1998

Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator under the False Claims Act

Gretchen L. Forney

Note

Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act

*Gretchen L. Forney**

Lloyd T. Bortner learned that his employer, Philips Electronics North America Corporation (Philips), was illegally concealing from the government its decision to withdraw from the U.S. market and desert their U.S. dealers.[1] The government relied on Philips's representations of continued participation in the U.S. market[2] when it purchased and leased equipment from Philips worth millions of dollars.[3] After discovering the fraudulent practices, Bortner filed suit against Philips on behalf of the government under the *qui tam*[4] provision of the False Claims Act[5] (FCA), which allows private citizens[6] to bring suit against those who knowingly defraud the U.S. government.

---

* J.D. Candidate 1999, University of Minnesota Law School; B.A. 1996, University of South Carolina.

1. *See* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 155 (5th Cir. 1997). After determining the company could not bring adequate products to the U.S. market, the executive committee decided to phase out of the market. *See* Relator's Second Amended Complaint at 6, *Searcy* (No. 1:95CV363). Philips concealed this decision from the United States because it was Philips's largest customer, and it was highly likely that the United States would have terminated existing leases, returned equipment, and exposed Philips to a multimillion dollar loss upon learning of Philips's plan to withdraw from the market. *See id.* at 8-9.

2. Despite determining it could not expand its activities in the United States, top executives continued to make representations that Philips would "put up whatever it took to succeed in the United States market" and stated the United States was an area where the company had to succeed. *See id.* at 13.

3. *See Searcy*, 117 F.3d at 155.

4. The phrase "*qui tam*" is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which is a Latin phrase interpreted as "who brings the action for the king as well as for himself." United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1086 n.1 (C.D. Cal. 1989).

5. 31 U.S.C. § 3730(b) (1994).

As required by the statute, Bortner served the Attorney General with the complaint and evidence under seal in order to help the government decide whether or not to pursue the action.[7] Initially, the government decided not to intervene and allowed Bortner to proceed individually.[8] During the year of discovery, Bortner provided the government with all of the court documents.[9] Bortner and Philips made two unsuccessful court-ordered attempts at mediation.[10] After three days of trial, the parties reached a settlement whereby the court would enter a $1 million judgment against Philips.[11] At this point, despite its earlier inaction, the government sought to intervene and block the settlement.[12]

After the district court approved the settlement and declined to allow the government to intervene, the government appealed.[13] On appeal, the Fifth Circuit reversed, allowing the government to intervene and veto the parties' settlement. The court feared the "danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States."[14] The court first determined the government had the right to appeal.[15] It further found that the language of the False Claims Act, which requires the consent of the Attorney General before a FCA case is dismissed,[16] unambiguously gives

6. The private citizen who brings the suit is called the "relator" or "*qui tam* plaintiff."

7. *See Searcy*, 117 F.3d at 155.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.* The government opposed the settlement on the grounds that the terms of the release were too broad. *See id.* For a case involving the opposite situation, where the government intervened in the *qui tam* action and sought to settle the case against the relator's wishes to continue the action, see *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325 (E.D. Cal. 1995).

13. *See Searcy*, 117 F.3d at 156.

14. *Id.* at 160. The court classified Bortner as a "relator who allegedly wants to trade on the defendants' desire to maximize preclusive effects." *Id.*

15. The court used the test set out in *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1442-43 (5th Cir. 1995). This test requires the court to determine whether "the non-parties actually participated in the proceedings below, the equities weigh in favor of hearing the appeal, and the non-parties have a personal stake in the outcome." *Id.*

16. *See* 31 U.S.C. § 3730(b)(1) (1994) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

the Attorney General absolute power to veto voluntary settlements between private parties.[17]

The False Claims Act[18] is the statutory formula for imposing liability on persons or corporations who knowingly defraud the government.[19] The FCA is enforced in one of two ways. Primary responsibility for enforcing the Act is vested in the Attorney General.[20] Under the FCA *qui tam* provision, private citizens are given enforcement power; they have the ability to bring false claim suits on behalf of the United States.[21] Currently, the government only enters about twenty-five percent of the suits filed,[22] giving the *qui tam* plaintiff substantial power to dictate the nature of the action. As *qui tam* plaintiffs developed more skill in conducting suits under the FCA, they have been able to manipulate the action, furthering their own position with a corresponding reduction in the government's recovery.[23] This manipulation has caused tension between the relator and the government, and has left the courts with the task of determining the rights of the relator and the government in *qui tam* actions.

Courts have struggled to define the respective roles of the government and the *qui tam* plaintiff in part because the statute itself has evolved over time.[24] Circuit courts are currently

17. *See Searcy*, 117 F.3d at 159-60.

18. 31 U.S.C. § 3729 (1994).

19. *See id.* § 3729(a)(1); *infra* notes 30-33 and accompanying text (discussing the elements of an FCA suit).

20. *See* 31 U.S.C. § 3730(a).

21. *See id.* § 3730(b).

22. *See* JAMES T. BLANCH ET AL., CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 140 (1996).

23. *See* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997) ("The *Killingsworth* litigation demonstrates that relators can manipulate settlements in ways that unfairly enrich them and reduce benefits to the government."). Consequently, the relationship between the relator and the government often becomes strained if the *qui tam* suit is brought for purposes of self-dealing. *See* Joseph P. Tomain, *False Claims Act Litigation: Whistleblower Qui Tam Suits Against Contractors Who Cheat the Government*, 47 ADMIN. L. REV. 299, 300 (1995) ("The relationship of the relator-plaintiff and the government contains a plot twist. As recounted in *False Claim Act Litigation*, acute embarrassment, subtle collusion, stubborn pride, or some other psychological glitch often causes the government to impede prosecution of such lawsuits . . . .").

24. *See* Tomain, *supra* note 23, at 300 ("[O]ver the history of the False Claims Act, there has been an expansion and contraction of the rights of the relator . . . ."). There have typically been three areas of concern with the relator's role in the conduct of the litigation: (1) if the government does not intervene, the *qui tam* plaintiff is directing the prosecution but proceeding in the government's name; (2) if the government decides to intervene, the court must

split over the issue of defining the rights of the parties in a *qui tam* suit. Contrary to the Fifth Circuit's decision in *Searcy*—that the government has absolute power to intervene in a *qui tam* action and block settlements[25]—the Ninth Circuit has held in *United States ex rel. Killingsworth v. Northrop Corp.*[26] that the Attorney General's consent for dismissal is only needed during the initial sixty-day period in which the government must decide whether it wants to intervene.[27] This split is not surprising due to the aberrant methods courts have used in interpreting the statute coupled with the myriad of challenges the statute has faced on constitutional grounds.

This Note discusses the positions courts have taken concerning the rights of the government and individual plaintiffs in *qui tam* suits under the FCA and concludes that the *Searcy* decision, giving the government absolute power to intervene in a *qui tam* suit, undermines the original intent of the provision. Part I addresses how the history of the FCA and the constitutional challenges to the *qui tam* provision have led to the current circuit split concerning the ability of the government to intervene and block settlements between the *qui tam* plaintiff and the defendant. Part II briefly examines the language of the FCA and summarizes how statutory interpretation has provided little guidance for the courts in deciphering the *qui tam* provision. Part III analyzes the potential ramifications for the *qui tam* provision if the *Searcy* decision is followed. This Note concludes that the ultimate concerns of the court in both the *Searcy* and *Killingsworth* decisions can be reconciled through an intermediary ground that balances the rights of the *qui tam* plaintiff and the government, while maintaining consistency with the language and purpose of the FCA's *qui tam* provision.

I. THE FALSE CLAIMS ACT: HISTORY AND CURRENT DEVELOPMENTS

The False Claims Act prohibits a wide variety of misconduct. Fraud infiltrates essentially every government program—from

---

determine whether it has shown "good cause" to do so; and (3) if a dispute arises between the relator and the government as to the conduct of suit, the government can ask the court to limit the relator's participation. *See* United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 621 (C.D. Cal. 1989).

25. *See Searcy*, 117 F.3d at 159.

26. 25 F.3d 715 (9th Cir. 1994), *cert. denied*, 117 S. Ct. 296 (1996).

27. *See id.* at 722.

welfare and food stamps, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs.[28] The Department of Justice estimates that fraud drains approximately one to ten percent of the entire federal budget per year.[29] The types of activities covered by the Act range from offering fraudulent invoices for reimbursement under a federally funded program to submitting false statements in an application for a government-guaranteed loan.[30] A person may be liable under the FCA even though the person has no direct contractual relationship with the government.[31] As long as the person causes someone else to submit a false claim, the individual may be liable.[32] The primary elements for most FCA cases are "that a claim was presented for payment by the government, the claim was false or fraudulent, and the defendant knowingly presented the claim or caused it to be presented for payment."[33]

The FCA allows a private individual to bring suit for a violation of the Act for the individual and for the U.S. government.[34] The person bringing the suit, labeled a relator, must

---

28. *See* S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 [hereinafter SENATE REPORT]. Those who have studied how much public money is lost to fraud estimate the figures range from hundreds of millions of dollars to more than $50 billion per year. *See id.* at 3.

29. *See id.* Detected fraud, however, is an inaccurate measure of how much fraud actually exists. *See id.*

30. *See* Robert L. Vogel, *Citizens' Lawsuits Based on the False Claims Act Have Multiplied*, NAT'L L.J., Nov. 26, 1990, at 20, 20. The FCA intended to cover all fraudulent attempts to cause the government to pay out sums of money or deliver property or services. *See* SENATE REPORT, *supra* note 28, at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274. Each separate bill, voucher, or other false payment demand constitutes a separate claim under the FCA. *See id.*

31. *See* Vogel, *supra* note 30, at 20.

32. *See id.*; *see, e.g.*, United States v. Bornstein, 423 U.S. 303, 309 (1976); United States v. Ehrlich, 643 F.2d 634, 637 (9th Cir. 1981).

33. Vogel, *supra* note 30, at 20; *see* 31 U.S.C. § 3729(a). Civil liability is imposed for persons who do any of the following:

> (1) knowingly submit a false claim to the government; (2) knowingly submit a false statement in support of a claim to the government; (3) conspire to defraud the government regarding a claim; (4) deliver property in inaccurate quantities or accept inaccurate receipts for property with intent to defraud the government; (5) knowingly obtain property from persons in the government who cannot lawfully sell or pledge the property; and (6) knowingly submit a false record or statement to conceal, avoid or decrease an obligation to pay money or transmit property to the government.

Kenneth D. Brody, *Recent Developments in the Area of "Qui Tam" Lawsuits: A New Weapon for Challenging Those Who May Be Submitting False Claims to the Government*, 37 FED. B. NEWS & J. 592, 593-594 (1990).

34. *See* 31 U.S.C. § 3730(b)(1). "The concept is simple: Discover someone

file the complaint under seal and serve it upon the government.[35] The relator is entitled to a percentage of the proceeds recovered from the action, an amount dependent on whether the government intervenes or not.[36] The government is given sixty days from the filing date to investigate the relator's claim and decide whether to intervene and take primary responsibility for the case.[37] If the government proceeds with the action, it has the primary responsibility for the prosecution.[38] If the government declines to take over the litigation, the relator "shall have the right to conduct the action."[39] Regardless of whether

---

defrauding the government and the law empowers you to sue the wrongdoer in the name of the United States." Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 46 (Mar. 1990); *cf.* FED. R. CIV. P. 17(a) ("[A]nd when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."). Section 3730(e) lists the circumstances under which *qui tam* actions are barred. There are essentially four situations in which courts are prevented from hearing *qui tam* actions: (1) when the action is brought by a former or present member of the armed forces against a member of the armed forces arising out of such person's service in the armed forces, *see* 31 U.S.C. § 3730(e)(1); (2) when the action is brought against a member of Congress, member of the judiciary, or senior executive branch official if the action is based on evidence known to the government when the action was brought, *see id.* § 3730(e)(2)(A); (3) when the action is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party, *see id.* § 3730(e)(3); and (4) when the action is based upon the public disclosure of allegations in a criminal, civil, or administrative hearing, or any other public record, unless the action is brought by the Attorney General or the person bringing the action is the original source of the information, *see id.* § 3730(4)(A).

35. *See* 31 U.S.C. § 3730(b)(2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.").

36. *See id.* § 3730(d)(1) (stating that if the Government proceeds with the action, the *qui tam* plaintiff is subject to receive at least 15% but not more than 25% of the proceeds of the action or settlement of the claim). If the government does not proceed with the action, the *qui tam* plaintiff "shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages." *Id.* § 3730 (d)(2) This amount shall no be less than 25% or more than 30% of the proceeds of the action or settlement. *See id.* The relator is also entitled to attorney's fees. *See id.; cf. id.* § 3730(d)(3) (reducing the share of the proceeds the *qui tam* plaintiff receives if the court determines the action was brought by the person who violated the FCA); *id.* § 3730(d)(4) (awarding the defendant attorney's fees if the claim of the relator is found to be "frivolous, clearly vexatious, or brought primarily for purposes of harassment").

37. *See id.* § 3730(b)(2); *cf. infra* note 45 (discussing the scenario where the government elects not to intervene).

38. *See id.* 31 U.S.C. § 3730(c)(1).

39. *Id.* § 3730(c)(3).

the government intervenes, it retains the right to receive pleadings and updates on the relator's case.[40]

When the government proceeds with the action, the relator still has the right to remain a party to the action,[41] but the Act ensures that the government is not bound by any actions of the relator.[42] In addition, even if the government declines to intervene, the relator cannot dismiss the action without the consent of the court and the Attorney General.[43] In the cases where the government initially elects not to intervene in the action, the court may permit an intervention at a later time upon a showing of good cause.[44] When the relator proceeds with the action alone, the Act is less clear what rights the relator retains while pursuing the action.[45]

---

40. *See id.* ("If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense).").

41. *See id.* § 3730(c)(1); *id.* at § 3730(b)(4)(a) (permitting the government to take over a filed *qui tam* action).

42. *See id.* § 3730(c)(2)(A) (giving the government the right to dismiss the action notwithstanding the objections of the relator); *id.* § 3730(c)(2)(B) (granting the government the right to settle the action over the objections of the relator so long as the court determines the settlement is fair); *id.* § 3730(c)(2)(C) (providing the government the authority to limit the relator's participation in the action).

43. *See id.* § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

44. *See id.* § 3730(c)(3); *cf.* FED. R. CIV. P. 24(a) (allowing anyone to intervene in an action upon timely application when a statute confers an *unconditional* right or where the applicant claims an interest in the action); FED. R. CIV. P. 24(b) (permitting intervention when a statute confers a *conditional* right or the applicant's claim in the main action have a question of law or fact in common). The government may also be given extensions on the time period in which it must decide whether to intervene. *See* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1341 (4th Cir. 1994) (showing how the government received eight extensions of time in which to consider whether to intervene between Siller's filing of the lawsuit and the government's ultimate decision to intervene in the action).

45. Although the FCA prohibits the relator from dismissing the action without the consent of the Attorney General, this provision has generated much controversy in the courts. *See, e.g.*, United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994) (stating that the consent provision only applies during the initial 60-day period); Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990) (finding that the consent provision applies only in cases where the plaintiff seeks voluntary dismissal of the FCA action); United States *ex rel.* Pedicone v. Mazak Corp., 807 F. Supp. 1350, 1352-53 (S.D. Ohio 1992) (holding that the *qui tam* plaintiff can dismiss the action without the consent of the Attorney General upon a finding that the plaintiff has adequately represented the United States' interests); United States *ex rel.*

A. THE *QUI TAM* PROVISION: A HISTORY OF CHANGES

The FCA's *qui tam* provision has a lengthy history, first becoming remunerative under Abraham Lincoln and during the Civil War.[46] The *qui tam* provision of the FCA was designed to give individuals who have independent knowledge of fraud[47] committed against the government the power to sue and recover part of the proceeds.[48] The idea behind the provision was that individuals within the entity defrauding the government would have superior knowledge of fraud over that of the Department of Justice.[49] Thus, the *qui tam* provision works to provide an incentive for private litigants to expose the fraud and benefit from the recovery.[50]

Stinson, Lyons, Gerlin & Bustamante v. Provident Life and Accident Ins. Co., 811 F. Supp. 346, 347 (E.D. Tenn. 1992) ("[O]nce the United States declines to intervene, the *qui tam* plaintiff has the right to conduct the action and dismiss or settle the case without the consent of the Attorney General."). "Under current law, the Government is barred from reentering the litigation once it has declined to intervene during this initial [60-day] period." SENATE REPORT, *supra* note 28, at 26. *But see* Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997) (reasoning that the government retains the right to veto a voluntary settlement).

46. *See* John C. Kunich, *Qui Tam: White Knight or Trojan Horse*, 33 A.F. L. REV. 31, 31-32 (1990) (linking the origin of FCA back to the Civil War when uncontrollable fraud on the part of government contractors cheated the Union out of much needed resources); *see also* SENATE REPORT, *supra* note 28, at 8 (providing a historical background to the FCA); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 349-50 (1989) (reviewing the original motivations behind the passage of the *qui tam* provision); Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1066 (1991) (stating Congress originally enacted the FCA as a response to the misuse of federal funds during the Civil War).

47. *See infra* note 55 and accompanying text (explaining the independent knowledge requirement of the *qui tam* provision).

48. *See* 31 U.S.C. § 3730(d).

49. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943) ("[*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 745 n.2 (9th Cir. 1993) (noting that discovering fraud is very difficult without the cooperation of those who are somehow involved in the fraudulent activity). Despite the possibility of monetary gain for the *qui tam* plaintiff, many individuals bringing suit under the FCA realize the significance behind exposing fraud. *See* Kunich, *supra* note 46, at 31 ("I'm a *qui tam* relator and I'm here to help the government." (quoting an anonymous citizen)).

50. *See* SENATE REPORT, *supra* note 28, at 2 *reprinted in* U.S.C.C.A.N. 5266, 5267 ("In the face of sophisticated and widespread fraud, the Committee

The standards for determining who could bring a *qui tam* action under the FCA have varied over time. Under the original FCA enacted in 1863, the government had no right take over an action brought by a *qui tam* plaintiff.[51] Until 1943, essentially anyone could originate a suit, based either on privately obtained or publicly available information of fraud.[52] As a result, *qui tam* plaintiffs started bringing suits based on information of fraud already known to the government.[53] In the face of widespread abuse of the provision,[54] the Act was

---

believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. [This amendment] increases incentives . . . for private individuals to bring suits on behalf of the Government."); *cf.* Hughes Aircraft Co. v. United States *ex. rel.* Schumer, 117 S. Ct. 1871, 1877 (1997) (stating that *qui tam* plaintiffs are primarily motivated to bring suit by the anticipation of monetary award rather than the public good of recovery lost moneys for the government and taxpayers); United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1994) (explaining that the only motivation by the individual relator is to recover a piece of the action given by statute); Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 282 (1992) (stating that rewards under the FCA are "significant given the fact that the Justice Department has estimated fraud to be as much as ten percent of the federal budget, or one hundred billion dollars a year"). "[S]uccessful whistleblowers can come away multimillionaires." *Id.* In 1996, private citizens who brought suits under the FCA won verdicts ranging from $1 million to $9 million. *See* Pamela H. Bucy, *Where to Turn in a Post-Punitive Damages World: The "Qui Tam" Provisions of the False Claims Act*, 58 ALA. LAW. 356, 356 (1997). For a general discussion on the policy implications of providing a monetary award to whistleblowers, see Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 98-100 (1997).

51. *See* United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 721 (9th Cir. 1994); BLANCH, *supra* note 22, at 122.

52. *See* BLANCH, *supra* note 22, at 58-59.

53. *See* Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237, 241 (1995) (reporting that beginning in the 1930s, relators began bringing lawsuits copied from preexisting indictment or ongoing congressional investigations).

54. The trend of bringing suits based on fraud already known to the government culminated with *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), where the Supreme Court held that the FCA permitted private persons to bring suit even if they copied their complaint from an indictment and had no original information regarding the defendant's wrongful conduct. *See* id at 545-48. In a subsequent letter to a member of Congress, the Attorney General summarized the harm of the *Marcus* decision by stating that the decision created a "scramble among would-be 'informers' to see who can be the first to file civil suit based on the charges in the [already filed] indictment." 89 CONG. REC. 7571 (1943). Bringing such suits against companies for millions of dollars was considered a "disgrace to the Government." *Id.* at 7572. The

amended in 1943 to limit the circumstances under which an individual could bring a *qui tam* action.[55] The 1943 version of the Act represented the government's belief that it could discover and prosecute fraud on its own.[56] Therefore, following the 1943 Amendments, the *qui tam* provision was scarcely utilized.[57]

After a flourishing federal budget deficit and continued extortion of government funds, Congress amended the FCA in 1986 with the stated intent of generating more private suits.[58]

---

idea of allowing *qui tam* plaintiffs to base their suits off information already within the knowledge of the government undermines the original intent of the *qui tam* provision. *See supra* note 49 and accompanying text (asserting that Government assumed *qui tam* plaintiffs would have *superior* knowledge of the committed against it).

55. *See* BLANCH, *supra* note 22, at 58 (describing the 1943 Amendments as Congress's attempt to prohibit *qui tam* actions that were based on information already in the possession of the government when the action was filed); Salcido, *supra* note 53, at 242 ("Congress acted immediately and decisively after *Marcus* to amend the False Claims Act."). The original source requirement is now codified at 31 U.S.C. § 3730(e)(4)(A):

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Id.

56. *See* Francis E. Purcell, Jr., Comment, *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U.L. REV. 935, 942 (1993) (classifying the 1943 Amendments as signaling Congress's belief that the federal government could handle false claims without the assistance of private relators); Salcido, *supra* note 53, at 240-48 (giving a lengthy history of the 1943 amendments).

57. *See* Bucy, *supra* note 50, at 356 ("For a variety of reasons, the FCA was not particularly effective until 1986."); Callahan & Dworkin, *supra* note 50, at 318 (noting that before the FCA was revised in 1986, *qui tam* actions averaged about six per year); Caminker, *supra* note 46, at 343 ("Restrictive statutory amendments and judicial interpretations of the Act drove *qui tam* actions into a period of desuetude for much of this century.").

58. *See* SENATE REPORT, *supra* note 28, at 23 (describing the Committee's overall intent in amending the *qui tam* section as to encourage more private enforcement of fraud); Salcido, *supra* note 53, at 250-57 (providing historical background of the 1986 amendments). "Faced with well-publicized reports of $400 hammers and $600 toilet seats, Congress in 1986 turned to the whistleblower lawsuit as its chief weapon for fighting fraud in the defense industry." Michael Waldman, *Time to Blow the Whistle? 'Qui Tam' Lawsuits Are a Double-Edged Sword: They Encourage Disclosure of Fraud but Can Poison Workplace Relations and Be Used to Settle Employee Grudges*, NAT'L L.J., Mar. 25, 1991, at 13, 13. The 1986 Amendments were needed to break the "conspiracy of silence" that had fallen upon employees who knew of government fraud, but were reluctant to report it. *See* SENATE REPORT, *supra* note 28, at 6. Workers

The 1986 Amendments strengthened the position of the *qui tam* plaintiff in three ways: (1) *qui tam* plaintiffs were given more power to initiate and prosecute claims, (2) financial incentives were enhanced, and (3) protections against employer retaliation reduced the risks inherent in exposing one's employer.[59] As a result, filing a *qui tam* action immediately became a lucrative business.[60]

B. INCREASED LITIGATION AND CONSTITUTIONAL CHALLENGES

Courts have interpreted the effect of the 1986 amendments on FCA litigation in different ways. One court identified the 1986 amendments as a continued extension of the executive branch's control over *qui tam* suits.[61] Another court concluded that the 1986 amendments expanded the ability of relators to bring suits and proceed with the suit in their own right.[62] Regardless of how the 1986 amendments are construed, a dramatic increase in the number of *qui tam* suits filed followed the changes.[63] After the 1986 Amendments, the term *qui tam* be-

---

in the defense industry (the biggest area of government fraud) believed there was no encouragement or incentives to report fraud. *See id.* at 5.

59. *See* France, *supra* note 34, at 47.

60. *See* Waldman, *supra* note 58, at 13 (reporting that since October 1986, nearly 280 *qui tam* suits had been filed and the *qui tam* plaintiffs had received approximately $9 million in awards). The government reported the following information at the end of 1995:

Fiscal Year	No. of Cases	Recoveries (approximate)
1989	95	$32 million
1990	82	$40 million
1991	90	$36 million
1992	119	$124 million
1993	131	$193 million
1994	221	$379 million
1995	274	$243 million

See Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 870-871 (1997).

61. *See* United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1090 (C.D. Cal. 1989) (stating that the 1986 version continued "the evolution of greater executive control over *qui tam* lawsuits").

62. *See* United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 2550 (1996).

63. Whether Congress intended the exact consequences of the 1986 amendments is questionable, but the effect was clear—a tremendous proliferation of fraud claims by private citizens. *See* Park, *supra* note 46, at 1062;

came increasingly well-known to government contractors, their employees, and their lawyers.[64]

As a method of resistance against the influx of *qui tam* suits, defendants began challenging the constitutionality of the amended *qui tam* provision. Constitutional challenges came on three different grounds.[65] Defendants first asserted the *qui tam* provision violated the separation of powers doctrine by depriving the executive of the ability to exercise discretion in enforcing the law.[66] Second, defendants argued the *qui tam* provision violated the appointments clause by vesting prosecutorial powers in individuals who were not appointed in accordance with the clause.[67] Third, defendants attacked the *qui tam* provision by alleging it violated the standing requirement of the Constitution because the *qui tam* plaintiff did not suffer any injury-in-fact.[68] Although the Supreme Court has not directly ruled on the constitutionality of the *qui tam* provision,[69] it has withstood all constitutional challenges,[70] generally

---

see also Purcell, Jr., *supra* note 56, at 936 (stating that after the 1986 amendments, the civil recoveries under the FCA more than doubled).

64. *See* Vogel, *supra* note 30 (discussing the multiplication of lawsuits based on the FCA after the 1986 Amendments).

65. *See* Caminker, *supra* note 46, at 344-48 (discussing the constitutional issues surrounding the *qui tam* provision); Park, *supra* note 46, at 1073 (stating the specific constitutional challenges to the *qui tam* provision have been brought under Article II, Article III, and the separation of powers doctrine). *But see* BLANCH, *supra* note 22, at 98 (stating that all constitutional problems with the FCA stem from the separation of powers issue).

66. *See* United States *ex rel.* Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1087 (C.D. Cal. 1989) (stating the court must decide whether the FCA "'impermissibly undermine[s]'" the powers of the executive or "'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions'" (citations omitted)). For a general discussion on the constitutionality of the *qui tam* provision in the context of Article II, see Ara Lovitt, Note, *Fight For Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853 (1997) (arguing that the *qui tam* provision violates the separation of powers doctrine).

67. *See* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 754-55 (9th Cir. 1993) (examining whether the *qui tam* provisions constitute an impermissible delegation of Executive Branch power).

68. *See* United States *ex rel.* Burch v. Piqua Eng'g, Inc., 803 F. Supp. 115, 118-119 (S.D. Ohio 1992) (denying the defendant's claim that the FCA is unconstitutional because no case or controversy exists); *cf.* Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965) (allowing the U.S. to recover under the FCA without any proof of damages). For a general discussion on the standing issue of the *qui tam* provision, see Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990).

69. The Supreme Court has strategically avoided a direct ruling on the

on the assertion that the government is the true party to the action, thus rendering all constitutional challenges void.[71]

C. IMPLEMENTING THE 1986 AMENDMENTS: EVOLVING INCONSISTENCIES

In resolving the diverse constitutional challenges to the 1986 Amendments, courts created additional confusion concerning the roles of the *qui tam* plaintiff and the government in a *qui tam* suit. Because the courts have used a number of different justifications for upholding the constitutionality of the FCA,[72] developing a consistent interpretation of other FCA

---

constitutionality of the *qui tam* provision. *See* Harvey Berkman, *Court Skips Sticky Qui Tam Issues*, NAT'L L.J., June 30, 1997, at 10, 10 (noting that the high court avoided several "meaty" questions regarding the *qui tam* provision); Linda Greenhouse, *High Court Hears Argument on Whistleblower Lawsuits*, N.Y. TIMES, Feb. 26, 1997, at A21 (reporting that the Court limited their review to avoid the constitutional issue raised by the defendant). The time for a direct ruling, however, is past due. "There are just too many cases and they're too conflicting not to go back up to the court soon." Berkman, *supra* (quoting an attorney who practices in the area of FCA suits). Predictions are that the Court will have at least one *qui tam* case before it every term for the next several years. *See id.*; *see also* Charles Tiefer, *Justices Ducked Major Issue in "Hughes"*, NAT'L L.J., July 14, 1997, at 21, 21.

70. *See Kelly*, 9 F.3d at 743; United States *ex rel.* Madden v. General Dynamics Corp., 4 F.3d 827 (9th Cir. 1993); United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993); United States *ex rel.* Givler v. Smith, 775 F. Supp 172 (E.D. Pa. 1991) (all rejecting defendants' constitutional challenges to the FCA). *But see* United States *ex rel.* Riley v. St. Luke's Episcopal Hosp., No. CIV.A.H-94-3996, 1997 WL 679105, at *8-9 (S.D. Tex. Oct. 21, 1997) (mem.) (granting defendant's motion to dismiss after finding that the *qui tam* plaintiff suffered no injury-in-fact required by Article III of the Constitution). This decision is unlikely to stand as it "overturns more than 130 years of American justice." Dean Starkman, *Whistle-Blowers Can't File Fraud Suits for Government, Federal Judge Rules*, WALL ST. J., Nov. 3, 1997, at B12 (quoting the *qui tam* plaintiff's lawyer who is appealing the decision).

71. *See* United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1213 (7th Cir. 1994) ("Once we accept the premise that the United States is the real plaintiff in a *qui tam* action, it stands to reason that challenges to the standing of the government's representative are beside the point."); *Kelly*, 9 F.3d at 758 (linking the court's Appointment Clause and separation of powers analysis to the fact that the Executive Branch retains sufficient control over the action); *cf.* United States *ex rel.* Yellowtail v. Little Horn State Bank, 828 F. Supp. 780, 786 (D. Mont. 1992) (using the FCA's *qui tam* provision to justify standing for the *qui tam* provision of 25 U.S.C. § 81).

72. *See Burch*, 803 F. Supp. at 119 (asserting *qui tam* plaintiffs have standing based on the potential ramifications to their employment status by reporting a violation of the FCA); United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 618-19 (C.D. Cal. 1989) (holding that the *qui tam* plaintiff does not need injury-in-fact where there is tangible injury to the gov-

provisions has been problematic.[73] The biggest problem for courts has been to define the role of the relator in a manner that maintains the constitutionality of the Act.[74] Since most constitutional challenges have been defeated on the basis that the government is the true party to the action, the *qui tam* plaintiff has been caught between the role of being the actual plaintiff in the lawsuit and being considered a mere formality with few rights.

Congress has not stated whether a *qui tam* action should be considered a suit by the government or by the *qui tam* plaintiff.[75] Thus, courts have struggled in determining who is the real party pursuing the action.[76] The *qui tam* provision states that the "action shall be brought in the name of the Government."[77] Such language suggests that the government is the real party in the action. This conclusion is supported by the common rebuttal to the constitutional challenge of standing: that the real party in interest is the government, who sustains injury-in-fact by being defrauded.[78] Some courts, however, have held that once the government declines to intervene in the initial sixty-day period, the relator becomes the real party in interest.[79]

---

ernment); United States *ex rel.* Stillwell v. Hughes Helicopters, 714 F. Supp. 1084, 1098 (C.D. Cal. 1989) (stating the *qui tam* plaintiff meets the standing requirement because the FCA essentially creates a de facto assignment of a portion of the government's interests in the action).

73. *See supra* note 45 (noting how the courts have struggled with interpreting the requirement that the Attorney General consent to dismissal as well as the government's power to intervene in an action when the 60-day period has elapsed).

74. *See* Vogel, *supra* note 30, at 20 (acknowledging how recent case law has failed to alleviate, and in some cases has added to, the difficulty of defining the roles of the parties to FCA litigation).

75. *See* Park, *supra* note 46, at 1068.

76. *See* United States *ex rel.* Haycock v. Hughes Aircraft Co., 98 F.3d 1100, 1102 (9th Cir. 1996) ("Reasonable people could go either way on whether the United States is a party, and have."); United States *ex rel.* Milam v. University of Tex., 961 F.2d 46, 48 (4th Cir. 1992) ("The issue then is simply stated: is this a suit by the United States?"); Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990) (holding that the United States is always the real party in interest in FCA *qui tam* actions).

77. 31 U.S.C. § 3730(b)(1); *cf.* FED. R. CIV. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest.").

78. *See supra*, note 71 and accompanying text (contending once the Government is the party in interest, the standing issue becomes moot).

79. *See* Public Interest Bounty Hunters v. Board of Governors., 548 F. Supp. 157, 161 (N.D. Ga. 1982) (stating that the United States itself is not a party to a *qui tam* action in which it elects not to intervene); United States *ex rel.* Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy, 588 F.2d 1327, 1329 (10th Cir. 1978) (per curium) (stating that after the 60-day period, the government's name in the action is merely a statutory formality). *But see supra*

Determining who constitutes the real party to the action also affects the separation of powers challenge to the *qui tam* provision. Courts have dismissed this constitutional challenge by stating that the executive branch maintains sufficient control over the action, and thus the relator does not interfere with the executive enforcement power.[80] Once the government decides not to intervene, however, courts often view the *qui tam* plaintiff as the litigant in control of the action.[81] Thus, it has become difficult to reconcile the notion that the *qui tam* plaintiff controls the litigation while maintaining the executive branch does not relinquish its authority over the action for purposes of constitutionality.

The controversy of defining the real party in interest depends on what Congress intended the government's role to be in the action once declining to intervene in the initial sixty-day period.[82] The opinions interpreting the government's decision not to proceed with the action are quite diverse. Courts have perceived the Attorney General's refusal to enter the suit as "tantamount to the consent of the District Attorney to dismiss the suit."[83] In contrast, the Ninth Circuit has stated, "To hold that the government's initial decision not to take over the *qui tam* action is the equivalent of its consent to a voluntary dismissal of a defendant with prejudice would require us to ignore the plain language of section 3730(b)(1)."[84]

---

note 76 and accompanying text (describing the difficulty courts have in determining whether the United States is the true party in the *qui tam* action).

80. *See* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 751-53 (9th Cir. 1993) (putting the *qui tam* provision to the separation of powers test as dictated in *Morrison v. Olson*, 487 U.S. 654 (1988)).

81. *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life and Accident Ins. Co., 811 F. Supp. 346, 347 (E.D. Tenn. 1992) (holding that once the United States decides not to intervene, the *qui tam* plaintiff may conduct the action and dismiss or settle the case without the consent of the Attorney General); *Bounty Hunters*, 548 F. Supp. at 161 (concluding that the cause of action belongs to the *qui tam* plaintiff, not the United States).

82. *Cf. Petrofsky*, 588 F.2d at 1329 (observing that no clear precedent supports a continuing governmental interest in *qui tam* suits after the United States has declined to intervene).

83. United States *ex rel.* Laughlin v. Eicher, 56 F. Supp. 972, 973 (D.D.C. 1944). This language has been quoted in more recent decisions. *See, e.g.*, Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990).

84. United States *ex rel.* McGough v. Covington Techs. Co., 967 F.2d 1391, 1397 (9th Cir. 1992).

It is also unclear whether Congress intended the *qui tam* suit to be a public lawsuit or one between private litigants.[85] The question arises when courts are confronted with the question of whether to apply procedural rules that govern litigation when the government is a party to the action.[86] If the action is one between private litigants, this would bar both the *qui tam* plaintiff and the defendant from using special rules that apply only if the government were a party. Constitutional defenses such as double jeopardy and excessive fines would presumably not be available.[87] Although the importance of this distinction has been challenged,[88] it is a useful analysis in solving the problem of who controls an FCA lawsuit.[89] If the suit is between

85. *See* Park, *supra* note 46, at 1070. Historically, the Supreme Court has also strategically avoided this issue. *See* United States v. Halper, 490 U.S. 435, 451 n.11 (1989) ("We express no opinion as to whether a *qui tam* action, such as the one in *Hess*, is properly characterized as a suit between private parties .... [W]e consider the issue unresolved."). Park asserts two theories for solving the private/public problem. *See* Park, *supra* note 46, at 1070-1073. Under the litigation theory, the government has assigned its interest in the claim to the relator, and this determines the "real party" issue. *See id.* at 1070. Under the cause-of-action theory, the *qui tam* provision is seen as an attempt to temporarily deputize private citizens as government agents. *See id.* at 1071-72. For a general discussion on the consequences of enabling private citizens to enforce federal regulatory statutes, see Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195 (1982).

86. *See, e.g.*, United States *ex rel.* Haycock v. Hughes Aircraft Co., 98 F.3d 1100, 1102 (9th Cir. 1996) (determining the government is a party to the action for purposes of FED. R. APP. P. 4(a)(1)); *Petrofsky*, 588 F.2d at 1329 (holding that the 60-day period the government has in which to file an appeal does not apply to a *qui tam* plaintiff); United States *ex rel.* Lamers v. City of Green Bay, Wis., 924 F. Supp. 96, 97-98 (E.D. Wis. 1996) (deciding whether the DOT's regulation governing testimony of employees in legal proceedings in which the United States is a party applies to a *qui tam* action); *see also Bounty Hunters*, 548 F. Supp. at 161 ("The False Claims Act itself thus provides clear evidence that a *qui tam* suit brought by a private informer in which the United States elects not to intervene is qualitatively different from one in which an appearance by the United States actually alters the identity of the prosecuting party."); Park, *supra* note 46, at 1069 (contemplating the results of a *qui tam* suit if Congress had explicitly provided that it is to be treated as a suit between private parties for all purposes). The issue also arises in the context of determining the applicability of sovereign immunity when state institutions are charged with violating the FCA. *See* United States *ex rel.* Foulds v. Texas Tech. Univ., 980 F. Supp. 864 (N.D. Tex. 1997).

87. *See* Park, *supra* note 46, at 1069.

88. *See* Caminker, *supra* note 46, at 346 (noting that the distinction between private and public representation is "conceptually infirm" because an injury to the general public can easily be reconstrued as an injury to each individual member).

89. *See* Searcy v. Philips Elecs. N. Am., Corp., 117 F.3d 154, 156 (5th Cir.

two private parties, then the *qui tam* plaintiff must be considered the true party to the action. On the other hand, if the suit is to be classified as a public action, the *qui tam* plaintiff becomes a mere formality to the lawsuit.

A slight conflict has always been present between the roles of the relator and the government.[90] Tensions between the government and the relator began with the "parasitic" *qui tam* suit—when the relator would bring an action based on information of fraud already within the knowledge of the government.[91] Both the 1943 and 1986 Amendments attempted to curtail such actions by including the requirement that the relator be the original source of the fraudulent information.[92] Recently, the government's concern has been over the ability of *qui tam* plaintiffs to join pendent claims (such as wrongful discharge) and attempt to manipulate the action to reduce the government's recovery.[93] This has led to government efforts to block "unfair"

1997) (stating the FCA's structure "distinguishes between cases in which the United States is an active participant and cases in which the United States is a passive beneficiary of the relator's efforts"); United States *ex rel.* Hyatt v. Northrop Corp., 91 F.3d 1211, 1215 (9th Cir. 1996) (noting the distinctions Congress made between the rights of the government and the rights of a *qui tam* plaintiff in order to determine whether to apply a statutory tolling provision to the government); *see also* France, *supra* note 34, at 46 (saying that, in effect, the FCA's *qui tam* provision "'privatizes' the government's anti-civil fraud function"). The *qui tam* plaintiff has even been classified as a private attorney general. *See id.* at 47.

90. *See* Richard W. Stevenson, *A Whistle-Blower to Get $7.5 Million in Big Fraud Case*, N.Y. TIMES, July 15, 1992, at A1 (expressing the concerns of the Department of Justice (DOJ) that the law encourages unwarranted suits by gold-diggers); Rick Wartzman & Paul M. Barrett, *For Whistle-Blowers, Tune May Change*, WALL. ST. J., Sept. 27, 1989, at B1 (writing on whether the DOJ will decide the "extra help" given by the *qui tam* provision in combating fraud is a "royal pain"). *See generally* Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendment Act*, 7 ADMIN. L.J. AM. U. 409 (1993) (discussing the DOJ's concerns with the 1986 amendments to the FCA).

91. *See* BLANCH, *supra*, note 22, at 147 (defining "parasitic" actions as those which serve no real public interest but instead are pursued for the self-interest of the relator); *supra* note 54 and accompanying text (discussing the widespread abuse of the *qui tam* provision prior to the 1943 amendments).

92. *See supra* notes 55-56, 58-59 and accompanying text.

93. *See infra* notes 104 & 121 and accompanying text. The FCA itself provides protection for employees who are subjected to adverse action for bringing a FCA suit against their employer under 31 U.S.C. § 3730(h), which provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in

settlements between the *qui tam* plaintiff and the defendant regardless of whether it has intervened in the action or not.[94]

D. THE CIRCUIT SPLIT: DOES THE GOVERNMENT HAVE ABSOLUTE POWER TO BLOCK *QUI TAM* SETTLEMENTS?

Observing the difficulty courts have had in interpreting and implementing the provisions of the FCA, not surprisingly, the problem of defining the roles and rights of the *qui tam* plaintiff and the government has come to a climax with a circuit split. The *qui tam* provision requires that the relator obtain the consent of the Attorney General before dismissal of the action.[95] In order to determine whether the government is able to block settlements when it has not participated in the lawsuit, the roles of the *qui tam* plaintiff and government need to be clearly defined. Due to the conflicting interpretations and application of the *qui tam* provision, the breadth of the consent requirement is the subject of a recent split between the Fifth and Ninth Circuits.

E. THE *KILLINGSWORTH* OPINION: THE GOVERNMENT'S CONSENT IS NOT REQUIRED

The Ninth Circuit concluded in *United States ex rel. Killingsworth v. Northrop Corp.* that the government does not enjoy absolute power to intervene in a *qui tam* action.[96] As a defense contractor to the government, Northrop Corporation improperly inflated cost estimates supporting MX missile contract bids.[97] As a result, Max Killingsworth brought a *qui tam* action against Northrop alleging it had defrauded the govern-

---

> furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status . . . 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination . . . .

31 U.S.C. § 3730(h) (1994).

94. *See* Searcy v. Philips Elecs. N. Am Corp., 117 F.3d 154, 155 (5th Cir. 1997) (indicating the government objected to the settlement when it discovered the *qui tam* plaintiff would receive 30% of the award plus attorney's fees); *cf.* 31 U.S.C. § 3730(c)(2)(B) (1994) (allowing the government to settle the action if the court determines the proposal is fair). *See generally* William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 29 (1975) (stating that economists have long assumed that a principle of private enforcement would fall short of its goal either because of free-rider problems or because of economies of scale).

95. *See* 31 U.S.C. § 3730(b)(1) (1994).

96. *See Killingsworth*, 25 F.3d 715, 723 (9th Cir. 1994).

97. *See id.* at 718.

ment.[98] The government investigated the claim for almost eighteen months, then declined to pursue the claim.[99] Subsequently, the parties entered into a settlement of $500,000 which fell through due to a dispute over several issues.[100] Killingsworth then amended his complaint to include wrongful discharge.[101]

Eighteen months later, Killingsworth and Northrop attempted again to settle the case.[102] The settlement provided that Northrop would pay $1 million for the FCA claim and $3.2 million for Killingsworth's wrongful discharge claim.[103] The government expressed concern with this agreement, noting that the "bulk of the settlement" would go to the wrongful discharge claim.[104] Although the government objected to the settlement, it still declined to formally intervene in the action.[105] Following the government's objection, Northrop and Killingsworth agreed to shift $500,000 from the wrongful discharge claim to the FCA claim.[106]

Three and a half years after Killingsworth had commenced the action, the government informed the court that it did not consent to the settlement agreement, but again refused to file a motion to intervene.[107] Consequently, the court entered its order of dismissal of the action with prejudice, stating that the Attorney General's consent to dismissal in the current circumstances was not required.[108] The government then appealed to the Ninth Circuit. The Ninth Circuit held that the government's appeal was timely,[109] but found that "the government's

---

98. *See id.* at 717.

99. *See id.* at 718.

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.* The government argued that the proposed settlement "reflects a deliberate attempt by Northrop and Killingsworth to divert money from the False Claims Act claim to Killingsworth's personal claim." *Id.* at 720. The government also complained about Northrop's failure to pursue a statute of limitations defense to the wrongful discharge claim which would have completely guarded Northrop from liability on that claim. *See id.* at 718.

105. *See id.*

106. *See id.*

107. *See id.*

108. *See id.*

109. *See id.* at 719. In determining whether the government's motion to appeal was timely, the court employed the test dictated in *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1393-94 (9th Cir. 1992).

consent to dismissal is only required during the initial sixty-day period" in which it must decide whether to intervene.[110] Nonetheless, the court held that the FCA authorizes the district court to ensure that the government receives its proper share of the settlement as mandated by statute.[111]

F. THE *SEARCY* OPINION: THE GOVERNMENT'S CONSENT IS ABSOLUTE

In contrast to the Ninth Circuit, the Fifth Circuit held in *Searcy v. Philips Electronics North America Corp.*[112] that the Attorney General maintains absolute power to veto voluntary settlements.[113] The court noted that most cases had only "flirted" with the issue of defining the provision of the FCA that requires the Attorney General's consent before dismissal.[114] The Second Circuit interpreted the provision to apply only in cases where the plaintiff sought voluntary dismissal of the claim.[115] The *Minotti* court went on to comment, however, that once the United States declined to intervene in an action, "little rationale" remained for requiring the consent of the Attorney General before the action was dismissed.[116] Another district court made a sweeping remark that "Congress

---

See Killingsworth, 25 F.3d at 719. The test requires consideration of three factors: (1) the stage of the proceeding at which the applicant seeks to intervene; (2) the prejudice to the other parties; and (3) the reason for the delay. *See id.* Because the court concluded that the government remains the real party in interest even when it does not intervene within the 60-day period under the statute, the government's motion survived the *McGough* test for timeliness. *See id.* at 720.

110. *See id.* at 723.

111. *See id.* at 724; *cf.* United States *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1338 (E.D. Cal. 1995) (considering the intent behind the section of the FCA which gives the relator the right to object to settlements proposed by the government). The history of 31 U.S.C. § 3730(c)(1) suggests the relator was given the right to object in order to "check that the Government does not neglect evidence, cause undue delay, or drop the false claims cases without legitimate reason." SENATE REPORT, *supra* note 28, at 26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

112. 117 F.3d 154 (5th Cir. 1997).

113. *See id.* at 159-60. Furthermore, the court stated, "[t]he power to veto voluntary settlements . . . does not conflict with the relator's statutory right to control the litigation when the government chooses to remain passive." *Id.*

114. *See id.* at 158.

115. *See* Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990).

116. *See id.* at 104 ("[W]e note that requiring the Attorney General's consent before dismissal is particularly inappropriate in this case, in light of the decision of the Attorney General . . . to decline intervening or proceeding with Minotti's claim on behalf of the Government.").

did not intend to give the United States a veto power over actions in which it has previously declined to intervene."[117] The Ninth Circuit had previously held that the government's approval of a voluntary settlement is required where the relator has failed to notify the government of the settlement terms.[118] In *Searcy*, however, Bortner (the *qui tam* plaintiff) had followed all statutory requirements for providing the government with court documents pertaining to the suit.[119]

The proposed settlement allotted thirty percent of the proceeds to be paid directly to Bortner.[120] Fearing that Bortner had manipulated the settlement, the government sought to intervene after initially declining to pursue the suit against Philips.[121] In holding that the government had absolute power to intervene, the court stated that the *Killingsworth* decision was "unpersuasive" and that the statutory language demanded an opposite result.[122] The court maintained that giving the government the power to veto voluntary settlements did not "conflict with the relator's statutory right to control the litigation."[123] Despite the intent of the *qui tam* provision,[124] the *Searcy* court stated that "intentions alone cannot work a repeal of the last sentence of § 3730(b)(1)."[125]

II. AN INTERPRETATIVE APPROACH TO DETERMINING THE PARTIES' RIGHTS

In order to resolve the dispute over interpretation, it is necessary to step back and analyze how the statutory text aids in determining the rights and roles of the *qui tam* plaintiff and the government. The language of 31 U.S.C. § 3730(b)(1) does, in fact, seem unambiguous when it states, "The action may be dismissed only if the court and the Attorney General give writ-

117. United States *ex rel.* Pedicone v. Mazak Corp., 807 F. Supp. 1350, 1352 (S.D. Ohio 1992).

118. *See* United States *ex rel.* McGough v. Covington Techs., Co., 967 F.2d 1391, 1397 (9th Cir. 1992).

119. *See Searcy*, 117 F.3d at 155.

120. *See* Order Approving Settlement, Awarding Proceeds, and Dismissing Claims with Prejudice at 2, *Searcy* (No. 1:95CV363).

121. *See Searcy*, 117 F.3d at 155.

122. *See id.* at 159.

123. *Id.* at 160.

124. *See supra* notes 49-50 (declaring the *qui tam* provision was created to encourage private citizens to report fraud).

125. *Searcy*, 117 F.3d at 159.

ten consent to the dismissal and their reason for consenting."[126] When combined with 31 U.S.C. § 3730(c)(3), which allows the government to intervene in the action upon a showing of good cause,[127] it seems correct to hold the government can intervene and prevent a settlement between the *qui tam* plaintiff and the defendant at any time. The government does not fulfill the "good cause" standard, however, by simply showing it has been overburdened by some aspect of the relator's case.[128] Thus, combining the text of these two provisions does not fully support the conclusion that the government has the absolute right to block proposed settlements between the *qui tam* plaintiff and the defendant.

The best reasoning for concluding that the government does not have an absolute right to intervene and block a settlement is arguing that the language of 31 U.S.C. § 3730(b)(1) applies "only to cases in which a plaintiff... sought to withdraw an action before the United States had opportunity to assess its merits or intervene in its conduct."[129] This rationale is essentially the same as the holding of the Ninth Circuit in *Killingsworth*—that the consent provision only applies to the sixty-day period in which the government must decide whether to intervene.[130] On the one hand, this method of interpretation seems consistent with the way these two provisions are written. The sixty-day provision[131] does not come until *after* the consent requirement in the text of the statute,[132] thereby suggesting Congress's intent to limit the time period in which the

126. 31 U.S.C. § 3730(b)(1) (1994).

127. *See id.* § 3730(c)(3).

128. *See* SENATE REPORT, *supra* note 28, at 25.

129. Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990). The court's specific holding stated that the consent provision only applies where the plaintiff seeks voluntary dismissal of the action pursuant to Federal Rule of Civil Procedure 41(a), and not where the court orders dismissal. *See id.*

130. *See, e.g., Killingsworth*, 25 F.3d at 722. The court, however, took another provision of the FCA as allowing the government to intervene *after* the initial 60-day period upon a showing of good cause. *See id.* at 724 (citing 31 U.S.C. § 3730(c)(3), which permits the government to intervene at a later date upon showing of good cause); *cf.* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 753-54 (9th Cir. 1993) ("Several of the control mechanisms built into the *qui tam* provisions are qualified.... [T]he government must show "good cause" in order to intervene in an action which has already commenced.").

131. *See* 31 U.S.C. § 3730(b)(2). Furthermore, "the term 'intervention' as used in § 3730(b)(2) is accompanied by the phrase 'and proceed with the action,'" thus referring "to the government's privilege of interceding and becoming a litigant in the action within the sixty-days." *See Killingsworth*, 25 F.3d at 722.

132. *See* 31 U.S.C. § 3730(b)(1).

Attorney General's consent is needed.[133] On the other hand, the two provisions can also be read as entirely distinct, indicating an intent that the consent requirement be enforced even after the initial sixty-day period. When read in the context of the whole statute, it appears the consent provision was included as a method of ensuring that the government had an opportunity to evaluate the merits of the *qui tam* plaintiff's claim before the parties settled.[134] Central to the structure of the *qui tam* provision is the option retained by the government to conduct an action brought by a private person.[135] The consent provision guarantees that legitimate claims are not dismissed before the government has been notified and given an opportunity to proceed with the action.[136] The provision does not suggest that the government possesses absolute power to block settlements between the *qui tam* plaintiff and the defendant.

Another obstacle to determining the respective roles of the government and the relator under the FCA is 31 U.S.C. § 3730(c)(3), which states, "If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."[137] On one hand, this language could be interpreted as giving the *qui tam* plaintiff all the benefits of a private litigant once the government declines to intervene, including the right to be free from objections from outside parties. On the other hand, the *qui tam* provision con-

---

133. Stated the *Killingsworth* court:

> The language in the statute requiring both the government and the court to consent to a dismissal came from the initial *qui tam* statute of 1863. The format and intent of the amended statute, however, do not preserve the government's absolute right to bar a dismissal without intervention except during the first sixty days plus any extension granted after the private person has filed a *qui tam* complaint.

25 F.3d at 722.

134. *See Minotti*, 895 F.2d at 103; United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Provident Life and Accident Ins. Co., 811 F. Supp. 346, 347 (E.D. Tenn. 1992). "Keeping the *qui tam* plaintiff under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit . . . ." SENATE REPORT, *supra* note 28, at 24. The Senate Report goes on to say that, under the consent provision, the purposes of the *qui tam* relator are balanced with the government's needs by allowing the relator to start the judicial process while protecting his own litigative rights. *See id.* By providing for sealed complaints, the Government is prevented from bringing suit first, and thus barring the *qui tam* plaintiff. *See id.*

135. *See Minotti*, 895 F.2d at 104.

136. *See supra* note 134.

137. 31 U.S.C. § 3730(c)(3).

tains substantial language clearly limiting the relator's role in the *qui tam* action.[138] The provisions limiting the relator's power, however, are qualified to when the government intervenes in the initial sixty-day period. Therefore, whether the same provisions apply after the *qui tam* plaintiff has proceeded with the action remains unanswered. It could be argued that if Congress wanted the government to have particular powers when the *qui tam* plaintiff proceeded with the action, it could have provided so in a separate provision.[139]

The language of the FCA clearly states that *qui tam* suits are "brought in the name of the government."[140] The courts' use of this statutory language to assist in defining the parties' roles is often unpersuasive, because whether the government is seen as a true party to the action generally depends on what benefit would be afforded to the *qui tam* plaintiff. For example, if viewing the government as a party would extend a benefit to the *qui tam* plaintiff typically reserved for the government (such as enjoying an extended period in which to appeal), the government is not seen as a party.[141] Moreover, if being a party to the action would be adverse to the government's interests, the government usually seeks exclusion from the action.[142]

---

138. *See supra* note 42 (discussing the specific statutory provisions).

139. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) ("'[W]here Congress includes particular language in one section of a statue but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Russello v. United States, 464 U.S. 16, 23 (1983))); *cf.* United States *ex rel.* Hyatt v. Northrop Corp., 91 F.3d 1211, 1215 (9th Cir. 1996) ("If Congress wanted to restrict the operation of the tolling provision to suits brought by the government, it could easily have done so.").

140. 31 U.S.C. § 3730(b)(1).

141. *See* Searcy v. Phillips Elecs. N. Am., 117 F.3d 154, 155 (5th Cir. 1997) ("The government reminded Bortner's counsel as a matter of course that it was not a party and that discovery of government documents would have to proceed by subpoena under Fed. R. Civ. P. 45."); United States *ex rel.* Petrofsky v. VanCott, Bagley, Cornwall, McCarthy, 588 F.2d 1327, 1329 (10th Cir. 1978) (stating that for purposes of enjoying the extended 60-day period in which to appeal, after the government did not intervene, "It was clear at that time the United States would not participate in the suit and that proceeding in its name was merely a statutory formality" and therefore the *qui tam* plaintiff only had 30 days to appeal). *But cf. supra* note 71 and accompanying text (explaining how the constitutional challenge of standing is answered by holding that the government is the real party in interest).

142. For example, in *Public Interest Bounty Hunters v. Board of Governors of the Federal Reserve System*, the government sought to be excluded from the action to avoid assessment of attorney's fees. *See* 548 F. Supp. 157 (N.D. Ga. 1982). The *qui tam* plaintiff tried to argue that the government was the true

When attempting to define the parties' rights in the context of 31 U.S.C. § 3730(c)(3),[143] the issue becomes even more complicated for the courts. The Federal Rules of Civil Procedure require that the action be prosecuted by the real party in interest.[144] With the *qui tam* provision, the relator is prosecuting the action, while the government contends it remains the real party in interest.[145] The Federal Rules of Civil Procedure provide an exception to the "party in interest" rule when a statute provides that the action be brought in the name of the United States.[146] But neither the FCA nor the Federal Rules of Civil Procedure answer the practical question of this arrangement: Who is in charge?

By clearly defining the roles of the *qui tam* plaintiff and the government under the FCA, courts can determine what rights each party possesses in a such an action. Unfortunately, the courts will probably need to look some place other than the actual text for guidance.[147] Although the *Searcy* court determined that the consent provision unequivocally gave the government absolute power to block settlements between the *qui tam* plaintiff and the defendant,[148] when interpreted within the whole statute and the purpose of the *qui tam* provision,[149] it is not consistent to hold that the government has absolute power in every aspect of a *qui tam* suit.[150] The relator and the gov-

---

party in interest for purposes of assessing attorney's fees. *See id.* 160. The court held that the Bounty Hunters's argument was "contrary to the plain meaning of the language of the False Claims Act, as well as to the cases construing this Act and similar *qui tam* provisions." *Id.* at 161. The court even went as far as to state that the *qui tam* plaintiff becomes the party aggrieved by defendants' alleged behavior who has "suffered 'injury' of the constitutional magnitude required to confer upon him a claim against defendants." *Id.* In *In re Schimmels*, the government argued that its interests in a *qui tam* action diverge from those of the relator to avoid the default judgment imposed on the relator. 127 F.3d 875, 882 (9th Cir. 1997). To avoid the default judgment the government asserted that it was a non-party, and thus enforcing the judgment against the government would violate due process. *See id.* at 885. Despite the government's arguments, the court maintained it was the real party in interest, and therefore affirmed the default judgment. *See id.*

143. *See supra* notes 137-138 and accompanying text.

144. *See* FED. R. CIV. P. 17(a).

145. *See supra* notes 71, 76, 142 (referencing cases which hold the government is the real party in interest in *qui tam* suits).

146. *See* FED. R. CIV. P. 17(a).

147. *See supra* note 85 and accompanying text.

148. *See* Searcy v. Phillips Elecs. N. Am. Corp., 117 F.3d 154, 159 (5th Cir. 1997).

149. *See supra* notes 50, 58 and accompanying text.

150. *See* United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d

ernment should be working toward a common goal—combating fraud. If courts give the government an unequal amount of power and allow it to completely block the relator's proposed settlement as in *Searcy*, the parties are forced into a position that dissolves the common goal.[151] In fact, often the *qui tam* plaintiff and the defendant take sides against the government in seeking to enforce the proposed settlement.[152] This situation is not consistent with the purposes behind the FCA.[153] Therefore, courts must find an intermediary ground that is consistent with the language and the spirit of the *qui tam* provision.

III. A THREAT TO THE *QUI TAM* PROVISION: *SEARCY* FOLLOWED

Not only is the *Searcy* approach flawed as a matter of statutory interpretation, it also has the potential to significantly undermine the policies of the *qui tam* provision. Suits under the FCA became scarce when the courts attempted to restrict the *qui tam* provision of the Act,[154] leading Congress to enact the 1986 amendments to reverse these restrictions. The pendulum could return to the pre-1986 state if courts follow the *Searcy* opinion. Requiring governmental consent for all settlements between parties in a *qui tam* suit is contrary to the purpose of the provision[155] and encroaches upon the relator's right to control the action.[156] From the origin of the *qui tam* provision, Congress realized the relator must have some incentive in order to expose the fraud being perpetrated on the government.[157] Suits under the FCA become very expensive

---

715, 722 (9th Cir. 1994) ("Congress' intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later intervention for good cause, is fundamentally inconsistent with the asserted 'absolute' right of the government to block settlement and force a private party to continue litigation.").

151. *See* Tomain, *supra* note 23, at 300 (stating the government's position is often antagonistic to the *qui tam* plaintiff).

152. *See, e.g., Searcy*, 117 F.3d at 155 (describing the conflicts that arose between the *qui tam* plaintiff and the government); Tomain, *supra* note 23, at 300-01 (showing how attorneys who represent relators are often fighting two battles—one against the defendant and the other against the government).

153. *See supra* note 50.

154. *See supra* note 57 and accompanying text.

155. *See supra* note 150 and accompanying text.

156. *See supra* note 81 (citing cases that hold the relator has the right to conduct the action after the government declines to pursue the claim).

157. *See supra* notes 49-50 and accompanying text.

and time consuming.[158] If the government is permitted to abuse its position in *qui tam* actions by barring a settlement after a private plaintiff has invested substantial resources in the litigation, it is unlikely future plaintiffs will be motivated to bring suit and expose fraudulent conduct.[159]

The provisions of the FCA already provide the government with ample opportunity to evaluate the merits of the relator's claim and decide whether to bear the burdens of litigation itself.[160] In addition, the FCA contains provisions which punish the relator if the relator's claim is found to be frivolous or brought for an improper purpose.[161] By agreeing to a settlement, the *qui tam* plaintiff is deciding that he or she is ready to end the litigation.[162] This decision is often made after the relator has dealt with the suit for years.[163] No other outside party could intervene and prevent the settlement at this point[164]—

---

158. *See infra* note 170.

159. *See* Callahan & Dworkin, *supra* note 50, at 276-292 (assessing the financial incentives to foster whistleblowing by using social-psychological literature). Callahan and Dworkin state that in all Congress's efforts to spur whistleblowing, "the most significant recoveries by whistleblowers are likely to be made under the federal False Claims Act." *Id.* at 281. Reward programs are methods of providing significant monetary awards to advocate whistleblowing. *See id.* at 278. The reward program under the FCA is unique because it must be aggressively pursued, contrary to other forms of reward systems. *See id.* at 294. It seems clear that the anticipation of a monetary award will often spur whistleblowing for those who would have otherwise remained silent. *See id.* at 296. "'The provisions of the False Claims Act allowing a whistleblower to share in the recovery provided me with both the incentive and the confidence to take on a matter which otherwise would have been too overwhelming for one person to pursue.'" Stevenson, *supra* note 90, at A1 (quoting a *qui tam* plaintiff).

160. *See supra* note 134 and accompanying text.

161. *See supra* note 36. Congress specifically added the provision awarding prevailing defendants attorney's fees at the cost of the *qui tam* plaintiff who brings a frivolous suit in order to create a strong disincentive to those who might consider using the FCA for illegitimate purposes. *See* SENATE REPORT, *supra* note 28, at 29; *see also infra* note 197 (citing the provision which reduces relator's recovery if the relator himself violates the provisions of the FCA).

162. *See infra* text accompanying notes 166-168 (presenting the problem of who pursues the litigation after the *qui tam* plaintiff wishes to settle the case and the government intervenes).

163. *See supra* text accompanying note 107.

164. *See supra* note 44. The theory behind Rule 24 is that the interests of the party seeking to intervene are not adequately represented by the current parties to the action. *See* FED. R. CIV. P. 24(a) (stating intervention should be granted unless the applicant's interests are adequately represented by existing parties). The theory underlying the *qui tam* provision is that the plaintiff *is* representing the government's interests. *See supra* note 34. Moreover,

and nothing in the FCA gives the government the absolute power to do so. Although the government deserves the ability to ensure the legitimacy of the relator's suit, there are better ways to appease the government's concerns other than the solution found in *Searcy*.[165]

Killingsworth addressed a practical problem in applying the *Searcy* approach. The *Killingsworth* court noted that at the time the government sought to block the settlement between the *qui tam* plaintiff and the defendant, neither the government nor the relator wanted to engage in further litigation.[166] Presumably, if the government was interested in the litigation, it would have intervened initially. Although the language of the FCA gives the government substantial powers over the *qui tam* action,[167] it does not specify the procedural effect of the government exercising those powers when the government did not initially intervene.[168] A reasonable question then arises if *Searcy* is followed: Who continues with the action if the government is allowed to block the settlement?

Most often, the government does not intervene because doing so would not be financially beneficial.[169] Conducting a successful *qui tam* action when the government does not intervene is generally very time consuming and expensive for the *qui tam* plaintiff.[170] Probably one of the biggest drawbacks of

---

both provisions of Rule 24 state the intervention must be "timely." *See* FED. R. CIV. P. 24(A)-(B). It is debatable whether an intervention to block a negotiated settlement should be considered "timely." *But see supra* notes 15, 109 (citing the *Searcy* and *Killingsworth* decisions in which the court determined the intervention by the government to object to the settlement was timely).

165. *See infra* Part IV.

166. *See* United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 723 (9th Cir. 1994). In explaining why it did not intervene in Killingsworth's claim initially, the government admitted it sought to avoid the burdens of litigation. *See id.* at 720.

167. *See supra* note 42.

168. *See supra* text accompanying note 139.

169. *See* United States *ex rel.* Berge v. Board of Trustees of the Univ. of Ala., 104 F.3d 1453, 1458 (4th Cir. 1997) (noting how the government did not intervene because it speculated that the costs of proceeding on Berge's claims outweighed the anticipated benefits). At the trial level, the jury ended up awarding the United States $1.66 million. *See id.* at 1455. Ultimately, however, the Fourth Circuit ruled that Berge's claim was preempted by federal copyright law and reversed the district court's decision denying the defendant's motion for judgment as a matter of law. *See id.* at 1465.

170. *See* Callahan & Dworkin, *supra* note 50, at 326 As early as 1986, litigation costs for relators were estimated to reach as high as $700,000. *See id.* at 32 n.212. One attorney litigating an FCA suit against McDonnell Douglas and its subsidiary Hughes Helicopter in 1993 calculated his attorney's fees as

the FCA's structure is the time it takes between reporting the fraud and when the relator receives the reward.[171] Although by settling the action the relator may receive less money than if he had proceeded to trial, the reward of prompt payment may outweigh the difference in the amount recovered.[172] Therefore, if the government is allowed to block settlements and essentially force the relator to proceed to trial, it may be removing a valuable incentive for future relators to bring an action under the FCA.[173]

The time and money spent by the *qui tam* relator are not the only costs such plaintiffs incur. Most *qui tam* actions are brought by employees of the entity defrauding the government. By exposing their employer's wrongdoing, these people stand to lose their job, ruin their reputation at work, and bear the label of "whistleblower,"[174] which might inhibit future employment.

---

approaching $3 million. *See* Gail Diane Cox, *Qui Tam Suit Is Heavy on Technicalities*, NAT'L L.J., Mar. 15, 1993, at 8, 8. Moreover, the government does not assist the *qui tam* plaintiff with the costs of proceeding with the action. As stated in 31 U.S.C. § 3730(f), "The Government is not liable for expenses which a person incurs in bringing an action under this section." Therefore, "[h]istory has shown that relators fare better when the government joins the FCA action as co-plaintiff." Bucy, *supra* note 50, at 357.

171. *See* Callahan & Dworkin, *supra* note 50, at 315.

172. *See id.* at 316.

173. *See, e.g., id.* at 297-98 (arguing that money will not serve as an incentive when it is unclear what type of conduct will be rewarded). Faced with the possibility of getting forced into a position similar to the plaintiff in *Searcy*, relators are unlikely to be motivated to bring FCA suits purely for the monetary reward when they are unsure about their rights in pursuing an action under the *qui tam* provision. *See* United States *ex rel.* Haycock v. Hughes Aircraft Co., 98 F.3d 1100, 1102 (9th Cir. 1996) (remarking that it matters a "great deal" that the *qui tam* plaintiff be able to figure out easily which time period applies in which he or she has to appeal). In addition, the research behind whistleblowing indicates that a monetary award is rarely the sole motivating factor in a decision to report wrongful activity. *See* Hamer, *supra* note 50, at 98-100.

174. *See* Callahan & Dworkin, *supra* note 50, at 314 (listing the personal and professional penalties whistleblowers can incur, such as discharge, failure to achieve promotion, blackballing, and social ostracism, as well as health and family problems caused by stress from these various forms of retaliation). An employee who had "blown the whistle" on his employer describes how he was treated by his employer subsequent to the reporting:

> They reacted angrily, calling me anti-management.... Gradually, I was squeezed out of the work I was doing.... I was excluded from meetings and was put to work doing menial tasks outside my job description, such as sweeping, making coffee and cleaning a 50 gallon coffee pot.

SENATE REPORT, *supra* note 28, at 5. In addition to infecting employee-employer relations with antagonism and suspicion, whistleblower lawsuits have also damaged relations among employees themselves. *See* Waldman, *supra* note 58, at 13 ("An existing atmosphere of cooperation and trust is

Some courts have viewed these collateral consequences for the *qui tam* plaintiff as sufficient enough to warrant injury-in-fact for standing purposes.[175] Allowing the government absolute power to block settlements between the *qui tam* plaintiff and the defendant indicates the government is unsympathetic to the burdens the relator has incurred in bringing the lawsuit.[176] If the government portrays its interests as adverse to the *qui tam* plaintiff, future plaintiffs will be reluctant to assist the government in combating fraud.

The employer's reaction to the growth in *qui tam* suits may also present problems for its continued use. The *qui tam* provision can threaten the viability of an organization that is prosecuted under the FCA and subjected to overwhelming civil fines and penalties.[177] A typical employer response to the *qui tam* provision of the FCA has been to create its own internal whistleblowing procedures.[178] This has created a conflict of interest for potential *qui tam* plaintiffs—whether to maximize their economic interests by reporting the fraud outside the organization, or to help protect the organization's interest by making an internal disclosure of the fraud.[179] If the FCA starts to lose its appeal, more and more employees may forgo the *qui tam* provision for continued job security and even an enhanced reputation within the organization. Although this method of exposure—i.e., internal procedures—still uncovers fraud, it does not punish the entity as would the FCA.[180] Faced with this possibility, the courts must be even more reluctant to limit the relator's rights while increasing the government's power in a *qui tam* action.[181]

---

sometimes replaced by suspicion that co-workers may be gathering evidence and implicating their colleagues.").

175. *See supra* note 72.

176. *See supra* note 174 and accompanying text; *see also* SENATE REPORT, *supra* note 28, at 5 (reporting that fear of reprisal was the second most cited reason given by employees for not reporting fraud).

177. *See* Hamer, *supra* note 50, at 100.

178. *See* Callahan & Dworkin, *supra* note 50, at 335; Hamer, *supra* note 50, at 100-01.

179. *See* Hamer, *supra* note 50, at 100.

180. By reporting the fraud via the internal reporting system, the wrongdoing may be corrected, but the organization remains largely unharmed. *See* Hamer, *supra* note 50, at 101.

181. Callahan and Dworkin even go so far in their article to question whether *any* amount of monetary award will be enough to offset the potential ramifications a *qui tam* suit has in the workplace. *See* Callahan & Dworkin, *supra* note 50 at 336. ("Are the gains worth the price? A few more millionaires, and a few million dollars for the federal treasury are probably not worth the loss of trust and atmosphere of cooperation."). Moreover, the research behind whistle-

The *Searcy* opinion can be seen as the final clash in determining who controls the *qui tam* litigation, as well as who constitutes the real parties to the action. Although the consent provision has its valid justifications,[182] if abused, it could be seen solely as a method for the government to impound on the relator's rights. Remembering that the relator has funded the litigation by his or her own personal resources,[183] the *Searcy* decision could lead to unfair results for the relator who is forced to proceed with the action when he or she wishes to settle. Congress created the *qui tam* provision to encourage suits by private litigants.[184] Relators may soon be discouraged, however, if they are forced into full-fledged trials which become expensive and time consuming.

IV. BALANCING THE RIGHTS OF THE GOVERNMENT AND THE *QUI TAM* PLAINTIFF

If the government wants the *qui tam* provision to remain useful, the courts must find a satisfactory solution for the tensions that have been created between the government and the *qui tam* plaintiff. Fraud on the government is not likely to cease, and the government should recognize from past experience that it is unable to combat fraud on its own.[185] In addition to depleting government money, fraud erodes public confidence in the government's ability to manage its own programs efficiently.[186] Therefore, it is essential that common ground be reached in interpreting the FCA to combat this widespread problem.[187]

The most effective compromise seems to be the Ninth Circuit's approach. While holding that the government is the real party in interest, the court nevertheless limited the government's ability to block the settlement by requiring it to seek court review of the proposed settlement.[188] This court review of

---

blowing indicates that a monetary award is rarely the sole motivating factor in a decision to report wrongful activity. *See* Hamer, *supra* note 50, at 100.

182. *See supra* note 134 and accompanying text (stating the consent provision was meant to ensure the government could evaluate the merits of the relator's claim before dismissal).

183. *See supra* note 170.

184. *See* SENATE REPORT, *supra* note 28, at 30.

185. *See supra* note 58.

186. *See* SENATE REPORT, *supra* note 28, at 4.

187. *See supra* notes 28-29 and accompanying text.

188. *See* United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 720 (9th Cir. 1994); *cf.* United States *ex rel.* Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1338-39 (E.D. Cal. 1995)

the proposed settlement serves the purpose of determining whether the provisions of the settlement improperly allocate funds to the relator which should be paid to the government.[189] With this arrangement, the government does not impede upon the rights of the relator after the relator has borne the burdens of bringing the action and pursuing the litigation. The government's ability to block the settlement between the *qui tam* plaintiff and the defendant is not absolute; nonetheless, the government is assured the settlement will be fair.[190]

The FCA does not specifically address the government's rights when the relator and the defendant arrive at a settlement.[191] The language of the FCA explicitly gives the relator the right to conduct the action,[192] which surely includes the right to negotiate a settlement with the defendant.[193] In the section of the FCA that addresses the allocation of recovery, the statute recognizes the relator's right to settle the action.[194] Thus, in addition to being consistent with the intent of the *qui tam* provision and general notions of fairness, refusing to give the government absolute power over any aspect of a relator's case is compatible with the plain language of the FCA. As noted by the court in *Killingsworth*, "The statutory scheme of the False Claims Act provides protection for the rights of both the relator and the government."[195] Therefore, it seems illogical to give one of the parties absolute power over any aspect of the litigation.

Allowing the court to decide the fairness of the settlement proposal between the *qui tam* plaintiff and the defendant is also supported by the language of the FCA. The Act gives the court the power to determine whether the settlement is fair

---

(considering the conditions upon which the relator was entitled to a hearing if the government moved to dismiss or settle the action, but the relator wished to proceed). The court required a hearing to determine if the government's purpose in dismissal is rationally related to a legitimate governmental purpose and that the dismissal is not arbitrary, fraudulent, or illegal. *See id.* at 1340.

189. *See Killingsworth*, 25 F.3d at 720.

190. *See supra* notes 93-94 and accompanying text.

191. *See Killingsworth*, 25 F.3d at 723.

192. *See* 31 U.S.C. § 3730(b)(4)(B) (1994).

193. *See Killingsworth*, 25 F.3d at 722.

194. *See* 31 U.S.C. § 3730(d)(2). ("If the Government does not proceed with an action under this section, the person bringing the action *or settling* the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages." (emphasis added)).

195. *Killingsworth*, 25 F.3d at 720.

when the *government* seeks to dismiss or settle the action.[196] In addition, the court has the power, under certain circumstances, to fix the amount of the recovery that the *qui tam* plaintiff receives.[197] The *Killingsworth* court interpreted this provision as indicating Congress's intent that courts have the duty to ensure that *qui tam* plaintiffs do not manipulate suits in a way to reduce the government's settlement.[198] This solution resolves the concerns of both the government and the *qui tam* plaintiff. First, the government is assured that relators will not have the power to exploit their position in FCA actions and abate the government's recovery because the courts will be guaranteeing the fairness of the settlement.[199] Second, *qui tam* plaintiffs can expect that, as long as they proceed in a proper manner, their rights as the party pursuing the action will not be thwarted by the government.[200]

The Ninth Circuit's solution also allows for resolution of the different explanations courts have used for upholding the constitutionality of the *qui tam* provision.[201] By ruling on the validity of a proposed settlement, the court acknowledges that the relator maintains substantial interest in the outcome of the suit[202] while recognizing that the government is the party who has sustained the actual injury of being defrauded.[203] The court is able to give the language "the action shall be brought in the name of the government" full effect without neglecting the relator's rights as the party conducting the action.[204] The

196. *See* 31 U.S.C. § 3730(c)(2)(B) (1994) ("The government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, *after a hearing*, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." (emphasis added)). For a case interpreting the breadth of this provision, see *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325 (E.D. Cal. 1995).

197. *See* 31 U.S.C. § 3730(d)(3) (stating that if the court finds that the action was brought by a person who violated the terms of the FCA himself, the court may reduce the relator's share of the proceeds).

198. *See Killingsworth*, 25 F.3d at 724.

199. *See supra* note 94 and accompanying text.

200. *See supra* note 173 and accompanying text.

201. *See supra* note 72 and accompanying text.

202. *See supra* notes 75-79 and accompanying text (discussing the problems the courts have had in defining who is the primary litigant in an FCA suit).

203. *See supra* note 71 and accompanying text (explaining how the standing challenge is solved by contending the United States is the real plaintiff in a *qui tam* action).

204. *See supra* notes 141-142 and accompanying text. Allowing the court

court reminds the relator of the government's presence in the litigation while recognizing the efforts the relator has made in bringing the action.[205] Thus, the tensions are relieved between the *qui tam* plaintiff and the government.[206] The court becomes the intermediary and decides what is fair for purposes of the FCA,[207] instead of choosing between the rights of the *qui tam* relator or the government.

CONCLUSION

Courts faced with deciding the roles of the government and *qui tam* plaintiff in an FCA action should be reluctant to grant the government absolute rights in any aspect when it has declined to intervene in the initial stages of the action. The structure of the FCA gives the government ample opportunity to evaluate the validity of the *qui tam* plaintiff's action at the beginning of the proceeding. Although the court should not permit *qui tam* plaintiffs to manipulate their position, the government should not be given absolute power to intervene at the finishing stages of the action.

The structure of the *qui tam* provision was designed to encourage private individuals to expose and prosecute those who defraud the government. These ideals are thwarted by allowing the government to scrutinize the *qui tam* plaintiff at every stage in the action and object to the methods used to prosecute the defendant. Providing the government the opportunity for a review of proposed settlements by the court is the best method of keeping the tensions between the *qui tam* plaintiff and the government at bay while recognizing that both parties have an interest in the ultimate outcome of the case.

---

to rule on the validity of the relator's settlement, however, does not resolve the question of whether a *qui tam* action is one between private litigants or one between the government and a private litigant for purposes of applying special procedural rules and immunity. *See supra* notes 85-86.

205. *See supra* notes 80-81 and accompanying text (discussing the separation of powers issue).

206. *See supra* note 23 (explaining the strains between the relator and the government); *supra* text accompanying notes 90-94 (reviewing how tensions have been created between the government and the *qui tam* plaintiff).

207. *See supra* notes 49-50 and accompanying text (examining how the FCA was formulated and designed to allow "private" prosecution of government fraud).