<sup>67</sup>

### III. LIMITATIONS TO FILING A QUI TAM SUIT

The FCA sets up a two-part test to determine whether a federal court can hear a qui tam case. First, the court must ascertain whether the fraud allegations are based on publicly disclosed material.<sup>68</sup> If so, the court then

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<sup>60</sup> JAMES T. BLANCHET AL., *CITIZEN SUITS AND QUI TAM ACTIONS: PRIVATE ENFORCEMENT OF THE PUBLIC POLICY* 61-62 (1996).

<sup>61</sup> *Id.* at 61-62.

<sup>62</sup> *See* § 3730(c)(2)(B).

<sup>63</sup> *Id.*

<sup>64</sup> § 3730(c)(2)(A).

<sup>65</sup> 151 F.3d 1139, 1145-47 (9th Cir. 1998).

<sup>66</sup> *Id.* at 1144.

<sup>67</sup> *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

<sup>68</sup> *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) (quoting 31 U.S.C. § 3730(e)(4)(A)(1994)).

must assess whether the relator is an original source of the disclosure.<sup>69</sup> Thus, in order to establish subject matter jurisdiction, the qui tam plaintiff must prove by a preponderance of the evidence that the suit is not based upon a prior public disclosure, or, if it is, that he or she was an original source of the information.<sup>70</sup>

The FCA outlines three ways in which prior public disclosure can occur:<sup>71</sup> (1) in a civil, criminal, or administrative hearing;<sup>72</sup> (2) in a Congressional, administrative, or GAO report, audit or investigation,<sup>73</sup> or (3) in the media.<sup>74</sup> Generally, courts broadly construe what types of disclosures

<sup>69</sup> *Id.* (quoting 31 U.S.C. § 3730(e)(4)(B) (1994)). If the answer to the public disclosure question is negative, then no need exists to ask whether or not the relator is an original source. *Id.*

<sup>70</sup> *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999) (citing 31 U.S.C. § 3730(e)(4)(A)-(B); *United States ex rel. Biddle v. Bd. Of Trustees of the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 535 (9th Cir. 1998)).

<sup>71</sup> 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 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. 31 U.S.C. § 3730(e)(4)(A) (2006). "Courts have applied the *expressio unius* doctrine [(i.e., the mention of one thing implies exclusion of another)] to conclude that this is an exhaustive list of the types of materials and hearings that can trigger the jurisdictional bar." Phelps, *supra* note 3, at 260 n.111.

<sup>72</sup> "Hearing" encompasses both civil complaints and criminal indictments. *U.S. ex rel. Siller v. Becton Dickinson & Co* "[T]he disclosure of allegations in [a civil complaint] consitute[s] a 'public disclosure of allegations' in a civil 'hearing.'" *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994). With respect to administrative hearings, the issue of what constitutes a "hearing" and thus a "public disclosure" is not so cut and dry. *See, e.g., A-1 Ambulance Serv. Inc. v. California*, 202 F.3d 1238, 1244 (9th Cir. 2000) (finding that disclosures made during a competitive bidding process constituted "administrative hearings"); *Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000) (finding that an administrative complaint filed with the FAA is considered an "administrative hearing"); *United States ex rel. Garibaldi v. Orleans Parish Sch. Bd.*, 21 F.Supp.2d 607, 614-15 (E.D. La. 1998) (holding that a school board meeting where allegations of FCA violations occurred was not an "administrative hearing"); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473-74 (9th Cir. 1996) (finding that a Federal Energy Regulatory Commission was an "administrative hearing").

<sup>73</sup> In *United States ex rel. Schwedt v. Planning Research Corp.*, 39 F.Supp.2d 28, 31, 32, 34 (D.D.C. 1999), an audit report prepared by the Office of Inspector General and reviewed by an outside accounting firm indicated that a government contractor had submitted flawed products while certifying their completeness. The district court held that a qui tam suit was based upon a public disclosure and was thus barred. *Id.* at 34. In *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999), the court held that information that was disclosed to the Farmers' Home Administration involved public disclosure thus precluding a qui tam action.

<sup>74</sup> 31 U.S.C. § 3730(e)(A)(4) (2005). Courts have applied the *expression unius* doctrine (i.e., the mention of one thing implies exclusion of another) to decide that this is an exhaustive list of the types of materials and hearings that can trigger the jurisdictional bar. Phelps, *supra* note 3, at 260.

fall into these categories.<sup>75</sup> The broader a court construes these types of disclosures, the more likely it is that a case will be barred by a court.<sup>76</sup> Disputes exist among courts, however, over how accessible the information must be to the public to trigger the jurisdictional bar.<sup>77</sup> The disputes revolve around whether information must actually be disclosed to the public or be capable of public disclosure.<sup>78</sup>

In *United States ex rel. Ramseyer v. Century Healthcare Corp.*,<sup>79</sup> qui tam relator Ramseyer became aware of widespread noncompliance with Medicaid requirements. On an independent basis, the Oklahoma Department of Human Services discovered the same deficiencies through an audit.<sup>80</sup> Three copies of the audit report were prepared though no copy was released to the public or made available to the public.<sup>81</sup> The district court held that the audit report had been publicly disclosed because the information had been disclosed to a government official (a stranger to the fraud).<sup>82</sup> The Tenth Circuit reversed the district court, holding that public disclosure means more than the mere theoretical or potential availability of information.<sup>83</sup> An affirmative act of public disclosure is necessary to invoke the jurisdictional bar of §3730(e)(4)(A).<sup>84</sup> Most, but not all, other circuits follow the reasoning of the Tenth Circuit.<sup>85</sup>

The Third Circuit is one that does not follow the Tenth Circuit. In *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins.*

<sup>75</sup> *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991)(Construing the term "hearing" to incorporate more than just formal proceedings; it includes any information disclosed in connection with criminal, civil, or administrative litigation); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C.Cir. 1994)("It is clear from the statutory context that the term 'hearing' was intended to apply in a broad context of legal proceedings under §3730(e)(4)(A)"); J. Androphy & M. Corroero, *Whistleblower and Federal Qui Tam Litigation—Suing the Corporation for Fraud*, 45 S. TEX. L. REV. 23 (2003).

<sup>76</sup> Phelps, *supra* note 3, at 260.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 90 F.3d 1514, 1517 (10th Cir. 1996).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1518.

<sup>83</sup> *Id.* at 1519.

<sup>84</sup> *Id.* According to the Tenth Circuit, "the 'affirmative disclosure' interpretation of the public disclosure bar coheres with the twin purposes of the FCA: '(1) to encourage private citizens with first-hand knowledge to expose fraud; and (2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of fraud.'" *Id.* at 1519-20 (quoting *United States ex rel. Precision Co. v. Koch Indust.*, 971 F.3d 548, 552 (10th Cir. 1992)).

<sup>85</sup> See *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995); *United States ex rel. Springfield Terminal Ry. Co.*, 14 F.3d 645, 652 (D.C. Cir. 1994).

Co.,<sup>86</sup> the appellate court ruled that narrative memos obtained during the discovery process but not filed with the court was public disclosure.<sup>87</sup> The court placed emphasis on whether the relevant documents could be filed, not on whether they were actually filed.<sup>88</sup>

A federal court can hear a qui tam action based upon information previously disclosed to the public if the qui tam plaintiff is the original source of the information.<sup>89</sup> The FCA defines an 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 [FCA] action” based on such information.<sup>90</sup> “Direct knowledge is knowledge gained by the relator’s own efforts” rather than learned secondhand through the efforts of others.<sup>91</sup> “Independent knowledge” is knowledge obtained apart from any public disclosure.<sup>92</sup> One purpose of the disclosure statement (filed by the qui tam relator) is to help the court decide whether the qui tam plaintiff has “direct and independent knowledge” necessary to maintain a suit where information has been publicly disclosed.

Courts, however, are split three ways in the interpretation of the original source’s relationship with the publicly disclosed information. One group of courts requires that the qui tam relator must be the source of the public disclosure.<sup>93</sup> More specifically, one court ruled that three conditions must be met for a plaintiff to qualify as an original source: (1) the relator must have direct and independent knowledge of the allegations; (2) the qui tam plaintiff must voluntarily provide the information to the government before filing suit; and (3) the relator must have directly or indirectly been a source to the entity that publicly disclosed the allegations.<sup>94</sup> According to a second set of court decisions, the identity of the discloser is irrelevant as when the

<sup>86</sup> 944 F.2d 1149, 1158–60 (3d Cir. 1991).

<sup>87</sup> *Id.* at 1158.

<sup>88</sup> *Id.* at 1159.

<sup>89</sup> See 31 U.S.C. § 3730(e)(4)(A) (2006).

<sup>90</sup> § 3730(e)(4)(B)(2006).

<sup>91</sup> *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787, 799 (10th Cir. 2002) (quoting *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006–07 (10th Cir. 1996

<sup>92</sup> *Minn. Ass’n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8th Cir. 2002) (citing *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995); *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000) (citing *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1016 (E.D. Va. 1995)); Vickie J. Williams, *Dead Men Telling Tales: A Policy-Based Proposal for Survivability of Qui Tam Actions Under the Civil False Claims Act*, 83 NEB. L. REV. 1073, 1104–05 (2005).

<sup>93</sup> *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); Phelps, *supra* note 3, at 267.

<sup>94</sup> *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990).

original source provided the information to the government.<sup>95</sup> The third school of thought requires the original source to disclose the information to the government before it is publicly disclosed.<sup>96</sup> Other limitations on qui tam claims also apply.

If the qui tam plaintiff is convicted of criminal conduct stemming from his or her role in the violation of the FCA, “that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.”<sup>97</sup> Even masterminds of fraud perpetrated against the federal government may receive awards for initiating a qui tam suit if they are not criminally convicted. The amount of the reward is not guaranteed and may be reduced by the court to zero.<sup>98</sup> Courts may not entertain lawsuits brought by a member of the armed forces, or those against a member of the armed forces for actions stemming from military service.<sup>99</sup> No qui tam suit may be filed 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.”<sup>100</sup> Moreover, a qui tam action against a state is barred since a state or state agency is not a “person” for purposes of qui tam liability.<sup>101</sup> Local governments, such as

<sup>95</sup> See *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1547 (10th Cir. 1996); *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 (11th Cir. 1994); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-49 (4th Cir. 1994).

<sup>96</sup> See *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) (holding that there is no requirement that an original source be a source to the disclosing entity but he must provide the information to the government before public disclosure); *United States ex rel. McKenzie v. Bellsouth Telecomm, Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) (holding that a qui tam plaintiff must apprise the government of the purported fraud before public disclosure of the information).

<sup>97</sup> 31 U.S.C. § 3730(d)(3) (2006).

[A] careful analysis of the potential relator's role in the submission of false claims to the United States must be made before arranging for a client to blow the whistle to Government prosecutors. If some question exists concerning the extent of a client's participation in criminal conduct, a thorough explanation of the risks to the [relator] is in order.

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, 746 (2000).

<sup>98</sup> § 3730(d)(3)

Under the sliding scale of awards contemplated by Congress, the basement is clearly occupied by those relators whose conduct is so reprehensible as to lead the trial judge to conclude that substantially rewarding the relator would do great injury to public policy.

Helmer, *supra* note 97, at 748.

<sup>99</sup> § 3730(e)(1).

<sup>100</sup> § 3730(e)(2)(A).

<sup>101</sup> *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). The Supreme Court has a longstanding interpretive presumption that “person” does not include the sovereign. See *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941).



cities and counties, however, are amenable to suit according to the holding in *Cook County, Ill. v. U.S. ex rel. Chandler*.<sup>102</sup>

#### IV. ELEMENTS OF A QUI TAM CLAIM

The FCA applies to a wide range of misconduct potentially harmful to the federal treasury. Most FCA cases are brought pursuant to §§3729(a)(1) and (2). Section 3729(a)(1) establishes liability for submitting a false claim and section 3729(a)(2) creates liability for making or using false records in support of a false claim. Section 3729(a)(7) is also growing in popularity in qui tam suits.<sup>103</sup> All legal claims filed under §3729(a) require proof of several elements to establish a violation of the FCA: (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”; (3) the claim must be “false” or “fraudulent”; (4) the claim must be material (while not in the statute, many courts require proof of materiality); (5) causation; and (6) the claim must have resulted in damage to the federal government.

##### A. “Claim”

The determination of whether an actual “claim” has been made is often not a simple task. The existing FCA contains a broad definition of what constitutes a “claim”:

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.<sup>104</sup>

A claim includes not only a demand upon the federal government for the payment of money or the transfer of property but a demand upon a contractor, grantee, or other recipient of government funds where the U.S.

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<sup>102</sup> 538 U.S. 199, 122 (2003).

<sup>103</sup> J.T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.01[G] (2003).

<sup>104</sup> 31 U.S.C. § 3729(c)(2006).

government provided any portion of the money which is requested or demanded.<sup>105</sup> The definition makes no distinction between money provided as a fixed sum and money provided under an open-ended program, but rather is broad enough to include any request for money which was originally obtained from the federal government.<sup>106</sup> Moreover, the definition encompasses any attempt to cause the government to pay out money to a third party.<sup>107</sup> In effect, any action by a claimant which causes the government to make a payment it is not obligated to make, or any action which intentionally deprives the government of money it is lawfully due, is properly deemed a “claim” within the FCA.<sup>108</sup>

The FCA does not attach liability to the underlying fraudulent activity or to the government’s wrongful payment, but to the “claim for payment.” In deciding whether a false statement is a claim or demand for payment, a court should determine whether the statement had the practical effect of inducing wrongful payment.<sup>109</sup> Examples of a “claim” for FCA purposes include false certifications of compliance with federal environmental, safety, and health regulations as a condition of payment for explosive and pyrotechnic devices,<sup>110</sup> a fraudulent inducement of physicians to bill for services not rendered,<sup>111</sup> supplying false cost and pricing data to the federal government in connection with a contract,<sup>112</sup> kickbacks,<sup>113</sup> and a markup scheme inflating costs for the repair of government laptop computers.<sup>114</sup>

### B. Made “Knowingly”

Prior to 1986, a qui tam plaintiff had to prove the defendant had acted with knowledge of the false or fraudulent claim. In other words, the FCA

<sup>105</sup> *Wilkins ex rel. United States v. Ohio*, 885 F.Supp. 1055, 1060 (S.D. Ohio 1995).

<sup>106</sup> *Id.* at 1062-63.

<sup>107</sup> *See, e.g., United States ex rel. Fahner v. Alaska*, 591 F.Supp. 794 (N.D. Ill. 1984); *United States v. Bornstein*, 423 U.S. 303 (1976) (stating false claims may be presented through an innocent third party); *United States v. Veneziale*, 268 F.2d 504 (3d Cir. 1959) (explaining that a lender’s claim for mortgage insurance benefits is a claim under the FCA).

<sup>108</sup> *Androphy and Corroero, supra note 46*, at 35-36. *See also United States v. Rivera*, 55 F.3d 703, 709-10 (1st Cir. 1995); *United States v. Richard Dattner Architects*, 972 F.Supp. 738, 746-47 (S.D.N.Y. 1997).

<sup>109</sup> *Rivera*, 55 F.3d at 709-10.

<sup>110</sup> *United States ex rel. Holder v. Special Devices, Inc.*, 296 F. Supp. 2d 1167 (C.D. Cal. 2003).

<sup>111</sup> *United States v. Merck-Medco Managed Care, L.L.C.*, 336 F. Supp. 2d 430 (E.D. Pa. 2004).

<sup>112</sup> *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1324 (M.D. Fla. 2003).

<sup>113</sup> *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28 (D.D.C. 2003).

<sup>114</sup> *United States v. Rachel*, 289 F.Supp. 2d 688 (D. Md. 2003).

required proof of specific intent to defraud. The 1986 statutory amendments changed this requirement.<sup>115</sup> The qui tam plaintiff no longer had to prove specific intent to defraud on the part of the defendant. The knowledge requirement was satisfied if the fraudster had “actual knowledge” of the falsity of the claim, acted in “deliberate ignorance of the truth or falsity” of the claim, or acted with “reckless disregard of the truth or falsity” of the claim.<sup>116</sup> The requisite intent is the knowing presentation of what is known to be false.<sup>117</sup>

A showing of deliberate ignorance or reckless disregard of the truth of the claim satisfies the “knowingly” element. Negligence and innocent mistake, however, are not sufficient to establish liability.<sup>118</sup> An interesting application of the “knowingly” requirement occurred in *U.S. v. Lorenzo*.<sup>119</sup> In that case, Dr. Lorenzo and several other dentists performed oral cancer screenings as part of routine dental examinations at nursing homes in Pennsylvania and New Jersey.<sup>120</sup> The cancer screenings, after being billed to Medicaid, were then billed to Medicare as limited consultations.<sup>121</sup> The evidence showed that Lorenzo knew that Medicare rules state that “limited consultations” do not include procedures during routine screenings.<sup>122</sup> The court found that Lorenzo, at the very least, acted in reckless disregard of the truth or falsity of the claims made.<sup>123</sup>

Another interesting example of a court analyzing the FCA “knowingly” requirement occurred in *Lamb Engineering & Const. Co. v. U.S.*<sup>124</sup> In the course of performing a contract with the Department of Energy, Lamb Engineering submitted five progress billings, four of which were supported by attached invoices from subcontractors and suppliers.<sup>125</sup> On four occasions, Lamb certified that it had made payments to subcontractors, despite having failed to pay all its suppliers and subcontractors (because of

<sup>115</sup> *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1266 (1st Cir. 1992).

<sup>116</sup> 31 U.S.C. § 3729(b) (2006). *See also United States v. TDC Mgmt. Corp., Inc.*, 24 F.3d 292, 296 (D.C. Cir. 1994); Christopher C. Frieden, *Protecting the Government's Interests: Qui Tam Actions Under the False Claim Act and the Government's Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041 (1998).

<sup>117</sup> *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991).

<sup>118</sup> *Androphy & Corroero*, *supra* note 46, at 36-37. *See also Hagood*, 929 F.2d at 1421; *United States v. Oakwood Downriver Med. Ctr.*, 687 F. Supp. 302, 305 (E.D. Mich. 1988).

<sup>119</sup> 768 F. Supp. 1127 (E.D. Pa. 1991).

<sup>120</sup> *Id.* at 1129.

<sup>121</sup> *Id.* at 1129-30.

<sup>122</sup> *Id.* at 1131.

<sup>123</sup> *Id.* at 1132.

<sup>124</sup> 58 Fed. Cl. 106 (2003).

<sup>125</sup> *Id.* at 108.

retention or a holdback of funds under a clause in its subcontracts).<sup>126</sup> The Court of Claims found that these actions indicated deliberate ignorance or reckless disregard of the truth or falsity of the claims submitted by Lamb.<sup>127</sup>

By not requiring proof of specific intent to defraud, Congress and the judiciary have extended liability to almost anyone associated with a false or fraudulent claim. Government vendors and others who submit claims for payment to the government have a strong incentive to make sure that their claims are accurately presented. The broadened knowledge requirement makes it risky for individuals to look the other way with regard to a fraudulent claim.<sup>128</sup> However, even the broadened intent or knowledge requirement may not be met under certain conditions.

Some courts have ruled that certain circumstances may not meet the threshold intent requirement and negate liability under the FCA.<sup>129</sup> In *U.S. ex rel. Durcholz v. FKW, Inc.*,<sup>130</sup> the government hired a contractor to dredge a sedimentation pond. A facility official thereafter instructed the contractor to submit invoices for unperformed excavation work instead of invoices for dredging.<sup>131</sup> The contractor complied, was paid by the facility, and Durcholz sued as a relator alleging that the contractor knowingly submitted false claims.<sup>132</sup> The Seventh Circuit upheld a summary judgment for the contractor on the basis that “[i]f the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim.”<sup>133</sup>

### C. “False” or “Fraudulent”

The Supreme Court has stated that the FCA is not designed to reach every kind of fraud committed against the government.<sup>134</sup> The words “false”

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<sup>126</sup> *Id.* at 110.

<sup>127</sup> *Id.* at 111.

<sup>128</sup> Friedman, *supra* note 116, at 1057-58.

<sup>129</sup> Abigail Avery, *Weapons of Mass Construction: The Potential Liability of Halliburton Under the False Claims Act and the Implications to Defense Contracting*, 57 ALA. L. REV. 827, 834 (2006).

<sup>130</sup> 189 F.3d 542 (7th Cir. 1999).

<sup>131</sup> *Id.* at 544.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 545. In addition to the Seventh Circuit, at least four other circuit courts recognize that prior government knowledge of an allegedly false claim can negate the “knowingly” element required for an FCA violation. See, e.g., *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993); *Hagood*, 929 F.2d at 1416; *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 579 (10th Cir. 2000); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284 (4th Cir. 2002).

<sup>134</sup> *United States v. McNinch*, 356 U.S. 595 (1958).

and “fraudulent” were not defined by Congress in the FCA. These terms have been interpreted by the courts through application of common law principles. For example, since the FCA uses the disjunctive connector “or,” no need exists for a *qui tam* plaintiff to prove a claim is both false and fraudulent. Either will do.<sup>135</sup>

A false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation.<sup>136</sup> Although the determination of whether the defendant in a given case submitted a false or fraudulent claim depends on the court’s application of the FCA, a regulation, or a contract, violations of laws or regulations alone do not create a cause of action under the FCA.<sup>137</sup> In *Hindo v. University of Health Sciences*,<sup>138</sup> the Seventh Circuit indicated that a claim must be based on fabrication or lie. The withholding of information critical to the government’s decision to pay is the essence of a false claim.<sup>139</sup> A government vendor or contractor may defeat a finding of falsity, however, when a contract or regulation is subject to more than one reasonable interpretation.

Courts have generally held that contractors are not liable under ambiguous or vague contract terms when the contractor’s interpretation is reasonable.<sup>140</sup> For example, the court in *U.S. v. Napco International, Inc.*<sup>141</sup> held that because the Arms Control Export Act was ambiguous and the defendant government contractor reasonably believed that the law did not apply, the claim was not false or fraudulent under the FCA. In that case, the government contractor purchased American-made military supplies from an Israeli corporation.<sup>142</sup> The government claimed that the Arms Control Export Act required contractors to buy items from American firms.<sup>143</sup> The

<sup>135</sup> James B. Helmer, Jr. & Julie W. Popham, *Materiality and the False Claims Act*, 71 U. CIN. L. REV. 839, 845 (2003).

<sup>136</sup> See *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001).

<sup>137</sup> See, e.g., *United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996); *United States ex rel. Siewick v. Jamieson Sci. & Eng’g*, 214 F.3d 1372 (D.C. Cir. 2000).

<sup>138</sup> 65 F.3d 608 (7th Cir. 1995).

<sup>139</sup> See, e.g., *United States ex rel. Fallon v. Accudyne*, 921 F.Supp. 611 (W.D. Wis. 1995); Randall M. Levine, Note, *Enforced Separation: Utilizing the False Claims Act to Prosecute Government Contractors Spending Federal Funds in Violation of Church/State Regulations*, 35 PUB. CONT. L.J. 155 (2005).

<sup>140</sup> *Avery*, *supra* note 129, at 833; See also *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457 (9th Cir. 1999).

<sup>141</sup> 835 F. Supp. 493 (D. Minn. 1993).

<sup>142</sup> *Id.* at 495.

<sup>143</sup> *Id.* at 496-97.

contractor read the statute to allow procurement from foreign entities so long as the items were of American origin.<sup>144</sup>

Similarly, in *U.S. ex rel. Lindenthal v. General Dynamics*,<sup>145</sup> the contractor defendant contracted with the Air Force to provide engineering drawings for a complex, mobile radar system. The qui tam plaintiffs alleged that General Dynamics knowingly produced inadequate drawings because they were not “build-to-print” quality and therefore violated the FCA.<sup>146</sup> The Ninth Circuit Court of Appeals disagreed, holding that extrinsic evidence admitted at trial to interpret ambiguous contract terms indicated that the contractor performed work that met Air Force standards.<sup>147</sup> The Court concluded that General Dynamic’s payment claim was not false.<sup>148</sup> Hence, a reasonable interpretation of ambiguous statutory language or contractual provisions may impact a court’s decision on whether an FCA claim is false or fraudulent.

#### D. Materiality

Surprisingly, the False Claims Act does not contain language that indicates a false or fraudulent claim must be “material” to impose liability. The operative provisions of the FCA contain 3,000 words and “materiality” is not one of them.<sup>149</sup> A review of all versions of the FCA since its enactment in 1863 demonstrates that the word “materiality” has appeared only twice. The word is present twice in 31 U.S.C. §3730(b)(2) and describes the type of evidence a qui tam plaintiff must supply to the government at the time of filing the complaint.<sup>150</sup> Despite these facts, many courts have held that “materiality” is one of the required elements of an FCA claim.<sup>151</sup>

In *U.S. ex rel. Berge v. Bd. of Trustees of the Univ. of Alabama*,<sup>152</sup> the Fourth Circuit Court of Appeals explicitly stated that the FCA imposes a materiality requirement. Also, the court determined that although materiality is a mixed question of law and fact, it is one for the court.<sup>153</sup> Other courts have

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<sup>144</sup> *Id.* at 497.

<sup>145</sup> 61 F.3d 1402 (9th Cir. 1995).

<sup>146</sup> *Id.* at 1410.

<sup>147</sup> *Id.* at 1411-12.

<sup>148</sup> *Id.* at 1412.

<sup>149</sup> Helmer & Popham, *supra* note 135, at 843.

<sup>150</sup> *Id.*

<sup>151</sup> Gregory Brooker, *The False Claims Act: Congress Giveth and Congress Taketh Away*, 25 HAMLINE L. REV. 373, 392-92 (2002).

<sup>152</sup> 104 F.3d 1453 (4th Cir. 1997).

<sup>153</sup> *Id.* at 1460.

also insisted that the qui tam plaintiff prove materiality to make a successful claim under the FCA.<sup>154</sup> In *U.S. ex rel. Wilkins v. North American Construction Corporation*,<sup>155</sup> the court indicated that the common law meaning of the term “false claim” is fraud. Materiality is defined as whether the false or fraudulent claim has a “natural tendency to influence agency action or is capable of influencing agency action.”<sup>156</sup>

Despite this legal position, some courts and legal commentators assert that a judicially imposed materiality requirement cannot be supported.<sup>157</sup> Indeed, such a requirement is inconsistent with the U.S. Supreme Court’s decision in *U.S. v. Wells*,<sup>158</sup> where the Court concluded that materiality is not an element of a criminal FCA offense. Courts and commentators have reasoned that since the criminal FCA provisions have no materiality element, it is illogical to impose such a requirement upon the parallel civil provisions, which are rooted in the same original legislative enactment.<sup>159</sup>

On the other hand, some legal commentators maintain that the inclusion of a materiality element in the civil FCA can be squared with the *Wells* opinion:

By contrast, the civil provisions of the FCA do imply materiality. While the term “false statement” does not connote materiality, the term “false claim” necessarily does. A “statement” can be determined to be true or false, regardless of whether the statement would have any material (influential) effect on its intended recipient. But a “claim” cannot be determined to be true or false without consideration of whether the decision maker should pay the claim—that is, a claim is “false” only if the Government or other customer would not pay the claim if the facts about the misconduct alleged to have occurred were known.<sup>160</sup>

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<sup>154</sup> See, e.g., *United States ex rel. Mathews v. Healthsouth Corp.*, 140 F. Supp. 2d 706 (W.D. La. 2001) (holding that a materiality requirement exists under the FCA); *Tyger Const. Co. v. United States*, 28 Fed. Cl. 35 (Fed. Cl. 1993); *Brooker*, *supra* note 152, at 842-44.

<sup>155</sup> 101 F. Supp. 2d 500 (S.D. Tex. 2000).

<sup>156</sup> *United States v. Norris*, 749 F.2d 1116, 1122 (4th Cir. 1984).

<sup>157</sup> See, e.g., *United States ex rel. Roby v. The Boeing Co.*, 184 F.R.D. 107 (S.D. Ohio 1998); *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F. 3d 1048 (9th Cir. 2001); *Brooker*, *supra* note 153, at 391-92; *Helmer & Popham*, *supra* note 137, at 840-41.

<sup>158</sup> 519 U.S. 482 (1997).

<sup>159</sup> *Helmer & Popham*, *supra* note 135, at 841-42.

<sup>160</sup> Clarence T. Kipps, Jr., Robert K. Huffman & Peter B. Hutt II, *Materiality as an Element of Liability Under the False Claims Act*, 1998 INST. ON CIV. FALSE CLAIMS ACT & QUI TAM ENFORCEMENT B-45 TO -46.

### E. Causation

Several courts have ruled that an FCA defendant's action must be the cause of the government's loss. The causation element under the FCA is satisfied if a person "presents or causes to be presented," a false or fraudulent claim to the U.S government for approval.<sup>161</sup> In *U.S. v. First Nat'l Bank of Cicero*,<sup>162</sup> the Seventh Circuit Court of Appeals held that the government only needed to prove that it would not have made a payment "but for" the false statement to establish cause. Under this test, an act or failure to act (i.e., submitting a claim) is not the cause of making a payment if the payment would have occurred regardless of the act or omission.

The FCA applies to any person who knowingly assisted in causing the government to pay claims that were grounded in fraud, without regard to whether that person had direct contractual relations with the government.<sup>163</sup> Thus, a person need not be the one who actually submitted a claim for payment. In *U.S. v. Krizek*,<sup>164</sup> a doctor was held liable for false claims prepared by his wife where he delegated to her the authority to submit claims on his behalf. In *U.S. v. Mackby*,<sup>165</sup> the defendant was found to have knowingly caused false claims to be submitted to Medicare by instructing a clinic's billing company and office manager to file claims.

The FCA allows for significant civil monetary damages to be awarded against a defendant who submits a fraudulent claim to the government. Violators are liable for a civil penalty of \$5,500 to \$11,000 per claim plus three times the government's damages.<sup>166</sup> Federal courts differ, however, as to whether the federal government must suffer fiscal harm before a qui tam suit may be filed. In other words, some courts require the qui tam plaintiff to prove injury or damages as an element of an FCA violation while other courts do not. We will examine each legal position in turn.

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<sup>161</sup> Androphy & Corroero, *supra* note 75, at 35-6; Michael M. Mustokoff & Carrie Nelson, *The False Claims Act and the Recent Trend Toward Kindler, Gentler Interpretations*, 5 J. Health Care Compl. 15 (2003).

<sup>162</sup> 957 F.2d 1362, 1374 (7th Cir. 1992).

<sup>163</sup> See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

<sup>164</sup> 111 F.3d 934 (D.C. Cir. 1997).

<sup>165</sup> 261 F.3d 821 (9th Cir. 2001).

<sup>166</sup> 31 U.S.C. § 3729(a) (2006). While the statute indicates a penalty of \$5,000 to \$10,000 per claim, the Department of Justice increased the penalty amount by 10 percent to adjust for inflation. See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s)(2), 110 Stat. 1321-358, 373 (1996).



**(I) STATUTORY PENALTY REQUIRES NO DAMAGES**

According to the FCA, liability for a false claim is not contingent upon the government suffering damages. Congress did not include a reference to actual payment of a claim by the federal government as an element of an FCA violation.<sup>167</sup> Therefore, some courts have held that the government does not have to sustain damages to invoke FCA liability.<sup>168</sup> The focus of FCA liability is on the presentment of the false claim, not the payment of it. By attaching liability to the claim itself, Congress decided that fraud against the government is best deterred by attacking the act that presents the risk of wrongful payment by the United States. The government need not wait until the false claim is paid before liability attaches.<sup>169</sup> Hence, an FCA qui tam suit may be initiated to recover civil penalties without showing actual compensatory damages.<sup>170</sup>

**(II) THE CLAIM MUST CAUSE MONETARY LOSS OR BE CAPABLE OF CAUSING MONETARY LOSS**

Another line of cases requires that the false claim actually result in financial loss to the federal government. The payment does not have to exceed what a legitimate provider would have received.<sup>171</sup> For example, in *U.S. v. Silver*,<sup>172</sup> the defendant allegedly cashed checks for his bankrupt firm that should have been deposited. Since the defendant paid the subcontractors on whose behalf the payments were made, the government admitted that it had not suffered actual damages.<sup>173</sup> Nonetheless, Silver's actions were deemed by the court to fall within the FCA.<sup>174</sup> In another case, the Third Circuit Court of Appeals decided that the submission of inflated legal bills to a bankruptcy court did not result in liability under the FCA because the government did not suffer economic loss.<sup>175</sup> As a practical

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<sup>167</sup> See § 3729(a)(1).

<sup>168</sup> See, e.g., *Tyger Constr. Co. v. U.S.*, 28 Fed. Cl. 35 (Fed. Cl. 1993); *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978); *Fallon* 921 F. Supp at 611.

<sup>169</sup> *Brooker*, *supra* note 151, at 393.

<sup>170</sup> See, e.g., *Rabushka ex rel. United States v. Crane Co.*, 122 F.3d 559 (8th Cir. 1997); *Hagood*, 921 F.2d at 1421; 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, 184-86 (2001).

<sup>171</sup> *Krause*, *supra* note 170, at 184.

<sup>172</sup> 384 F. Supp. 617 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir. 1975).

<sup>173</sup> *Silver*, 384 F. Supp. at 620.

<sup>174</sup> *Id.*

<sup>175</sup> *Hutchins v. Wilentz*, *Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001).

matter, fraud enforcement efforts would be hindered if no legal cause of action arose until the government paid the claim.<sup>176</sup>

### (III) FINANCIAL DAMAGES ARE REQUIRED

A minority of cases hold that damages are necessary for the government to recover under the FCA. Such a legal position receives weak statutory support from the language contained in §3731(c), which lists damages as an essential element of an FCA claim that must be established by a preponderance of the evidence.<sup>177</sup> This section addresses FCA procedure such as the burden of proof that must be met by the government (or qui tam relator).<sup>178</sup> In *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Insurance Company*,<sup>179</sup> the court ruled that damages must be established to find an FCA violation. Other courts have similarly ruled that the qui tam relator must provide specific proof of damages to the government for liability to adhere.<sup>180</sup>

## V. THE RELATOR'S RECOVERY

The FCA sets out three types of monetary interest in a claim. First, the statute awards the relator a percentage of the total recovery ranging from fifteen to thirty percent.<sup>181</sup> Second, the law provides for reasonable expenses, attorneys' fees, and costs to the relator who pursues the claim.<sup>182</sup> Third, if the qui tam plaintiff has been discharged, demoted, suspended, harassed, or discriminated against by his or her employer because of lawful acts then the relator is entitled to all necessary relief.<sup>183</sup> We examine each of these three monetary interests in turn.

<sup>176</sup> Krause, *supra* note 170, at 185.

<sup>177</sup> *Id.*; 31 U.S.C. § 3731(c)(2006).

<sup>178</sup> Krause, *supra* note 170, at 185.

<sup>179</sup> 721 F. Supp. 1247 (S.D. Fla. 1989).

<sup>180</sup> *See, e.g., Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001); *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055 (S.D. Ohio 1995).

<sup>181</sup> 31 U.S.C. § 3730(d)(2006).

<sup>182</sup> *Id.* This provision only applies to the qui tam plaintiff who prosecutes the case, not to those instances where the government assumes the action. *Id. See also* Joseph Hoffer, Comment, *Qui Tam: Survival of the Action and Fate of the Proceeds Following the Death of the Relator, For the King and for Himself . . . and His Heirs*, 37 ST. MARY'S L. J. 199, 214 n.69 (2005).

<sup>183</sup> 31 U.S.C. § 3730(h) (2006). Whistleblower protection is available to any employee who participates in the qui tam action on behalf of the government or relator. *Id.* It also includes reinstatement to the same seniority status, twice the amount of back-pay including interest, and special damages. *Id.* This relief is based on a separate legal action. *Id. See also* Hoffer, *supra* note 183, at 214 n.70.

### A. Factors Considered in Setting the Relator's Award

The False Claims Act provides the court discretion in the determination of the relator's share of any recovery. The statute itself, however, establishes some guidelines. Several factors control the relator's percentage, including whether the government assumes the action and the significance of the relator's contribution to the case.<sup>184</sup> As noted above, relators who are criminally convicted cannot recover. Qui tam plaintiffs who are not convicted but are the masterminds of the fraudulent claims fall into the zero to ten percent range. Plaintiffs who base their suit mainly on publicly disclosed information (for which they were not the discloser) and in whose case the government later intervenes also fall into the zero to ten percent range.<sup>185</sup> In cases where the government joins the qui tam suit and the relator is the original source of information (or the case is not based on publicly disclosed information), the relator receives between 15 and 25 percent of the recovery.<sup>186</sup> In those cases in which the government does not intervene, the qui tam relator is awarded between 25 and 30 percent of the recovery.<sup>187</sup>

The federal government has developed internal guidelines in establishing an appropriate share for qui tam plaintiffs. These guidelines are as follows:

When trying to reach agreement with a relator as to his share of the proceeds, or proposing an amount or percentage to a court, we suggest that you begin your analysis at 15 percent. Then consider if there are any bases to increase the percentage based on the criteria set forth below. Having done this, consider if that percentage should be reduced based on the second set of criteria. Of course, absent one of the statutory bases for an award below 15 percent discussed at the end of these guidelines, the percentage cannot be below 15 percent (or 25 percent if we did not intervene).

#### *Items for consideration for a possible increase in the percentage*

1. The relator reported the fraud promptly
2. When he learned of the fraud, the relator tried to stop the fraud or reported it to a supervisor or the Government

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<sup>184</sup> 31 U.S.C. § 3730(d). See also Hoffer, *supra* note 182, at 215.

<sup>185</sup> § 3730(d). See also Helmer, *supra* note 97, at 756.

<sup>186</sup> § 3730(d)(1).

<sup>187</sup> § 3730(d)(2).

3. The qui tam filing, or the ensuing investigation, caused the offender to halt the fraudulent practices.
4. The complaint warned the government of a significant safety issue.
5. The complaint exposed a nationwide practice.
6. The relator provided extensive, first-hand details of the Fraud to the Government.
7. The Government had no knowledge of the fraud.
8. The relator provided substantial assistance during the investigation and/or pretrial phase of the case.
9. At his deposition and/or trial, the relator was an excellent, credible witness.
10. The relator's counsel provided substantial assistance to the Government.
11. The relator and his counsel supported and cooperated with the Government during the entire proceeding.
12. The case went to trial.
13. The FCA recovery was relatively small.
14. The filing of the complaint had a substantial adverse impact on the relator.

*Items for consideration for a possible decrease in the percentage*

1. The relator participated in the fraud.
2. The relator substantially delayed in reporting the fraud or filing the complaint.
3. The relator, or relator's counsel, violated FCA procedures:
  - a. complaint served on defendant or not filed under seal.
  - b. the relator publicized the case while it was still under seal.
  - c. statement of material facts and evidence not provided.
4. The relator had little knowledge of the fraud or only suspicions.
5. The relator's knowledge was based primarily on public information.
6. The relator learned of the fraud in the course of his Government employment.
7. The Government already knew of the fraud.
8. The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in

developing the case, or unreasonably opposed the Government's position in litigation.<sup>188</sup>

If the courts are to carry out Congressional intent to encourage the filing of qui tam suits, then generous relator's awards should be forthcoming. The government is still left whole due to the treble damages and enhanced penalty provisions. Ultimately, the fraudster is paying the relator's share.<sup>189</sup>

### B. Whistleblower Relators

Employees who initiate qui tam lawsuits under the FCA against their employers are protected by the statute from retaliation. The FCA states "[a]ny 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 filing a qui tam action] shall be entitled to all relief necessary to make the employee whole."<sup>190</sup> This statutory provision is designed to deter retaliatory action by an employer who has filed a qui tam lawsuit alleging fraud against the government.

A qui tam plaintiff must prove three elements to sustain a whistleblower action under the FCA: (1) the employee must have engaged in conduct protected under the statute; (2) the employer must have been aware of the employee's conduct; and (3) the employee must have been discriminated against because of engaging in protected conduct.<sup>191</sup> As to the first element, the qui tam plaintiff need not have actually filed suit under the FCA to receive protection.<sup>192</sup> The second element requires that a reasonable jury could infer that the employer had reason to believe that the employee was contemplating a qui tam action.<sup>193</sup> The third element shifts the burden of proof to the employer to show that the employee would have been terminated, demoted, or suspended regardless of the suit.<sup>194</sup> Certainly, §3730(h) of the FCA and controlling court decisions encourage qui tam employee-relators to pursue actions against fraud aimed at the government.

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<sup>188</sup> DEPARTMENT OF JUSTICE RELATOR'S SHARE GUIDELINES (1996); reprinted in CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* App C-2-1 to App. C-2-3 (2005).

<sup>189</sup> Helmer, *supra* note 97, at 760-61.

<sup>190</sup> 31 U.S.C. § 3730(h)(2005).

<sup>191</sup> See *Mikes*, 889 F. Supp. 746; *United States ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996).

<sup>192</sup> See *Mikes*, 889 F. Supp. 746.

<sup>193</sup> *Id.*; Frieden, *supra* note 116.

<sup>194</sup> *Mikes*, 889 F. Supp. 746.; *Consolidated Edison of New York, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982).

## VI. CONCLUSION

The False Claims Act is a potent weapon in the arsenal of auditors, lawyers, fraud investigators, regulators, and whistleblowers. Individual plaintiffs may initiate lawsuits on behalf of the government and themselves against those who defraud the federal government. A qui tam plaintiff may pursue legal action even when the federal government chooses not to participate in a lawsuit. In any qui tam recovery, the relator is entitled to a maximum of 25 percent of the damages and up to 30 percent when the government does not intervene.

Once a qui tam relator initiates a lawsuit by filing a complaint in camera, the complaint and accompanying material remain under seal for a minimum of 60 days. While the lawsuit is under seal, the government can exercise a number of options, including joining the lawsuit, deciding not to intervene, intervening and settling the lawsuit, or dismissing the lawsuit.

A federal court may not hear a qui tam suit brought under the FCA if the case is based on a public disclosure and the relator is not an original source of the information on which the fraud allegations are based. Previous public disclosures can occur in a judicial or administrative hearing, a government report, or in the media. If the qui tam plaintiff is the original source of the FCA lawsuit allegations then prior public disclosure is irrelevant.

Any FCA claim requires that the qui tam relator prove several elements. First, the defendant must present a "claim" to the government or the defendant must cause a third party to submit a claim. Second, the claim must be made "knowingly." Third, the claim must be "false" or "fraudulent." Fourth, according to some courts, the claim must be material. Fifth, the defendant's action must be the cause of the government's loss. Sixth, and finally, according to some courts, the claim must have resulted in damage to the federal government.

The FCA awards the qui tam relator between 15 and 30 percent of the total recovery as a finder's fee. The statute also allows the relator to receive reasonable expenses, attorneys' fees, and costs for bringing the action. A qui tam employee-relator may file a whistleblower action by proving that he or she engaged in protected conduct, and the employer thereafter discriminated against the employee for engaging in protected conduct.

