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The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?

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> [N]othing is needed more than truth, and in relation to it everything else has only second-rate value.[1]

I. INTRODUCTION

The qui tam provisions of the False Claims Act ("FCA" or "the Act") allow private citizens to prosecute fraud on the government's behalf.[2] There are at least three primary justifications for such provisions: (1) the need to provide private incentives to expose fraudulent conduct, (2) the Justice Department's unwillingness to aggressively prosecute fraud, and (3) the limited enforcement resources available to the federal government.[3] The FCA contains a jurisdictional bar that provides that no court shall have jurisdiction over a qui tam FCA action if the information on which the action is based has been publicly disclosed.[4] Ostensibly, this jurisdictional bar is in place to prohibit freeloaders from bringing parasitic actions while contributing nothing to the actual disclosure of fraud.[5] The central problem this Note seeks to address is whether a disclosure pursuant to the Freedom of Information Act constitutes a "public disclosure" within the meaning of the FCA. Hence, this Note asks whether FCA actions based on information in Freedom of Information Act ("FOIA") disclosures will be jurisdictionally barred. The prevailing view is that a disclosure made pursuant to the Freedom of Information Act qualifies as a "public disclosure" within the meaning of the FCA, thus triggering the jurisdictional bar. This Note will demonstrate why the prevailing interpretation is problematic, and why the future of qui tam litigation under the FCA may be in jeopardy. While five courts of appeals have considered this problem, to date no commentator has addressed the issue.

An example of the minority view demonstrates how the FCA and the Freedom of Information Act can synergize and lead to greater prosecution of fraud and a greater net recovery for the United States Treasury. In 1980, a contractor who sold soybean oil to the government requested, through the Freedom of Information Act, cost

1. FRIEDRICH NIETZSCHE, THE GAY SCIENCE 344 (Kaufmann ed., 1887).

2. *See* 31 U.S.C. § 3729(a) (2000).

3. *See* William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1821-25 (1996).

4. *See infra* notes 142-46 and accompanying text.

5. *See infra* note 51 and accompanying text.

and pricing data submitted by a competing contractor.[6] From the pricing information disclosed through the Act, he was able to prove that the competing contractor had defrauded the government by selling soybean oil at inflated prices.[7] In addition, the competing contractor had submitted false data to the government in order to support the inflated prices.[8] The end result was that the fraud exposure caused the competing contractor to be dropped from the government program, although there is no evidence that the fraud was ever formally prosecuted.[9] This case shows the usefulness of the FCA in prosecuting fraud and recovering funds for the United States Treasury. The future of the potential synergy of the FCA and the FOIA, however, is unclear.

This Note will rely heavily on the history of the FCA in proposing a solution. Part I provides a starting point for understanding the complex issues involved by focusing on the early history of the qui tam action. Part II traces the development of the FCA from the Civil War era to its most recent amendment. Part III explores the relevant structure of the FCA by outlining its commonly invoked provisions. Part IV discusses the law and policy behind the so-called public disclosure bar. Part V provides a brief introduction to the Freedom of Information Act and sets out this Note's principle concern. Part VI provides an analysis of the potential synergy of the FCA and the Freedom of Information Act and proposes a solution to the central problem based on interpretation of the relevant statutes.

II. HISTORY OF THE QUI TAM ACTION

Private citizens have enjoyed a long history of public law enforcement and regulation both in the United States and in the rest of the world.[10] Precedent for legal provisions allowing the private citizen to enforce public laws dates from ancient Roman and Anglo-Saxon times.[11] The phrase "qui tam" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which is translated as

6. EVAN HENDRICKS, FORMER SECRETS: GOVERNMENT RECORDS MADE PUBLIC THROUGH THE FREEDOM OF INFORMATION ACT 91 (1982) (discussing the many examples of fraud exposed through the Freedom of Information Act).

7. *Id.*

8. *Id.*

9. *Id.*; *see infra* notes 65-67 and accompanying text.

10. *See* James Fisher et al., *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, 19 DICK. J. INT'L L. 117, 120 (2000).

11. *See* O.F. ROBINSON, THE CRIMINAL LAW OF ANCIENT ROME 100 (1995); J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 566 (2000).

"who pursues this action on our Lord the King's behalf as well as his own."[12] The modern qui tam plaintiff is often referred to as a "relator."[13] Perhaps the most extensive and comprehensive history of qui tam law enforcement comes from England.[14]

An example of an early qui tam enforcement provision can be found in Anglo-Saxon English law. Wihtred, the King of Kent, issued a decree prohibiting labor on the Sabbath in A.D. 695.[15] Wihtred's decree contained a qui tam enforcement provision: "If a freeman works during the forbidden time between sunset on Saturday evening and sunset on Sunday evening, he shall forfeit his healsfang, and the man who informs against him shall have half the fine, and the profits arising from the labour."[16]

Centuries after the widespread implementation of qui tam legislation in England, Sir William Blackstone identified several characteristics of a qui tam statute.[17] Blackstone's *Commentaries* shed valuable light on the history and purpose of qui tam litigation. Under early English penal statutes, a claim could be brought by "any of the king's subjects" who would pursue the action.[18] Moreover, the person bringing the action could sue even where he had suffered no injury by the defendant's conduct.[19] Blackstone called such actions "popular actions" brought by "common informers," because they are given to the

12. Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000) (citation omitted); *see also* Bass Anglers Sportsman's Soc'y of Am. v. U.S. Plywood-Champion Papers, Inc., 324 F. Supp. 302, 305 (S.D. Tex. 1971).

13. *See, e.g.*, United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 746 (9th Cir. 1993). Alternatively, qui tam plaintiffs also may be referred to as "informers," *see id.*, or sometimes as "whistleblowers," *see* Fisher, *supra* note 10, at 120-21. Ancient Roman criminal law referred to private citizen informants as "delatores." *See* Beck, *supra* note 11, at 566. The term "relator" literally means "narrator." *See* Frederick M. Morgan, Jr. & Julie Webster Popham, *The Last Privateers Encounter Sloppy Seas: Inconsistent Original Source Jurisprudence Under the Federal False Claims Act*, 24 OHIO N.U. L. REV. 163, 164 n.10 (1998).

14. *See, e.g.,* Beck, *supra* note 11, at 565-66; Fisher, *supra* note 10, at 120; Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 458-59 (1998). Note, however, that England's Parliament has since eliminated qui tam legislation via the Common Informers Act of 1951. *See* Beck, *supra* note 11, at 605.

15. Beck, *supra* note 11, at 567.

16. THE LAWS OF THE EARLIEST ENGLISH KINGS 3, 27 (F.L. Attenborough ed. & trans., 1963).

17. Beck, *supra* note 11, at 552-53 (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *161-62). Blackstone primarily noted that qui tam actions exist when the following criteria are present: (1) a statutory offense, (2) a penalty or forfeiture, (3) an enforcement action pursued by a private party, (4) a lack of the necessity of a private injury, (5) a private benefit extracted from the defendant, and (6) a binding effect on the government. *Id.*

18. *Id.* at 551 (quoting WILLIAM BLACKSTONE, COMMENTARIES *161).

19. *Id.*

public at large.[20] Blackstone's *Commentaries* emphasize two important purposes of qui tam litigation—the "common informer" simultaneously advances the public interest and forecloses any subsequent prosecution involving the same claim.[21]

Though the qui tam action is unique in its structure and policy, public participation in law enforcement is neither new nor limited to qui tam actions. For example, in England, a proclamation by King Henry I established that "each man is to be judged by his peers of the same neighborhood," thereby bringing the judicial process to a local level.[22] Indeed, the advent of the jury itself may have stemmed from an overriding goal of utilizing "local participation and social pressure" in law enforcement.[23] Similarly, where the law has suffered from a perceived weakness, or where it is nonexistent, individuals have taken the law into their own hands via vigilante movements.[24] The utilization of the qui tam action, therefore, was possibly precipitated by a perceived need or desire to involve the citizenry in public law enforcement.

III. THE HISTORY OF THE MODERN FALSE CLAIMS ACT

A. The Original FCA: Lincoln's Law

In 1863, Congress enacted the original False Claims Act (FCA) at the request of President Abraham Lincoln.[25] The primary purpose

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20. *Id.*

21. *Id.* "Thus the qui tam informer stands in the shoes of a government attorney" who is self-appointed and "statutorily empowered to enforce the social contract in place of public officials." *Id.* Interestingly, Blackstone approaches the qui tam action from a contract perspective rather than a legislative one. He argues that a fundamental social contract implies the obligation to obey penal statutes and to pay the penalty incurred to any persons whom the law mandates. *Id.* at 550.

22. *See* Fisher, *supra* note 10, at 120-21.

23. *See id.* at 120.

24. *Id.* From about 1840 to the 1900s, the American West was the site of many such vigilante movements where " 'the law' was what the dominant culture said it was, and the real question seemed to be: '[W]hat is the dominant culture?' " *Id.* at 121.

25. *See* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door*, 27 PUB. CONT. L.J. 669, 672-73 (1998). The original False Claims Act was commonly known as the "Lincoln Law." *Id.* Note, however that the history of qui tam actions in America dates back to the early colonies which employed qui tam statutes "in a wide variety of cases." Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 342 n.2 (1989). The First Congress also employed qui tam statutory provisions in numerous forms for violations such as "harboring runaway mariners" or "avoidance of liquor import duties." *See id.* at 342 n.3. Other qui tam statutes enacted over one hundred years ago still remain on the books—for example, 25 U.S.C. § 81 (2000) (providing a private cause of action against one who unlawfully contracts with Indians) and 35 U.S.C. § 292(b) (2000) (providing a private cause of action against one who falsely marks

of the original FCA was to combat fraud against the Union Army during the height of the Civil War.[26] As the Civil War progressed, President Lincoln realized that the Treasury was being depleted by the war effort.[27] Much of the Treasury's budget was being paid to fraudulent claimants seeking payment for rancid beef,[28] horses and mules which had already been sold, and crates of sawdust supposedly containing muskets.[29] Perhaps most importantly, the FCA contained a qui tam provision which allowed any person to file a suit on behalf of the United States and which entitled both the government and the qui tam relator to share in the recovery of money paid on fraudulent claims.[30] Under the original FCA, violators were liable for double damages and a $2,000 forfeiture with the relator collecting fifty percent of the total governmental recovery—a hefty incentive to expose fraud.[31] Thus the original FCA provided a "tripartite framework of values that underlie qui tam suits: (1) the use of citizens to discover and expose fraud; (2) activation and advancement of cases to prosecution; and (3) the addition of the relator's resources to the fraud action."[32] The key provisions of the FCA have been amended twice since its original enactment, and both amendments have had dramatic substantive effects on prosecuting fraud against the government.[33]

B. The 1943 FCA Amendments

The FCA essentially lay dormant between the Civil War and the New Deal, most likely due to the lack of significant government

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patented articles). Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000).

26. *See, e.g.*, Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 24 (1998); *see also* United States v. Bornstein, 423 U.S. 303, 309 (1976).

27 *See* Anthony L. DeWitt, *Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act*, 65 UMKC L. REV. 30, 31 (1996).

28. *See id.*

29. *See* Fisher, *supra* note 10, at 138.

30. *See* Thompson, *supra* note 25, at 673.

31. *See id.*

32. *Id.*

33. The FCA is by no means the only vehicle that Congress has enacted to prevent fraud on the government. *See* 18 U.S.C. § 1001 (2000) (stating that the "False Statements Act" prohibits the making of false statements to the government by imposing criminal penalties); 18 U.S.C. § 287 (1994) (noting that the "Criminal False Claims Act" prohibits the making of false claims to the government and carries a five-year jail sentence); 10 U.S.C. § 2304 (2000) (stating that the "Truth in Negotiations Act" prohibits the submission of false statements in the form of inaccurate cost or pricing data).

spending.[34] Federal spending dramatically increased, however, during the New Deal and especially in preparation for World War II.[35] In 1943 the Supreme Court decided an FCA action involving a relator who apparently filed his complaint based solely on the government's previously filed criminal indictment.[36] Based on the plain language of the 1863 statute, the Supreme Court upheld the relator's action and recovery despite the fact that the government objected.[37] It seems doubtful, however, that Congress ever intended the FCA to cover such parasitic actions. The relator's action was based on publicly disclosed government information, and the government argued that this negated the principal objective of the FCA, which was to provide incentives for persons to *discover* and bring forth allegations of fraud against the government.[38]

In the wake of *United States ex rel. Marcus v. Hess*, Attorney General Francis Biddle officially delivered his complaint to Congress, urging them to "put a stop to this unseemly and undignified scramble" to file parasitic FCA actions based on government criminal indictments.[39] The Attorney General sought to have Congress either repeal the FCA altogether or amend it to provide the government with the first chance to litigate the action.[40] After vigorous debate, the House passed an amendment in 1943 containing a jurisdictional bar which mandated that "[a] court shall have no jurisdiction to proceed with any suit . . . based upon evidence or information in the possession of the United States."[41] Additionally, the 1943 amendments empowered the Department of Justice with the discretion to intervene and take over an FCA action and reduced the relator's share of recovery to a maximum of twenty-five percent.[42] By 1943 it had also

34. *See* Thompson, *supra* note 25, at 673.

35. *See id.*

36. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545-48 (1943).

37. *Id.*

38. *See* Thompson, *supra* note 25, at 674. This interpretation also created a problem: Potential relators would scramble to the courthouse searching for government indictments in order to bring their own qui tam bounty action, when the government was obviously aware of any fraud that such a person would uncover. *Id.* The problem was exacerbated by the fact that the 1863 statute did not provide for government intervention in qui tam enforcement actions. The relator could thus pursue the action unfettered by outside intervention. *Id* at 673 n.25.

39. *See* 89 CONG. REC. 7569, 7571 (1943).

40. *Id.*

41. *See* Thompson, *supra* note 25, at 676 (quoting 89 CONG. REC. 7569, 10,849 (1943)).

42. *See* Raspanti & Laigaie, *supra* note 26, at 25-26 (citing Act of Dec. 23, 1943, ch. 377, at § 3491(c)).

become clear that the FCA was a disfavored action, and some courts even went so far as to narrow the Act judicially.[43]

C. The 1986 FCA Amendments

The modern FCA action lay virtually dormant throughout the last half of the century primarily due to the strict 1943 amendments and adverse court decisions regarding the FCA's vitality.[44] Then, in 1986 Congress once again breathed life into the FCA with a series of key amendments.[45] In the mid-1980s, as the defense budget was rising under President Reagan's broad defense strategy,[46] the public was outraged by several high-profile media exposés which highlighted excessive fraud (e.g., government payments of $600 for toilet seats, $400 for hammers, and $7,622 for coffeemakers).[47]

The impetus for reform became even more obvious in 1984 when a would-be qui tam plaintiff's FCA action was dismissed for lack of jurisdiction, because the government possessed the information revealing fraud, but only by virtue of the plaintiff's complaint.[48] Such FCA jurisprudence effectively removed any incentive for private citizens to bring FCA qui tam actions. With the jurisdictional bar raised to such heights, private citizens were all but precluded from

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43. *See id.* One court, for example, required the qui tam plaintiff to show "clear, unequivocal and convincing" evidence as a heightened burden of proof. *See* United States v. Ueber, 299 F.2d. 310, 315 (6th Cir. 1962). Another court required a "specific intent to defraud," arguably contrary to the statutory guidelines. *See* United States v. Ekelman & Assocs., Inc., 532 F.2d 545, 548 (6th Cir. 1976). The minority of the Senate Judiciary Committee opposed the 1943 amendments, supporting abolition instead: "The qui tam mechanism of the FCA was enacted during Civil War time, to meet a situation then existing, which does not now exist... [n]ow adequate facilities in respect to handling such matters exist and through the Federal Bureau of Investigation and many other investigative agencies of the Government, adequate investigations of frauds against the United States are being made." *See* Beck, *supra* note 11, at 559-60 n.82 (quoting S. REP. NO. 78-291, pt. 1, at 2 (1943) (Supp. Docs. No. Y 1.1/2:Serial 10756)).

44. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 343 n.12 (1989).

45. *See id.* at 243 n.13.

46. *See generally* Gaylord Shaw, *Summit Ended with Tough Words; "No Way," Reagan Told Soviet Leader*, L.A. TIMES, Oct. 15, 1986, § 1, at 1 (discussing President Reagan's broad defense strategy including "Star Wars").

47. *See, e.g.*, Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 390 (2001); Beck, *supra* note 11, at 561. During Senate hearings, one Senator stated that "[o]ver the past several years it seems like we have been treated to monthly scandals as we pick up the newspaper with our morning coffee." Beck, *supra* note 11, at 642 (quoting S. REP. NO. 99-345, at 13 (1986) (Sup. Docs. No. Y 1.1/2:Serial 13676), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5278).

48. *See* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1102-03 (7th Cir. 1984). The jurisdictional bar was deemed to apply notwithstanding the fact that the only reason the government was in possession of the information was because of the qui tam plaintiff's disclosure to the government. *See id.*

bringing FCA actions; therefore, the government could, at its discretion, let fraud go either unnoticed or unprosecuted.[49] In contrast, the 1986 FCA amendments dictate that the jurisdictional bar should only apply where the information has been publicly disclosed *and* where the public disclosure did not originate from the relator in the case.[50] Thus, the amendments seek a balance "between encouraging private parties to expose fraud and preventing individuals from enjoying large monetary rewards without contributing to the disclosure of fraud."[51]

Through the enactment of the 1986 amendments, Congress obviously sought to expand qui tam law enforcement and to encourage more private citizens to bring FCA suits.[52] The Department of Justice estimates that "between [one] percent and [ten] percent of the entire federal budget is lost to fraud every year."[53] Furthermore, while the decade before the enactment of the 1986 amendments saw the filing of only twenty qui tam FCA suits, relators filed nearly 1,100 suits in the decade after the 1986 amendments.[54] Private relators have recovered a net $2.29 billion for the United States Treasury since the 1986 amendment.[55] Today, qui tam actions under the FCA include cases involving health care fraud,[56] defense fraud,[57] and even environmental fraud[58] against the government.[59]

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49. *See* Thompson, *supra* note 25, at 678-79.

50. That is, if the relator is the source of the publicly disclosed information regarding the fraud at issue, then the suit will be allowed; therefore, the court will not dismiss the case for lack of jurisdiction as it would have under the previous statute. 31 U.S.C. § 3730(e)(4)(A)(2000). The Supreme Court noted that this amendment, by "expand[ing] the universe of plaintiffs," "essentially create[d] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 950 (1997).

51. *See* Meador & Warren, *supra* note 14, at 460; *see also supra* note 38 and accompanying text.

52. *See* Morgan & Popham, *supra* note 13, at 166-67; *see also* Michael Isikoff, *Defense Lobbyists Bottle up Bill on Contractor Fraud,* WASH. POST, Aug. 17, 1986, at K01 (discussing the widespread support for the bill by both Congress and the public while defense contracting lobbyists staunchly opposed the bill).

53. Ann M. Lininger, *The False Claims Act and Environmental Law Enforcement,* 16 VA. ENVTL. L.J. 577, 579 (1997).

54. *Id.* (citing News Release, Dept. of Justice, Oct. 18, 1995, *available at* 1995 WL 614572).

55. *See* Beck, *supra* note 11, at 638. The relators recovered $409.8 million for themselves as the statutory bounty. Another source computes that relators, on average, have recovered eighteen percent of the total damages awarded. *See* Lininger, *supra* note 53, at 580. A total of $2 million was recovered in 1988 while relators recovered over $200 million for the United States Treasury in 1995. *Id.* at 579. Note too, that these recoveries stem from lawsuits "against a veritable who's-who of government contracting—large successful companies represented by the nation's ablest law firms." *See* Morgan & Popham, *supra* note 13, at 167.

56. *See, e.g.,* Michael Stockham, Note, *"This Might Sting a Bit": Policing Skin Care in Nursing Facilities by Litigating Fraud,* 87 CORNELL L. REV. 1041 (2000).

D. Overriding Purpose of the FCA

The amended FCA has three primary goals: (1) to encourage those with information of fraud on the government to disclose this information; (2) to discourage "parasitic qui tam actions that simply take advantage of information already in the public domain;" and (3) to assist and to prod the government to act upon the information provided.[60] By enacting the FCA, Congress addressed the government's weakness in exposing and prosecuting fraud on its own.[61] Fraud may go undetected "because of the government's 'weak internal controls and the fact that government auditors do not pay adequate attention to fraud.' "[62] Not only does the government often allow fraud to go undetected, but Congress determined that even where the government knows of fraud, it takes action "in only a small percentage of cases."[63] Hence, the FCA was amended to cure such government incentive problems by providing the public with an

57. *See, e.g.*, Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939 (1997).

58. *See, e.g.*, Paul W. Morenberg, Comment, *Environmental Fraud by Government Contractors: A New Application of the False Claims* Act, 22 22 B.C. ENVTL. AFF. L. REV. 623 (1995).

59. Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 791 (2000) (Stevens, J., dissenting) ("The False Claims Act is also all-embracing in scope. . . ."). The FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the government." United States v. Neifert-White Co., 390 U.S. 228, 232 (1968). The FCA has also been used to effectively prosecute government construction fraud, research grant fraud, customs fraud, student loan fraud, natural resource royalties fraud, agricultural subsidy fraud, and municipal bond fraud (i.e., "yield-burning") in connection with certain tax-exempt bond refinancings. Phillips & Cohen, *Other Types of Fraud, available at* http://www.whistleblowers.com/HTML/BODY/cmtypso.htm. *But see Vermont Agency of Natural Res.*, 529 U.S. at 770 (holding that the FCA is not applicable to states, because states are not "persons" for purposes of the FCA); *see also* United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486, 493 (5th Cir. 2001) (holding that local governments are not subject to FCA liability and are not "persons" under the Act, based on the legislative history regarding punitive damages under § 3729; local governments are not subject to punitive damages as a matter of public policy).

60. United States *ex rel.* Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 400 (3d Cir. 1999) (Becker, C.J., dissenting) (citing S. REP. NO. 99-345, at 1-8, 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-73, 5288-89).

61. *See, e.g.*, Thompson, *supra* note 25, at 677.

62. *Id.* (quoting H.R. REP. NO. 99-660, at 18 (1986)); *accord* S. REP. NO. 99-345, at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5267-68.

63. *Id.* (quoting S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5267). "[D]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of government fraud, there appears to be a great unwillingness to expose illegalities." *See* Beck, *supra* note 11, at 563 n.109. (quoting S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269).

incentive to expose fraud.[64] The alleged prosecutorial diffidence of the Justice Department with respect to fraud was perceived to originate from two basic problems.[65] First, some pointed to the Gramm-Rudman budget crunch, which severely limited the resources of government enforcement mechanisms.[66] Second, and more sinister, some claimed that the Justice Department failed to prosecute fraud because of prevailing "political considerations."[67]

Hence, at least one difficulty Congress sought to cure was the lack of adequate governmental resources available to pursue allegations of fraud.[68] By arming private citizens with not only the right to expose fraud but also a direct prosecutorial role in the litigation, Congress supplemented limited monetary and human governmental resources with private resources.[69] Of course, it is also probable that an implicit goal of the FCA was not only to recover stolen funds for the Treasury, but also to deter fraud on the government by making it prohibitively expensive.[70]

IV. STRUCTURE OF THE MODERN FCA

The False Claims Act imposes civil liability on any person who knowingly presents a false or fraudulent claim to the government.[71] There are various contexts in which false claims satisfying the FCA may be presented. Specifically, the FCA imposes liability on any person who:

64. The Senate concluded that "most fraud referrals remain unprosecuted, and lost public funds, therefore, remain uncollected." *See* Thompson, *supra* note 25, at 678 (quoting S. REP. NO. 99-345, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269). "According to the Senate report, Justice Department statistics showed that in fiscal year 1985 the civil division received 2,734 fraud referrals but filed only [thirty-six] complaints. . . ." *Id.* (quoting S. REP. NO. 99-345, at 4 n.10, *reprinted in* 1986 U.S.C.C.A.N. at 5269 n.10). Compare the lack of incentive the government currently has to prosecute fraud with the adverse incentive local government had to prosecute fraud prior to the 1328 Statute of Northampton, which empowered citizens to bring forth allegations of illegal conduct for a statutory reward. *See supra* notes 20-23 and accompanying text.

65. *See* Beck, *supra* note 11, at 564.

66. *Id.*

67. *Id.*

68. *See* Thompson, *supra* note 25, at 678-79. In effect, Congress has appointed private attorneys general to prosecute fraud on the government's behalf via a partial assignment of the government's damages claim. Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000). A partial assignment is necessary, in part, to justify constitutional standing under Article III. Thompson, *supra* note 25, at 678-79.

69. *See* Thompson, *supra* note 25, at 678-79. An FCA case can be extremely expensive to litigate. *See generally* DeWitt, *supra* note 27, at 31 (discussing the high costs of nonintervention by the U.S. Department of Justice).

70. *See infra* note 132 and accompanying text.

71. 31 U.S.C. § 3729(a)(1) (2000).

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

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

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

4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

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.[72]

Hence, to prevail in an FCA action, a relator must generally prove at least three elements: (1) that the defendant presented a claim for payment or approval, (2) that the claim presented was false or fraudulent, and (3) that the defendant acted knowingly.[73] The following summary will highlight a broad remedial reading of the statute's provisions similar to that advocated in Parts VI and VII.

A. The FCA's Scienter Provision

The amended FCA contains a liberal scienter provision. A person "knowingly" engages in fraudulent conduct under the FCA if that person: "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or the falsity of the information; or (3) acts in reckless disregard for the truth or falsity of the information,

72. § 3729(a)(2). Sections (a)(3) through (a)(6) are less common and are not directly discussed here.

73. Lininger, *supra* note 53, at 580. The FCA, however, is not a tool for relators alone. Wholly apart from its qui tam provisions, the FCA is a tool for prosecuting fraud on the government without private intervention. *See* § 3729. This Note deals only with the FCA's qui tam provisions authorizing private intervention.

and no proof of specific intent to defraud is required."[74] The expansive scope of this provision is striking. For example, the Court of Appeals for the District of Columbia Circuit found a doctor liable for "knowingly" presenting a false claim under the "reckless disregard" standard for failing to review submitted bills calculated by his wife.[75] The Ninth Circuit, however, has held that mere negligence or an honest mistake is not sufficient to satisfy the broad scienter provision.[76]

B. The Meaning of "Claim"

The defendant must present, or cause to be presented, a claim for payment or approval.[77] The statute vaguely, but broadly, defines a claim as

> includ[ing] 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 reimhurse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."[78]

The issue of what qualifies as a "claim" has significance not only because there is no liability without it but also because damages may depend on the number of false claims presented.[79]

The Supreme Court considered the question of the potential scope of the word "claim" in 1968.[80] Its decision, though construing a previous version of the FCA, provides valuable guidance not only on the meaning of the term in the expanded FCA, but also upon the guiding principle of FCA interpretation.[81] The issue before the Court was whether the FCA was applicable to a situation in which false information had been supplied to a federal agency, the Commodity Credit Corporation ("CCC").[82] The Court also considered whether the defendant grain dealer had submitted a "claim" to the CCC when it submitted a loan application containing fraudulent statements to the

74. § 3729(b). This specific provision sought to clarify what some courts had apparently misinterpreted prior to the 1986 amendments—that no specific intent is required. *See, e.g.*, United States v. Ekelman & Assocs., Inc., 532 F.2d 545, 548 (6th Cir. 1970) (holding that a specific intent to defraud is required under the FCA).

75. United States v. Krizek, 111 F.3d 934, 942 (D.C. Cir. 1997).

76. Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1478 (9th Cir. 1996).

77. § 3729(a).

78. § 3729(c)

79. *See infra* note 128 and accompanying text.

80. United States v. Neifert-White Co., 390 U.S. 228 (1968).

81. *See id.*

82. *See id.* at 229.

agency.[83] Citing the original purpose and broad phrasing of the Act,[84] the Court reversed the Ninth Circuit's decision.[85] The Court held that "the term 'claims,' as used in the statute, is broad enough to reach the conduct alleged by the Government in its complaint" and that the CCC, as a wholly owned government subsidiary, qualified as "the Government of the United States" within the meaning of the statute.[86] This decision is important because it demonstrates the Supreme Court's willingness to read the FCA liberally—that is, as a remedial statute with broad ramifications.[87]

The FCA sets forth several categories of false claims. First, under § 3729(a)(1), a defendant presents a claim when that person fraudulently seeks a government benefit without revealing that he is not entitled or eligible for such a benefit.[88] For example, the court in *United States ex rel. Fallon v. Accudyne Corp.* indicated that a defendant presents a "claim" within the meaning of § 3729(a)(1) when he knowingly fails to abide by relevant environmental compliance provisions of a government contract and then attempts to collect payment under the contract as if all the terms of the contract had been satisfied.[89] The court in *United States v. Nazon* indicated that a doctor who presented files for Medicaid reimbursement presented a "claim" under § 3729(a)(1) when he was not legally eligible for such reimbursement.[90] In *United States ex rel. Schumer v. Hughes Aircraft Co.*, the Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment after finding a genuine issue of material fact as to whether the defendant contractor had submitted a "claim" when he sought payment for work to which he may not have been entitled.[91] As these decisions suggest, defendants will not only find

83. *See id.* The defendant in this case was not seeking *payment* from the government on a "claim," but was only seeking a government-sponsored loan. *Id.* Nonetheless, the Court construed tbis conduct as falling within the broad phrasing of the FCA, even though the defendant's conduct did not strictly come within the purview of the Act. *See id.*

84. Note that the Court interpreted a more restrictive FCA than the current expanded FCA. *See supra* note 41 and accompanying text.

85. *Id.* at 233.

86. *Id.*

87. *See id.*

88. *See* Lininger, *supra* note 53, at 582-83.

89. 97 F.3d 937, 938 (7th Cir. 1996); Lininger, *supra* note 53, at 582-83.

90. No. 93-C-5456, 1993 WL 459966, at *2 (N.D. Ill. 1993); *see also* Lininger, *supra* note 53, at 584.

91. 63 F.3d 1512, 1515-16 (9th Cir. 1995). In *Hughes Aircraft Co.*, defendant contractor sought payment for services rendered even though defendant's accounting records indicated that its costs may not have heen properly allocated. *Id.* Hence, defendant may not have heen entitled to the full benefit it sought. *Id.* at 1516. The Supreme Court later dismissed the case for lack of jurisdiction. *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 952 (1997).

themselves liable under § 3729(a)(1) for affirmatively presenting a fraudulent claim, but also will be liable for a failure to disclose their ineligibility for a benefit sought.[92] Such reasoning underscores the broad scope commonly given to the FCA in light of its congressional purpose.

Second, under § 3729(a)(2), a defendant presents a "claim" when "he or she knowingly makes, uses, or causes someone else to make or use, a false record or statement to enable the defendant to improperly obtain a benefit from the United States."[93] The distinction between this provision and § 3729(a)(1) is that in § 3729(a)(2), one must show that the defendant affirmatively made a false statement through a record.[94] That is, the defendant is subject to liability under § 3729(a)(2) if and only if he or she utilizes a false record indicating eligibility for a benefit that he or she is in fact not eligible to receive.[95] For example, in *Pickens v. Kanawha River Towing*, the court held that a barge operator acting as a government contractor was not liable under § 3729(a)(2) for submitting invoices containing false statements regarding compliance with the Clean Water Act.[96] The government's precondition for payment was compliance with environmental laws, and the defendant's invoice seeking payment therefore may have qualified as a "claim" under § 3729(a)(2) because the invoice was a false record.[97] In other words, the invoice represented that the defendant was eligible to receive payment when, in fact, he had not complied with all the terms of the contract.[98] Because the invoice was never directly presented to the government, but instead to another contractor, the defendant was not found liable.[99] Nonetheless, the defendant was held liable under § 3729(a)(2) on the theory that he failed to record required discharges in the ship's logbook, which constituted the submission of a false record under § 3729(a)(2).[100]

A "claim" under § 3729(a)(2) therefore requires an affirmatively false statement representing eligibility for a benefit that one is not legally eligible to receive.[101] Moreover, the *Pickens* decision again underscores the broad scope of the FCA and the willingness of at least

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92. *See* Lininger, *supra* note 53, at 584.

93. *Id.* at 585.

94. *See id.*; *see also* 31 U.S.C. § 3729(a)(2) (2000).

95. *See* § 3729(a)(2); *see also* Lininger, *supra* note 53, at 585.

96. 916 F. Supp. 702, 707 (S.D. Ohio 1996); *see also* Lininger, *supra* note 53, at 585-86.

97. *See* Kanawha Rover Towing, 916 F. Supp. at 707.

98. *Id.*

99. *Id.*; *see also* Dewitt, *supra* note 28, at 36 (discussing generally § 3729(a)(2) as a "catch-all" provision).

100. *Id.*

101. *Id.*

some courts to apply the statute in borderline cases.[102] It seems far from clear that a failure to record required information qualifies as affirmative conduct; nevertheless, the *Pickens* court was prepared to give the statute a broad remedial interpretation to realize its central purpose of prosecuting and deterring fraud.[103]

Under § 3729(a)(7), a defendant also presents a "claim" when he or she utilizes a false record or statement to conceal, avoid, or decrease an otherwise outstanding obligation to pay the government.[104] This provision has come to be known as the "reverse false claims" provision.[105] Here, the "cause of action arises not from the submission of a claim to be paid, but from the concealment of an obligation owed to the government."[106] Like § 3729(a)(2), this provision requires the affirmative action of making a false record, but here the record is falsified to decrease an already existing obligation.[107] Importantly, no request for payment is required under this provision.[108] The *Pickens* court held the defendants liable under § 3729(a)(7) as well as under § 3729(a)(2) because the ship's log was falsified in order to avoid an obligation to the government.[109] Because the government relied on the ship's log to conduct a regulatory function, the contractor's failure to record the illegal dumping of waste in violation of the Clean Water Act constituted a false "claim."[110] The court found that the ship's log constituted a "record" such that "if the log excludes a major event that it should ordinarily contain, the record is a false one."[111] Once again, although the statutory language of § 3729(a)(7) seems to require an affirmative false statement or record, the *Pickens* court interpreted the Act liberally, characterizing an affirmative omission as an affirmative action.[112]

102. *See* United States *ex rel.* Pickens v. Kanawha River Towing, 916 F. Supp. 702 (S.D. Ohio 1996).

103. *See id.*

104. 31 U.S.C. § 3729(a)(7) (2000).

105. *See, e.g.*, Dewitt, *supra* note 27, at 37; Lininger, *supra* note 53, at 586-87. At least one commentator has noted that this provision of the FCA has been widely underused. *See* Dewitt, *supra* note 27, at 37.

106. Dewitt, *supra* note 27, at 37.

107. *See* § 3729(a)(7).

108. *Id.*

109. *Kanawha River Towing*, 916 F. Supp. at 707.

110. *Id.* at 707.

111. *Id.* at 708. "If the government relies upon or otherwise reviews such [ships'] logs as part of its regulatory role, then the defendants would have submitted a false report in order to avoid an obligation to the government." *Id.*

112. *Id.*

C. Requirement of Falsity

Finally, a defendant's claim under § 3729 must be false or fraudulent.[113] In the absence of specific statutory guidance, courts have interpreted "false or fraudulent" in an objective fashion.[114] Courts have held that a claim is false only "if it is false under any reasonable interpretation."[115] For example, the Ninth Circuit has held that when a legal dispute exists regarding the truth or falsity of the claim submitted, the claim is at least not prima facie false.[116] In another case, *United States v. Krizek*, a doctor's claim was not considered false because of the reasonableness of the doctor's belief in its truth.[117] The fact that the doctor commonly billed for more time than he actually spent with the patient was inconsequential, because the practice is common in the psychotherapist community.[118] The Second Circuit Court of Appeals recently examined the meaning of the falsity requirement.[119] The court noted that "[t]he juxtaposition of the word 'false' with the word 'fraudulent,' plus the meanings of the words comprising the phrase 'false claim,' suggest an improper claim is aimed at extracting money the government otherwise would not have paid."[120] Finding the FCA to focus primarily on restitution, the court saw an essential link between the false claim and the government's decision to pay the claim.[121] The court also noted a dichotomy between two categories of potential false claims: (1) legally false claims, and (2)

113. *See* 31 U.S.C. § 3729 (2000). The determination of whether a claim is false or fraudulent has important implications for expanding the reach of FCA litigation—particularly for "anti-kickback" violations. *See* Meador & Warren, *supra* note 14, at 458-59, 473 (discussing, for example, the Medicare antikickback statute which prohibits kickbacks as remuneration such that the FCA might apply but only if "a claim induced by a kickback is rendered false").

114. *See* Meador & Warren, *supra* note 14, at 464.

115. *Id.* at 465.

116. *See* Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1477 (9th Cir. 1996). "[T]he term "false or fraudulent" is not defined in the Act." United States *ex rel.* Mikes v. Straus, 274 F.3d 687, 696 (2d Cir. 2001).

117. *See* 859 F. Supp. 5, 10 (D.D.C. 1994) (finding that the claims submitted, although not technically correct procedure, did not constitute false claims within the meaning of the FCA where the doctor was charged for a systematic practice of overbilling commonly known as "upcoding").

118. *Id.* The additional billed time included "bundled services" such as a "review of patient file" and "prescription management." *Id.* at 10. The government contended that while the code billed by the doctor required "face-to-face" contact with the patient for forty-five to fifty minutes, the doctor had actually not spent that entire time "face-to-face" with the patient but instead had used part of the time for other services. *Id.* at 9.

119. *See* United States *ex rel.* Mikes v. Straus, 274 F.3d 687 (2d Cir. 2001).

120. *Id.* at 696.

121. *See id.*

factually false claims.[122] A legally false claim, under the "certification theory [is] predicated upon a false representation of compliance with a federal statute or regulation or a prescribed contractual term."[123] A factually false claim, or "factually false certification," involves "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided."[124] Importantly, the FCA embraces both "legally false" and "factually false" claims, but only to the extent that the falsity of the claim actually "influenced the government's decision to pay."[125] Thus, the meaning of a "false claim" is intrinsically bound up with an uncertain variable—whether the government's payment decision would have been different but for the false claim.[126]

D. The FCA's Damages Provision

In its attempt to discourage fraud and replenish the United States Treasury, the FCA provides for severe penalties.[127] First, the plain language of § 3729 does not require that the plaintiff show financial injury to the United States, nor does it require that the United States actually suffer any financial injury.[128] The damages provision provides that the government is entitled to a "civil penalty of not less than $5,000 and not more than $10,000" for each false claim submitted.[129] For example, in *United States v. Lorenzo*, a doctor who submitted 3,683 false claims to Medicare was found liable for over $18

122. *Id.* The court further divides the universe of possible claims into an expressly false certification theory and an impliedly false certification theory. *See id.*

123. *Id.* at 696-97; *see also* Lisa Michelle Phelps, Note, *Calling off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003, 1014-15 (1998).

124. *Straus*, 274 F.3d at 697.

125. *See id. But see* 31 U.S.C. § 3729(a) (2000) (providing for civil penalties regardless of whether the government was injured or whether the government would have paid the claim but for the fraud).

126. Straus, 274 F.3d at 697.

127. "Any person who . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus [three] times the amount of damages which the Government sustains because of the act of that person. . . ." § 3729(a).

128. *See id.*

129. *Id.* While it appears from the legislative history that Congress intended damages to apply irrespective of actual injury, some courts have nonetheless suggested that actual damages are necessary for liability under the Act. *See* S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. *See, e.g., Straus*, 274 F.3d at 687 (suggesting that the FCA damages provision is limited to instances in which the false claim would have actually "influenced the government's decision to pay"); *see also* Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1043 (Fed. Cir. 1994).

million dollars in civil penalties.[130] The court noted that the provision granted no discretion in setting the penalty and that it must be between $5,000 and $10,000 for each claim submitted.[131] Perhaps most importantly, the FCA provides for treble damages.[132] This provision can be potent against large-scale, nonreccurring fraud, such as procurement fraud where the government sustains large losses. The burden of proving damages under the FCA rests with the relator and requires a preponderance of the evidence.[133]

E. Procedural Aspects of an FCA Claim

Complying with all the procedural aspects of the FCA statute is of paramount importance.[134] First, the Act prohibits relators from bringing actions where the government is already party to an action based on the same allegations or transactions.[135] The purpose of this jurisdictional bar is to prevent parasitic qui tam actions by relators who add nothing to the government's pending case.[136] The Act includes another jurisdictional bar, often called the "first-to-file" bar, which precludes any FCA action that is based on the same allegations as a previously filed action.[137]

As a practical matter, the FCA requires a qui tam complaint to be filed in camera and placed under seal for a sixty-day waiting

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130. *See* United States v. Lorenzo, 768 F. Supp. 1127 (E.D. Pa. 1991). The Supreme Court, however, has held that the imposition of the FCA civil penalty after the defendant has sustained a criminal penalty for the same action constitutes douhle jeopardy under the Fifth Amendment. *See* United States v. Halper, 490 U.S. 435, 451-52 (1989). However, the Double Jeopardy Clause is not applicable to litigation between private parties. *Id.* at 451. The open question, then, is whether a qui tam action under the FCA implicates the Double Jeopardy Clause. *See* Browing-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989). Furthermore, at least one district court has invoked the Eighth Amendment's Excessive Fines Clause to limit FCA damage awards. *See* United States *ex rel.* Smith v. Gilbert Realty Co., 840 F. Supp. 71 (E.D. Mich. 1993).

131. In that case, the court decided to pierce the corporate veil, and the individual doctor and his business were therefore held jointly and severally liable for the entire $18,415,000. *Lorenzo*, 768 F. Supp. at 1133. The court noted that the defendant had failed to observe corporate formalities and was undercapitalized. *Id.*

132. § 3729(a). The Supreme Court has noted that the treble damages provision is essentially punitive in nature: "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 786 (2000) (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981)).

133. 31 U.S.C. § 3730(c) (2000).

134. *See* § 3730.

135. *See* § 3730(e)(3). This is sometimes referred to as the "government was first" bar. *See, e.g.*, Raspanti & Laigaie, *supra* note 26, at 36.

136. *See id.*

137. *See id.* at 35.

period.[138] The complaint may not be served on the defendant until the court so orders.[139] The purpose of the sixty-day period is to give the government ample time to decide whether or not it will intervene in the action while allegations remain out of the public domain.[140] Under § 3730, the government is given the choice either to intervene in the FCA action, in which case it will lead the prosecution, or to decline to intervene, in which case the action may go forward under the direction of the relator.[141]

V. THE FCA'S PUBLIC DISCLOSURE BAR

In addition to the two jurisdictional bars mentioned above, the FCA includes a third jurisdictional bar: the "public disclosure bar." The public disclosure bar and its surrounding body of precedent are complex, confusing, and the subject of conflicting interpretations.[142] Specifically, the public disclosure bar found in § 3730(e)(4) provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is hrought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.[143]

Thus, the FCA bars any action "based upon" a "public disclosure" of "allegations or transactions" unless the relator qualifies as the "original source" of such "allegations or transactions."[144] That the public disclosure bar originated with the 1986 amendments is instructive of its purpose. One court of appeals explained that the bar was intended to provide "incentives to whistleblowing insiders with

138. § 3730(b)(2).

139. *Id.*

140. *See* Raspanti & Laigaie, *supra* note 26, at 36-37. This provision may inadvertently create problems for additional would-be relators who file in the gap period before the sanctity of the seal is broken, because their action will be barred under the "first-to-file" bar. *See id.*; § 3730(b)(5). The government may also dismiss the action upon a hearing and with the approval of the court. § 3730(c)(2).

141. *See* § 3730(c)(3)-(4).

142. *See, e.g.*, Robert L. Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 PUB. CONT. L.J. 477 (1995); *see generally*, Thompson, *supra* note 25, at 672 (exploring the ways in which "courts have used the public disclosure bar").

143. § 3730(e)(4).

144. *See id.*

genuinely valuable information" while barring "parasitic exploitation[s] of the public coffers, . . . [by] . . . opportunistic plaintiffs who have no significant information to contribute of their own."[145] Though an exhaustive analysis of the public disclosure bar is beyond the scope of this Note, mention of a few representative cases will facilitate a more fruitful analysis of the "public disclosure" bar as it relates to the Freedom of Information Act.[146]

A. The Meaning of "Based Upon"

The public disclosure bar is only activated if a qui tam action is "based upon" a public disclosure.[147] Currently, the circuits are split as to the meaning of the phrase "based upon."[148] The Court of Appeals for the Fourth Circuit has developed a common sense interpretation of "based upon" which seems to best conform to the language and purpose of the FCA.[149] In *United States ex rel. Siller v. Becton Dickinson & Co.*, the court was confronted by an FCA action in which the allegations in the relator's complaint were publicly disclosed but in which the individual relator had independent knowledge of the allegations in the complaint.[150] Initially, the court relied upon the plain language of the statute (and a dictionary) in deciding that "based upon" means "to use as a basis for."[151] While vacating the district court's ruling, the court held that the public disclosure bar was not triggered in this instance, because the relator's action was not "actually derived from" a public disclosure.[152]

The Fourth Circuit decision, although currently representing only a minority view, best comports with both the plain language and policy of the FCA, because it encourages FCA actions based on personal knowledge (which otherwise may not be pursued) while discouraging parasitic FCA suits derived solely from information in

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145. United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

146. For more on the public disclosure bar, see generally Thompson, *supra* note 25; Vogel, *supra* note 142; and Lininger, *supra* note 53.

147. *See* § 3730(e)(4).

148. *See, e.g.*, United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir. 1994) (holding that "based upon" means "derived from," such that the bar is only triggered as to the realtor if his complaint was "derived from" the public disclosure). *But see* United States *ex rel.* Biddle v. Bd. of Trustees, 161 F.3d 533, 539-40 (9th Cir. 1998) (holding that "based upon" means "supported by" or "same as," such that the bar is triggered irrespective of whether the individual relator learned about the allegations via the public disclosure).

149. *Becton Dickinson & Co.*, 21 F.3d at 1348.

150. *See id.*

151. *See id.*

152. *See id.* at 1349.

the pubic domain.[153] Note, however, that "[a]ll the other circuits that have reached this question have disagreed with the Fourth Circuit. . . ."[154] Interestingly, the Supreme Court has had an occasion to interpret the phrase "based upon," albeit in a non-FCA context.[155] In interpreting a federal jurisdiction statute where "based upon" was a key component of the decisional calculus, the Court held that a claim was "based upon" conduct only if that conduct formed the "basis" or "foundation" of the claim.[156]

B. The Meaning of "Allegations or Transactions"

A relator's complaint must be based upon publicly disclosed "allegations or transactions" in order for the public disclosure bar to be triggered.[157] It is crucial to develop a tenable theory of what constitutes "allegations or transactions" in order to realize the purpose of the FCA. In some close cases, the court must compare the relator's complaint to the publicly disclosed information to determine "whether there is a sufficient similarity to trigger the statutory bar."[158] Courts are not, however, barred from hearing every action brought by a relator involving publicly available information; instead, the bar is activated only "if the publicly disclosed information is so substantial as to constitute 'allegations or transactions.' "[159]

In *United States ex rel. Springfield Terminal Railway v. Quinn*, the D.C. Circuit explained that a mere disclosure of relevant facts

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153. This view strikes a balance most in line with the spirit of the 1986 amendments—between allowing legitimate FCA actions and disallowing actions where the relator contributes nothing to the suit. As one commentator notes, the FCA has dual goals: "(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." *See* Lininger, *supra* note 53, at 590-91. The Fourth Circuit decision appears to further both aims. *See id.* Note, bowever, that tbe Fourtb Circuit's logic bas been the subject of almost universal disapproval. *See id.*

154. United States *ex rel.* Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 386 (3d Cir. 1999). Most circuits have held tbat "based upon" means "supported by" or "substantially similar to." *See* United States *ex rel.* Biddle v. Bd. of Trustees, 161 F.3d 533, 539-40 (9th Cir. 1998); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 682-84 (D.C. Cir. 1997); United States *ex rel.* Precision Co. v. Koch Indus., Inc. 971 F.2d 548, 552 (10th Cir. 1992); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992).

155. Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (stating that respondent based his suit on allegedly tortious conduct, not on a breach of contract).

156. *Id.*

157. *See* 31 U.S.C. § 3730(e)(4) (2000).

158. QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT 47 (Howard W. Cox & Peter B. Hutt, II eds., 1999).

159. Lininger, *supra* note 53, at 591 (quoting United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 653 (D.C. Cir. 1994)).

supporting a claim does not rise to the level of "allegations or transactions."[160] The language of the *Quinn* court is often quoted:

> [I]f X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit qui tam actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain. . . .[161]

In contrast, at least one commentator has noted that although the statute speaks strictly of "publicly disclosed information," it is commonly understood by courts that "*both* the allegation of fraud and all information proving the allegation" must be publicly disclosed to trigger the bar.[162] Similarly, in *Wang v. FMC Corp.*, the Court of Appeals for the Ninth Circuit concluded that the FCA bars suits based on publicly disclosed "allegations or transactions," not mere public information.[163]

C. The Meaning of "Original Source"

The FCA contains one exception to the public disclosure bar: If the relator is an original source of the public disclosure, the suit will not be barred.[164] According to the legislative history of the 1986 amendments, "[t]he paradigmatic 'original source' is a whistleblowing insider."[165] Correspondingly, courts have strictly required that a relator's knowledge be "direct and independent" in order for that relator to qualify as an original source.[166] "Direct knowledge" under the Act has been defined as knowledge "marked by absence of an intervening agency," or as knowledge "unmediated by anything but [the relator's] own labor," while " '[i]ndependent knowledge' has been consistently defined as knowledge that is not dependant on public disclosure."[167] In addition to the "direct and independent"

160. 14 F.3d 645, 653 (D.C. Cir. 1994).

161. *Id.* at 654.

162. Lininger, *supra* note 53, at 592 (emphasis added).

163. *See* Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992); Lininger, *supra* note 53, at 592. Note the logical distinction between a bare assertion and the proof of that assertion. *See id.*

164. *See supra* note 141 and accompanying text.

165. S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

166. QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT, *supra* note 158, at 49.

167. United States *ex rel.* Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995) (citations omitted).

requirement, the would-be "original source" relator must voluntarily provide the government with information prior to filing a complaint.[168]

The Second and Ninth Circuits have imposed a third requirement—that the relator must "play some part" in making the "original public disclosure."[169] In contrast, the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuits have rejected this requirement.[170] Interestingly, the Fourth Circuit explicitly rejected this requirement as an "additional extratextual requirement that was not intended by Congress."[171]

While the decisions discussed above certainly do not represent an exhaustive study of the many facets of the complex public disclosure bar, they provide a context for modern FCA interpretation. It seems as if virtually no aspect of the FCA is the subject of universal agreement. While some courts opt to invoke the usual canons of statutory construction, others turn to the FCA's vast legislative history. Interpretation of the FCA is doubtless hampered by several textual gaps. A court's interpretational problem is further compounded by its attempt to find a delicate balance between encouraging FCA suits that are beneficial to the Treasury while disallowing parasitic and opportunistic actions. It will be helpful to keep this central balance in mind throughout the course of the following discussion of the Freedom of Information Act.

VI. INTERACTION OF THE FCA AND THE FREEDOM OF INFORMATION ACT

A. A Brief FOIA Primer

The United States government is the world's largest producer of information.[172] The American citizen's right to this vast body of information derives from England, where the press was officially prohibited from reporting on the actions of the House of Commons and the House of Lords.[173] The idea of an "informed citizenry took on new meaning" when the Continental Congress declared independence in

168. *See* United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 865-66 (7th Cir. 1999).

169. *Wang*, 975 F.2d at 1418; *see also* United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993).

170. QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT, *supra* note 158, at 53.

171. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1351 (4th Cir. 1994).

172. FEDERAL INFORMATION POLICIES IN THE 1990S 1 (Peter Hernon et al. eds., 1996).

173. HERBERT N. FOERSTEL, FREEDOM OF INFORMATION AND THE RIGHT TO KNOW: ORIGINS AND APPLICATIONS OF THE FREEDOM OF INFORMATION ACT 1 (1999).

1776.[174] Justice Louis Brandeis later emphasized the importance of public information to all citizens in *Whitney v. California*, writing "that public discussion is a political duty; and that it should be a fundamental principle of the American government."[175] Finally, after years of discussion and debate concerning the public's right-to-know, the Freedom of Information Act was signed into law on Independence Day, 1966.[176]

The FOIA is a disclosure statute that grants every individual an equal statutory right to access government information.[177] Citizens also have a statutory right to seek judicial review of denials of requested government information.[178] The FOIA, as amended in 1974, 1976, 1986, and 1996, contains six subsections.[179] Information sought from a governmental agency by any citizen, pursuant to a proper request, is subject to disclosure unless one of nine exemptions applies.[180] The exemptions are structured such that an agency *may* withhold information falling into the Act's various exempted categories.[181] Not only must a request under the FOIA satisfy the requisite statutory hurdles of the nine exemptions, but it may also be the subject of hostile opposition from the agency receiving the request as well as from the executive branch.[182] It is important to note that the FOIA is not just a tool for curious citizens, as many corporations have

174. RICHARD D. BROWN, THE STRENGTH OF A PEOPLE: THE IDEA OF AN INFORMED CITIZENRY IN AMERICA, 1650-1870 xiv (1996).

175. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

176. FOERSTEL, *supra* note 173, at 42.

177. *Id.* at 44.

178. *Id.*

179. *Id.* at 44-57.

180. *See* 5 U.S.C. § 552(b) (1994).

181. *Id.* Matters exempt from disclosure are as follows: (1) matters specifically authorized by Executive Order "to be kept secret in the interest of national defense or foreign policy and are properly classified pursuant to such an order," (2) "[m]atters related solely to the internal personnel rules and practices of an agency," (3) "[m]atters specifically exempted from disclosure by statute, providing that such statute leaves no discretion on the issue or establishes particular criteria or types of material for withholding," (4) "[t]rade secrets and commercial or financial information that is privileged or confidential," (5) "[i]nter-agency or intra-agency communications which would not be available by law in litigation with the agency," (6) "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," (7) "[r]ecords or information compiled for law enforcement purposes, . . . " (8) "[m]atters related to reports prepared by . . . an agency responsible for the regulation or supervision of financial institutions," (9) "[g]eological and geophysical information and data, including maps, concerning wells." FOERSTEL, *supra* note 173, at 61-64.

182. *See* FOERSTEL, *supra* note 173, at 71, 76.

found the FOIA indispensable in obtaining important business information about themselves and their competitors.[183]

B. Schumer v. Hughes Aircraft Co.

The Ninth Circuit case of *United States ex rel. Schumer v. Hughes Aircraft Co.* aptly illustrates this Note's central focus.[184] The appellant relator, William Schumer, brought a qui tam FCA action against Hughes Aircraft Company ("Hughes"), alleging that Hughes defrauded the government in a defense procurement contract.[185] Specifically, Schumer, a former employee of Hughes, alleged that Hughes had improperly allocated development expenditures between two separate projects: a B-2 radar project for the Northrop Corporation and an F-15 project for the United States Air Force.[186] Because each project required the development of similar technology, Hughes entered into internal "commonality agreements" by which the cost of common components would be allocated to either project, presumably with the consent of both parties.[187] Later, Schumer alleged that the "commonality agreements" were not authorized and were deliberately concealed from both parties.[188]

After extensive government audits, the government concluded that the agreements had not been authorized and were not correctly accounted for in corporate disclosure statements.[189] The government therefore withheld payment owed Hughes in the amount of $15.4 million.[190] Upon Schumer's complaint, and after a sixteen-month independent investigation, however, the Department of Justice declined to intervene in the case.[191] At trial, the district court granted

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183. *See id.* at 137. Approximately seventy-five percent of all FOIA requests are from businesses and lawyers working for businesses. *Id.* Note, however, that since 1987, pursuant to President Reagan's Executive Order, companies must be notified in advance of FOIA disclosures. Interestingly, many "reverse-FOIA" lawsuits have emerged; here, companies are attempting to prevent the disclosure of government-held information in response to FOIA requests. *Id.*

184. 63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997).

185. *Id.* at 1515.

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.*

190. *See id.*

191. *See id.* at 1516. One commentator observed that a decision of nonintervention by the Department of Justice is the "kiss of death" for a FCA action. *See* Dewitt, *supra* note 27, at 46 n.118. Since FCA cases can be prohibitively expensive, every effort should be made to persuade the Department of Justice to prosecute the case. *See id.* at 45-48. However, another commentator and at least one court have indicated that the Department of Justice has a "track record for mistreating qui tam relators and challenging their entitlement to share" in a successful outcome. *See* Raspanti & Laigaie, *supra* note 26, at 47.

summary judgment for Hughes, finding that the "commonality agreements" were authorized by all but one material party.[192] This exception was held to be excusable because of a national security interest in confidentiality.[193]

On appeal, Schumer contested the summary judgment ruling on the merits, while Hughes contended that the action should be dismissed on one of two grounds: (1) that the alleged fraud occurred prior to the 1986 amendments and that the amendments should not apply retroactively, so the action should be dismissed for want of jurisdiction, or (2) that Schumer's complaint was "based upon public disclosures of allegations," and the action should therefore be jurisdictionally barred *even if* the 1986 amendments applied.[194] After finding that the 1986 amendments to the FCA should apply retroactively, the Ninth Circuit proceeded to Hughes' second argument regarding public disclosure.[195] Hughes alleged that Schumer's allegations of fraud had been publicly disclosed through the FOIA.[196] More specifically, Hughes alleged that three unclassified government audits by the Defense Contract Audit Agency were available for public inspection upon a proper FOIA request. Therefore, according to Hughes, the audits were publicly disclosed within the meaning of the FCA's public disclosure bar.[197] Hughes bolstered its argument with a Third Circuit opinion holding that allegations made available via the discovery process were publicly disclosed.[198] The *Schumer* court, however, relied on a D.C. Circuit opinion reaching the opposite conclusion.[199] The D.C. Circuit held that only discovery material "actually made public through filing" was disclosed; discovery material merely exchanged between the parties, but not filed, "is only theoretically available upon the public's request."[200]

The *Schumer* court considered this reasoning to be indispensable and rejected Hughes' argument that the FOIA rendered the audits publicly disclosed.[201] Relying on the dichotomy between "actual" and "theoretical" availability as explained by the Court of

192. *Hughes Aircraft Co.*, 63 F.3d at 1516.

193. *Id.*

194. *See id.*

195. *See id.* at 1517.

196. *Id.* at 1518.

197. *Id.* at 1519.

198. *Id.* (citing United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1155-56 (3d Cir. 1991)).

199. *Id.* at 1519-20.

200. *Id.* at 1520 (interpreting United States *ex rel.* Springfield Terminal Ry., 14 F.3d 645 (D.C. Cir. 1994)).

201. *Id.*

Appeals for the District of Columbia, the court noted that the audits in question were only "theoretically" or "potentially" available through the FOIA.[202] The court indicated that in order for information to be deemed publicly disclosed within the meaning of the FCA, it must actually be available—a higher standard than potential availability.[203] Unfortunately, though a writ of certiorari was ultimately granted by the Supreme Court, the Court vacated the Ninth Circuit's ruling on other grounds and thus failed to provide a definitive answer to the question of whether a disclosure pursuant to FOIA constitutes a public disclosure within the meaning of the FCA.[204]

C. Schumer's Logical Extension

More recently, in *United States ex rel. Mistick PBT v. Housing Authority of Pittsburgh*, the Third Circuit considered whether a FOIA request and subsequent disclosure constituted a public disclosure within the meaning of the FCA.[205] In *Mistick PBT*, the court was faced with a qui tam action under the FCA in which the relator requested and obtained letters through the FOIA that had been written by a business associate and addressed to the United States Department of Housing and Urban Development.[206] The relator believed that these letters contained evidence of false claims.[207] It was unclear whether the letters, standing alone, contained sufficient information to constitute either an "allegation" of a false claim or the "essential elements" of a false claim.[208]

The court in *Mistick PBT*, making a logical inference from *Schumer*, held that the disclosure of information pursuant to a FOIA request is "public disclosure" for purposes of the FCA.[209] The court noted the statutory language of the FOIA, that "[e]ach agency shall make available *to the public*" certain specified information.[210] Next,

202. *Id.*

203. *Id.*

204. *See generally* Hughes Aircraft Co., 520 U.S. 939 (vacating the decision of the Ninth Circuit based on jurisdiction, because the fraudulent activity occurred prior to the 1986 amendments which were held not to apply retroactively). Under the pre-1986 FCA statute, a different jurisdictional bar precluded a court from hearing FCA actions when the government had knowledge of the relator's allegations prior to the commencement of the action. *See supra* notes 41 & 43 and accompanying text.

205. 186 F.3d 376 (3d Cir. 1999).

206. *Id.*

207. *Id.* at 381.

208. *See id.* This issue was not necessary for deciding the case; it formed no part of the appellate court's inquiry. *See id.*

209. *Id.* at 383.

210. *Id.* (quoting 5 U.S.C. § 522(a) (2000)) (emphasis added by the court).

the court held that the public disclosure occurred within one of contexts specified in § 3730(e)(4)(A). Recall from the previous discussion that the public disclosure bar is only triggered if the disclosure originates from one of the statutorily enumerated sources, including an "administrative ... report, hearing, audit or investigation."[211] The court held that a FOIA disclosure constitutes an "administrative ... report" within the meaning of the FCA's public disclosure bar.[212] In doing so, the court relied on a dictionary definition of "report"—"something that gives information"[213]—and a Third Circuit definition of "administrative"—"those administrative reports that originate with the federal government."[214]

Another consideration apparently motivating the court's decision was the fear that "public agency records would be flooded with citizens requesting information in order to bring qui tam suits" if FOIA disclosures were not jurisdictionally barred.[215] The court noted that "Congress did not intend the qui tam provision to transform FOIA from sunshine legislation into a search for the pot of gold at the end of the rainbow."[216]

Moreover, the *Mistick PBT* court found solace in a Supreme Court decision holding that "the disclosure of information pursuant to the FOIA constitutes a 'public disclosure' within the meaning of the Consumer Product Safety Act ("CPSA")."[217] In that case, the Court was called upon to construe a provision of the CPSA that required notice to be given to product manufacturers before the Consumer Product Safety Commission ("CPSC") could publicly disclose any information pertaining to a consumer product.[218] The purpose of the CPSA is "to protect the public against unreasonable risks of injury associated with consumer products" and to assist consumers in evaluating the comparative safety of consumer products[.]"[219] The

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211. *See supra* note 142 and accompanying text. Courts have generally held, as a plain reading of the statutory language would suggest, that the statutorily enumerated sources of disclosure are exclusive and not merely representative of potential disclosure sources. *See, e.g.*, United States *ex rel.* Dunleavy v. City of Delaware, 123 F.3d 734, 744-46 (3d Cir. 1997).

212. *See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir.1997).

213. *See id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1925 (1971)).

214. *See id.* (quoting *Dunleavy*, 123 F.3d at 745).

215. *Id.* at 385.

216. *Id.*

217. *See id* at 383 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)).

218. *See GTE Sylvania*, 447 U.S. at 105.

219. 15 U.S.C. § 2051(b)(1), (2) (2000).

CPSA created the CPSC to fulfill these statutory purposes.[220] The purpose of the notice provision, as construed by the Court, was to ensure that the information disseminated by the CPSC was fair, accurate, and in accordance with the central purpose of the CPSA.[221] The provision therefore required notice to the relevant manufacturer prior to any public disclosures which might directly or indirectly reflect poorly on either the product or the product manufacturer.[222] The CPSA provides for additional protections which illustrate its overriding purpose: Manufacturers must be given a chance to submit comments regarding the information disclosed, and the CPSC must retract the disclosure if the information released to the public is inaccurate or misleading.[223]

In light of the statutory history of the CPSA, it is troubling that the *Mistick PBT* court found such comfort and persuasive value in this opinion since the legislative and judicial context of the CPSA was wholly unrelated to the issue before the court.[224] For instance, while the stated purpose of the CPSA stresses a need for broad disclosure, the history surrounding the FCA posits no such need.[225] Indeed, both the legislative and judicial history of the FCA emphasize the need for a broad remedial reading of the statute so that fraud will not go unprosecuted.[226] Instead, the *Mistick PBT* court, along with the *Schumer* court in dicta, gave a broad interpretation to the *jurisdictional bar* of the FCA.[227] Incredibly, the courts have gone against the goals of the Act by giving an overly broad reading to the jurisdictional bar—the logical equivalent of giving the FCA itself a very *narrow* reading. While the Supreme Court has stated that it "has consistently refused to accept a rigid, restrictive reading [of the FCA], even at the time when the statute imposed criminal sanctions," the appellate courts have avoided this mandate.[228]

Since the Third Circuit decided *Mistick PBT*, the Sixth,[229] Seventh,[230] and District of Columbia Circuits[231] have joined in holding

220. *See GTE Sylvania*, 447 U.S. at 104.

221. *See id.* at 105.

222. *See* § 2055(b)(1).

223. *See id.*

224. *See supra* notes 218-20 and accompanying text.

225. *See supra* notes 221-22 and accompanying text.

226. *See supra* note 59 and accompanying text.

227. *See supra* notes 201-04 and accompanying text.

228. *See* United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

229. *See* United States v. A.D. Roe Co., 186 F.3d 717, 723-24 (6th Cir. 1999).

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

that a public disclosure occurs within the meaning of the FCA when a FOIA request results in disclosure of the information. Curiously however, the most recent court of appeals to consider the issue rejected this prevailing wisdom.[232] The Fourth Circuit stands alone in holding that a disclosure pursuant to a FOIA request does not result in a public disclosure within the meaning of the FCA.[233] However, the decision has two shortcomings. First, the court only considered the issue in a footnote to the opinion, and, second, the decision is unpublished.[234] Notwithstanding these shortfalls, the court's holding is certainly plausible; FOIA disclosures do not fall within the public disclosure bar because "FOIA information . . . is not among the items listed in § 3730(3)(4)(A) as 'public disclosures' and therefore does not act as a jurisdictional bar."[235] The court then noted, as the vast majority of the circuits have concluded, that the statutorily enumerated list of disclosures is exclusive.[236]

VII. THE FCA AND FOIA: OF PARASITIC POTENTIAL OR POSITIVE SYNERGY?

Any reading of the FCA should arguably proceed with the twin aims of the act in mind: "(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."[237] Furthermore, the Supreme Court has noted the remedial nature of the FCA: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil."[238] The Court has also indicated

231. *See* United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 684-86 (D.C. Cir. 1997).

232. *See infra* note 234 and accompanying text.

233. *Id.*

234. *See* United States *ex rel.* Bondy v. Consumer Health Found., No. 00-2520, 2001 U.S. App. LEXIS 24238, at *8 n.2, slip op. at 3. (4th Cir. Nov. 9, 2001). Note that according to the Fourth Circuit local rule 36(c), the citation of unpublished opinions is disfavored.

235. *Id.* at *8 n.2.

236. *Id.*

237. *See* Lininger, *supra* note 53, at 590-91; United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519-20 (10th Cir. 1996) (citing United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992)).

238. United States v. Neifert-White Co., 390 U.S. 228, 232 (1968).

that since the purpose of the FCA is to recover stolen money for the Treasury, the Act deserves a broad remedial interpretation.[239]

Having knowledge of this historical context while interpreting an ambiguous portion of the FCA should prove fruitful. The prevailing view has either shunned this remedial logic or concluded that the issue is unambiguous—thus providing evidence that the FCA has fallen into disfavored status. For example, the *Mistick PBT* court apparently had no reservations about ambiguities when it invoked the jurisdictional bar based on a plain-meaning argument.[240] Nonetheless, the future of FCA and FOIA synergy appears dim at this stage. It is interesting to recall the impetus for encouraging qui tam actions under the 1986 amendments—public outrage over massive fraud, which culminated in congressional action.[241] Whether FOIA disclosures will bar future FCA actions depends both on public and judicial sentiment toward the FCA and on whether the remaining circuits find the prevailing wisdom persuasive. It is the purpose of this Note to call for reform, and the remaining sections are devoted to this task.

A. Where "Allegations or Transactions" Are Available via the FOIA

Where "allegations or transactions" are only possibly available through the FOIA but not actually disclosed pursuant to a request, this situation should not constitute public disclosure within the meaning of the FCA's public disclosure bar. As *Schumer* noted, this kind of information is not strictly or easily "accessible to the public."[242] The fact that the information might later be released pursuant to a proper request, and absent a relevant exemption, suggests a relationship far too tenuous to be equated with public disclosure. Furthermore, even after a thorough investigation, it may be virtually impossible to predict whether requested information will be disclosed. Correspondingly, Chief Judge Skelly Wright has noted that "the federal bureaucracy has been extremely reluctant to embrace the principle of public disclosure on which the FOIA is founded and, with significant help from the federal courts interpreting the exemptions broadly, not narrowly, has succeeded in frustrating much of its implementation. . . ."[243] In some situations, FOIA availability is

239. *See id.* at 233.

240. *See supra* notes 209-14 and accompanying text.

241. *See supra* notes 47 & 64 and accompanying text.

242. *See* United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1520 (9th Cir 1995).

243. Ray v. Turner, 587 F.2d 1187, 1200, 1223 (D.C. Cir. 1978).

subject to hostile opposition from both federal agencies and corporations, who must now be notified in advance of disclosures.[244] In one case, large defense contractors fought a four-year court battle against citizens demanding disclosure of defense contract spending.[245] When disclosure was eventually compelled, the claimed "confidential business data" revealed over two million dollars in suspicious lobbying expenditures.[246] To suggest that information on which an FCA action is brought is publicly disclosed because it is possibly available through the FOIA is reminiscent of the former 1943 act under which government possession of information barred the action[247]—an evil that Congress sought to cure with the 1986 amendments.[248]

B. Where "Allegations or Transactions" Are Disclosed Pursuant to the FOIA

Although the courts of appeals have almost universally agreed that a FOIA disclosure is sufficient to trigger the FCA's public disclosure bar, this logic is incongruous with both the legislative and judicial history of the Act and is utterly untenable if the FCA is to remain a viable fraud-combating statute. First, it is clear that the FCA's public disclosure bar is ambiguous. Indeed, "Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar."[249] Second, due to the provision's ambiguity, legislative and judicial history should be instructive as to the FCA's overriding purpose.[250] Nevertheless, courts have rarely inquired into the purpose of the Act when interpreting the ambiguous provision.[251]

Of course, if fraud is not prosecuted through the qui tam provisions of the FCA, the Department of Justice may still bring an

244. *See supra* note 183 and accompanying text.

245. HENDRICKS, *supra* note 6, at 49.

246. *Id.* The author notes that in "time[s] of severe budgetary restraints, taxpayers must retain their ability to ensure that federal spending is both wise and efficient. The Freedom of Information Act makes such oversight possible." *Id.* Although such oversight is possible, however, the FOIA is of only limited value if there is no recourse to ensure that fraud is prosecuted. *Id.*

247. *See supra* note 41 and accompanying text.

248. *See supra* note 52 and accompanying text.

249. United States *ex. rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 681 (D.C. Cir. 1997).

250. *See supra* note 52 and accompanying text.

251. *See supra* notes 209-14 and accompanying text.

action against the perpetrator.[252] One therefore may be inclined to accept a restrictive reading of the FCA if fraud will otherwise be prosecuted. However, all the evidence supports the notion that most fraud will go undetected and unprosecuted if the qui tam provisions do not secure a prominent place in fraud prosecution.[253] According to the General Accounting Office, most fraud will go undeterred absent qui tam enforcement: "For those who are caught committing fraud, the chances of being prosecuted . . . are slim. . . . The sad truth is that crime against the government does pay."[254] It could therefore be argued that the public disclosure bar should be interpreted to ensure that fraud against the government is prosecuted and thereby deterred.

At the very least, any interpretation of the public disclosure bar should not render the qui tam FCA action impotent or severely impaired. Unfortunately, the prevailing view does render the qui tam FCA enforcement action severely impaired, if not totally impotent. Hypothetical analysis of FCA and FOIA jurisprudence under the prevailing precedent will illustrate this point.

First, consider the case of hypothetical Relator 1. Relator 1 has "direct and independent knowledge" of a particular instance of fraud on the government (e.g., he is an employee for a government contractor).[255] Relator 1 will qualify as an "original source" if and only if he "voluntarily provides the information" to the government prior to filing his suit.[256] In addition, though few circuits have considered this issue, the D.C. and Sixth Circuits agree that a relator must voluntarily provide the information to the government prior to *any* public disclosure in order to qualify as an original source.[257] So, Relator 1, as an insider with full knowledge of the fraud, brings a qui tam FCA action against the perpetrator. Unbeknownst to Relator 1, FOIA requester W has requested government audits on Relator 1's

252. *See supra* note 141 and accompanying text.

253. *See supra* notes 64-67 and accompanying text. *See also* Joan Biskupic, *Justices Ask: Can Citizens Sue for U.S.? Law Aimed at Fraud Issue in Vermont*, WASH. POST, Nov. 30, 1999, at A04 (discussing the FCA action and its net three billion-dollar recovery for the United States Treasury); Micheal Isikoff, *Defense Lobbyists Bottle up Bill on Contractor Fraud*, WASH. POST, Aug. 17, 1986, at K01 (discussing the inadequate resources of the Justice Department to investigate even known fraud and stating that "as a result, some fraudulent defense contractors have a virtually free ride").

254. S. REP. NO. 99-345, at 3, reprinted in 1986 U.S.C.C.A.N. at 5269 (quoting GAO, *Fraud in Government Programs: How Extensive is It? How Can it be Controlled?*, GAO REP. at 19 (1981)).

255. *See* 31 U.S.C. § 3730(e)(4)(B) (2000).

256. *See id.*

257. *See* United States *ex rel.* McKenzie v. Bellsouth Telecomms., Inc., 123 F.3d 935, 943 (6th Cir. 1997), *cert denied*, 522 U.S. 1077 (1998); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 691 (D.C. Cir. 1997).

employer. The disclosed audits reveal both the allegation of fraud and all its essential elements. Hence, under the prevailing precedent, the "allegations or transactions" of fraud which Relator 1's complaint is "based upon" have been publicly disclosed, and the action will be jurisdictionally barred.[258]

Luckily, however, Relator 1 considers the action to be maintainable, even under a *Mistick PBT* analysis, because he calculates that the court will never learn of the disclosure to W. Unfortunately for Relator 1, however, his employer will most certainly know of the disclosure to W by virtue of a 1987 executive order requiring disclosure to corporations when business records are being released under the FOIA.[259] Therefore, the corporation will simply raise the jurisdictional public disclosure bar as a defense to Relator 1's action and will likely escape prosecution altogether for the reasons mentioned above.[260]

It will be impossible for Relator 1 to protect himself by becoming an original source, because the disclosure to W may have occurred prior to Relator 1 learning of the fraud or having the opportunity to disclose it to the government.[261] Alternatively, assume Relator 1 still has complete knowledge of the fraud and seeks to bring a qui tam action but that this time requester W has requested information containing only the essential elements of the fraud. In other words, the information W obtains through the FOIA does not contain an allegation of fraud itself but only constitutes an allegation of fraud when the elements are put together by an inference (e.g., by doing a mathematical calculation). In this case, W may have no idea that fraud has occurred. Similarly, even the governmental agency itself may be totally unaware that a fraud has been committed. Here again, however, Relator 1's FCA action will be jurisdictionally barred due to the public disclosure. More precisely, Relator 1's action is "based upon" (i.e., supported by) the "public disclosure" (i.e., via the FOIA to W) of "allegations or transactions" (i.e., the essential elements of fraud).[262] Therefore, the fraud of which Relator 1 has intimate knowledge remains unprosecuted because W requested audits which happened to contain the essential elements of the fraudulent transaction. In this regard, it is important to note that there are countless reasons for requesting information through the FOIA, and

258. *See* § 3730(e)(4)(A); *see also supra* note 148 (explaining that most courts have concluded that "based upon" means "supported by").

259. *See supra* note 183 and accompanying text.

260. *See supra* Part IV.

261. *See supra* note 172 and accompanying text.

262. *See* § 3730(e)(4)(A).

the possibility that some requesters will remain oblivious to fraud even when they have the essential elements in a document remains great.[263]

Now consider the case of hypothetical Relator 2. Relator 2 is a low-ranking employee of a large defense contracting firm and is responsible for overseeing certain aspects of performance under a government contract. A requisite to complete performance under the contract is compliance with all applicable environmental laws.[264] Specifically, the contract requires that the firm attest to compliance with these laws in order to receive payment under the contract. After Relator 2's firm completes performance and receives payment, Relator 2, from his own investigation, becomes suspicious that some environmental laws were violated. However, Relator 2 does not possess any of the information from which fraud can be inferred. He has only the bare allegation of fraud to make his stand.[265] Of course Relator 2 will be wary of disclosing his bare allegation for fear that he is mistaken or because he has nothing to gain and much to lose. The FCA provides Relator 2 with an economic incentive to disclose the fraud, but in this case a disclosure will jurisdictionally bar the action. In other words, Relator 2 cannot qualify as an original source, because he does not have "direct and independent knowledge of the information on which the allegations are based."[266]

Should Relator 2 have any recourse to expose this potential fraud? First, Relator 2 may notify the Department of Justice of his allegation, but such notification is unlikely to lead to a successful prosecution due to the reasons previously noted.[267] Second, Relator 2 may commence his own investigation through FOIA disclosure requests. If Relator 2 obtains the necessary information to establish fraud through the FOIA, he may be persuaded to bring a formal FCA action both to recover damages for the Treasury and to punish his company for defrauding the government and polluting the environment. Of course, Relator 2 will be surprised to learn that he will be jurisdictionally barred from bringing his action in at least four

263. *See generally* FOERSTEL, *supra* note 173, at 212 (discussing the mutifaceted nature of the FOIA and why persons request information under the FOIA).

264. Such a term is common in government contracts, especially those involving environmental issues. *See, e.g.*, Lininger, *supra* note 53, at 587-88.

265. For example, Relator 2 overhears a manager alluding to noncompliance.

266. *See* § 3730(e)(4)(B).

267. *See supra* notes 73-76; Micheal Isikoff, *Defense Lobbyists Bottle up Bill on Contractor Fraud*, WASH. POST, Aug. 17, 1986, at K01 (stating that "thousands of cases of potential fraud fall through the cracks each year because they involve misbillings that aren't large enough to persuade the Justice Department to devote the necessary time and expense to bring criminal or civil actions").

circuits; the fraud is therefore likely to go undeterred, and the Treasury will suffer a net loss.[268]

Next, consider the case of hypothetical Relator 3. Relator 3 is a subcontractor working on military aircraft pursuant to a government contract that includes strict specifications.[269] In the course of his work, Relator 3 becomes dissatisfied with his central contractor C. Relator 3 uncovers information leading him to believe that C is taking advantage of him by not fulfilling all of his contractual obligations. Eventually, Relator 3 and C become involved in litigation over a breach of contract. Relator 3, pursuant to his litigation investigation, obtains government audits through the FOIA which contain false information submitted by C. The only reason Relator 3 knows the information submitted is false is because he performed the work to specification Y where C attested that the work was performed to specification X. That is, X represents the disclosure of the false state of affairs through the FOIA, and Y represents the true state of affairs originally known only to Relator 3. Here the allegation of fraud could not have been inferred though the FOIA disclosure alone, because only Relator 3 would have the requisite knowledge to infer fraud from X and Y. If however, Relator 3 files a FCA action under the qui tam provision, he will be jurisdictionally barred, because his complaint will be "based upon" (i.e., supported by) the "public disclosure" (i.e., via the FOIA disclosure) of "allegations or transactions" (i.e., X and Y).[270]

It should be apparent that none of these outcomes is desirable. In addition, these hypothetical cases may seem even more objectionable when a further element is added. Consider again the case of Relator 2, armed with the bare allegation of fraud with no supporting facts. Relator 2 pursues his own investigation of the fraud and eventually uncovers the documents supporting the fraud (i.e., containing all its essential elements) in a company warehouse. He will be surprised to learn that his FCA action is jurisdictionally barred because the allegations on which his complaint is based were previously publicly disclosed. But how could this scenario evolve if Relator 2 was so careful to obtain his information from inside the company? As it turns out, Relator 2's company routinely requests FOIA audits on virtually all company business; hence, Relator 2's FCA action will be foreclosed based on the fraud perpetrator's FOIA

268. *See supra* notes 229-31.

269. For purposes of simplicity, assume that the subcontractor is one individual.

270. *See* § 3730(e)(4)(B). Note that under current law, Y will be held to have been publicly disclosed—not through the FOIA, but from discovery materials regarding the lawsuit between Relator 3 and C. *See* United States *ex rel.* Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 385 (3d Cir. 1999).

request. For obvious reasons, such a request and subsequent disclosure will have no effect on the fraud actually being prosecuted. Therefore, though the government is no closer to being made whole and the perpetrator is no closer to being deterred, the qui tam enforcement action will be dismissed for lack of jurisdiction. Indeed, if this perverted conception of FCA jurisprudence is to continue, corporate fraud perpetrators would be well-advised to seek FOIA disclosure of all fraudulent activity in order to insulate themselves from FCA liability.

C. An Interpretational Solution to the Public Disclosure Dilemma

As a starting point, any tenable interpretation of the FCA should give effect to its legislative mandate, which is to encourage the private prosecution of fraud while discouraging parasitic actions that merely take advantage of information already in the public domain.[271] In other words, private citizens should be encouraged to bring FCA actions based on their own knowledge, but freeloaders who contribute nothing to the action should be statutorily barred.[272] Any interpretation of the public disclosure bar should not depart from the statutory language when it is clear.[273] Furthermore, any viable interpretation should not lend itself to a *reductio ad absurdum* argument as the hypotheticals above do.[274]

Perhaps the most readily accessible interpretation of the FCA's public disclosure bar is that information disclosed pursuant to the FOIA does not fall within the meaning of "public disclosure." Therefore, hypothetical Relators 1, 2, and 3 would not be jurisdictionally barred, but will be free to pursue FCA actions on the government's behalf. Alternatively, courts might hold that a disclosure pursuant to a FOIA request is a "public disclosure" within the meaning of the FCA, but that an action based on such disclosure is not jurisdictionally barred because the disclosure did not fall under one of the statutorily exclusive sources in § 3730(e)(4)(A).[275] In this case, one might conclude that a FOIA disclosure does not rise to the level of an "administrative . . . report" in the context of the FCA.[276] Either of

271. *See supra* note 153 and accompanying text.

272. *See supra* note 153 and accompanying text.

273. "[I]t is preferable for the law to rule rather than any one of its citizens, and according to this same principle, even if it be better for certain men to govern, they must be appointed as guardians of the laws and in subordination to them. . . ." ARISTOTLE, POLITICS, 1287a (H. Rackham trans., Harvard Univ. Press 1990) (1944).

274. *See* discussion *supra* Part VI.B.

275. *See supra* note 143 and accompanying text.

276. *See supra* note 143 and accompanying text.

these interpretations is subject to attack, however, based on the argument that each of them would let parasitic actions flourish. Of course, the strength of this challenge necessarily depends on one's notion of a parasitic claim. Though reasonable minds may disagree on the definition of parasitic, the general idea is that actions revealing no new information should be barred as parasitic or opportunistic.[277]

From a public policy standpoint, one may argue that either interpretation would open the qui tam door to a flood of parasitic claims.[278] The argument, as articulated by the Third Circuit, is as follows: If FCA actions were allowed to be based upon FOIA disclosures, public agency records would be flooded with FOIA requests from private citizens seeking information with which to bring FCA actions.[279] This slippery-slope argument, at least according to the Third Circuit, represents a public peril to be avoided at all costs.[280] Of course, one cannot help but speculate as to the degree this logic, or illogic, has motivated courts in deciding these issues. To the extent that one finds this reasoning persuasive, at least two questions must be answered: (1) Is there any good reason to think that FOIA requests will overwhelm federal agencies, and, (2) if agencies are overwhelmed, is this necessarily an evil which needs to be prevented?

First, the Third Circuit's argument disregards the effect that the costly nature of a qui tam suit has on the litigation process. Qui tam litigation can be prohibitively expensive from the relator's standpoint,[281] and if the Department of Justice declines to intervene in prosecuting the case, the expense problem is compounded.[282] Though the Department of Justice can easily outspend any large defense contractor, most law firms cannot.[283] It is therefore likely that qui tam actions that are not meritorious would be weeded out far in advance of trial, especially if the Justice Department is not intervening in the case.[284]

Next, the argument against parasitic claims misunderstands the complex process behind FOIA disclosures. First, disclosure requests under the FOIA must be for specific "records," not "information." Agencies are "not required to research or analyze data

277. *See* Beck, *supra* note 11, at 558.

278. *See supra* note 153 and accompanying text.

279. *See Mistick PBT*, 186 F.3d at 385.

280. *See id.*

281. *See* DeWitt, *supra* note 27, at 45.

282. *See id.*

283. *See id.*

284. *See id.* (noting that the Justice Department's nonintervention is the "kiss of death" to a qui tam suit).

for a requester."[285] Rather, they are "only required to look for an existing document as described in a FOIA request."[286] In addition, only a written request conforming to several other formalities "place[s] the agency under a legal obligation to respond."[287] Moreover, any requester is subject to certain fees and costs of processing which vary with the purpose of the request or the status of the requester.[288] Therefore, not only are the litigation costs of bringing a qui tam action prohibitively expensive, but the costs associated with a FOIA request can also be substantial.[289] Because of these factors, the Third Circuit's argument that agencies will be flooded with FOIA requests from hopeful get-rich-quick relators is mistaken. A potential relator having no knowledge of fraudulent activity will have a very difficult task of uncovering fraud through the FOIA in the first place—not to mention risking the danger of incurring monetary costs.

Not only is the Third Circuit's scenario unlikely to occur, but it is wholly unclear that if it did occur it would be undesirable since it is unclear that a FOIA requester who obtains knowledge of fraud is unfit to serve as a proper qui tam relator. Even if one seeks to prohibit parasitic claims, this claim is not parasitic because parasitic claims are those that merely take advantage of information already in the public domain.[290] If a relator's claim, wholly based on a FOIA disclosure, is allowed to go forward it is unclear that this qualifies as parasitic. This claim would only take advantage of information already in the public domain, assuming FOIA disclosures are in the public domain. The fact that only one or two individuals will be privy to some FOIA disclosures demonstrates that the information is not in the public domain, at least not in the traditional sense. Moreover, the purpose of the FCA is to prevent and prosecute fraud. If the fraud uncovered through the FOIA is not meritorious it will be abandoned for the reasons already stated.[291]

VIII. CONCLUSION

In sum, the Third, Sixth, Seventh, and D.C. Circuits have rendered an untenable reading of the public disclosure bar as it relates to the FOIA. Because it precludes Relators 1, 2, and 3 from

285. *Id.*
286. *Id.*
287. *Id.*
288. *See id.*
289. *See supra* note 69 and accompanying text.
290. *See supra* note 153 and accompanying text.
291. *See supra* note 291 and accompanying text.

bringing otherwise meritorious FCA suits, the courts' prevailing wisdom is unjustifiable. Not only do Relators 1, 2, and 3 have meritorious suits, but also, in each case barring their actions inevitably leads to injustice. The Treasury will not recover stolen money, and the perpetrator of the fraud will go unpunished if these actions are barred. It is equally unlikely that the Justice Department will ever uncover the fraud, and even if it does, it is unlikely that the fraud will ever be prosecuted.[292] If the FCA is to remain a viable fraud-prosecuting statute, other courts of appeals must take notice of the irrational implications of current interpretation. The representative cases of Relators 1, 2, and 3 serve both to illustrate the ineptitude of the prevailing precedent and also to demonstrate a viable synergy between the FCA and FOIA.

Although it is unclear precisely what factors have motivated these four courts to reach such an untenable interpretation of the FCA, it is clear that these holdings have not given effect to the policies behind the FCA's rich statutory history.[293] Moreover, these decisions so weaken the utility of the FCA that fraud perpetrators may effectively absolve themselves of liability by using the public disclosure bar as a defense. Indeed, corporations can literally profit from the public disclosure bar by "publicly disclosing" information through the FOIA that contains fraudulent allegations or transactions, thereby shielding themselves from later prosecution.

The interpretation of the public disclosure bar which conforms most clearly to the statutory language, legislative history, and public policy is that FOIA disclosures do not amount to "public disclosures" within the meaning of the FCA. To hold otherwise would be to interpret the public disclosure bar broadly (i.e., to interpret the FCA narrowly). This interpretation is not plausible, because it necessarily rejects the sweeping mandate of the 1986 amendments, which sought to encourage qui tam litigation to preserve the public fisc.[294] Instead, qui tam litigation has been discouraged by these decisions and has effectively been made anachronistic. As the Supreme Court has noted, "[T]he objective of Congress in enacting the False Claims Act was to broadly protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were

292. *See supra* note 64 and accompanying text.

293. *See supra* discussion Parts II, III.

294. *See supra* notes 44-51 and accompanying text.

made. . . ."[295] In the current disfavored environment of FCA litigation, it is crucial that the judiciary take Congress's mandate more seriously.

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295. United States v. Neifert-White Co., 390 U.S. 228, 233 (1968) (citing Rainwater v. United States, 356 U.S. 590 (1958)).

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