THE FUTURE OF THE FALSE CLAIMS ACT: BACK TO THE FUTURE FOR THE GOVERNMENT'S PRIMARY FRAUD-FIGHTING WEAPON

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Introduction

After nearly a quarter of a century without a single legislative update, the U.S. Government's primary fraud-fighting weapon was finally modernized in 2009 and 2010. Specifically, by passing the Fraud Enforcement and Recovery Act of 2009 (FERA)[1] and the Patient Protection and Affordable Care Act of 2010 (PPACA),[2] Congress removed some of the statutory confusion and liability loopholes that have been undermining the federal False Claims Act (FCA).[3] Among other things, these landmark amendments restored key liability provisions and changed the cost-benefit analysis for dishonest entities who seek to steal Government funds. This article highlights some of the concerns addressed by these recent amendments, offers a glimpse into the practical impact of these changes, and explains why additional work is still needed in the future to fully restore the Act.

I. FULLY PROTECTING GOVERNMENT FUNDS FROM FRAUD

The recent FCA amendments sensibly corrected legislative deficiencies that fraudfeasors had used and abused to drain billions of dollars from the U.S. Treasury. Congress clarified, once and for all, the reach of the *preexisting* FCA liability provisions and rejected extraneous limits that judges had legislated from the bench. Restoring the full reach of the FCA, the amendments empowered our law enforcement efforts to finally reach those who were stealing taxpayer dollars with impunity. The key improvements to the FCA Section 3729(a) liability provisions were those designed to do the following: a) fully protect U.S. Government dollars even when the Government relies on others to make payment decisions for the federal Government; b) impose liability on those who steal funds administered by the U.S. Government; and c) recover funds from those who convert taxpayer funds to unauthorized uses or knowingly retain overpayments.

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[1] Pub. L. No. 111-21, 123 Stat. 1617.

[2] Pub. L. No. 111-148, 124 Stat. 119.

[3] 31 U.S.C. 3729 *et seq.*

A. Liability for Those Who Seek to Steal Government Funds from Government Contractors or Grantees

The U.S. Government drastically changed in the quarter century since the FCA was last amended. During the course of this time, the U.S. Government increasingly turned to federal contractors for many traditionally government functions, including procurement and contract management. However, with the FCA statutory language cemented to reflect the realities of the 1986 government contracting environment, a number of court decisions read the Act in a way that exposed the expenditure of Government funds to fraud and abuse. Oftentimes, courts lamented that the Act's antiquated language "tied their hands" to decisions that were directly contrary to the applicable legislative history.[4]

However, the Congressional intent behind the 1986 FCA amendments could not have been clearer. For example, in 1986, Congress intended FCA to apply to false claims "made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States."[5] To further drive home the point, Congress emphasized, "[A] false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States is a false claim to the United States."[6]

Courts increasingly turned a blind eye to this crystal clear legislative history. Finally, the need for clarifying legislation was heightened by *Allison Engine Co. v. United States ex rel. Sanders*, a 2008 U.S. Supreme Court decision that narrowed the Act to *only* apply to false claims that were potentially reviewable by the "Government itself" and that were "material to the Government's decision to pay."[7] This limiting Court decision was reached notwithstanding the underlying Congressional intent and a statutory definition of "claim" that included claims "made to a contractor, grantee, or other recipient if the United States provides any portion of the money or property which is

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[4] *See, e.g.*, *United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488, 495 (D.C. Cir. 2004) (Then-Judge John Roberts encouraging Congressional intervention: "It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." (internal quotations and citations omitted)). *See also* oral argument transcripts from every U.S. Supreme Court case examining the FCA over the past 24 years, in which Justice Scalia regularly begs Congress to fix the Act's "drafting" problems.

[5] S. Rep. No. 99-345, 99th Cong., 2d Sess. 19-20 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

[6] *Id.*

[7] *Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

requested or demanded."[8]

The real-world impact of this Supreme Court decision was evident the very next day, when a district court dismissed, on the eve of trial, the Government's prosecution of a substantial crop subsidy fraud scheme.[9] In this case, the Government relied on a private bank to distribute government funds in the form of crop subsidies. However, because a government official did not personally ink the crop subsidy checks, the court ruled that the "Government itself" was not involved in the payment decision and thus, the Government could not utilize the FCA to recover its stolen funds. Moreover, the court held, when a private entity pays a claim and then seeks reimbursement from the Government, a false statement can *never* be "material to the Government's decision to pay."

Subsequently, similar arguments were parroted in courts throughout the country, seeking to squelch government investigations involving Medicare and Medicaid fraud,[10] defense subcontractor fraud,[11] and fraud on local and state programs, including those "funded in part by the United States where there [wa]s significant Federal regulation and involvement."[12]

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[8] 31 U.S.C. § 3729(c).

[9] *United States v. Hawley*, 566 F.Supp.2d 918 (N.D. Iowa 2008).

[10] *See United States ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302, 1305-06 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) (dismissing case involving nursing home claims on state Medicaid agency); *United States ex rel. Brunson v. Narrows Health & Wellness*, LLC, 469 F. Supp. 2d 1048, 1053 (N.D. Ala. 2006) (dismissing Medicare claims submitted to an insurance company hired by the federal government to administer the Medicare program).

[11] *See United States ex rel. Sanders v. Allison Engine Co.,* 364 F. Supp. 2d 710 (S.D. Ohio 2003*), rev'd by,* 471 F.3d 610 (6th Cir. 2006), *vacated and remanded by Allison Engine Co. v. United States ex rel. Sanders*, 128 S.Ct. 2123 (2008).

[12] S. Rep. No. 99-345 at 19-20 (citing an area in which Congress intended the FCA to be applicable). *See, e.g., United States ex rel. Rutz v. Village of River Forest,* 2007 WL 3231439 (N.D. Ill. Oct. 25, 2007) (federal Bureau of Justice Assistance block grant to county)*; U.S. DOT ex rel. Arnold v. CMS Eng'g*, 2007 U.S. Dist. LEXIS 9118 (W.D. Pa. Feb. 6, 2007) (U.S. Department of Transportation grant to Pennsylvania Department of Transportation); *U.S. v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) *affirmed on other grounds by,* 523 F.3d 333 (5th Cir. 2008) (U.S. Department of Housing funding of City of Houston housing authority); *United States ex rel. Rafizadeh v. Cont'l Common*, *Inc*., 2006 U.S. Dist. LEXIS 18164 (E.D. La. April 10, 2006) *affirmed on other grounds by,* 553 F.3d 869 (5th Cir. 2008) (U.S. grants to state Department of Social Services and state Department of Health & Hospitals).

Congress was deeply concerned that these troubling court decisions were just the tips of the iceberg of future court dismissals, especially given the modern-day government contracting environment. These concerns were particularly well-founded in the years leading up the recent amendments, for the federal Government had outsourced an unprecedented number of governmental functions to private entities, including the contracting process itself.[13] Indeed, this trend was accelerating to a record level, with the Government spending nearly *40 cents* of every discretionary dollar on contracts with private companies.[14] In fact, in 2009, there was an estimated contract workforce of more than 7.6 million employees, or three contractors for every federal employee, and the number of contractors had skyrocketed 70 percent since 2002.[15]

The pervasiveness of this government outsourcing was highlighted by the U.S. Comptroller General in the year prior to the FCA Amendments:

> The government is relying on contractors to fill roles previously held by government employees and to perform many functions that closely support inherently governmental functions, such as contracting support, intelligence analysis, program management, and engineering and technical support for program offices.[16]

This trend was also identified in a 2008 Government Accounting Office report, noting that spending by the Department of Defense (DOD) on contractor services more than *doubled* between 1998 and 2008.[17] The GAO also reported that procurement

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[13] Between 1993 and 2000, the size of the civilian workforce was reduced by 426,000 positions, reaching a level equal to that under President Eisenhower. Between 2000 and 2005, annual government procurement spending increased by 86%, or $175 billion dollars. *Dollars, Not Sense: Government Contracting Under the Bush Administration* at i, 3 (Comm. Print 2006), H.R. Comm. Gov't Reform – Minority Staff Special Investigations Division, 109th Cong., 2d Sess.

[14] *Id.* The Department of Energy spends approximately 98% of its budget on contractors, the Pentagon spends nearly half of its budget on contractors, and the National Air & Space Administration spends about 78% of its budget on contractors. Shane, Scott. "Uncle Sam keeps SAIC on Call for Top Tasks/Government Turns to California Company for Variety of Sensitive Jobs." THE BALTIMORE SUN, 26 Oct. 2003.

[15] Light, Paul C. "Open Letter to Presidential Candidates," *available at* http://www.nyu.edu/public.affairs/releases/detail/2182 (last visited March 29, 2010).

[16] *DOD's Increased Reliance on Service Contractors Exacerbates Long-standing Challenges*, *2008: Hearings on Defense Acquisitions before the Subcom. On Defense of the House of Representatives Comm. on Appropriations*, 110th Cong., 2d Sess. 10-12 (2008) (statement of David M. Walker, Comptroller General of the United States).

[17] *DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight*, *2008: Hearings on Defense Management Before*

spending had reached an all-time high in 2008, and that between 2000 and 2005, procurement spending had risen by 86% to $377.5 billion annually.[18] During this time period, spending on federal contracts grew over twice as fast as other discretionary federal spending.[19]

Then, in early 2009, the outlay of government funds reached unprecedented proportions. Specifically, with the passage of the federal stimulus package,[20] nearly a trillion *additional* federal dollars were released into the economic stream. Of course, instead of having the "Government itself" pay out these funds, the federal Government largely relied on the usual third parties, including State agencies, government contractors, and government grantees, to distribute these stimulus funds.

Thus, against this backdrop of increased reliance on government contractors and unmatched government spending, the Supreme Court ruled in *Allison Engine* that the FCA only protected government funds when the "Government itself" was involved in the payment decision. Of course, with a "shadow government" of contractors disbursing government funds, a government employee is rarely involved in the payment decision. For example, when seeking reimbursement from the Medicare or Medicaid program, hospitals submit their claims to private insurance companies on contract with the federal or a state government, and the "Government itself" is *never* consulted on whether or not to pay the claims. Similarly, defense contractors typically find themselves billing another defense contractor who, in turn, bills another defense contractor, who may or may not be the one with the prime contract with the Department of Defense. In each of these examples, however, the person submitting the bill knows full well that he is being paid by the taxpayers to perform work in furtherance of governmental purposes.

In short, the Supreme Court *Allison Engine* decision constructed a rapidly expanding "free fraud zone" for the *numerous* situations in which companies bill entities that have been paid in advance by the federal Government.

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the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services, 110th Cong., 2d Sess. 3 (2008) (statement of David M. Walker, Comptroller General of the United States).

[18] GAO Report, *2008: Hearings on Defense Management Before the Subcomm. On Readiness of the House of Representatives Comm. On Armed Services*, 110th Cong., 2d Sess. 3 (2008), *available at* http://oversight.house.gov/story.asp?ID=1071 (last visited March 29, 2010).

[19] *Id.*

[20] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

FERA shut down this gaping enforcement loophole by making the following changes to the FCA:

3729(a)(1)(~~1~~A) knowingly presents, or causes to be presented, ~~to an officer or employee of the United States Government or a member of the Armed Forces of the United States~~ a false or fraudulent claim for payment or approval;

3729(a)(1)(~~2~~B) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~get~~ a false or fraudulent claim ~~paid or approved by the Government~~;

3729(b)~~(c) CLAIM DEFINED.—For purposes of this section,~~(2) the term "claim~~" includes~~"—

(A) means any request or demand, whether under a contract or otherwise, for money or property ~~which~~ and whether or not the United States has title to the money or property, that—

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government —

(I) provides or has provided any portion of the money or property ~~which is~~ requested or demanded,~~;~~ or ~~if the Government~~

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

Thus, consistent with the Congressional intent behind the 1986 FCA amendments, FERA corrected the FCA to make clear that liability attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the federal Government; with an agent acting on the Government's behalf; or with a third party contractor, grantee, or other recipient of such money or property. Notably, to ensure that the Act was not interpreted to federalize fraud that threatens no harm to Government

purposes or federal program objectives, the amendment explicitly excluded from liability requests or demands for money or property that the Government had paid to an individual as compensation for federal employment or as an income subsidy, such as Social Security retirement benefits, with no restrictions on that individual's use or the money or property at issue.

These amendments, in turn, clarified that the FCA could be used to redress Medicare Part D fraud and fraud on Medicare managed care, for Government contractors administer both of these programs. Moreover, FERA eliminated the argument, once and for all, that the FCA does not reach false claims submitted to State-administered Medicaid programs, as some argued under *Allison Engine*. Additionally, FERA correctly clarified that the Act could be used to reach federal funds stolen from recipients of federal block grants. The simple fact is that such claims undermine the purpose of those grants by diverting funding away from the objectives that the federal program sought to achieve.

Notably, these clarifications merely returned the FCA back to where Congress intended in 1986. By removing from FCA Section 3729(a)(1) language that could be narrowly read to limit liability to persons who present false claims directly "to an officer or employee of the Government, or to a member of the Armed Forces," FERA finished the job Congress intended to complete in 1986, when it defined actionable "claims" in the current Act to include "any request or demand . . . 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."[21]

B. Liability for Those Who Steal Funds Administered by the United States

In 1986, Congress surely could not have predicted that the U.S. Government would enter into the role of administering the funds of another country, such as the Iraqi funds administered by U.S. officials at the Coalition Provisional Authority. However, as the U.S. Justice Department unsuccessfully argued to a court prior to the FERA, when the United States elects to invest its limited resources in administering the funds of another entity, the FCA should protect these funds from fraud.[22] Unfortunately, because the FCA did not expressly impose liability for false claims for money administered, but not owned by the United States, fraudsters were able to drain these critical funds with impunity.

[21] 31 U.S.C. § 3729(c). *See also* S. Rep. No. 345, 99th Cong., 2d Sess. 1986 (section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).

[22] *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 636-641 (E.D. Va. 2006).

However, the Justice Department regularly argued that there were a myriad of reasons why the Act should be used to cover such situations. Perhaps most importantly, when the United States elects to invest its resources in administering the funds of another, it does so only because the achievement of important foreign or domestic policy goals turns on proper management of the funds. Indeed, while the Act did not explicitly cover these funds prior to FERA, the U.S. Government pursued cases of this nature, recovering millions of dollars from oil, gas and mining companies that had underreported the royalties owed under leases on Native American land.[23]

FERA codified, once and for all, the Government's ability to protect these funds under the FCA. FERA prudently amended the FCA so that it covered fraud on U.S.-administered funds by defining "claim" to include, among other things, requests or demands for money or property that are presented to an officer, employee, or agent of the United States "whether or not the United States has title to the money or property."[24] This amendment to the existing statutory language clarified that FCA liability attached to knowingly false requests or demands upon the United States for money or property administered by the United States on behalf of another person. This amendment took on added importance given the concern about fraud on Iraqi funds paid out by the U.S. Government.

C. Liability for Those Who Convert Taxpayer Funds to Unauthorized Uses or Knowingly Retain Overpayments

Since the FCA was last amended in 1986, a gaping liability loophole was recognized by fraudsters, allowing a "finders' keepers" regime to flourish when it came to the overpayment of federal funds. Specifically, the knowing retention of overpayments was, and is, a tremendous problem in government health programs and government procurements. Moreover, as then-CBO Director Peter Orszag stressed, "[f]uture health care spending is the single most important factor determining the nation's long-term fiscal condition."[25]

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[23] *See, e.g., Kennard v. Comstock Resources, Inc.,* 363 F.3d 1039 (10th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005)*; U.S. v. Chevron,* 186 F.3d 644 (5th Cir. 1999)*; United States ex rel. Wright v. Agip Petroleum Co.,* 2006 U.S. Dist. LEXIS 93415 (E.D. Tex. Dec. 27, 2006)*; United States ex rel. Koch v. Koch Indus.*, 57 F. Supp. 2d 1122 (N.D. Okla. 1999).

[24] *See* new 31 U.S.C. § 3729(b)(2)(A).

[25] "Opportunities to Increase Efficiency in Health Care," Statement of Peter R. Orszag, Director, Congressional Budget Office, at the Health Reform Summit of the Committee on Finance, United States Senate, June 16, 2008, at 8.

A common example would be a hospital that mistakenly overbilled the federal Government for services, identified its mistake, and then decided not to disclose the mistaken billing to the Government in order to fraudulently hold on to the overpayment. Understandably, the hospital's mistake might have stemmed from a misunderstanding of the billing rules or some other error, but, in each case, FCA liability would not attach, for the original claims would not be "knowingly" false.[26] However, after the hospital discovered the mistaken payment and retained it, it has committed a criminal offense.[27] The Compliance Guidelines of the Office of Inspector General of the U.S. Department of Health & Human Services (OIG) warn that failure to return overpayments within a "reasonable period of time" following discovery may be interpreted as an intentional attempt to conceal the overpayment from the Government.[28] Paradoxically, however, because of a drafting problem with the 1986 FCA Amendments, the Government was unable to use the FCA to protect these funds. In short, because *qui tam* whistleblowers were unable to expose the scheme under the FCA, the Government had a difficult time tracking down the individual dishonest providers who were engaged in this common fraud scheme.

Equally disturbing, unless a contractor submitted something to the Government concealing its dishonesty, the FCA did not previously apply when someone wrongfully converted Government funds to an unauthorized use. An example of this scenario would be a government contractor's decision to spend an advance payment intended for hurricane relief efforts on his personal enrichment, instead. Of course, in the midst of a war effort or the wake of a major hurricane, government funds are oftentimes disbursed quickly in advance of the work being performed, and without the usual required certifications of performance under the contract. Moreover, when a contractor uses an advance payment for an improper purpose in these circumstances, there will rarely be a false claim or false statement submitted to the Government that would have triggered FCA liability. In short, these dishonest contractors were able to evade FCA liability.

FERA sought to address both of these common fraud schemes by expressly imposing liability on anyone who "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the United States." This language made clear that a person who retains an overpayment, while

[26] In many situations of this nature, there also would no false statement to trigger liability. With the exception of long term health care providers that must submit quarterly statements to the Medicare program disclosing any known overpayment ("Credit Balance Reports" submitted by Medicare Part A providers), health care providers generally are not asked to submit statements disclosing known overpayments.

[27] 42 U.S.C. § 1320a-7b(a)(3).

[28] *See, e.g.*, Hospital Compliance Guidelines, 63 FED. REG. 8987 (February 23, 1998); Supplemental Compliance Program Guidance for Hospitals, 70 FED. REG. 4858 (January 31, 2005); Compliance Program for Individual and Small Group Physician Practices, 65 FED. REG. 59,434 (October 5, 2000).

avoiding a duty to disclose or return the overpayment that arises from a statute, regulation or contract, violates the False Claims Act. Indeed, to address any potential confusion among the courts as to what was intended to be encompassed within the term "obligation" as used in the revised Section 3729(a)(7),[29] now codified as Section 3729(a)(1)(G), the amendments broadly defined that term in new Section 3729(b)(3) as encompassing legal duties that arose from the retention of any overpayment.

As outlined above, this amendment was needed to plug a gaping loophole that was draining our public fisc and undermining the long-term viability of our government health care programs. This provision alone should recover millions of additional stolen tax dollars.[30]

II. REMOVING EXTRANEOUS HURDLES & ROADBLOCKS UNDERMINING THE FCA'S LAW ENFORCEMENT CAPABILITIES

A. Vesting the Government with Veto Power Over Defendants' Efforts to Use the Public Disclosure Bar to Silence Meritorious *Qui Tam* Actions

In an attempt to decipher the application of the FCA public disclosure bar, 31 U.S.C. 3730(e)(4), a court summarized the prevailing sentiment: "The Court sympathizes with anyone litigating under the False Claims Act. Perhaps Congress will elect at some point to give legislative attention to the FCA to resolve some of the still unresolved questions about the Act's application."[31] In passing the PPACA, Congress finally listened to the courts and removed much of the confusion surrounding the much-litigated public disclosure bar.

This pre-PPACA confusion was reflected in the 200+ published and unpublished rulings in well over 100 separate cases concerning the meaning of the "public disclosure" bar. The seemingly simple act of flow charting the steps in the public disclosure bar

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[29] *See, e.g., United States ex rel. Prawer & Co. V. Verrill & Dana*, 946 F. Supp. 87 (D. Me. 1996); American Textile Manufacturers Institute, Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999).

[30] Nearly a decade ago, before the baby boomer generation even qualified for Medicare, HHS-OIG researched the instances of overpayment in the Medicare system and concluded that $23.2 billion, or 14% of total program costs, were lost each year due to fraud, waste and abuse. *HCFA's FY 1996 Medicare Audit, 997: Hearing before the Subcomm. On Health of the House Comm. On Ways and Means*, 105th Cong., 1st Sess. (1997) (statement by June Gibbs Brown, Inspector General, Dep't of Health & Human Services).

[31] *United States ex rel. Montgomery v. St. Edward Mercy Medical Center*, 2008 WL 110858 (E.D. Ark. 2008).

provision quickly produced a maze of diverging roads leading to confusion. The myriad of conflicting court decisions facilitated the ability of defendants to evade liability, greatly undermining the Government's fraud-fighting efforts.

Ironically, Congress added this so-called "public disclosure" bar in 1986 with the sole goal of protecting the Government's interests in allowing non-parasitic *qui tam* suits to survive dismissal. This provision replaced an earlier provision known as the "government knowledge bar" that deprived courts of jurisdiction over *qui tam* actions "based on evidence or information the Government had when the action was brought." Courts interpreted this provision so broadly that few *qui tam* actions survived, and the FCA fell into virtual disuse. By 1986, Congress had determined to eliminate this so-called "government knowledge bar" in light of its stated concern about cases in which "the Government knew of the information that was the basis of the *qui tam* suit, but in which the Government took no action."[32] Congress wished to "encourage more private enforcement suits" and consequently amended the statute to eliminate the government knowledge bar in 1986.[33] Congress remained concerned, however, about "parasitic" *qui tam* whistleblowers such as those who filed complaints simply by copying information from a government indictment.

The resulting public disclosure bar provision was an attempt to strike a balance between "encouraging people to come forward with information and . . . preventing parasitic lawsuits."[34] Unfortunately, however, by depriving courts of jurisdiction over cases barred under the provision, Congress unwittingly handed defendants a tool that was then used and abused to derail meritorious suits and to prevent judgments on liability.

Subsequently, virtually every *qui tam* suit was met with a motion to dismiss pursuant to the public disclosure bar. Even over the frequent objections of the *Government*, courts allowed defendants to use the public disclosure bar as a weapon to kill meritorious *qui tam* actions. The rampant use of this provision deterred countless insiders from risking their livelihoods in filing *qui tam* suits. For those who braved the *qui tam* waters, the courts' unreasonably broad interpretations of what constitutes a "public disclosure" forced many *qui tam* counsel from thoroughly investigating fraud allegations, fearful that their due diligence would trigger the public disclosure bar. For example, counsel were quite reluctant to use the Freedom of Information Act (FOIA) to corroborate their client's understanding of transactions, for some courts had barred *qui tams* based even in part on responses to a private party's FOIA request.[35]

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[32] H. R. Rep. No. 660, 99th Cong., 2d Sess. 22-23 (1986).

[33] S. Rep. No. 99-345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5288-89.

[34] *FCA Implementation, Hearing Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 3 (1990) (Statement of Sen. Grassley).

[35] *See, e.g., United States ex rel. Grynberg v. Praxair, Inc.,* 389 F.3d 1038, 1051 (10th

In 2007, the public disclosure bar confusion boiled up to the U.S. Supreme Court in a case where the Government wished to pay a whistleblower for being the original source in a successful fraud prosecution.[36] The Court, rejecting the Government's own assessment of the whistleblower's contributions, ruled that the statutory language of the public disclosure bar *prevented* the Government from awarding this particular whistleblower. In 2010, the U.S. Supreme Court, again, rejected the Government's interpretation of the public disclosure bar, further expanding the "public disclosure" definition.[37]

In passing PPACA, Congress made the following changes to the public disclosure bar and its original source exception:

> 3729(e)(4)(A) ~~No court shall have jurisdiction over~~ The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same ~~based upon the public disclosure of~~ allegations or transactions as alleged in the action or claim were publicly disclosed—
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> > (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
> >
> > (ii) in a congressional, ~~administrative, or~~ Government ~~Accounting~~ Accountability Office, or other Federal report, hearing, audit, or investigation~~,~~; or
> >
> > (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
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> 3729(e)(4)(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on allegations or transactions in a claim are based, or (2) who has knowledge that is ~~direct and~~ independent of and materially adds to the publicly disclosed allegations or transactions, ~~knowledge of the information on which the allegations are based~~

Cir. 2004), *cert. denied*, 545 U.S. 1129 (2005); *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.,* 384 F.3d 168, 175-176 (5th Cir. 2004); *United States ex rel. Mistick PBT v. Housing Auth.,* 186 F.3d 376, 383 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

[36] *Rockwell Int'l Corp. v. United States*, 127 S. Ct. 1397 (2007).

[37] *Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson*, 130 S.Ct. 1396 (U.S. Mar. 30, 2010).

> and who has voluntarily provided the information to the Government before filing an action under this section ~~which is based on the information~~.

Thus, most importantly, Congress appropriately placed ultimate control over the public disclosure bar in the hands of the Government. Specifically, by inserting the veto language "unless opposed by the Government," Congress ensured that the Government would have the final say over whether a *qui tam* action was truly parasitic. Moreover, the amendment removed much of the uncertainty plaguing the Act by explicitly limiting "public disclosure" to the news media and specific *federal* Government fora. Finally, to eliminate the argument that industry-wide allegations somehow bar actions against specific wrongdoers, Congress stressed that the allegations must be *substantially* similar to trigger the public disclosure bar.

In addition to narrowing the relevant "public disclosures" that trigger the public disclosure bar, Congress expanded the original source exception, with the hopes of only precluding those who truly regurgitate publicly disclosed allegations of fraud. Perhaps most importantly, by removing the much-litigated "direct" knowledge prong from the original source exception, Congress rejected much of the extraneous and strained court decisions that have placed undue weight on this statutory term. Instead, under the amended Act, a relator qualifies for the original source exception if her disclosure to the government predates the public disclosure or if her knowledge adds anything of substance beyond what is revealed in the public disclosure.

In the wake of these amendments, FCA defendants have lamented that the public disclosure bar is now too narrow and that the original source exception is too broad. However, the simple truth is that the Government is in the best position to determine whether a whistleblower is a "parasite" of public information. Moreover, because the Government takes on the primary role of prosecuting these suits and must pay a share to a successful whistleblower, they have a sizeable incentive to ensure that *only* non-meritorious suits proceed. The FCA defendants, on the other hand, have *every* incentive to get rid of meritorious whistleblower suits.

FCA defendants also have complained that, in effect, they will no longer be able to use the public disclosure bar to dismiss frivolous *qui tam* suits. However, this is a red herring, for the FCA public disclosure bar has *nothing* to do with the merits of a case. If cases are truly frivolous, defendants may and should rely upon the following:

- F.R.C.P. 11 (providing sanctions for unwarranted factual contentions and legal theories)
- F.R.C.P. 12(b)(6) (dismisses a complaint that "fails to state a claim upon which relief may be granted")
- F.R.C.P. 56(b) (permits defendant to move "at any time" for judgment on the facts set forth in the pleadings)
- F.R.C.P. 54(d) (awards costs to prevailing defendants)
- 31 U.S.C. 3730(d)(4) (awards attorneys' fees and expenses to defendants that prevail in *qui tam* actions that are "clearly frivolous, clearly vexatious, or brought primarily for purposes of

harassment")

In short, the amendments correctly vested the Government with ultimate power over the public disclosure bar, while still preserving the defendant's existing options for dismissing truly frivolous *qui tam* suits.

B. Empowering the Government With A Practical Subpoena Tool That Clearly Defines Appropriate Use of Subpoenaed Material

Perhaps most importantly for the day-to-day capabilities of the Justice Department, FERA amended the FCA to permit the Attorney General to delegate the issuance of Civil Investigative Demands (CIDs), a form of administrative subpoena that may be used to obtain documents, testimony and interrogatory responses. In 1986, when Congress added the CID to the Act, the Senate Judiciary Committee viewed this as an authority "supplementing the investigative powers of the IGs [Inspectors General]."[38] Unfortunately, the statutory language did not make the CID power delegable. Thus, when an Attorney General was occupied with matters that he or she considered more important than FCA investigations, the line attorneys at the Department of Justice and in the Offices of U.S. Attorney were unable to utilize CIDs to investigate their cases.

To compound matters, the CID provision did not spell out permissible "official uses" of materials obtained under the CID. This uncertainly over appropriate use of materials caused most Department of Justice trial attorneys and Assistant U.S. Attorneys to shy away from utilizing the CID authority in the first place.

FERA addressed these debilitating concerns by permitting the Attorney General to delegate the authority to issue CIDs, and by clearly defining the term "official use" to include "any use that is consistent with the law, and the regulations and policies of the Department of Justice." This new definition of "official use" also included specific examples of the types of uses that fall within the term "official use." Notably, these examples were not meant to be an exhaustive list, but rather illustrative of the ordinary, lawful uses of subpoenaed material in a Department of Justice investigation or litigation that Congress intended the Justice Department to employ in FCA cases. FERA also removed confusing language that had been misinterpreted by the courts to prevent the custodian of CID material from sharing the material with other Justice Department or program agency personnel for official uses in the absence of authority from regulations or a court.

Earlier this year, the Justice Department decided to delegate CID issuance authority for delegated and monitored FCA cases to the individual U.S. Attorneys' Offices. Typically, because these cases only allege a few million dollars in damages, they do not receive the same level of monetary and investigative support as the larger cases

[38] S. Rep. No. 99-345, 99th Cong., 2d Sess. 33, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266, 5298 (1986).

handled by Main Justice. With powerful CID subpoenas in their arsenal, US Attorneys will be able to leverage additional information from wrongdoers. In short, finally arming the Main Justice Department and the US Attorneys with usable CID powers should permit them to effectively investigate FCA cases on their own means, thereby allowing them to investigate many more cases and recover millions of additional dollars each year.

C. Updating Service Requirements to Reflect Realities of Multi-Jurisdictional *Qui Tam* Suits

FERA also recognized that *qui tam* plaintiffs were increasingly filing FCA actions on behalf of not only the federal Government, but also one or more States joined as co-plaintiffs pursuant to state False Claims Act statutes. Such cases ordinarily allege false claims submitted to Medicaid, which is a program funded jointly by the United States and the states.[39] The FCA had already provided that state law claims could be asserted in a case filed under the federal FCA if the claims arose from the same transaction or occurrence. However, the FCA was unclear as to whether the federal FCA seal precluded the *qui tam* plaintiff from complying with state requirements to serve the complaint, or restricted the *qui tam* plaintiff and the federal Government in their ability to serve other pleadings on the States.

FERA explicitly clarified that the seal did *not* preclude service or disclosure of such materials to the State officials authorized to investigate and prosecute the allegations that the *qui tam* plaintiff raises on behalf of the State. It also clarified that State officials and employees must respect the seal imposed on the case to the same extent as other parties to the proceeding must respect the seal.

D. Clarifying That the Government's Complaint-In-Intervention Relates Back to *Qui Tam* Complaint's Original Filing Date

Prior to the enactment of FERA, the FCA did not expressly provide that the Government could amend the *qui tam* plaintiff's complaint or that it could file its own complaint upon intervention in a *qui tam* case. This lack of clarity raised a question of whether the Government could avail itself of the Federal Rules of Civil Procedure "relation back doctrine." The Second Circuit ruled that the United States could not avail itself of this rule when amending a *qui tam* plaintiff's complaint.[40] The implication of that ruling was that the United States would have been regularly forced to forego a thorough investigation of the merits of *qui tam* allegations in order to ensure that it did not lose claims due to the running of the statute of limitations.

[39] These cases have been increasing in number as many States have enacted *qui tam* statutes, especially after Congress offered the States a substantial monetary incentive under the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

[40] *United States v. Baylor Univ. Medical Center*, 469 F.3d 263 (2d Cir. 2006).

FERA solved this conundrum by clarifying that the Government's complaint-in-intervention or amended complaint relates back to the date of the original *qui tam* complaint so long as the conditions of Federal Rule of Civil Procedure are otherwise met. Specifically, FERA added a new paragraph (c) to Section 3731 that expressly provided that the United States' complaint-in-intervention or amended complaint relates back to the date of the complaint filed by the *qui tam* plaintiff "to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person."

III. PROBLEMS STILL UNDERMINING THE FCA

Many of the FCA Amendments recently etched into the law first appeared in a more comprehensive bill, the False Claims Act Corrections Act of 2009. To understand the need for the remaining clarifications offered under this legislation, one must first understand the important and necessary role *qui tam* whistleblowers and their counsel play in uncovering fraud against the U.S. Government.

Over the years, as the complexity of fraud has become increasingly buried behind innocuous transactions, there has emerged a heightened need for the inside fraud evidence *qui tam* whistleblowers bring to fraud investigations. Equally important, as the limited resources of the federal Government have been stretched thin, especially in the wake of the September 11th attacks, the Government has relied, more and more, on the supplementary resources and capabilities of *qui tam* counsel. Indeed, *qui tam* whistleblowers and their counsel have been the driving force behind nearly 70% of the FCA dollars recovered in recent years and were the ones to originally file nearly all of the top FCA settlements of all time. In fact, several FCA settlements were achieved after *qui tam* whistleblowers and their counsel devoted years either trying to persuade the Government of the merits of the case before achieving an intervention decision, or litigating the case following a Government declination.

Perhaps the best example of the benefits *qui tam* assistance brings to FCA enforcement was seen in a 2006 settlement involving Northrop Grumman. Here, the United States negotiated a $134 million FCA settlement that simply never would have been achieved without the dedication, hard work and perseverance of two *qui tam* whistleblowers and their counsel.[41] This settlement resolved allegations that were originally brought to light in 1989, that the defense contractor was overcharging the Government for radar jamming devices installed on Air Force airplanes. When the Government declined to intervene, the *qui tam* whistleblowers and their counsel continued working the case on their own for the next *nine years*, undertaking extensive document and deposition discovery, and risking their personal resources on the case. Finally, in 2002, they were able to convince the Government to take a second look and to

[41] *United States ex rel. Holzrichter v. Northrop Grumman*, Civil Action No. 89C 6111 (N.D. Ill. 2006).

intervene in the suit.

The good news for the public fisc is that this settlement is not an outlier. Time and time again, *qui tam* whistleblowers and their counsel have recovered the country's stolen tax dollars.[42] FCA defendants, however, argue that *qui tam* suits recover few dollars for the public fisc, especially after the Government declines to intervene. To support their argument, they point to Justice Department statistics that show a relatively low number of settlement dollars under the "non-intervened *qui tam* suits" category. However, while settlements like the above *Northrop Grumman* case are tallied in the "intervened *qui tam* suits" category, it is dishonest to argue that *qui tam* whistleblowers and their counsel brought little to the table in the nine years that they solely carried the case during the post-declination period.

However, for every successful FCA settlement, there are perhaps a dozen meritorious *qui tam suits* that have been derailed by atextual procedural hurdles found nowhere in the FCA or in the underlying legislative history. FCA defendants counter that the current FCA is working "well enough" and that the $27 billion recovered under the Act since the 1986 FCA Amendments is somehow sufficient. They paint our country's courageous whistleblowers as "parasites" whose cases should be silenced, not because of the merits of their suits, but because existing judicial rewrites to the Act. Their similar tactics in courts have silenced countless *meritorious* whistleblower suits, undermining FCA enforcement to the determent of the U.S. Department of Justice and the public fisc. The truth is that over the last quarter century of FCA enforcement, FCA defendants have been successful in highlighting some of the statutory deficiencies and procedural inefficiencies in the law. As outlined above, Congress recently decided to correct some of these deficiencies. However, when it comes to fighting fraud, particularly in the current economic crisis, it is not a matter of settling for "well enough."

In turn, the remaining proposed amendments offered in the FCA Corrections Act have received broad bipartisan support. They reject judge-created, extraneous procedural hurdles that have wrongfully derailed meritorious suits, and they fully restore the law enforcement capabilities of the FCA. The remainder of the bill clarifies that *qui tam* whistleblowers with *detailed* knowledge of fraudulent schemes may bring cases even

[42] Another good example is the settlements of *United States ex rel. Alderson v. HCA-The Healthcare Company* and *United States ex rel. Schilling v. HCA-The Healthcare Company*. Although the Justice Department originally intervened in all aspects of both cases in 1998, when it came time to litigate the consolidated cases following a lengthy stay of the proceedings, the Government declined to pursue a number of the allegations, instead restricting its efforts to the strongest claims. The *qui tam* whistleblowers and their counsel pursued the rest of the claims on their own, recovering about $100 million for the Government through their independent efforts. In addition, at the request of the Justice Department, they assumed almost all of the affirmative discovery work on the intervened parts of the case, with the Government's lawyers focusing on defending depositions of government witnesses and producing government documents. In 2003, the two cases settled for more than $600 million in cash and credits.

when they lack access to the FCA defendants' underlying billing documentation. Moreover, it replaces the current patchwork of statute of limitations period with a uniform, straightforward statute of limitations period.

A. Encouraging *Qui Tam* Suits That Specifically Detail Fraudulent Schemes, Regardless of Whether the Allegations Include Innocuous Billing Documentation

Congress needs to inject predictability into the FCA practice by explicitly clarifying *how* Federal Rule of Civil Procedure Rule 9(b) applies to FCA *qui tam* suits. Currently, courts are in disarray on the proper application of Rule 9(b). Different standards apply in different federal circuits--and *even in the same courthouse and same type of case*[43]--with some requiring claims evidence at the pleading stage[44] and others not requiring such evidence.[45] This confusion is compounded by the fact that no other

[43] *Contrast Hopper* v. *Solvay Pharms., Inc.*, 588 F.3d 1318, 1326 (11th Cir. 2009) (holding that a relator must plead a specific false claim to avoid dismissal of his complaint), petition for cert. pending, No. 09-1065 (filed Mar. 4, 2010), with *United States ex rel. Walker* v. *R&F Props. of Lake County, Inc.*, 433 F.3d 1349, 1360 (11th Cir. 2005)(permitting a relator to allege detailed information about a fraudulent scheme supporting an inference that the defendant submitted false claims), cert. denied, 549 U.S. 1027 (2006), and *United States ex rel. Clausen* v. *Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (stating that a *qui tam* complaint must contain "some indicia of reliability . . . to support the allegation of an actual false claim for payment") (emphasis omitted), cert. denied, 537 U.S. 1105 (2003). *Cf. United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 501 F.3d 493, 504n.12 (6th Cir. 2007) (declining to address whether a complaint must be dismissed "where a relator demonstrates that he cannot allege the specifics of actual false claims that in all likelihood exist, and the reason that the relator cannot produce such allegations is not attributable to the conduct of the relator").

[44] *See United States ex rel. Bledsoe* v. *Community Health Sys., Inc.*, 501 F.3d 493, 504 (6th Cir. 2007) ("We hold that pleading an actual false claim with particularity is an indispensable element of a complaint that alleges a FCA violation in compliance with Rule 9(b)."); *see also United States ex rel. Sikkenga* v. *Regence BlueCross BlueShield*, 472 F.3d 702, 727-728 (10th Cir. 2006) (affirming dismissal of cause of action that failed "to identify any specific [false] claim"); *United States ex rel. Atkins* v. *McInteer*, 470 F.3d 1350, 1358-1360 (11th Cir. 2006) (same); *United States ex rel. Joshi* v. *St. Luke's Hosp., Inc.*, 441 F.3d 552, 560 (8th Cir.) (requiring the relator to plead "some representative examples" of false claims), cert. denied, 549 U.S. 881 (2006).

[45] *See, e.g.*, *United States ex rel. Lusby* v. *Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (Easterbrook, C.J.) ("[It is not] essential "essential for a relator to produce the invoices (and accompanying representations) at the outset of the suit."); *United States ex rel. Grubbs* v. *Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

category of cases has demanded pleading of specific pieces of evidence at the *pleading* stage of litigation.

That uncertainty and confusion greatly hinders *qui tam* relators ability to assist the Government. The simple fact is that the Government needs whistleblowers to provide inside information about fraudulent schemes; the Government already has easy access to the underlying invoice documentation. This is precisely why the Justice Department has consistently argued that requiring *qui tam* whistleblowers to plead specific false claims is a "formalistic and rigid interpretation of Rule 9(b) which distorts the purpose of the Rule."[46] The Government contends that it "hamstring[s] the parties in counter-productive pleading and motion practice that [ ] unduly delay[s] examination of False Claims Act cases on the merits."[47]

Moreover, requiring relators to identify specific false claims would not meaningfully assist the Government's enforcement efforts. To the contrary, the likely effect of such a requirement would be to discourage the filing of *qui tam* suits by relators who would otherwise have both the means and the incentive to expose acts of fraud against the United States. Whistleblowers typically know the details of the fraudulent scheme, not the innocuous information on an invoice. However, by requiring a *qui tam* whistleblower to produce an invoice, or some other sheet of paper, at the pleading stage, courts have prevented fraudulent schemes from seeing the light of day. Moreover, some laws prevent or discourage compiling claims data. For example, national and state patient privacy laws may discourage a physician-insider from disclosing this information, even if he knows everything about the underlying fraud scheme.

Time and time again, *qui tam* whistleblowers have alleged significant details of the fraudulent schemes, only to have courts dismiss the suits on the basis that the whistleblowers lacked access to the billing documentation, and consequently could not allege details of the invoices sent to the Government, such as which billing department employee submitted the false claims, on which date, and with regard to the care of which patient. In fact, the Eighth and Eleventh Circuits both recently dismissed cases under Rule 9(b) simply because the whistleblowers "did not work in the billing department."[48]

The Eighth Circuit *Joshi* decision is a perfect example of the real-world absurdity of this Rule 9(b) misapplication. Here, the court acknowledged that it "fully recognize[d] Dr. Joshi alleges a systemic practice of St. Luke's and Dr. Bashiti submitting and conspiring to submit false claims over a sixteen year period."[49] In particular, in the

[46] *Statement of Interest of the United States, United States ex rel Hopper v. Solvay Pharmaceuticals*, Civil No. 8:04-CV-2356 (M.D. Fla. 2007).

[47] *Id.*

[48] *See, e.g., United States ex rel. Joshi v. St. Luke's Hospital*, 441 F.3d at 557; *Corsello*, 428 F.3d at 1013-14.

[49] *Joshi* at 557.

court's own words:

> Dr. Joshi, an anesthesiologist who practiced from 1989 to 1996 at St. Luke's, brought a *qui tam* action under the FCA against St. Luke's and Dr. Bashiti, alleging violations [of the FCA] . . . In Count I, Dr. Joshi alleges St. Luke's requested and received Medicare reimbursement from the government for anesthesia services performed by Dr. Bashiti at the reimbursement rate for medical direction of anesthesia services, when St. Luke's was entitled only to the lower reimbursement rate for medical supervision or no reimbursement at all. Dr. Joshi alleged Dr. Bashiti failed both to perform pre-anesthetic evaluations and prescribe anesthesia plans, and Dr. Bashiti falsely certified he supervised or directed the work of several certified registered nurse anesthetists (CRNAs).[50]

In short, Dr. Joshi provided more than enough details of the scheme for the defendants to know exactly the nature of the fraud at issue. As an anesthesiologist, Dr. Joshi witnessed Dr. Bashiti's failure to perform the work and the supervision required to bill Medicare for specified services, and he alleged the specifics of what he had observed. Then, Dr. Joshi detailed how the services were being billed, and the fact that Medicare was being billed. Nonetheless, the Eighth Circuit affirmed the lower court's ruling that Dr. Joshi's failure to identify specific billing documentation was fatal to his complaint, noting: "Dr. Joshi was an anesthesiologist at St. Luke's, not a member of the billing department."[51]

Regrettably, court decisions such as *Joshi* drastically undermine the Government's ability to uncover false claims targeting the U.S. tax dollar. This is especially true when the fraud takes places behind corporate walls, where organizational knowledge is regularly compartmentalized: the billing department employees rarely know the details of what is happening on the operational side, and the reverse is true as well. For example, in a hospital overbilling case, it would be highly unusual for billing department employees to be in a position to discern that a given doctor was misrepresenting the nature of the services delivered to any particular patient. On the flip side, the doctors practicing alongside another doctor will see what medical work he is performing, and may overhear how the work is being billed, but will not have access to the actual billing documentation itself.

While these court decisions may not pose a problem for the rare whistleblower-billing department employee, they pose a serious threat to the vast majority of potential whistleblowers who witness the fraud but do not work in the billing department. The reality is that the employees with the necessary inside information and knowledge of the underlying fraudulent schemes do not have ready access to the actual claims or invoices

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[50] *Joshi* at 554.

[51] *Joshi* at 557.

submitted to the Government. However, the information that would be supplied by these employees is *precisely* the evidence needed to unravel complex fraud schemes.

Moreover, as some courts have correctly recognized, the chief objective of Rule 9(b) -- putting the defendant sufficiently on notice of the allegations so that it can mount a defense--is easily met by a complaint that details other aspects of the fraudulent scheme, such as the category of claims alleged to be false, the perpetrators, time and location of the scheme, and the factual predicate for the whistleblower's belief that the claims are false.

Congress should reject such excessively rigid evidentiary standards by explicitly making Rule 9(b) apply to *qui tam* whistleblowers the *same* as it applies to any other litigant in a case where the Rule applies. Explicitly adopting the reading of the Rule 9(b) championed by the Justice Department, Congress should add a new subsection to the FCA that would provide that "[i]n pleading an action brought under section 3730(b), a person shall not be required to identify specific false claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."

This proposed amendment would correctly highlight the inside information the Government actually needs for a successful fraud prosecution. Notably, the amendment would expressly require *qui tam* whistleblowers to either "identify ***specific*** claims that result from an alleged course of misconduct" or "provide adequate notice of the ***specific*** nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made." In turn, the Government would be greatly assisted by detailed *qui tam* suits without concerns that meritorious fraud allegations will be silenced under an erroneous pleading standard, and the defendants would have more than enough information to mount a defense.

B. Setting Uniform Statute of Limitations Period

Congress should also remove the confusion over the statute of limitations period by adopting a straightforward ten-year period. Under the current law, the statute of limitations period is *currently* up to ten years for cases where the defendants have concealed the fraud. The truth is that because of the subversive nature of fraudulent schemes, the vast majority of *current* FCA cases qualify for the 10-year period. However, because some courts have adopted differing standards, it behooves Congress to adopt one uniform 10-year standard for all cases.

FCA defendants complain that such a change would greatly expand the limitations period from six years to ten years. However, the statute of limitations on FCA claims currently runs *on the later* of six years from the date of violation, or three years

from the date that the United States learned of the violation, *not to exceed ten years*. The proposed amendment is necessary only because this language has proven confusing for the courts and the parties. Courts across the country now read the confusingly-worded limitations period in a myriad of ways, only adding to the confusion of all parties.[52]

The proposed amendment is especially needed to permit the U.S. Government to pursue fraud by contractors providing goods and services in Iraq. Some courts have effectively required the FCA plaintiff--whether the Government or a *qui tam* whistleblower--to file suit within six years of the date when the defendant violated the FCA. Six years is far too short a time to uncover many of the fraudulent schemes aimed at Government programs. In fact, Congress has provided the Government with a ten-year statute of limitations for recovery of debts owed to the United States.[53] Surely when fraud is involved, the Government needs at least as long a period of time to uncover the matter as it would need to look into an ordinary debt.

Moreover, a ten-year statute of limitations is even more important when the Government must surmount the special challenges of locating and acquiring evidence in a war-torn country. These special challenges include working with foreign law enforcement personnel, arranging for special security in high threat zones, and finding witnesses willing to risk their lives to cooperate with the Government's investigation. The United States is entering its eighth year in Iraq. Under some of the incorrect readings of the FCA statute of limitations, the United States has already lost the ability to pursue many claims for Iraq war fraud that took place in the initial year of the Iraq war and reconstruction effort. This proposed amendment is critical to preserve the ability of the

[52] The FCA currently requires an FCA complaint to be filed by *the later of*: (i) six years from the date of the violation, or (ii) three years from the date "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," not to exceed ten years from the date of the violation. 31 U.S.C. § 3731(b). The chief source of confusion has been the three year tolling provision in 31 U.S.C. § 3731(b)(2). The courts have been unclear how to apply this provision when a relator files a case, or proceeds with a case declined by the United States. Some courts have held that the relator does not get the benefit of the tolling provision at all. *See, e.g., United States ex rel. Sikkenga v. Regence Blue Cross Blue Shield of Utah*, 472 F.3d 702, 724-25 (10th Cir. 2006); *Neal v. Honeywell*, 33 F.3d 860, 865-66 (7th Cir. 1994); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 171 (D.D.C. 1998). Other courts have held that the relator may file within three years of when he or she first knew or reasonably should have known the facts material to the rights of action. *See, e.g., United States ex rel. Hyatt v. Northrop Corp*., 91 F.3d 1211, 1218 (9th Cir. 1996); *United States ex rel. Lowman v. Hilton Head Health Sys*., L.P., 487 F. Supp. 2d 682, 697 (D.S.C. 2007). Yet other courts have ruled that the relator may file within three years of when the Government knew or reasonably should have known about the violation. *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.,* 474 F. Supp. 2d 75, 88-89 (D.D.C. 2007).

[53] *See* 31 U.S.C. § 3716(e).

Justice Department to effectively pursue and obtain recoveries for such fraudulent activities. In short, the proposed amendment would not only remove the confusion plaguing the FCA practice, but it would ensure that the Government is able to fully prosecute fraud targeting our war efforts in Iraq and Afghanistan.

These proposed amendments would fully restore the False Claims Act, bringing it back to the future and back in line with Congress's original intent for the Government's primary fraud-fighting weapon.