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Games and Stories: Game Theory and the Civil False Claims Act

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FLORIDA STATE UNIVERSITY
LAW REVIEW

KOSHER WITHOUT LAW: THE ROLE OF NONLEGAL SANCTIONS IN OVERCOMING FRAUD WITHIN THE KOSHER FOOD INDUCSTRY

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GAME THEORY AND THE CIVIL FALSE CLAIMS ACT

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GAMES AND STORIES: GAME THEORY AND THE CIVIL FALSE CLAIMS ACT

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> "[T]he False Claims Act . . . has been . . . the Department's primary civil enforcement tool to combat fraud . . . ."[1]
>
> "The [False Claims Act] . . . can be an oppressive bludgeon. . . .; a favorite weapon of the federal government to regulate by terror. . . ."[2]
>
> "[The False Claims Act] creates market place incentives to encourage the private sector to do the public's work. . . . [It] change[s] the dynamics in the workplace . . . ."[3]

Gripping tales of intrigue,[4] smuggling,[5] deceit,[6] courage,[7] dogged persistence,[8] extortion,[9] and waste[10] pour forth when one studies the

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1. *Health Care Initiatives Under the False Claims Act That Impact Hospitals: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 105th Cong. 38 (1998) [hereinafter *Subcomm. on Claims Hearing*] (statement of Donald K. Stern, U.S. Attorney, Mass. Dist., and Chair, Attorney General's Advisory Comm., U.S. Dept. of Justice).

2. James J. Graham & T. Jeffery Fitzgerald, *Curbing False Claims Act Abuse*, BUS. CRIMES BULL., Oct. 1998, at 1.

3. Interview with John R. Phillips, Co-Director, Center for Law in the Public Interest, in Los Angeles, Cal. (Nov. 3, 1987), *in* CORP. CRIME REP., Nov. 9, 1987, at 11 [hereinafter Phillips Interview]. Phillips is generally credited with passage of the 1986 amendments which revitalized the False Claims Act (FCA). This interview is a fascinating account of how the amendments came about, and how the FCA changes the dynamics within the United States Department of Justice and within industries relevant to FCA liability. *Id.* at 5-12.

4. *See, e.g.*, United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1037 (6th Cir. 1994). Chester Walsh was a General Electric (GE) executive sent by GE to Israel to serve as liaison to the Israeli military with regard to a contract between the U.S. Department of Defense and Israel to supply the Israeli military with GE-manufactured F-110 fighter engines. After Walsh arrived in Israel, he discovered a scheme by a high-level GE executive and a brigadier general in the Israeli military to defraud the United States government on the contract. Fearing for his personal and job security, Walsh used aliases to consult with attorneys about what to do regarding his suspicions. *Id.*

Civil False Claims Act (FCA).[11] The FCA creates a cause of action on the part of "any person" who believes that another has submitted false claims to the federal government.[12] It has been heralded as one of the most effective crime-fighting tools ever devised,[13] and cursed as

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5. *Id.* After Walsh discovered fraud upon the United States Government by a high-ranking GE executive and a brigadier general in the Israeli military, he feared for his personal safety. *Id.* Apparently, his concerns were reasonable. After the GE fraud came to light, the Israeli General was court-martialed and pled guilty to conspiring to kidnap a potential witness and to injure and threaten the witness "to prevent him from testifying." United States v. Gen. Elec. Co., 808 F. Supp. 580, 583 (S.D. Ohio 1992), *aff'd in part and rev'd in part*, 41 F.3d 1032 (6th Cir. 1994). After seeing another GE whistleblower transferred, Walsh feared for his job security as well as his personal safety and requested a transfer to Switzerland. *Taxpayers Against Fraud*, 41 F.3d at 1037. While awaiting transfer, Walsh began collecting evidence, including secretly recording conversations. *Id.* He hid this evidence with common household goods when he moved from Israel to Switzerland. *Id.*

6. For example, Grace Pierce, M.D., was demoted from her position as associate director of medical research at Ortho Pharmaceutical Corporation after she refused to proceed on human trials she and fellow researchers considered carcinogenic. Although Dr. Pierce's position on the carcinogenic nature of the drug in question was supported by FDA guidelines, her supervisor, the executive director of medical research, "accused her of irresponsibility, lack of judgment and conduct unbecoming a director." ALAN F. WESTIN, WHISTLE-BLOWING: LOYALTY AND DISSENT IN THE CORPORATION 113 (1981).

7. *See, e.g.*, United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1325 (M.D. Fla. 2001). Alderson was fired and endured years of financial hardship and personal and family stress after refusing to prepare two sets of Medicare cost reports for his employer. *Id.*

8. *See, e.g.*, United States *ex rel.* Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000), *rev'g* 52 F. Supp. 2d 420 (E.D. Pa. 1998). Over a period of two years, Merena spent hundreds of hours assisting and working with federal attorneys and agents to investigate fraud at SmithKline Beecham Laboratories. United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 420, 442 (E.D. Pa. 1998).

9. WESTIN, *supra* note 6, at 113.

10. *See, e.g.*, United States *ex rel.* Hochman v. Nackman, 145 F.3d 1069 (9th Cir. 1998) (affirming summary judgment for defendants in qui tam action for insufficiency of evidence). Relator filed suit after the Office of Inspector General of the United States Department of Veterans Affairs conducted an investigation and concluded that "allegations could not be substantiated." *Id.* at 1071.

11. 31 U.S.C. §§ 3729-3733 (2002).

12. *Id.* § 3730(b).

13. For example, in fiscal year 2000 the "United States collected $1.5 billion in civil fraud recoveries," most of which, $1.2 billion, was collected through a private justice action, the qui tam provisions of the False Claims Act (FCA). *FCA News: Top Qui Tam Recoveries of 2000*, 21 TAF Q. REV. 16, 18 (2001) [hereinafter *FCA News*] (reproducing November 2, 2000 press release from the Department of Justice). As one Department of Justice official explained in 1996: "The recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute [the FCA] works and is an effective tool in our continuing fight against fraudulent use of public funds." TAXPAYERS AGAINST FRAUD, THE 1986 FALSE CLAIMS ACT AMENDMENTS, TENTH ANNIVERSARY REPORT 15 (1996) (quoting Frank W. Hunger, Assistant Attorney General, Civil Division, U.S. Dept. of Justice); *see also Subcomm. on Claims Hearing*, *supra* note 1, at 39 (Donald K. Stern, U.S. Attorney, Mass. Dist., and Chair, Attorney General's Advisory Comm., U.S. Dept. of Justice, stating that "the False Claims Act . . . is a critical [civil enforcement] tool in fighting and deterring."); *Id.* at 15 (Lewis Morris, Assistant Inspector General for Legal Affairs, Office of Inspector Gen., U.S. Dep't of Health and Human Services, asserting that "[t]he False Claims Act has been an essential tool to protect the integrity of the Medicare program." To achieve this goal "of 'zero tolerance' of Medicare fraud and abuse . . . the Government relies on a

irresponsible and disruptive to a healthy economy.[14] What is clear is that the False Claims Act, with its unique partnering of private individuals and governmental investigators, fundamentally alters public

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number of enforcement options—criminal, civil, and administrative, as well as educational outreach efforts. Chief among the enforcement tools has been the False Claims Act."); *Id.* at 25 (Dr. Robert A. Berenson, director, Center for Health Care Plans and Providers Administration, Health Care Financing Administration, U.S. Dep't of Health and Human Services, claiming that "the False Claims Act is an important tool for . . . law enforcement . . . to pursue fraud and abuse.").

> [To deal with health care fraud and abuse,] Congress in recent years [has] expand[ed] statutory authority and [increaseed] resources to deal with the problem. However, none of these things are likely to play a more important role in recovering improper payments or in acting as a deterrent than the False Claims Act. Use of the FCA by Federal authorities has become an important tool for fighting fraud and abuse in many programs, including the Medicare program.

Id. at 63 (statement of Ruth Blacker, member, National Legislative Counsel, American Association of Retired Persons).

14. *See* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 205 (1998) (describing how the False Claims Act is regarded by many government contractors as "a costly, substantial burden of doing business with the government"); John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 50 (1999) (According to Boese, foremost expert on the FCA and a respected defense counsel, because of the FCA, "health care providers today are expected to operate in an almost kafkaesque environment, where conventional conduct is made illegal and where the government is permitted broad prosecutorial discretion, the exercise of which is unpredictable and subject to being overruled by both private citizens and other branches of the government." *Id.*; *see also* Michael Kendall, *The Indiscriminate Targeting of Hospitals with False Claims Act*, BUS. CRIMES BULL., June 1997, at 4-5.

> [T]he government is threatening to use the False Claims Act to punish billing errors that are frequently the result not of intentional lies but of negligence or attempts to comply with vague rules. Virtually any billing dispute can be labeled a violation of Medicare billing rules. This is a lucrative strategy. Given the cost of litigation and the consequences of losing, health care providers frequently settle in response to the government's threats [to sue under the FCA].

Id.; Harvey Berkman, *Spoils to Bounty Hunters, Federal Contractors Gripe*, NAT'L L.J., Mar. 4, 1996, at B1, B1-B2.

> Critics of [the FCA] argue that the rise in whistleblower suits does not reflect a sudden unearthing of a large amount of fraud. Rather, they contend, companies, without intending to defraud, can make mistakes in handling complex government contracts and find themselves pressured to settle suits to avoid the far larger penalties than can follow a False Claims Act trial.

Id.; Uwe E. Reinhardt, *Medicare Can Turn Anyone into a Crook*, WALL ST. J., Jan. 21, 2000, at A18.

> Has it [our renowned health-care system] become host to widespread malfeasance? While politicians would like us to think so, the simpler answer is that health-care regulations have just become too complicated to understand.
>
> . . . .
>
> Given the tangled web of Medicare legislation, more fraud investigations are inevitable. Rather than engaging in a long, protracted fight to set the record straight, throughout which share prices suffer and business slumps, a health company's best bet may simply be to hand over the files and get on with business.

Id.; Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 45 (1998) (supplying an overview of industry attacks on the False Claims Act).

regulatory theory and practice. It does so by changing the world of regulation from a two-party dynamic between regulator (R) and targeted business (T) to a three-party dynamic between R, T, and a private party (P) who files suit under the False Claims Act and thereby becomes a player in the regulatory *game*.

This new dynamic presents fascinating questions: Why would regulators cede any of their independence and prosecutorial discretion to private parties? Should regulators breach the traditional and often necessary confidentiality in which they work by allowing private individuals to join them in investigating and prosecuting wrongdoing? Why would a private individual want to work with regulators, especially when doing so may create significant personal, professional, and financial hardships? How does the private-public partnering produced by the FCA affect the decisions and strategies adopted by targets and defendants? Using Game Theory analysis, I look at these questions. Because of its focus on how and why people decide whether to cooperate, Game Theory is an especially enlightening lens with which to view the regulatory world created by the False Claims Act.[15] Through its disciplined modeling, Game Theory allows us to address these questions rigorously and supply some answers.

I have two goals in this Article. The first is to explore how a private attorney general model such as the FCA alters the regulatory world, and whether the alteration is for better or worse. This is a worthy topic because of what it tells us about the merits of any mechanism that integrates private citizens into law enforcement efforts. As our world becomes more complex and global—and more vulnerable to systemic wrongdoing—such integration may be a necessary component of an effective public regulatory system.

My second goal in this Article is to demonstrate the extraordinary versatility and effectiveness of Game Theory for analyzing legal issues. Developed in the fields of mathematics and economics, Game Theory remains on the fringe of legal thought, used by a few;[16] ignored by most. I hope to convince others of what I have come to realize—Game Theory is enormously useful for thinking about legal issues and public policy questions.

Part I of this Article provides an overview of the False Claims Act and emphasizes the changing roles it creates for public regulators, regulated industry, and private parties who join in the regulatory *game*. This Part shows that the FCA is important because of what it

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15. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 19-23 (5th ed. 1998); MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY 1 (1994).

16. Legal academics who have employed Game Theory to analyze legal and policy issues include Jason Scott Johnson. *See* Jason Scott Johnson, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343 (2002).

tells us about the effectiveness, or lack thereof, of any system that deploys private persons into public regulatory efforts. Part II of this Article summarizes general principles of Game Theory. Part III uses Game Theory to examine the changes in the regulatory world brought about by the False Claims Act. Part III concludes by drawing lessons from Game Theory about optimal strategies for the players in this new regulatory world. Stories from FCA cases abound throughout this Article, for it is through them that theory meets reality. As these stories show, FCA cases involve high stakes and strange alliances.

I. THE CIVIL FALSE CLAIMS ACT

A. Overview

The False Claims Act,[17] first passed in 1863,[18] and amended several times since,[19] most dramatically in 1986,[20] grows out of a long tradition of using private parties to supplement law enforcement efforts.[21] Such actions, termed "informer" actions, were common in thirteenth-century England and colonial America.[22] These early actions provided for minimal, if any, oversight of "informers," and were

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17. 31 U.S.C. §§ 3729-3733 (2002).

18. Act of March 2, 1863, ch. 67, 12 Stat. 696, 696-98. Incensed at shoddy equipment delivered by suppliers to the Union Army and scam artists who delivered nothing at all though were paid for it, President Abraham Lincoln sought to have the False Claims Act passed. Priscilla R. Budeiri, *The Return of Qui Tam*, WASH. LAW., Sept.-Oct. 1996, at 24, 25. He described those at whom the Act was aimed:

> Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the Nation while patriotic blood is crimsoning the plains of the South.

Id. at 26.

19. Rev. Stat. 3490-94 and 5438 (1875); 89 CONG. REC. S7606 (Sept. 17, 1943); False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153; Pub. L. No. 103-272, 108 Stat. 1362 (1994).

20. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. The 1986 Amendments are credited with revitalizing the FCA, which had fallen into disuse. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.04[H] (2d ed. Supp. 2003). The 1986 amendments increased the amount of recovery a private party who brought an FCA action (termed a "relator") could receive; guaranteed a minimum amount of recovery for the relator; relaxed the "jurisdictional bar" provisions which had prevented many relators from filing suit; clarified and relaxed the mens rea requirement; expanded the statute of limitations; clarified the burden of proof; and added protection for whistleblowers who are retaliated against by their employers. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 45-47 (2002).

21. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539 (2000); Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 909-17 (2002) [hereinafter Bucy, *Information as a Commodity*]; Bucy, *supra* note 20, at 12-54; Note, *The History and Developments of Qui Tam*, 1972 WASH. U. L.Q. 81 [hereinafter *History and Developments*].

22. Bucy, *Information as a Commodity*, *supra* note 21, at 909-17; Beck, *supra* note 21, at 565-608; *History and Developments*, *supra* note 21, at 83-91.

subject to many abuses.[23] By the mid-twentieth century, they had been abolished in England[24] and fell into disuse in America.[25]

In American jurisprudence today there are a number of actions that private parties may bring alleging that a defendant has violated some federal or state law.[26] To the extent these actions supplement the efforts of law enforcement in detecting, proving, and deterring lawbreaking, the private parties who bring them serve as "private attorney generals." In almost all of these actions, the private party who brings the action has been personally injured by the defendant's conduct.[27] The False Claims Act is unique among these actions because it allows a private party who has not been personally injured to bring the FCA action alleging violation of public laws by the defendant.[28]

Briefly, here is how the FCA works. A person who believes that he has information and evidence that someone else (individual or company) has filed false claims against the federal government may file a lawsuit making such allegations.[29] This plaintiff (termed a "relator") is required to file his lawsuit under seal (not even serving it on the defendant). The relator is also required to give a copy of the lawsuit to the United States Department of Justice (DOJ), along with a written report of "all material evidence and information" the relator possesses.[30] The lawsuit stays under seal, often for two years or more, to allow the DOJ to fully investigate the charges made by the relator.[31] The secrecy provided by sealing the complaint not only protects a defendant's reputation if the relator's information amounts to noth-

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23. Bucy, *Information as a Commodity, supra* note 21, at 909-17. For example, a party that expected to be charged with a crime would "locate a friendly informer who would file suit" against the defendant and settle for an amount less than the defendant would have paid the government had there been a prosecution by the government. *Id.* This strategy worked to defendants' advantage since prosecution by an informer precluded prosecution by the government. *Id.* at 913.

Other "common abuse by informers [included] filing suit in a venue far from where the defendant lived," bringing suit "under obsolete or little known statutes, or for popular conduct that constituted a technical offense," or simply extortion not to prosecute. *Id.* at 914.

24. Common Informers Act, 1951, 14 & 15 Geo. 6, c. 39 (Eng.) (abolishing most informers actions); Act to Redress Disorders in Common Informers, 1956, 18 Eliz., ch. 5, §4 (imposing sanctions against informers who brought vexatious suits).

25. 89 CONG. REC. S7606 (Sept. 17, 1943), *codified at* 31 U.S.C. §§ 232-235 (1976) (limiting relators' ability to bring FCA actions and limiting the proceeds relators could receive if they brought an action).

26. *See, e.g.*, The Electronic Communications Privacy Act, 18 U.S.C. § 2520 (2000 & Supp. 2001); American Disabilities Act, 42 U.S.C. § 12188(a)(1) (2002); The Civil Rights Act of 1964, 42 U.S.C. § 1981 (2002); Guardian Assn. v. Civil Serv. Comm'n, 463 U.S. 582, 593-95 (1983) (implying § 1981 under Title VI); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (implying § 1981 under Title IX).

27. Bucy, *supra* note 20, at 13.

28. The FCA provides, "[a] person may bring a civil action for a violation [of this Act] for the person and for the United States Government." 31 U.S.C. § 3730(b) (2002).

29. *Id.* § 3730(b)(1).

30. *Id.* § 3730(b)(2).

31. ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER 33 (2000).

ing,[32] but also facilitates the DOJ's further investigation of the relator's information.[33]

At the conclusion of its investigation, the DOJ decides whether it will intervene in the lawsuit as an additional plaintiff. If it does, the DOJ assumes "primary responsibility" for the case, although the relator remains as a plaintiff and is guaranteed a participatory role.[34] In some cases, the DOJ handles the entire case after intervening; in others, relators work hand-in-hand with government prosecutors. In some cases, relators and their attorneys assume the bulk of the investigative and litigative duties.[35]

If the DOJ does not join the lawsuit, the relator may continue pursuing the case, litigating it alone.[36] Even if the DOJ does not join a relator's case, it retains authority over the relator's lawsuit in several ways: the DOJ monitors the case and may join it at any time, even for limited purposes, such as appeal;[37] the DOJ may settle or dismiss a relator's suit over the relator's objections as long as the relator has been given an opportunity in court to be heard;[38] the DOJ may seek limitations on the relator's involvement in the case,[39] or

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32. Bucy, *supra* note 20, at 69-70.

33. Phillips Interview, *supra* note 3, at 9. Phillips, who is generally credited as the person responsible for the 1986 Amendments to the FCA, explained how the sealing provision came about:

> The Justice Department resisted these *qui tam* provisions of the False Claims Act. If you look at the record, the Justice Department didn't want them changed at all. One argument that was advanced was, "you are going to make our job more difficult because as soon as you file these complaints, it is public information, and we can't do our normal investigations. If we want to put a wire on somebody or do an undercover investigation, you have blown the cover instantly, so this is a bad idea." My response was to say, "fine, we will draft a seal provision so that it is under seal until you decide to join the case. . . ." It is a very unusual provision in that regard. What [it] did was [to] completely negate the argument advanced by the Justice Department.

Id.; *See, e.g.*, WEST, *supra* note 31; S. REP. NO. 99-345 at 16 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5281.

34. 31 U.S.C. § 3730(b)(4)(B).

35. For other examples of FCA qui tam cases where the relator and relator's counsel assumed large amounts of responsibility for the preparation of the case, see United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323 (M.D. Fla. 2001); United States *ex rel.* Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000) (facts more fully discussed in United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420 (E.D. Pa. 1998), *rev'd,* 205 F.3d 97 (3rd Cir. 2000)).

36. 31 U.S.C. § 3730(c)(3).

37. *Id.*; *see, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 770 (2000); United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486, 489 (5th Cir. 2001).

38. 31 U.S.C. § 3730(c)(2)(A)-(B). The DOJ may even move for dismissal or oppose a settlement without intervening. *See, e.g.*, Juliano v. Fed. Asset Disposition Assoc., 736 F. Supp. 348, 350-51 (D.D.C. 1990) (moving to dismiss relator's case by the DOJ after declining to intervene); United States v. Health Possibilities, P.S.C., 207 F.3d 335, 340-41 (6th Cir. 2000) (intervening by the DOJ to oppose the settlement reached by relator and defendant after declining to take the case).

39. 31 U.S.C. § 3730(c)(2)(C).

seek alternative remedies (such as administrative sanctions) in lieu of the relator's lawsuit.[40]

If the government joins the relator's case, the relator is guaranteed at least 15 percent of any judgment or settlement and the court can award more—up to 25 percent. If the government does not join the lawsuit, the relator is guaranteed 25 percent and could receive up to 30 percent.[41] The amount within the statutory award depends upon the relator's helpfulness to the government.[42] Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments,[43] relators' percentages involve substantial sums.[44]

The case of *United States ex rel. Alderson v. Quorum Health Group*[45] shows how the FCA works. It is typical in that it shows the steps of an FCA qui tam action. It is atypical because of the unusual contribution made by the relator to pursuing the case; in this respect, *Alderson* exemplifies the FCA working to its fullest potential.

In the 1980s, Alderson was the Chief Financial Officer at North Valley Hospital in Whitefish, Montana. He had been so employed for six and one-half years.[46] In August 1990, Quorum Health Group took over as the management company for the hospital. Soon thereafter a Quorum representative instructed Alderson to prepare two Medicare cost reports. Hospitals that participate in the Medicare program by treating Medicare patients must submit annual cost reports. These are lengthy, detailed reports that provide extensive information about a hospital's costs.[47] Alderson was told to prepare an "aggres-

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40. *Id.* § 3730(c)(5).

41. *Id.* § 3730(d)(2).

42. The FCA has four built-in features to reward only those relators who actually supply helpful information. First, the FCA directs courts to determine what percentage, within the statutory range, of the judgment should be given to the relator based upon how helpful the relator was in "advancing the case to litigation." *Id.* § 3730(d)(1). Second, a court is directed to reduce the share of the award further if the relator "planned or initiated" the FCA violation and to exclude the relator from receiving any portion of the award if she has been convicted of conduct constituting the FCA violation. *Id.* § 3730(d)(3). Third, the FCA's jurisdictional bar provision prohibits a qui tam case from going forward if the information it includes is already public (unless the relator is the "original source" of the information). *Id.* § 3730(e)(4). Lastly, the FCA provides that only the first qualifying qui tam lawsuit may proceed. *Id.* § 3730(b)(5).

43. For example, recent judgements in FCA qui tam cases include an $875 million settlement from TAP Pharmaceuticals, 55 HEALTHCARE FIN. MGT. 10 (2002), a $745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a $385 million settlement with National Medical Care, Inc.; a $325 million settlement with SmithKline Beecham Clinical Laboratory; a $325 million settlement with National Medical Enterprises; and a $110 million settlement with National Health Laboratories. BOESE, *supra* note 20, § 1.05[A].

44. Recent relators' awards include $44.8 million, $28.9 million, and $18.1 million. *FCA News*, *supra* note 13, at 20.

45. 171 F. Supp. 2d 1323 (M.D. Fla. 2001).

46. *Id.* at 1325.

47. Form HCFA 2552, Cost Reports for Hospitals (on file with author). Cost reports are lengthy and complex, consisting of hundreds of worksheets and requiring detailed in-

sive" cost report to submit to Medicare, and a "reserve" report to be used internally.[48]

Alderson refused to prepare the two inconsistent reports. He was terminated four days later.[49] Within months, Alderson filed a wrongful termination suit.[50] During depositions regarding his termination, Alderson learned of additional irregularities in Quorum's cost-reporting practices. He sought documents that would shed further light on such practices and engaged a forensic accounting expert.[51] In 1992, two years after his termination by Quorum, Alderson filed a pro se FCA qui tam complaint alleging that Quorum's cost reporting practice defrauded the Medicare program. As required by the FCA, Alderson provided the federal government with a copy of his complaint and a written statement of the information and evidence he had gathered supporting the charges in his complaint.[52]

Unable to find another job after being fired from North Valley Hospital, Alderson and his family suffered financially for years after his termination. His family was forced to move from its comfortable home to a cramped apartment in another town. They used the college savings they had accumulated for their two teenage children.[53]

For nine years after he filed his pro se FCA complaint, Alderson spent thousands of hours working on his FCA case,[54] retained two different law firms to represent him in the action[55] and, either by himself or with his attorneys, met often with DOJ attorneys and/or investigators, mostly in Washington, D.C., and at his own expense.[56] At these meetings, Alderson explained how Quorum's reserve cost report practice defrauded the Medicare Program.[57] When DOJ attorneys expressed concern about a legal theory to support an FCA case,

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formation about the facility, its staff and operation. Providers are required to allocate various costs, including capital expenditures, medical education costs, travel, malpractice insurance premiums and payments, and every type of patient care costs to various centers, designated by whether the patient was a Medicare patient and whether the expense is properly reimbursable to the Medicare program. ROBERT FABRIKANT ET AL., HEALTH CARE FRAUD, ENFORCEMENT AND COMPLIANCE § 2.02[4] (2003).

48. *Alderson*, 171 F. Supp. 2d at 1325.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1325-26.

53. Kurt Eichenwald, *He Blew the Whistle, and Health Giants Quaked*, N.Y. TIMES, Oct. 18, 1998, § 3, at 1.

54. *Alderson*, 171 F. Supp. 2d at 1330.

55. Approximately one year after filing his pro se qui tam complaint, Alderson retained a law firm that specialized in health care law to handle his qui tam case. *Id.* at 1325. In 1995, Alderson changed to a law firm that specialized in FCA qui tam cases. *Id.* at 1327. This firm represented Alderson until the case was resolved.

56. Id. at 1325-29.

57. *Id.*

or what they viewed as weak evidence or minimal damage,[58] Alderson addressed their concerns.[59] The forensic accountant Alderson retained, and continued to pay, met with DOJ officials in Washington, D.C. to assist Alderson in explaining the fraud to the DOJ attorneys.[60]

Working with the DOJ attorneys and investigators, Alderson identified voluminous documents that government investigators should subpoena from Quorum.[61] At the DOJ's request, he reviewed the documents obtained by subpoena.[62] These were extensive: eight boxes of more than 11,000 records from 197 hospitals for seven years. For one year, working alone, Alderson analyzed the records and prepared a spread sheet summary of relevant cost reserve information. He "culled a set of 2,500 documents that corroborated . . . specific reserve information" and presented his summary, spreadsheet, and relevant documents to the DOJ.[63]

Seven years after Alderson filed his action,[64] the DOJ agreed to intervene in Alderson's lawsuit, but only after receiving "assurances from Alderson's counsel of their ability and willingness to commit the necessary resources to the case and to undertake the principal role in prosecuting the litigation."[65] Thereafter, Alderson's counsel:

- assisted in drafting the DOJ's amended complaint;[66]
- retained auditors to analyze one-half of the cost reports (government auditors analyzed the other half);[67]
- handled the third-party discovery, including the preparation and service of subpoenas to 200 hospitals nationwide; performing this task required that Alderson's lawyers hire two additional associates;[68]
- "contributed substantially to the motion practice and discovery that followed the filing of the [amended] complaint";[69]

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58. DOJ attorneys believed the fraud to be $10 million or less, too low to consider. *Id.* at 1325-31.
59. *Id.*
60. *Id.* at 1325-26.
61. *Id.* at 1326.
62. *Id.*
63. *Id.* at 1326.
64. *Id.* at 1329.
65. *Id.*
66. *Id.*
67. *Id.* at 1327.
68. *Id.* at 1330, 1330 n.22.
69. *Id.* at 1329-30.

- worked with the DOJ in combined efforts to respond to defense motions to dismiss;[70] and
- directed a two-year substantial, sustained mediation on behalf of the plaintiffs to reach a settlement in the case.[71]

The case ultimately settled for $85.7 million.[72] Alderson's share was approximately $20.6 million. The average relator's award, when the government intervenes, is sixteen percent of the judgment recovered.[73] When awarding Alderson an unusually large award of twenty-four percent, the court looked to the FCA, its legislative history, DOJ Guidelines for Relator's Award,[74] Alderson's persistence,[75] expertise, the personal sacrifices he made to help the government,[76] and the significant contribution of Alderson's counsel in pursuing the case.[77] Alderson's attorneys were awarded $2.7 million in attorneys fees pursuant to the FCA's requirement that culpable defendants should pay "reasonable attorneys' fees and costs."[78]

The court that determined Alderson's share described Alderson's contribution to the case: "The record graphically demonstrates Alderson's profound personal and professional commitment to success in this litigation. His commitment manifested itself in his persistent labors and those of his attorneys and accountants, all of whom contributed mightily both before and after the United States intervened."[79]

B. The Changing Regulatory Dynamics Created by the FCA

Before the FCA was revitalized with amendments in 1986 and became a factor in federal law enforcement, the only effective way to

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70. *Id.* at 1330.

71. *Id.* Alderson also attended and participated in all of the mediation conferences, held throughout the United States. *Id.*

72. *Id.* at 1339.

73. *Panel: FCA Enforcement in the Post-*Stevens *World*, A.B.A. NAT'L INST. ON THE CIVIL FALSE CLAIMS ACT AND QUI TAM ENFORCEMENT (2000) (Discussion with Michael Hertz, Director, Commercial Litigation Branch, Civil Division, U.S. Dep't of Justice).

74. *Alderson*, 171 F. Supp. 2d at 1331-35.

75. *Id.* at 1336-38. According to the court, "[o]nly [Alderson's] dogged resolution, eventually supported by competent professionals and an occasionally reluctant government, resulted in the millions now available for distribution." *Id.* at 1338.

76. *Id.* at 1337-38.

77. *Id.* at 1335. According to the court, "[t]he record establishes that Alderson's counsel contributed significantly (in both quality and quantity) and at certain moments crucially to this case. That contribution deserves manifest and telling weight in determining the proper relator's award." *Id.* The award of attorneys fees and costs was in addition to the contingency portion of his award that Alderson agreed to pay to his attorneys. *Id.* at 1335 n.35.

78. *Id.* at 1330 n.25 (awarding attorneys fees and costs pursuant to 31 U.S.C. § 3730(d)(1) (2002)).

79. *Id.* at 1338.

investigate what appeared to be intentional fraud[80] against the government was before a grand jury, as a criminal matter.[81] Grand jury investigations of complex economic wrongdoing are tedious and lengthy.[82] Investigators must pierce enough of the corporate veil to figure out what has taken place, who is involved, how far and deep the wrongdoing goes, and since the case is being investigated as a criminal matter, whether the fraud was intentional rather than the result of mistakes, inexperience, overwork, or sloppiness.

Grand jury investigations proceed step-by-slow-step. They often begin with interviews of the source who first alerted law enforcement that there may be a possible problem. Next, relevant financial records are subpoenaed. These records are analyzed to determine what documents, transactions, individuals, or companies may be involved. More records are subpoenaed and analyzed.[83]

This process continues until the investigation stops turning up new information. Often, the most helpful evidence comes from slow, painstaking tasks such as charting checking and savings account deposits and withdrawals, and correlating those with significant business transactions. Generally, only after documentary investigation has revealed what is going on, or the investigation has reached an impasse, do investigators resort to questioning live witnesses. This is because there are risks in questioning witnesses without a full picture of what was going on and who was involved. Throughout an investigation, investigators must guard against alerting those who may destroy or alter evidence, or threaten or tamper with witnesses.

Rarely in grand jury investigations will a knowledgeable insider offer helpful information or be willing to cooperate until law enforcement has established that individual's involvement in the wrongdoing. Most insiders are too fearful of the consequences of cooperating with the government to do so under any other circumstance. Thus, prosecutors secure cooperation from a knowledgeable insider only by negotiating leniency in exchange for the insider's testimony. Such negotiation is always a gamble since prosecutors may not know until it is too late that they have cut a deal with an individual who has greater culpability than those he is being asked to

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80. The FCA includes a mens rea requirement of "knowingly," which the FCA defines as "actual knowledge of the information," "deliberate ignorance of the truth or falsity of the information," or "reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b) (2002). This is the same definition for mens rea used in many criminal offenses. *See, e.g.*, United States v. Jewell, 532 F.2d 697, 701-04 (9th Cir. 1976).

81. *See, e.g.*, JAMES B. STEWART, THE PROSECUTORS 154 (1987) (regarding the value of the grand jury in conducting investigations of wrongdoing).

82. *Id.* at 23, 222, 243-45, 248-49.

83. *See generally* PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE §§ 2.06, 4.02 (3d ed. Supp. 1997); SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6 (2d ed. 2001).

testify against.[84] Such mishaps are always a possibility since investigators rarely have a full understanding of the fraud at the time they must decide who to approach for cooperation. There is another danger in conscripting witnesses with a cooperation-for-leniency exchange: such individuals often are not trustworthy.[85] They tend to minimize their own involvement or that of their friends and close colleagues.[86] Corroboration is always necessary to verify their information.[87] It is also difficult for investigators to know whether they have fully uncovered the scope of the wrongdoing and wrongdoers, or the number and identity of all victims.[88]

Imagine what a knowledgeable insider can add to this investigation process. It would be invaluable to have an insider who knows everything about the organization being investigated and who can explain the full scope of the wrongdoing, identify everyone who was involved, when they became involved, and the extent to which they were involved. A knowledgeable insider can identify which records and transactions to examine, what companies and businesses are involved in the relevant transactions, and who the victims are. With such information, investigations could proceed more quickly and thoroughly, clearing those who are not culpable and gathering available evidence against those who are.

It is this dynamic that the FCA changes. The FCA encourages honest, non-culpable insiders to come forward and to work with investigators throughout an entire case. Because of the way it is structured (honest insiders can receive a significant recovery, but culpable insiders receive less, or nothing) the FCA entices honest insiders, not the culpable individuals grand jury investigations tend to unearth. Because of their credibility advantages, these non-culpable insiders are more valuable to government investigators than are those who are cooperating only to save themselves and who become willing to cooperate only after the government has already proven much of what occurred. By tying the amount of the insider's award to the insider's helpfulness, the FCA encourages insiders to work with investigators by supplying information and providing other assistance.[89]

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84. STEWART, *supra* note 81, at 139-40, 202-08, 220.
85. *Id.* at 214, 223, 241.
86. *Id.* at 25-27, 158, 165, 217.
87. *Id.* at 163.
88. *See generally* DIAMOND, *supra* note 83, § 4.02; BEALE ET AL., *supra* note 83, § 6:1.
89. *See* 31 U.S.C. § 3730(d)(1) (2002) (requiring that in determining what percentage, within the mandatory range, of the judgment shall be awarded to the relator, a court "tak[e] into account the significance of the information and the role of the person bringing the action in advancing the case to litigation"); United States *ex rel* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1333-34 (M.D. Fla. 2001) (listing DOJ guidelines).

Besides bringing helpful inside information of wrongdoing, qui tam relators also bring investigative and litigative talent to regulators. The FCA, both by its terms and its practice, provides significant financial inducement not only for insiders but also for experienced, skilled attorneys who represent relators' cases. Under the FCA, successful relators recover attorneys fees and costs from defendants.[90] In practice, additional compensation for relators' counsel has evolved. Relators generally negotiate with their attorneys to pay a percentage of the relator's award to counsel.[91] This total package of attorneys fees, costs, and percentage of the relator's award can be quite lucrative—enough to lure skilled counsel from other sophisticated areas of practice.

The case of Michael R. Lissack demonstrates the dual resources of insider information and legal talent that qui tam relators bring to regulators.[92] Michael R. Lissack was a highly successful investment banker at Smith Barney, becoming, for example, the second youngest person to serve as a managing director in Smith Barney's history. One day, Lissack made an anonymous phone call to a United States Attorney's office that was investigating certain investment firms for various frauds. Lissack described another fraud, "yield burning," that was quite massive and about which law enforcement knew nothing.[93]

By law, the investment banks are required to price securities no higher than fair market value. They are also required to reimburse the United States Treasury for any profits they reap on their handling of municipal securities.[94] Yield burning occurs when investment banks price securities in excess of fair market value and retain the profits this generates, rather than passing them on to the United States Treasury in the form of lower interest payments as required.

In Lissack's initial phone call to the U.S. Attorney's Office and in multiple later conversations, all made anonymously, Lissack explained yield burning to prosecutors who were unfamiliar with the practice, and described how it was diverting millions of dollars from the Treasury.[95]

One and one-half years later, in February 1995, when nothing had yet been done to stop yield burning, despite his telephone calls, Lissack decided to force the government to act by taking action himself.

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90. 31 U.S.C. § 3730(d)(1).

91. *See id.*

92. Erika A. Kelton, *The False Claims Act and Wall Street: How a Qui Tam Case Reformed the Municipal Bond Market*, 19 TAF Q. REV. 35-44 (2000); Charles Gasparino, *Muni Matters: Cities Have a Headache Thanks to Wall Street*, WALL ST. J., Aug. 26, 1997, at A1; *cf. Wall Street Update*, WALL ST. J., Apr. 14, 2002, at C2.

93. Kelton, *supra* note 92, at 35.

94. *Id.* at 36-37.

95. *Id.* at 35-36.

He filed a FCA qui tam lawsuit against national and regional investment banks. After seven years, this case settled for a total of $200 million, with thirty investment banks paying the damages awarded.[96]

Lissack's FCA suit got the attention of the Securities Exchange Commission, which initiated multiple investigations and ultimately sanctioned individuals and banks. Lissack's qui tam suit also got the attention of the Internal Revenue Service, which initiated a review of the tax-exempt status of hundreds of tax-free municipal bonds. The IRS concluded its review by issuing a new Revenue Procedure to protect the Treasury from losses of any yield-burning activity in the future. The IRS's new procedure placed the burden on public issuers to detect future yield-burning situations, or to repay any yield-burning profits realized.

In addition to filing a federal FCA action, Lissack filed a qui tam action under the California False Claims Act. In this suit, Lissack alleged that the yield-burning activity of one investment banker, Lazard Feres & Company, caused the Los Angeles County Metropolitan Transportation Authority (LAMTA) to incur losses of approximately $3 million. The State of California intervened in Lissack's suit and hired Lissack's qui tam team of lawyers to represent LAMTA. In 1998, Lazard settled the California action, agreeing to pay treble damages of $9 million.[97]

The Lissack case shows the contributions that a knowledgeable insider and his counsel can make to exposing and preventing fraud: Lissack alerted regulators to a significant, systemic, complex theft that was depriving the federal government of millions of dollars and of which regulators were unaware. When regulators failed to act to stop the practice one and one-half years after Lissack told regulators about it, he rallied regulators to action by filing his own lawsuit. To prepare the case, Lissack's legal team gathered public bond transaction documents from more than 500 issuers and retained economic experts who generated evidence with multiple regression analysis on more than 1900 individual Treasury securities.[98] Their analysis demonstrated how yield burning defrauded the federal government.[99] With his knowledge of investment banking and the yield-burning practice, Lissack was able to anticipate and rebut defenses.[100] Lissack and his attorneys supplied significant expertise, labor, and resources to investigate and prepare the case. Lissack's whistleblowing led to

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96. Telephone Interview with Erika A. Kelton, counsel for Michael Lissack, Phillips & Cohen (Mar. 25, 2003).

97. Kelton, *supra* note 92, at 42.

98. *Id.* at 39.

99. *Id.*

100. *Id.*

fundamental changes in how municipal financing occurs, which better protects federal and state treasuries from massive graft and theft.[101]

C. Tensions Created by the FCA

Despite the benefits the FCA presents to government regulators and to participaing private parties, the FCA creates tensions. For starters, it forces regulators to compromise the veil of secrecy that traditionally has surrounded government investigations.[102] The FCA also aligns the interest of private individuals to that of government regulators instead of to professional colleagues and employers. This shift in loyalty often creates considerable personal and professional struggles.[103] For all of these reasons—habit, confidentiality, personal hardship—it is difficult for regulators and private individuals to work together to investigate and prove wrongdoing. Often, the tensions grow as the FCA case proceeds.[104] In some cases, the two plaintiffs, the DOJ and the relator, battle.[105] The DOJ may oppose a relator, as when the DOJ argues that a relator should be dismissed from the case.[106] The relator and the DOJ may disagree on trial strategy,

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101. *Id.* at 44.

102. *See, e.g.*, FED. R. CRIM. P. 6(e)(2). "A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made [as permitted in this Rule] shall not disclose matters occurring before the grand jury . . . ." *Id.* "A knowing violation . . . may be punished as a contempt of court." *Id.*

103. Bucy, *Information as a Commodity, supra* note 21, at 948-58.

104. Although the relator should be aware that opposing the DOJ on such issues may earn the relator a reduced percentage of the judgment for failing to be cooperative. *See, e.g.*, United States *ex rel.* Coughlin v. IBM Corp., 992 F. Supp. 137, 141-42 (N.D.N.Y. 1998).

105. Several courts have noted the DOJ's antagonism to relators, especially when it comes to sharing the judgement. *See, e.g.*, United States v. Gen. Elec. Co., 808 F. Supp. 580 (S.D. Ohio 1992).

> No one likes "snitches," but they can be valuable. In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where this Court has noted the antagonism of the Justice Department to a whistleblower. The reason continues to be unknown, but the attitude is clear.

Id. at 584; *see also* United States *ex rel.* Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352, 370 (E.D. Pa. 2000):

> I recognize that the government's present litigation stance is that Mr. Merena helped very little and merely provided basically clerical assistance that the government could have obtained without him. In view of the many public accolades previously given him by the same government officials responsible for the prosecution of the case, I have trouble accepting or even rationalizing the government's present position other than attributing it to an over-zealous attempt to lower the amount of the award rightfully due.

106. *See, e.g.*, United States *ex rel.* Grant v. Rush-Presbyterian/St. Luke's Med. Ctr., No. 99C06313, 2001 WL 40807, at *1 (N.D. Ill. Jan. 16, 2001); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1495 (11th Cir. 1991); *Merena*, 114 F. Supp. 2d at 366.

such as lifting the seal to permit discussions with the defendant[107] or granting the DOJ an extension of the sealing period.[108] Although the DOJ and the relator may work cooperatively for years, the DOJ may oppose the relator when dividing the settlement.[109]

Strange alliances also develop. The relator and the defendant may work together against the DOJ—as when the DOJ opposes a settlement reached by the relator and the defendant.[110] Or, the relator and the defendant may join forces to oppose individuals who seek to qualify as qui tam relators.[111] The DOJ and the defendant may join forces to exclude the relator.[112] Perhaps most oddly of all, offices within the DOJ may oppose one another as to how a relator should be treated.[113]

The case of *United States ex rel. Merena v. SmithKline Beecham Corp.*[114] demonstrates these odd dynamics. A financial systems analyst at SmithKline Beecham Clinical Laboratory (SBCL),[115] Robert Merena served as supervisor of the "Response Department," where he handled SBCL's payments from Medicare and other insurers.[116]

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107. This is a common strategy in qui tam cases. *See* Kathleen McDermott, *Qui Tam, An AUSA's Perspective*, 11 TAF Q. REV. 20, 25-26 (1997).

108. While it may be to the relator's benefit to agree to extensions of the seal so as to allow the DOJ to fully investigate the relator's claims and prepare the case if the DOJ determines it is meritorious, the delay hurts the relator because it gives time for more relators to file qui tam lawsuits regarding the same transactions. As long as the initial qui tam suit is under seal, of course, no one, including future relators, will know about it and thereby be deterred from filing their own qui tam action. Although the FCA is clear that only the first relator to file a qui tam action may proceed with the case, and all other subsequent qui tam actions arising from the same transaction must be dismissed, the first-to-file relator will have to protect her status, often through lengthy, involved litigation. Part of the reason such litigation becomes complex is that the parties likely will have to delve deeply into the facts of the various qui tam complaints, to determine whether the various actions truly arise from the same transaction, and whether some relators (the first to file, perhaps) may be jurisdictionally barred from proceeding, thereby clearing the way for the subsequently-filing relators to proceed. *See generally* Raspanti & Laigaie, *supra* note 14, at 36-37.

109. *See, e.g.*, United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323 (M.D. Fla. 2001); United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429-30 (E.D. Pa. 1998); *Gen. Elec.*, 808 F. Supp. at 583-84.

110. *See, e.g.*, United States v. Health Possibilities, P.S.C., 207 F.3d 335, 436-41 (6th Cir. 2000).

111. Marc Raspanti & David M. Laigaie, *A Case Study:* Department of Justice v. Qui Tam Relators, BUREAU OF NAT'L AFFAIRS, 2 HEALTH CARE FRAUD REP., June 3, 1998, at 425.

112. *See, e.g.*, United States *ex rel.* Grant v. Rush-Presbyterian/St. Luke's Med. Ctr., No. 99C06313, 2001 WL 40807 (N.D. Ill. Jan. 16, 2001).

113. *Merena*, 52 F. Supp. 2d at 436-37. Prosecutors within the DOJ testified differently as to how much assistance Robert Merena, a relator, had provided and therefore what percentage of the recovery he was entitled to upon settlement of the case. *Id.*

114. 114 F. Supp. 2d. 352 (E.D. Pa. 2000), *on remand from* 205 F.3d 97 (3rd Cir. 2000), *rev'g* 52 F. Supp. 2d 420 (E.D. Pa. 1988).

115. *Id.* at 360.

116. Merena spent his entire SBCL career at SBCL's national headquarters. *Merena*, 52 F. Supp. 2d at 443. SBCL provided clinical laboratory services throughout the United

Merena became concerned about suspicious billing practices at SBCL. After alerting federal officials and retaining counsel, Merena met with federal officials and described the several fraudulent billings schemes he suspected were going on at SBCL.[117]

Three months after meeting with federal officials, Merena filed a qui tam action under the FCA. Thereafter, Merena "spent literally hundreds of hours assisting the Government."[118] Remaining employed at SBCL for eighteen months after he initially approached the Government, Merena was able to supply the Government with documents,[119] including SBCL's internal directory of personnel and a complete set of SBCL's 1993 monthly billing and accounts receivable reports.[120] Once SmithKline learned that Merena was a whistleblower, "it no longer became practicable for him to keep his position."[121] Unable to find employment with other companies once his whistleblower role became public, Merena and his family fell into dire financial straits, depleting their savings for living expenses.[122]

In his meetings with Government attorneys and agents, Merena:

- explained how the various suspected fraudulent billing schemes worked;
- provided names of key individuals at SBCL, along with a description of their duties,[123] and his impression of which individuals would be most likely to cooperate with the Government;[124]
- provided "an overview of SBCL's operations throughout the country";
- explained SBCL's computer billing system including its "scheme of 'jamming' diagnosis codes, whereby SBCL's computer automatically added other diagnosis codes for particular claims where specific diagnoses are required";[125]

States. *Merena*, 114 F. Supp. 2d at 360. Merena visited each of SBCL's 27 laboratory sites as part of his duties. *Id.*

117. *Merena*, 52 F. Supp. 2d at 442-44.

118. *Id.* at 442; Raspanti & Laigaie, *supra* note 111, at 424-25.

119. *Merena*, 52 F. Supp. 2d at 442.

120. *Id.* at 447.

121. Raspanti & Laigaie, *supra* note 111, at 425.

122. *Id.*; Donna Shaw, *A Year Later, Whistle-Blower Still Waits for His Millions*, PHILA. INQUIRER, Feb. 1, 1998, at A1.

123. *Merena*, 52 F. Supp. 2d at 443.

124. *Id.* at 447.

125. *Id.* at 443.

- assisted the Government in drafting document requests to SBCL;[126]
- "reviewed documents received from SBCL in response to three subpoenas, two of which he was helpful in preparing";[127]
- explained "many of the internal documents [the Government] received . . . in response to the subpoenas";[128]
- assisted FBI and LABSCAM Task Force agents in preparing for interviews of witnesses "and in reviewing notes after the witness interviews."[129]

In 1995, the Government began settlement negotiations with SBCL. In 1996, it intervened in Merena's qui tam action and reached a settlement of $325 million with SBCL.[130] After two years of working closely with Merena, the DOJ tried, unsuccessfully, to minimize his contribution so it could pay less of the judgment to him. Merena ultimately received a relator's award of $26 million, but not until there had been three years of acrimonious litigation between the DOJ and Merena.[131]

The DOJ and Merena disagreed over what portion of the settlement was eligible to calculate the relators' share, whether the relators were jurisdictionally barred, which relators were eligible to share in the judgment and, most significantly, the degree to which the relators had contributed to the case.[132] One year after the qui tam case had been settled with the defendants, a seven-day hearing was held in district court to determine Merena's shares.[133] At this hearing, various DOJ officials testified, apparently contradicting each other as to the value of Merena's contribution to the case.[134] Clearly

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126. *Id.* at 442-50.
127. *Id.* at 446.
128. *Id.*
129. *Id.*
130. *Id.* at 424; Shannon P. Duffy, *SmithKline to Pay $335 Million in Whistleblower Suit*, 216 LEGAL INTELLIGENCER, Feb. 25, 1997, at 1.
131. United States *ex rel.* Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352, 372 (E.D. Pa. 2000). Determination of Merena's share of the settlement was heavily litigated with different offices within DOJ opposing each other regarding an appropriate percentage for Merena. Raspanti & Laigaie, *supra* note 111, at 425-26.
132. *Merena*, 52 F. Supp. 2d at 430-54.
133. *Id.* at 429.
134. Merena worked primarily with attorneys and agents in the U.S. Attorney's Office for the Eastern District of Pennsylvania. *Id.* at 450. James Sheehan, chief, Civil Division, for this office testified by deposition as to Merena's assistance. *Id.* at 442-43. Carol Lam, Assistant U.S. Attorney, Southern District of California, and Laurence Freedman, assistant director, Commercial Litigation Branch, Civil Division, DOJ, also testified. According to Mr. Freedman, "the Philadelphia Task Force did not even know much about the case." *Id.* at 445. According to the court:

exasperated, the District Court, which found "that Mr. Merena contributed substantially and provided most of the information utilized in the successful prosecution and settlement,"[135] questioned the DOJ's motive and tactics:

> I recognize that the government's present litigation stance is that Mr. Merena helped very little and merely provided basically clerical assistance that the government could have obtained without him. In view of the many public accolades previously given him by the same government officials responsible for the prosecution of the case, I have trouble accepting or even rationalizing the government's present position other than attributing it to an overzealous attempt to lower the amount of the award rightfully due.[136]

Note the remarkable aspects of this case: P (private party) and P's counsel worked extensively and candidly[137] with R (regulator) prior to the filing of P's qui tam action; R broke its tradition of confidentiality to work with P and P's counsel to investigate the case; P worked with R while P was still employed at T (targeted business), bringing R helpful records and evidence;[138] P provided R with expertise on a complicated fraud; P and P's counsel worked hand-in-hand with the Government to investigate and prepare the case from the beginning

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> [T]he attorneys [from DOJ offices in] San Diego and Washington, DC . . . seek to take far more credit for the overall success of the proceedings than is rightly due. The suggestion has been presented that San Diego and Washington took care of . . . the most valuable part of the case, and that the United States Attorney's office in the Eastern District of Pennsylvania, . . . through Mr. Sheehan . . . played only a minor part in bringing about the successful conclusion of the actions. Perhaps the reason the litigation has been presented in this light is because the contacts that Relator Merena . . . had with the Government was in providing assistance . . . [to this district] and the Government wants to minimize the contributions of the Relators in order to lower their ultimate award.

Id. at 450.

135. *Merena*, 114 F. Supp. 2d at 371.

136. *Id.* at 370.

137. Candor with R by P and P's counsel is essential, as explained by an experienced relator's counsel: "To work successfully, the relators must be totally candid with the government agents." William J. Hardy, *A Relator Counsel Perspective*, 10 TAF Q. REV 14, 14 (1997).

138. In other cases, P's who are still employed at T have worn recording equipment, providing taped conversations as evidence. Federal agents (referring to conversations taped by another relator while that relator was still employed at defendant's offices) discussed the contribution such evidence has to building a case:

> [I]f possible, it is important to become involved covertly as soon as practicable, while the conspiracy is still forming, to make evidence gathering more effective. Furthermore, experience has also shown that traditional "paper trail" white collar cases are very complicated and difficult to present to a jury. "Tape cases," on the other hand, are more attractive to prosecutors and easier for juries to follow. Thus, time can really be of the essence in these matters where the fraudulent activity is ongoing.

T. Clay Mason & Larry D. Leonard, *A Government Investigator Perspective*, 10 TAF Q. REV. 10, 12 (1997).

of the case until its settlement;[139] for years after working cooperatively, R and P litigated bitterly over what should be the relators' share.[140] As *Merena* demonstrates, the FCA alters the relationship between private individuals and public regulators and produces dynamics unlike anything else in regulatory theory or practice.

II. GENERAL PRINCIPLES OF GAME THEORY

A. But First, a Personal Note

Before delving into Game Theory and the insights it provides to the changing dynamics created by the FCA, I should state that I came to Game Theory intrigued and skeptical. I am now a convert.

I was intrigued because I had a sense that Game Theory was an ideal analytical tool for examining any far-ranging public policy initiative. As a federal prosecutor, I had seen first-hand the strengths and weaknesses of the two-player regulatory model and saw the practical and significant changes in this two-player regulatory *game* brought by the FCA. I suspected that Game Theory was an ideal perspective for examining any policy initiative that altered dynamics among participants.

I came to Game Theory quite skeptical, however, because it seemed to me that Game Theory was nothing more than a self-fulfilling prophecy where the outcome of any *game* is determined by benefit-cost values arbitrarily assigned to each player's moves. As I used Game Theory analysis to *play* games of regulation, watching how they were influenced by the introduction of the FCA, I came to realize that by calculating and justifying the benefits and costs I attributed to various moves of the players, my analysis became more precise, thoughtful, and thorough. The rigor Game Theory imposed provided innumerable, significant insights. I became a Game Theory convert.

B. Overview of Game Theory

Developed in the early and mid-twentieth century by a mathematician, John von Neumann, and an economist, Oskar Morgenstern,[141]

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139. After settlement this cooperation fell apart as one office within the DOJ opposed another when determining Merena's appropriate share of the judgement. Raspanti & Laigaie, *supra* note 111, at 425-26; Tom Lowry, *Whistleblowers, Justice Clash Over Settlements*, USA TODAY, Mar. 25, 1998, at B3; Donna Shaw, *Dispute over Whistle-Blowers' Fees Hits Court*, PHILA. INQUIRER, Mar. 19, 1998, at C01; Donna Shaw, *Judge Boosts Reward in Fraud Cause to $52 Million*, PHILA. INQUIRER, Apr. 9, 1998, at A01.

140. *See Merena*, 114 F. Supp. 2d at 352; United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429 (E.D. Pa. 1998).

141. JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (3d ed. 1953).

Game Theory is a method for studying how people make decisions.[142] Game Theory arises from the notion that routinized, describable habits and behaviors govern day-to-day interactions, much as rules govern parlor games such as bridge and poker.[143] Like other "rational choice" theories, Game Theory assumes that decision-makers are rational actors who pursue their self-interest.[144] Game Theory also assumes that when determining their strategy, actors take into account what they expect other rational, self-interested decision-makers will do.[145] Like all economic modeling, Game Theory simplifies social situations and offers insights from such simplification.[146]

Game Theory relies upon key concepts to examine decisions people make. A normal form game (also called a strategic form of a game) is the simplest model of interaction.[147] It has three elements: (1) players, (2) strategies available to players, and (3) payoffs players receive for each strategy or combination of strategies players pursue.[148] While *strategies* are courses of conduct that are physically possible, *payoffs* are the consequences of actions. An example of a normal form, two-player game is a child (Player One) and a parent (Player Two) and the child's effort to get cookies before a meal. The payoff for the child is getting cookies before dinner; the payoff for the parent is having the child come to dinner with a healthy appetite. The child's decision to eat cookies before dinner probably will be influenced by his expectation of what his parent will do if she finds out the child has eaten cookies before dinner. The child will adopt different strategies (bargaining for cookies or sneaking cookies) based upon his expectations of his parent's strategy (willing to agree to a compromise of two cookies or standing firm and imposing punishment for eating pre-dinner cookies).

Whereas a normal form game describes the situation where players are making simultaneous decisions, an extensive form game assumes the parties will interact over time.[149] The elements of an extensive form game are (1) players, (2) when each player can act, (3) strategies are available to a player whenever it is time for the player

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142. ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 158-66 (1991); POSNER, *supra* note 15, at 19-23; *see also* AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY 1-4 (1991).

143. MORTON D. DAVIS, GAME THEORY (rev. ed. 1983).

144. ELLICKSON, *supra* note 142, at 156-59; POSNER, *supra* note 15, at 19-23.

145. ROBERT AXELROD, THE EVOLUTION OF COOPERATION vii (1984); ELLICKSON, *supra* note 142, at 156-64; OSBORNE & RUBINSTEIN, *supra* note 15, at 1; DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 11-12 (1994).

146. BAIRD ET AL., *supra* note 145, at 7; ELLICKSON, *supra* note 142, at 157.

147. OSBORNE & RUBINSTEIN, *supra* note 15, at 3.

148. BAIRD ET AL., *supra* note 145, at 7-8.

149. *Id.* at 52; OSBORNE & RUBINSTEIN, *supra* note 15, at 3.

to act, (4) information a player has about other players when it is time for the player to act, and (5) payoffs to each player.[150]

Parties in games may have complete information (they know who the other players are, and the strategies and payoffs available to all players), or incomplete information (lacking some of the above).[151] When a player has complete information but does not know which strategy the other player will choose, she has complete but imperfect information. When a player has complete information and knows which strategy the other player will choose, she has complete and perfect information.[152] Games are zero-sum when one player wins only if the other party loses (baseball, poker, etc.). Games are non-zero-sum if all players can win (a teacher and a student both win when the student learns his math). Non-zero-sum games work because players have the same goal.[153]

Solution concepts are general principles of behavior that tend to govern and predict, which strategies a player will choose. Legal rules can provide players with solution concepts.[154] For example, the legal rule that those caught stealing another's property could go to jail may affect an actor's decision whether to steal if given the opportunity to do so.

The Nash Equilibrium is a solution concept that states that each player will choose a strategy that is best for that player given the fact that other players are also choosing strategies that are best for them.[155] Stated another way, the Nash Equilibrium requires that players, when choosing their best strategy, take into account what other players are likely to do.

Here is an example of the Nash Equilibrium. Assume that A, B, and C belong to a club of fifty members. Also assume that A, B, and C all wish to run for the presidency of the club at an upcoming election. Further assume that A, B, and C discuss their presidential ambitions before the election and realize that all three will probably pull support from the same thirty club members, with the remaining twenty members voting for D, the sole other candidate for club presidency. A, B, and C recognize that if all three campaign for the presi-

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150. BAIRD ET AL., *supra* note 145, at 51; HERBERT GINTIS, GAME THEORY EVOLVING 10-11 (2000).

151. BAIRD ET AL., *supra* note 145, at 10; OSBORNE & RUBINSTEIN, *supra* note 15, at 3; *cf.* ERIC A. POSNER, LAW AND SOCIAL NORMS 188 (2000).

152. BAIRD ET AL., *supra* note 145, at 10; DAVIS, *supra* note 143, at 9.

153. BAIRD ET AL., *supra* note 145, at 43; DIXIT & NALEBUFF, *supra* note 142, at 13-14; ROBERT WRIGHT, NONZERO, THE LOGIC OF HUMAN DESTINY 5-10 (2000).

154. BAIRD ET AL., *supra* note 145, at 11, 24-31.

155. John F. Nash, Jr., *The Bargaining Problem,* 18 ECONOMETRICA 155, 155-62 (1954); *cf.* BAIRD ET AL., *supra* note 145, at 19-28; DAVIS, *supra* note 143, at 119-23; DIXIT & NALEBUFF, *supra* note 142, at 74-80; GINTIS, *supra* note 150, at 6; OSBORNE & RUBINSTEIN, *supra* note 15, at 155-57.

dency, they will split the votes among their supporters, and all will lose, with the result that D will be elected. Realizing this, A, B, and C agree that their best, collective strategy is to decide which of them will run for president, which will run for president-elect, and which will run for secretary-treasurer (and we will assume, by tradition, move up to president-elect the next year). Having made their decision, A, B, and C campaign accordingly. Each is elected to the position campaigned for and their desired result is achieved: D is defeated and A, B, and C are elected to the three officer positions, securing the presidency among them for the next three election cycles.

Game Theory analysis begins with a triggering event, then assesses the possible strategies of all players in responding to the event. Each player's benefits and costs are calculated for each strategy. In short, Game Theory is simply a disciplined way of assessing the benefits and costs of the choices one faces.

C. The "Games" Played in This Article

Using the above Game Theory concepts, we will examine how the introduction of the FCA alters the regulatory game. We will analyze two Games: Game One is without the FCA; Game Two is with it. The Games we will analyze are extensive form games since the parties make their decisions over time, rather than simultaneously. The players are R (public regulators), T (targeted business), and P (private individuals with inside information). The Games are repeated games or iterated, since at least one player, R, and possibly another, P's counsel, will interact repeatedly.

In these Games, the players have incomplete, imperfect information. No player has complete information about who the other players are (for example, more defendants could surface as an investigation proceeds) or when the other players can act. The players know that there are limited strategies available to each player (essentially, cooperate with regulators, or not). It is reasonable to assume that players have complete information about the payoffs facing each player (there aren't many options for payoffs: a finding of liability on the part of T with resulting payoffs to R and P, or a finding of no liability for T, which is a payoff for T). Players almost certainly do not have complete information as to what other players know about each other. In fact, T, and possibly P, may try to conceal facts. It is also unlikely that R will reveal to either T or P all relevant information it has.

As between P and R, the Games are most likely non-zero-sum since P and R share at least one common goal: establishing T's liability. However, if this goal changes (for example, R may decide that it is in the public interest to dismiss P's case or R may seek to limit the

percentage of award P gets), the Game between P and R becomes zero-sum. If either P or R wins, the other loses. The game between R and T rarely will be anything but zero-sum since a finding of liability on the part of T is almost always the only way R wins.

For purposes of these Games, we will make three major assumptions. First, we will assume that R is honest, competent, and acting in the public interest. We make this assumption not for normative reasons but because it is necessary. Doing otherwise introduces infinite permutations into the Games, making it impossible to generalize behavior. Second, we will assume that T, a public company, has actually engaged in significant wrongdoing, namely, that T has concealed its true financial status from lenders and investors in public reports by falsifying expenses. Again, this is not a normative statement about wrongdoing by regulated industries, but necessary for our discussion. Lastly, we shall assume that approximately twenty-seven percent of the information about T's wrongdoing that P supplies to R is helpful to R.[156]

Game theory employs an inverted tree diagram to illustrate an extensive form game where the branches represent different strategies available to each player. There are six diagrams in Appendix B that illustrate the two Games we are playing. For ease of discussion, each Game is diagramed from only one player's perspective. Thus, in Game One, which is the regulatory game *without* the FCA, Game 1(A) views the game from R's perspective; Game 1(B) views it from T's perspective; and Game 1(C) views it from P's perspective. In Game Two, which is the regulatory game *with* the FCA, Game 2(A) views the Game from R's perspective; Game 2(B) views it from T's perspective; and Game 2(C) views it from P's perspective. Each tree diagram reflects the strategies available to the player profiled. Following each diagram is a discussion of how the values at each point

156. Admittedly, twenty-seven percent is a rough approximation. It is calculated as follows: Historically the DOJ has intervened in twenty-three percent of qui tam cases. Presumably these are meritorious. In addition, relators have proceeded to judgment or settled another two percent of qui tam cases (where the DOJ did not intervene). Letter from the U.S. Dep't of Justice, to Author, FOIA Request 145-F01-6072 (Oct. 20, 2001) (on file with author). It is likely that not all two percent of these cases were meritorious but were settled for convenience. Thus these percentages should be discounted somewhat. It is also probably true, however, that the DOJ has not intervened in every meritorious case and that relators dismissed some meritorious cases after the DOJ elected not to intervene. This conclusion is supported by the significant work relators and their counsel undertook to convince the DOJ to intervene in some cases. *See, e.g.*, *supra* text accompanying notes 45-79 (discussing United States *ex rel.* Alderson v. Quorum Health Group, 171 F. Supp. 2d 1323 (M.D. Fla. 2001), 92-101 (discussing the case of *Lissack*), 114-40 (discussing United States *ex rel.* Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000)). This conclusion is also evidenced by the fact that experienced relators' counsel often declined to proceed if the DOJ decided not to intervene. *See* Mitchell R. Kreindler, So You Wanna Be a Whistleblower's Lawyer? (Nov. 28, 2001) (unpublished paper presented at A.B.A. National Institute on Civil False Claims Act and on file with author).

of strategy (Node) were determined. The values are based upon the significance of each benefit or cost, discounted by how speculative that benefit or cost may be.

III. APPLICATION OF GAME THEORY TO THE CIVIL FALSE CLAIMS ACT

A. Game 1(A): Regulatory Game Without the FCA: From R's Perspective

As noted, Game One is regulation *without* the presence of a mechanism like the FCA that encourages private parties to bring information about wrongdoing to regulators and encourages these private parties to work with regulators to investigate and litigate such wrongdoing. Game 1(A) looks at this regulatory *Game* from the perspective of regulators (R). The triggering event for Game 1(A) is R's obtaining information that T possibly is engaged in wrongdoing. We will presume that this information is not extensive, detailed, or conclusive of wrongdoing. It is suggestive only, such as a significant drop in stock price or high-profile and public resignations by key leadership within T for unexplained or suspicious reasons.[157] From this triggering event R has choices of strategies: whether to investigate T (Nodes I and II), and whether to initiate action against T (Nodes III and IV). At Node V, R wins, and at Node VI, R loses the action it initiated.[158]

1. Nodes I & II: Whether R Opens an Investigation of T

At Node I, R decides not to investigate T even though R has information that T is engaged in wrongdoing. There are legitimate reasons why R might make such a decision. R may determine, for example, that it cannot afford to allocate its scarce investigative resources to investigate a business without more concrete information. This leads to the first benefit R reaps with its decision not to investigate T: R will save investigative resources that can be directed to other investigations. There is another possible benefit. If T learns of R's decision not to open an investigation, T could be deterred in continuing its wrongdoing since T doesn't want R to investigate it. If T knows that T is on R's radar screen, T may decide to cease wrongdoing and

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157. Similar events preceded HealthSouth's $1.4 billion scandal, *HealthSouth Faked $1.4 Billion Profits, The SEC Alleges*, WALL ST. J., Mar. 20, 2002, at A1, and the bankruptcy of Enron. *See also* Matt Krantz, *Peeling Back the Layers of Enron's Breakdown*, USA TODAY, Jan. 22, 2002, at 1B; Jim Yardley, *Critic Who Quit Top Enron Post is Found Dead*, N.Y. TIMES, Jan. 26, 2002, at B1, B6. The seventh-largest commercial bankruptcy in United States history, Enron's downfall apparently was brought on by the company's practice of hiding, from public scrutiny, millions of dollars of Enron debt on the books of offshore partnerships. *The Enron Scandal*, USA TODAY, Jan. 22, 2002, at 3B.

158. *See infra* app. A, at 677-79 (describing charts 1-6 of Game 1(A)).

not further pique R's interest. Because both T's awareness and T's response are speculative, this possible benefit is deemed to be minimal.

R's decision not to investigate creates possible costs for R: (1) T may be encouraged, if not emboldened, to continue its wrongdoing, especially if T is aware of R's decision not to investigate T; (2) R's decision may give T time to revise and improve its fraud methodology, allowing T to become even more sophisticated in committing and concealing its wrongdoing; (3) If T is allowed to continue its wrongdoing and possibly expand it, more persons may become victims of T's fraud; and (4) If other businesses become aware of R's decision not to investigate T's wrongdoing, they too will be encouraged to continue, or commence, similar wrongdoing.

For these reasons, the costs of R's decision not to investigate T once R receives information that T is engaging in wrongdoing outweigh R's benefit.[159]

At Node II, R opts for the opposite strategy: R decides to investigate T. By adopting this strategy, R obtains the converse of many of the benefits and costs noted at Node I. Thus, R achieves the following possible benefits: (1) R discourages T from engaging in at least some of its wrongdoing. (2) R discourages other observant business from engaging in wrongdoing. Businesses not already subject to investigation have reason to be concerned when another business in the same industry comes under investigation,[160] since often R expands its investigation of one business to include other similar businesses on the assumption that they too are engaging in the same wrongdoing.[161] Additional possible benefits accruing to R include: (3) Opening an investigation of T makes it difficult for T to continue refining its wrongdoing methodology, and (4) makes it less likely T will expand its wrongdoing to include more victims. (5) During its investigation of T, R develops some institutional knowledge and expertise about T, T's industry, and the type of behavior T is engaging in. This knowl-

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159. *See infra* app. A chart 1, at 677.

160. The "national initiative" undertaken by the United States Department of Health and Human Services, Office of Inspector General (OIG), demonstrates this. For example, in 1996 the OIG sent a letter to the 125 teaching hospitals associated with all 125 academic medical centers in the United States informing these hospitals that they were subject to an audit of their teaching physicians' Medicare Part B billings. This national initiative arose after Medicare Part B irregularities were found at one such medical center, the University of Pennsylvania. Pamela H. Bucy, *The PATH from Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3, 3-14 (2000).

161. Russell Hayman, *Dissecting a Health Care Fraud Investigation, in* HEALTH CARE FRAUD & ABUSE: HOW TO NAVIGATE THE COMPLIANCE PROCESS 223, 238-44 (PLI Corp. Law & Practice Course Handbook Series No. B-1129, 1999) (reviewing regional and national initiatives by federal regulators aimed at multiple health care providers), *available at* WL 1129 PLI/Corp 223.

edge may be generic—how to more effectively investigate a general type of wrongdoing—or specific to T or T's industry. While such institutional knowledge could benefit R in future investigations, its value is highly speculative since turnover at R could dissipate it. Thus, this last benefit is minimal.

R also incurs costs with its decision to investigate T: (1) Because R has little information about T's possible wrongdoing and no inside information about it, R's investigation will consume considerable resources. R's investigation is also likely to be relatively unfocused and inefficient with unlikely chance of uncovering the full extent of T's wrongdoing and all individuals who are involved. (2) Because R's resources are limited, R incurs an opportunity cost when it directs its resources toward T. By spending scarce investigative resources on T, R will be unable to investigate other deserving targets.[162] For these reasons, R's benefits at Node II, where R opts to investigate T, slightly outweigh R's costs.[163]

2. Nodes III and IV: Whether R Initiates Action at the Conclusion of Its Investigation of T

Whether R initiates action against T after completing its investigation of T depends upon whether R uncovered T's wrongdoing. The action R brings could be criminal, civil, administrative, or as minimal as increasing R's oversight of T.[164] At Node III, R declines to initiate action against T because R did not find T's wrongdoing. At Node IV, where R uncovers T's wrongdoing, R initiates action.

The benefits for R at Node III of not initiating an action against T are minimal: (1) R puts an end to R's investigative costs; and (2) R generates some institutional knowledge from its unsuccessful investigation of T.

The costs to R of closing its investigation of T without taking action are: (1) R has incurred investigative expenses without learning about T's wrongdoing; (2) R will not be able to protect victims who

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162. Elizabeth Amon, *White Collar Crime, Heat Going Up*, NAT'L L.J., July 8, 2002, at A15.

163. *See infra* app. A chart 2, at 677.

164. Because administrative sanctions such as exclusion from contracting with the federal government can effectively bankrupt a corporation, *see, e.g.*, 42 U.S.C. § 1320a-7 (2002); 42 C.F.R. § 1001.1–1001.3005 (2002); FABRIKANT ET AL., *supra* note 47, § 5.01, some types of administrative action can be quite draconian. Initiation of a punitive civil action (such as filing a complaint under the False Claims Act) can also be an extremely severe sanction because of the extraordinarily high damages and penalties such an action can bring. Surprisingly perhaps, the least severe sanction, at least from a corporation's point of view, may be criminal prosecution. Although the consequences of a criminal conviction potentially can be harsh for a fictional entity (revocation of corporate charter or court-supervised reorganization, for example), these are unlikely. Fines are more likely, and these fines can be reduced significantly if a corporation cooperates with prosecutors.

have been, are being, and likely will be hurt by T's wrongdoing; (3) R's decision not to initiate action against T could damage R's credibility as an effective regulator, perhaps even neutralizing much of the deterrence R achieved at Node I when it opened an investigation of T; (4) R's decision may damage morale within R if the decision is viewed as the result of incompetence, corruption, or inadequate resources, rather than merit. Given our assumption for these Games, R's employees and any other observers might believe that T is engaged in wrongdoing; and (5) By shutting down its investigation without bringing charges, R signals to T that T can successfully elude R.[165]

This last cost is incurred if T is aware that R was investigating it, which is likely given the nature of fraud investigations. Unlike R's decision at Node I, where R only *possibly* signaled encouragement to T by not investigating, R's decision to close its investigation without taking action against T almost certainly *will* send a signal of encouragement to T and other observant businesses. At Node I, when R opted not to investigate T, it is unlikely that T or other businesses knew of R's decision. The decision not to investigate a possible target is an exercise of prosecutorial discretion generally hidden deep within the confines of R. In fact, it would be inappropriate for R to publicize its decisions not to investigate an individual or business since simply stating as much could disparage or defame targets.[166] If R actually opens an investigation of T, however, it is almost certain that T, and possibly other businesses, will know that R was investigating T. It is also virtually certain that T will surmise R's decision to close its investigation without initiating action. During a typical fraud investigation, subpoenas requiring document or witness production will be served on targets, obviously alerting targets that R is investigating them.[167] Almost certainly, T's attorneys will engage in discussions with R about document and witness productions.[168] When no more subpoenas come and no further R action occurs, T will correctly conclude that the matter has been resolved. Pursuant to T's

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165. Eric Posner discusses signaling, suggesting that in repeated games, participants signal to other players their willingness to cooperate in the future games. POSNER, *supra* note 151, at 18-22. According to Posner, signaling is an important way not only to enter relationships, but also to maintain them. *Id.* at 21. Even so, as Posner notes, "signals do not work perfectly or even particularly well" because it is cheaper for some people to send signals than for others, and it can be difficult to get information about signals. *Id.* at 21-22; s*ee also id.* at 18-22, 50-55, 70-72, 98-100, 127-28, 174-77. Ellickson also focuses on signals, noting how Shasta County rural residents use signals to cooperate (follow social norms for dealing with trespassing cattle). ELLICKSON, *supra* note 142, at 71-81.

166. *See, e.g.*, PAMELA H. BUCY, WHITE COLLAR CRIME, CASES AND MATERIALS 448 (2d ed. 1998); United States v. Sells Eng'g, 463 U.S. 418 (1983).

167. Hayman, *supra* note 161, at 225-26, 236-37.

168. *See, e.g.*, Peter H. White, *Let's Make a Deal: Negotiating and Defending Immunity for "Targets and Subjects"*, 29 LITIG. 1, 44 (2002).

request for notification by R of its status, T may even be told that it is no longer a target of R. In this way R's decision not to bring an action against T will signal to T and other observant businesses that T can continue its wrongful activity. Signaling such encouragement obviously presents a significant cost.

For these reasons, the costs to R of closing its investigation without taking action against T outweigh the benefits.[169]

At Node IV, R initiates action against T after finding grounds to do so during its investigation. The benefits of initiating action are: (1) Enhanced credibility for R in the eyes of T and other businesses; (2) Enhanced credibility in the eyes of T's employees and competitors who may have valuable evidence against T and are more willing to come forward once R has initiated an action; (3) Enhanced morale within R; (4) Ability to minimize, if not prevent, additional harm to victims; (5) Deterrence of T's wrongdoing;[170] and (6) Deterrence of wrongdoing by other observant businesses.

R incurs the following costs with its decision to initiate action against T: (1) Because R lacks inside information about T's wrongdoing—at least of the helpful type that a qui tam relator can provide—R probably will not fully discover the scope of T's wrongdoing. As a result, R may not be successful, or as successful as it otherwise could have been, in the legal action it initiates against T or in protecting the public from T's wrongdoing; and (2) Without inside information about T's wrongdoing such as who is involved, who might provide evidence, what records are relevant, and where assets are located, R will incur significant investigative and litigative costs in pursuing the action it has initiated against T. R's investigation, even if successful, will be inefficient, consuming unnecessary investigative resources.[171]

For the forgoing reasons, R's benefits outweigh its costs in opting to initiate an action against T at the conclusion of its investigation.[172]

3. Nodes V and VI: R Wins or Loses the Action It Brought Against T

At Node V, R prevails in the action it initiated at Node IV. The benefits R obtains are significant and obvious: (1) There will be a public acknowledgment of T's wrongdoing;[173] (2) R's victory will help

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169. *See infra* app. A chart 3, at 678.

170. David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1858-66 (2001).

171. *See supra* notes 80-88 and accompanying text.

172. *See infra* app. A chart 4, at 678.

173. Kevin J. O'Brien, *Will There Be a Legal Legacy*, NAT'L L.J., Apr. 22, 2002, at A20 (referring to one of the DOJ's purposes in prosecuting Arthur Andersen for obstruction of

educate and inform the relevant industry as to what is permissible behavior and what is not;[174] (3) Collection of judgment, fines, or penalties. Almost certainly, T will make a significant payment to R (or R's umbrella organization, such as the federal government) in judgment, fines, or penalties; (4) T likely will cease committing its wrongdoing (or at least as much of it as R has detected); (5) Other observant businesses engaging in similar wrongdoing or contemplating doing so will be deterred; and (6) R's credibility will be enhanced. This may have several ripple effects. Citizens may become more willing to assist in future regulatory efforts overall or may become more favorably disposed to regulators when sitting as jurors. More individuals may even become inclined to choose career paths at regulatory agencies.

R will incur costs even though R wins the action. These costs include: (1) The lost opportunity of pursuing other deserving T's. Because of R's limited resources, R's decision to pursue T necessarily means that R is unable to pursue other wrongdoers; and (2) Possibly, an inability to recoup from T, R's full investigative expenses. This will, of course, depend upon T's solvency and the priority of other T creditors or victims.

For the reasons stated, R's benefits outweigh R's costs when R wins the action it brought against T.[175]

At Node VI, R loses the action it initiated at Node IV. Surprising perhaps, but there are two benefits to R from this adverse outcome. One is certain, the others, speculative: (1) The certain benefit is that with its loss, R's investigative and litigative costs will end; and (2) The possible benefits are that R will deter T and possibly other observant businesses from engaging in wrongdoing simply because these entities want to avoid the tangible and intangible costs a business sustains in responding to R's investigation, and in defending itself (albeit successfully) in the action R initiated against T. These businesses may decide that such costs are so significant that they will operate "cleaner" businesses in the future so that they do not come under R's investigative scrutiny.

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justice as obtaining a "public admission by Andersen that it committed a crime in destroying Enron-related documents").

174. If we were concerned with obvious forms of wrongdoing this would not be an issue. Every legally sane person knows that rape, murder, robbery, and the like are wrong and public prosecution of such behavior, while achieving other goals perhaps, does little to communicate the wrongfulness of this conduct to possible future perpetrators. This is not the case with economic wrongdoing, however, for often the line between aggressive business strategies and wrongdoing is not clear. Successful regulatory action, whether criminal, civil, or administrative, can help communicate where the line is and what conduct crosses it.

175. *See infra* app. A chart 5, at 679.

Not surprisingly, R's costs at Node VI are significant: (1) R loses credibility with the regulated industries, among R's own employees and among the general public; (2) R will have incurred substantial investigative and litigative expense with no result; (3) R incurs opportunity costs since by allocating resources to pursue T, R is unable to investigate other deserving targets; and (4) R's loss in the action almost certainly signals to T and other observant businesses two things. First, if T's targeted behavior was of ambiguous lawfulness, R's loss may communicate that such behavior is lawful.[176] Second, even if it is clear that T's behavior was unlawful, R's loss signals that R is unable to successfully pursue such behavior and that businesses may engage in it with impunity.

For these reasons, R's costs are significant, and R's benefits are minimal when R loses the action it has brought against T.[177]

B. Game 1(B): Regulatory Game Without FCA: From T's Perspective

Game 1(B) continues with a regulatory "Game" that does not include a mechanism such as the FCA which encourages private parties to bring information about T's wrongdoing to regulators and to work with regulators to investigate and litigate against T. In Game 1(B) this regulatory system is viewed from the perspective of T, the targeted business. The triggering event for Game 1(B) is T's commission of wrongdoing. T's strategy options flow from this event: whether T discloses its wrongdoing to R (Nodes I and II); whether T cooperates in the investigation that R opens (Nodes III and IV); whether T cooperates with R *after* R initiates an action against T (Nodes V and VI). At Nodes VII and VIII, T responds: at Node VII, T loses the action R initiated; at Node VIII, T prevails.[178]

1. Nodes I and II: Whether T Discloses Its Wrongdoing to R

T's strategy at Node I, not to disclose its wrongdoing to R, may be a rational option even though, as discussed *infra*,[179] the consequences of T's wrongdoing can be mitigated considerably if T discloses its wrongdoing to R before R discovers it. The reason non-disclosure may be advantageous is because R may never discover T's wrongdoing even though R has been alerted to it. Or even if R discovers T's wrongdoing, it is not clear that R would respond with consequences. It is possible that R would lose interest in T (if more egregious offenders came along to absorb R's interest and resources), or that R's

176. *See supra* note 164.
177. *See infra* app. A chart 6, at 679.
178. *See infra* app. B, at 699 (diagramming Game 1(B)).
179. *See infra* notes 181-84 and accompanying text.

priorities and personnel would change, focusing R's attention on actors besides T.

If R never detects T's wrongdoing or if R fails to respond if R does learn of it, T reaps an obvious and substantial benefit by adopting a strategy of non-disclosure:[180] T (1) avoids a finding of culpability, (2) avoids resulting sanctions, and (3) avoids the collateral consequences that may flow from the imposition of sanctions. These collateral consequences likely include adverse publicity and adverse reaction by T's shareholders, lenders, or business associates.[181]

The costs to T of adopting a non-disclosure strategy are: (1) The uncertainty of not knowing if, or when, R will learn of T's wrongdoing—such uncertainty makes business planning and preparation difficult; (2) The likelihood that if R learns of T's wrongdoing, R will impose greater sanctions on T than whatever R would have imposed had T demonstrated good faith and corporate responsibility by disclosing its malfeasance before getting caught; and (3) T loses some ability to control its fate by waiting to see if and when R does anything. By adopting a non-disclosure strategy, T is in the position of reacting to R's initiatives, leaving T with less ability to influence R's assessment of T's liability, R's view of appropriate sanctions, and the collateral consequences that flow from sanctions.

The ability of targets to influence regulators is significant. If T alerts R to T's wrongdoing before R otherwise learns of it, T can possibly persuade R that T's wrongdoing was less intentional than R may assume. Especially in areas governed by complex rules and regulations, T may be able to demonstrate to R that T's conduct was not the result of an intent to defraud, but resulted from a reasonable interpretation of applicable rules. It is common, in complex corporate investigations, for defense counsel to present T's evaluation of R's case to R before R decides what action to take.[182] If T's counsel effectively demonstrates that there is a satisfactory explanation for T's behavior, showing it to be legitimate (or at least resulting from inno-

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180. *See generally* Thomas E. Holliday & Charles J. Stevens, *Disclosure of Results of Internal Investigations to the Government or Other Third Parties*, *in* INTERNAL CORPORATE INVESTIGATIONS 279, 291-94 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2003); Dennis G. Kainen, *When the IRS Comes Knocking*, 29 LITIG. 40, 42 (2002); Shelly R. Slade, *Truth and Its Consequences: Should You Voluntarily Disclose Overbillings to Law Enforcement?*, 12 HEALTH LAW., No. 5, 36, 37-39 (2000); Linda C. Quinn et al., *Disclosing Bad News: An Overview for Securities Counsel*, *in* RESPONDING TO BAD NEWS: HOW TO DEAL WITH THE BOARD OF DIRECTORS, STOCKHOLDERS, THE PRESS, ANALYSTS, REGULATORS AND THE PLAINTIFFS' BAR 329, 341 (PLI Corp. Law & Practice Course Handbook Series No. B-1149 1999), *available at* WL 1149 PLI/Corp 329.

181. *See infra* note 182.

182. *See, e.g.*, WEST, *supra* note 31, at 26; Hayman, *supra* note 161 at 237; Christopher Myers et al., *Warding Off Criminal Liability with an Effective Corporate Compliance Program*, 29 LITIG. 69 (2002); United States *ex rel.* Grant v. Rush-Presbyterian/St. Luke's Med. Ctr., No. 99C06313, 2001 WL 40807, at *2 (N.D. Ill. Jan. 16 2001).

cent mistake rather than intentional misconduct), early dialog between R and T could influence R to close its investigation of T without bringing an action against T. Even if T cannot prevent R from taking action completely, T may still be able to favorably influence what action R will take, convincing R to return lesser charges against T because of the good faith and corporate responsibility T has shown by coming forward. (4) By adopting a non-disclosure policy, T also foregoes the opportunity to influence the collateral consequences of R's action against T. T would like to impact the publicity that may surround disclosure of T's wrongdoing. Negative publicity can affect T's share value, which could lead to shareholder derivative suits, class action fraud suits, and investigations by even more regulatory agencies.[183] Once they learn that an investigation is pending against T, lenders or potential business partners of T may become reluctant to deal with T because of the uncertainty such an investigation introduces about T's ability to engage in future business endeavors.[184] Some, perhaps many, of T's personnel may become distracted by the investigation or concerned about their job security. Some may choose to leave T for other opportunities. Even choosing *when* T incurs adverse publicity can be important. By disclosing its wrongdoing on a day dominated by other news or at a time that news media are not likely to be attentive, T can minimize publicity. By disclosing its wrongdoing at the same time T announces constructive responses to such activity, T can favorably influence the content of publicity. By alerting key business partners, lenders, and shareholders prior to disclosure, T can minimize the disruption to its business that results from publicity.

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183. Bucy, *supra* note 20, at 62-64.

184. *Id.*; *cf.* FABRIKANT ET AL., *supra* note 47, § 6.05; Bucy, *supra* note 160, at 3, 12-14, 40-48. The experience of Dartmouth-Hitchcock, an academic medical center, demonstrates the hardship businesses can face once they become subject to investigation. The Office of Inspector General (OIG), Department of Health and Human Services informed Dartmouth that it was being investigated for improperly billing Medicare for services rendered by medical residents. It was given the choice of conducting its own audit under OIG supervision or paying for the OIG to conduct an audit. Dartmouth opted to conduct its own audit. In ten months, after a review of about half of the sampled admissions, and a finding of no billing errors, the OIG allowed Dartmouth to terminate its audit. By this point, Dartmouth had spent approximately $1.7 million to conduct the audit. During the audit period, planned expansion was delayed because of concerns by Dartmouth's investment banker and credit agency about the audit outcome. GENERAL ACCOUNTING SERVICES, REP. NO. HEHS 98-174, MEDICARE CONCERNS WITH PHYSICIANS AT TEACHING HOSPITALS (PATH) AUDITS 13-14 (1998). In another instance, St. Vincent's Hospital, a suburban hospital in Massachusetts, received a letter from the DOJ stating that a government audit indicated that St. Vincent's had submitted false claims to Medicare and was facing $2.6 million in penalties and damages under the False Claims Act. The hospital, which processed more than 80,000 claims totaling almost $300 million during the period in question, challenged the DOJ's audit, ultimately settling for $19,000. Bucy, *supra* note 20, at 63.

Lastly, by deciding that it will not disclose its wrongdoing and waiting to see if R discovers its wrongdoing, T also loses the opportunity to minimize, or at least manage, the resources T spends responding to R's investigation and action. It can be enormously expensive to defend against an investigation by R. There are significant out-of-pocket expenses in providing R with copies of records that R may subpoena. Burdensome amounts of time of T's employees and offices may be consumed in responding to document requests, or in testifying or responding to interview requests. T may lose business opportunities because of the time its personnel are devoting to the investigation.

T can avoid many of these expenses, however, by disclosing its wrongdoing. By opting to work with R to flesh out what wrongdoing occurred, T can determine, to some extent, when and how it incurs unavoidable litigation expenses. Such *resource management* includes affecting when documents or individuals are produced, who within T responds to R's inquiries, and what business transactions T may pursue while the investigation is pending. An ability to manage the expenditure of its resources could prove quite valuable to T, since doing so allows T to conduct its business with as little interruption as possible.

The costs to T of adopting a non-disclosure strategy depend, of course, on the likelihood that T will get caught in the future. The greater the chances of getting caught, the higher the costs to T in not disclosing its wrongdoing. Assuming for purposes of this Game that the chances are moderate to slim that R will discover T's wrongdoing, T's benefits at Node I where T adopts a non-disclosure strategy outweigh, albeit barely, T's costs.[185]

At Node II, T discloses its wrongdoing to R. By so doing, T obtains the following benefits:[186] (1) T ends the uncertainty of not knowing if or when R will discover its wrongdoing; (2) T is able to influence R's assessment of T's liability; (3) T almost certainly positions itself to receive less onerous sanctions from R than it would receive if R discovered T's wrongdoing itself; (4) T obtains the opportunity to *spin* its wrongdoing in the most favorable light possible and thus influence the collateral consequences that are likely to result from publicity about T's wrongdoing and R's response to it; (5) T can minimize or at least manage the resources it expends to respond to R's investigation; and (6) T can minimize any liability T, or T's executives, incur for not

185. *See infra* app. A chart 7, at 680.

186. *Cf.* Myers et al., *supra* note 182, at 49, 51; Slade, *supra* note 180, at 36; Quinn et al., *supra* note 180, at 341; Darryl Van Duch, *Keeping a Boss Out of Trouble*, NAT'L L. J., Feb. 5, 2001, at B1, B4.

disclosing wrongdoing. Certain criminal statutes and theories of liability make the knowing failure to disclose wrongdoing a crime.[187]

The costs to T of adopting a disclosure policy are: (1) Foregoing the possibility that T gets away with its wrongdoing; (2) Incurring the sanctions R will impose; and (3) Incurring the collateral consequences that flow from a finding of liability and resulting sanctions.

For these reasons, T's benefits at Node II, where T opts to disclose its wrongdoing to R, exceed T's costs.[188]

2. Nodes III and IV: Whether T Cooperates with R when R Opens an Investigation of T

T's next strategy choices, at Nodes III and IV, depend upon what R does. Obviously, T's prior options, to disclose or not to disclose its wrongdoing to R, continue if, for whatever reason, R does nothing to investigate T after receiving information of T's possible wrongdoing. It is when R opens an investigation of T that T faces its new decision: whether to cooperate with R in its investigation.

At Node III, T can achieve three possible benefits by choosing a non-cooperation strategy. Without T's cooperation, R will have to find and prove T's wrongdoing by itself and R may not uncover T's wrongdoing or may not uncover all of it. Thus, non-cooperation would allow T to: (1) avoid a finding of culpability; (2) avoid sanctions; and (3) to avoid the collateral consequences of such sanctions.

However, T incurs possible costs by adopting a non-cooperation strategy: (1) Because of our assumption for these Games that T is engaging in wrongdoing, T faces the prospect that R will uncover all of T's wrongful conduct during R's investigation. This prospect could disrupt T's future planning; (2) T loses the opportunity to influence R's assessment of T's culpability; (3) T loses the opportunity to affect the sanctions R seeks; (4) T loses the opportunity to impact the collateral consequences, such as publicity, that flow from R's investigation of T; and (5) T loses the opportunity to control, or minimize, the resources T will spend in responding to R's investigation.

For the above reasons, T's costs significantly outweigh T's benefits when T adopts a non-cooperation strategy after R has opened an investigation of T.[189]

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187. For example, 42 U.S.C. § 1320a-7b(a)(3) (2002), creates a felony offense to conceal or fail to disclose the fact that one may have improperly received Medicare payments in the past. *See, e.g.*, FABRIKANT ET AL, *supra* note 47, §2.02[5]; Gary C. Lynch & Eric F. Grossman, *Disclosure of Corporate Wrongdoing, in* RESPONDING TO BAD NEWS: HOW TO DEAL WITH THE BOARD OF DIRECTORS, STOCKHOLDERS, THE PRESS, ANALYSTS, REGULATORS AND THE PLAINTIFF'S BAR 207, 211 (PLI Corp. Law & Practice Handbook Series No. B. 1149, 1999), *available at* WL 1149 PLI/Corp 207; Slade, *supra* note 180, at 36.

188. *See infra* app. A chart 8, at 680.

189. *See infra* app. A chart 9, at 681.

At Node IV, T opts to cooperate with R during R's investigation of T. This cooperation could be anything from simple civility in producing whatever R requires to fully disclosing any and all suspected wrongdoing.

T obtains the following possible benefits by cooperating with R: (1) T is able to make a more informed decision about future strategies. By cooperating with R, T is likely to learn what aspects of T's business R is focusing on, and much about R's commitment to the case and resources available to pursue it;[190] (2) T may be able to influence R's assessment of T's culpability; (3) T may be able to obtain less onerous sanctions. Even if T cannot convince R that T is not culpable, T may be able to influence R's decision as to what sanctions it will seek against T once it is determined that T is culpable; (4) T may be able to influence the collateral consequences that befall T because of R's finding of culpability and imposition of sanctions; and (5) By cooperating with R during R's investigation of T, T may be able to reduce or at least manage the resources it expends when responding to R's investigation.

It should be noted when assessing the benefit to T of cooperating with R, once R has opened an investigation, that the earlier T begins cooperating, the more T benefits. If T waits until R's investigation is almost complete, R is more likely to view T's cooperation as pure expediency, not indicative of good faith or contrition. Also, the later T begins cooperating, the less valuable to R is T's cooperation since R has already expended resources that could have been conserved if T had cooperated earlier. Lastly, T will not be able to develop as much of a rapport with R if T waits until most opportunities for dialog have passed.

The costs to T of cooperating with R once R has initiated action against T are: (1) T almost certainly will have to cease its wrongdoing, which presumably has been lucrative for T or T would not have been doing it; and (2) Although it may be able to minimize and manage the resources it devotes to responding to R's action, T will still expend significant resources.

For the above reasons, T's benefits outweigh T's costs when T adopts a strategy of cooperating with R during R's investigation of T.[191]

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190. *Cf.* Hayman, *supra* note 161, at 227 ("Understanding the type and status of the investigation will inform the provider as to its best response. Identifying the likely violation in the government's eyes will greatly assist counsel's efforts to identify the nature and likely scope of the investigation.").

191. *See infra* app. A chart 10, at 681.

3. Nodes V and VI: Whether T Cooperates with R Once R Initiates Action Against T

At Node V, where T adopts a non-cooperation strategy with R once R has initiated an action against T, T obtains two benefits: (1) T forces R to prove its case against T. If R is unable to do so without T's cooperation, T escapes liability and all of the consequences that flow from such a finding; and (2) T can learn much about R's case against T when R files its action: what R knows, and doesn't know, what resources R is willing to allocate to pursue T.[192] Such information will allow T to make more informed decisions about T's optimal strategies from this point forward.

The costs to T of pursuing a non-cooperation strategy once R has initiated action against it are: (1) Uncertainty in not knowing how the action will be resolved and difficulty in planning given such uncertainty; (2) T's lost opportunity to affect R's assessment of T's culpability; (3) T's lost opportunity to affect the severity of sanctions R will seek; (4) T's lost opportunity to affect the collateral consequences that flow from the sanctions R will seek; and (5) T's lost opportunity to minimize and manage the resources T expends in responding to R's action. Although these are the same types of costs T encountered at Node III when T opted not to cooperate with R's investigation, each of these costs will increase once R has filed an action against T for the simple reason that when R's case progresses from investigation to action, T has forever lost opportunities to influence R.

For these reasons, T's costs significantly outweigh T's benefits in Game One when T adopts a non-cooperation strategy with R when R initiates an action against T.[193]

T reaps the following benefits at Node VI by adopting a cooperation strategy with R after R initiates an action against T: (1) An enhanced ability to make decisions about T's future strategies since T is now more informed about what R knows or doesn't know, how strong R's case is against T, and what resources R is willing to devote to pursuing the action against T; (2) Ability to influence R's assessment of T's culpability; (3) Ability to influence R's selection of sanctions against T; (4) Ability to manage the collateral consequences of the sanctions R seeks against T; and (5) Ability to minimize and manage the resources T expends in responding to R's action.

Although these are the same types of benefits T experienced when T made the decision to cooperate with R when R was just opening its investigation of T, the value of these benefits to T is different. The first benefit, T's enhanced ability to make decisions, increases in

192. *See infra* app. A chart 11, at 682.
193. *Id.*

value. Now that R's investigation has crystallized into specific charges, transactions, and defendants, T has quite detailed information from which it can make decisions about future strategies. The next set of benefits: T's ability to influence R's assessment of T's culpability, R's selection of sanctions, the collateral consequences of R's sanctions, and the resources T spends in responding to R's action, are worth less to T if T has only begun cooperating with R after R's initiation of an action against T. As noted in the earlier discussion regarding the value of T's cooperation with R after R opens an investigation of T,[194] R will not be as impressed by T's cooperation since R has already expended resources T could have helped conserve if T had cooperated earlier. T's cooperation is likely to be viewed by R as expediency, not indicative of contrition and good faith, and thus, T has lost significant opportunities to influence R's future decisions regarding T.

T's costs of cooperating with R once R has initiated an action against T are: (1) T will have to stop or significantly curtail its wrongdoing. Presumably this will be to T's detriment since, otherwise, T would not have been engaging in such wrongdoing; and (2) T will expend resources in responding to R's investigation.

For the above reasons, T's benefits outweigh T's costs when T opts to cooperate with R.[195]

4. Nodes VII and VIII: Whether T Wins or Loses the Action R Has Brought Against T

Surprising perhaps, but T obtains some benefits at Node VII where T loses the action R has brought against T: (1) T sees an end to the tangible and intangible costs it was incurring in litigating the action against R; (2) T sees an end to the uncertainty in which it has operated because of R's ongoing investigative and litigative efforts toward T; and (3) The unfavorable outcome in R's action against T may cause beneficial changes in T, such as corporate restructuring or dismissal of culpable or ineffective leaders.[196]

T's costs when losing the action R has brought are substantial: (1) Although resolution of the case will end the immediate costs T was spending to defend the action, there may be lingering effects from those costs. Reputational or morale damage, or lost or aborted business opportunities, for example, could have lasting effects on T's productivity; and (2) There will be sanctions against T. These probably

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194. *See supra* Part III.B.2. at 640.

195. *See infra* app. A chart 12, at 682.

196. *Cf.* Interview with Neil V. Getnick, Partner, Getnick & Getnick, in New York, N.Y. (July 15, 1992), *in* CORP. CRIME REP., July 27, 1992, at 17-20 [hereinafter Getnick Interview].

will include fines,[197] payment of damages and penalties,[198] and implementation of costly internal structures, such as extensive corporate compliance plans.[199]

For the above reasons, T's costs in losing the action R has brought against it outweigh the minimal benefits T reaps.[200]

T's benefits at Node VIII where T prevails in the action R brings against T are significant: (1) Most obviously, T avoids the sanctions and the collateral consequences of sanctions, that would result from being found liable; (2) T's victory may enhance its reputation as a *winner*, which may help T in future dealings with R, or with other Ts on transactions unrelated to the action with R; (3) If the alleged wrongdoing on the part of T was of an ambiguous nature (Was there malfeasance or simply aggressive but permissible business tactics?), T's victory at Node VIII may be viewed as an imprimatur that such conduct is permissible; and (4) T achieves an end to the uncertainty that has lingered over T's business since R initiated its investigation.

T obtains one possible cost even though it has prevailed in the action: T may suffer from some lingering effects from defending itself in the investigation and action. For the above reasons, T's benefits outweigh T's costs when T wins the action R has brought against it.[201]

C. Game 1(C): Regulatory Game Without the FCA: From P's Perspective

Game 1(C), from P's perspective, is the last view of Game One. The triggering event is P's knowledge of T's wrongdoing. From this event, P has three, limited choices. At Node I, P chooses to do nothing with the information of T's wrongdoing. At Node II, P reports the wrongdoing internally within T. At Node III, P reports T's wrongdoing externally to sources such as the media, congressional committees, or additional regulatory agencies. P can pursue the strategies at Node II and Node III simultaneously.[202]

1. Node I: P Does Nothing Upon Learning of T's Wrongdoing

The benefits to P of doing nothing upon learning of T's wrongdoing are: (1) P will not precipitate retaliation by T; and (2) P will not incur

197. U.S. SENTENCING GUIDELINES MANUAL, ch. 8, pt. C, Fines (Nov. 2003), *available at* http://www.ussc.gov/2003guid/tabcon03_1.htm (last visited Feb. 6, 2004).

198. *See, e.g.*, 31 U.S.C. § 3729(a) (2002).

199. Slade, *supra* note 180, at 40-41; Kirk S. Jordan & Joseph E. Murphy, *Compliance Programs: What the Government Really Wants*, *in* 1 CORP. COMPLIANCE 529, 554-68 (2000).

200. *See infra* app. A chart 13, at 683.

201. *See infra* app. A chart 14, at 683.

202. *See infra* app. B, at 700 (diagramming Game 1(C)).

any personal or professional consequences from reporting T's wrongdoing.

The costs to P of adopting a do-nothing strategy are: (1) T's wrongdoing, if left to continue, may undermine T's existence, and thus, P's professional security; (2) If T's wrongdoing comes to light through avenues besides P, P may be held accountable, in whole or in part, for T's malfeasance. This is more likely if P is highly-placed within T. Such culpability could be alleged in shareholder derivative actions, civil suits for fraud, or even criminal prosecutions;[203] and (3) P may experience personal angst for failing to report T's wrongdoing, especially if many innocent people are victimized by the wrongdoing. This last cost will vary considerably depending upon P's personality, the extent to which the wrongdoing will harm individual victims, and P's awareness of such harm. This cost is quite speculative and thus, is discounted.

For the above reasons, the benefits to P of adopting a do-nothing strategy outweigh P's costs.[204]

2. Node II: P Reports T's Wrongdoing Internally

This Node assumes that P is either an employee of T (likely) or at the least, an insider in T's industry (perhaps a competitor or vendor to T). Realistically, P will fit into one of these roles or would not have access to significant information about T's wrongdoing.[205]

P's benefits at Node II, where P reports T's wrongdoing internally, are: (1) Possibly preventing greater troubles for T in the future.[206] If T responds to P's internal whistleblowing by remedying the problem P identifies, T may be able to avoid future harm to victims, competitors, or business associates, as well as future complaints, lawsuits, and regulatory actions; (2) By reporting the problem, P may be viewed within T as demonstrating leadership. This is especially true if higher management was truly unaware of the wrongdoing and a culture of compliance pervades T. If P's action is viewed favorably, P may advance within T or within the relevant industry; and (3) By reporting the wrongdoing, P may minimize the psychological angst P would have experienced in not taking action that could prevent others, perhaps many others, from becoming victims. The value of this benefit increases if the harm to victims is significant, but is speculative since it is difficult to know how various Ps will respond.

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203. *See, e.g.*, White, *supra* note 168, at 44.

204. *See infra* app. A chart 15, at 684.

205. BOESE, *supra* note 20, § 4.01[B].

206. Christopher A. Myers, *An Effective Compliance Program Can Save Companies Money and Keep Executives Out of Jail*, 10 METRO. CORP. COUNS. 10 (June 2002); *cf.* Getnick Interview, *supra* note 196, at 17-20 (July 27, 1992) (discussing how businesses can become more profitable by actively self-monitoring fraud and wrongdoing by employees).

P's costs at Node II are: (1) Possible retaliation by T and/or the relevant industry;[207] (2) P's time and energy in reporting T's conduct; and (3) P's personal and professional hardships that result from reporting the wrongdoing.[208]

For the above reasons, P's benefits and costs neutralize each other.[209]

3. Node III: P Reports Externally

At Node III, P reports T's wrongdoing externally to sources such as the press, professional self-policing organizations, or regulatory bodies. The benefits to P of adopting this strategy are: (1) Possible prevention of future problems for T; (2) P demonstrates leadership

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207. Job loss is probably the most consistently identified consequence of blowing the whistle, although whistleblowers may experience informal repercussions short of job loss, or prior to job loss, such as isolation, abuse, forced psychiatric referral, impossible demands by supervisors, threats of defamation or disciplinary actions, demotion, or reassignments. *See, e.g.*, MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 79-80 (1992); Bucy, *Information as a Commodity, supra* note 21, at 905, 953-58; K. Jean Lennane, *Whistleblowing: A Health Issue*, 307 BRIT. MED. J. 667, 668-69 (1993); Alan F. Westin, *Conclusion: What Can and Should Be Done to Protect Whistle Blowers in Industry*, *in* WESTIN, *supra* note 6, at 132-33 (1981); *see also* Clyde H. Farnsworth, *Survey of Whistle Blowers*, 133 CHI. DAILY L. BULL., July 7, 1987, at 3. Philip H. Jos et al., *In Praise of Difficult People: A Portrait of the Committed Whistleblower*, 49 PUB. ADMIN. REV. 552, 552-54 (1989).

In a study of thirty-five whistleblowers, thirty-four suffered retribution from their employer. Lennane, *supra*, at 668. The one exception was an individual who had not been working for the organization he informed upon. *Id.* Of the thirty-four whistleblowers studied, eight were dismissed, fifteen were pressured to resign, three saw their position abolished, five were transferred to another town, and one was pressed to "take redundancy." *Id.*

208. Surveys of whistleblowers consistently show the hardship and retribution these individuals experience. For example, in one survey of ninety whistleblowers, fifty-four percent said they were harassed at work, eighty-two percent were harassed by superiors, eighty percent reported physical deterioration following their whistleblowing experience, and eighty-six percent reported "negative emotional consequences, including feelings of depression, powerlessness, isolation, anxiety and anger." Farnsworth, *supra* note 207, at 3.

Insiders who remain employed after blowing the whistle do not usually last long at work. It becomes too miserable. They face ostracism, hostility, rejection, and taunting by coworkers. *See, e.g.*, Leo Kohls, *Refusing to Drive Unsafe Vehicles*, *in* WESTIN, *supra* note 6, at 95-97; Henry I. Kurtz, *Asserting Professional Ethics Against Dangerous Drug Test*, *in* WESTIN, *supra* note 6, at 107-08; Robert Lipsyte, *What Happens After the Whistle Blows?*, N.Y. TIMES, July 20, 2002, at D1.

In addition to immediate, tangible repercussions, there are cultural disincentives to providing information about wrongdoing by others. Whistleblowers often face ostracism from long-time friends and colleagues once it becomes known that they have volunteered information of wrongdoing. Albert D. Clark, *Ethical Implications of Whistle Blowing*, 42 LA. BUS. J. 364, 365 (1994) (terming whistleblowers as "rats" and "snitches"); Farnsworth, *supra* note 207, at 3 (calling whistleblowers "tattlers"); David Kocieniewski, *Officer Says He Was Hurt for Aiding an Inquiry*, N.Y. TIMES, July 27, 1996, at L25 (terming whistleblowers as "cheese eaters"); Jacqueline P. Taylor, *The World of Whistleblowers: Are They Sinners or Saints?*, (Feb. 2, 1998), *at* http://www.womenofcolorado.com/Articles/le020 298.asp (calling whistleblower's M&M's).

209. *See infra* app. A chart 16, at 684.

and advances within T; and (3) P minimizes or prevents P's personal angst. These are the same benefits P realized when reporting T's wrongdoing internally. When P reports T's wrongdoing externally, however, there are additional benefits: (4) By reporting T's wrongdoing publicly, P more convincingly demonstrates P's non-culpability for the wrongdoing; (5) P may obtain protection from T's retaliation because T will look guilty and vindictive if T retaliates against P after P has publicly disclosed T's wrongdoing; and (6) T may be more eager to cease its wrongdoing and quickly repair the damage it has created because of the publicity P's external disclosure has brought.

The costs to P of reporting T's wrongdoing externally are: (1) P increases the likelihood of ostracization, if not retaliation, within T and within the relevant industry. The accompanying personal or professional hardships for P could be significant;[210] (2) P's time and energy; and (3) Depending on the amount of publicity P's disclosure generates, T's response, and P's personality, P may feel discomfort at becoming a public figure, especially if T responds to P's external reporting by publicly disparaging P.[211]

For the above reasons, P's benefits outweigh P's costs when P opts to report T's wrongdoing externally.[212]

D. Game 2(A): Regulatory Game with the FCA: From R's Perspective

In Game Two, there is a mechanism, such as the FCA, that encourages private parties (P) to bring information about wrongdoing to regulators and to work with regulators to investigate and litigate such wrongdoing. Game 2(A) looks at this regulatory game from the perspective of regulators (R). The triggering event, as in Game 1(A), is R's knowledge of T's possible wrongdoing. Unlike Game 1(A), however, R learns of T's possible wrongdoing in Game 2(A) from P. Also, unlike the sketchy, inconclusive information R received in Game 1(A) about T's wrongdoing, P provides R with detailed information of T's wrongdoing since, as noted *supra*, the FCA requires that relators provide the DOJ with a copy of the complaint P has filed (under seal) against T, as well as all information and evidence P has regarding T's wrongdoing.[213]

From this triggering event, R has two choices: conduct a minimal investigation (Node I), or a thorough investigation (Node II). Note that R's options vary from Game One where R had the choice of whether to open an investigation or not. In Game Two, where the

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210. *See supra* notes 202-05.

211. Joseph Rose, *Reporting Illegal Campaign Contributions*, *in* WESTIN, *supra* note 6, at 35.

212. *See infra* app. A chart 17, at 685.

213. 31 U.S.C. § 3730(b)(2) (2002).

FCA is part of the regulatory scheme, R has a statutory obligation to investigate P's information once P has served R as required.[214] After R has conducted its investigation, R has two choices: decline to intervene in P's lawsuit (Node III), or intervene in P's lawsuit (Node IV). If R intervenes, both R and P achieve benefits or incur costs, depending on the outcome in the action brought against T. At Node V, R and P win the action, and at Node VI, R and P lose the action.[215]

1. Nodes I and II: How Much of an Investigation R Should Conduct upon Learning from P of T's Possible Wrongdoing

In Game Two, at Node I where R opts to conduct a minimal investigation of P's information that T is engaged in wrongdoing, R obtains the following benefits: (1) If T knows that R is aware of T's wrongdoing, T may be deterred from continuing it. Because both T's awareness and T's response are speculative, this is deemed to be a minimal benefit; and (2) By conducting only a minimal investigation, R saves resources that could be directed to other investigations. Given the complexity of economic wrongdoing in general, and the type of wrongdoing the FCA is aimed at in particular—government contracting fraud—the amount of R's resources needed to investigate P's information could be considerable because it takes significant time and sophistication to investigate such complex malfeasance.[216] On the one hand, because of our assumption for these Games that T is engaged in wrongdoing and thus a worthy target of R's investigatory resources, this would seem to be a minimal benefit. On the other hand, it is not clear that P's information is helpful in identifying T's wrongdoing. In fact, given our estimate that Ps are helpful to R only twenty-seven percent of the time,[217] R could waste considerable resources investigating P's information.

This situation—P dictating who and what R investigates—demonstrates both the strength and weakness of the FCA paradigm. The strength is that the FCA enlists a new player, P, who potentially brings the valuable resource of inside information to regulatory efforts. The weakness is that this new player *forces* R to *play* and to invest resources that could be better allocated elsewhere.[218] One way to

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214. *Id.*

215. *See infra* app. B, at 701 (diagramming Game 2(A)).

216. *See, e.g.*, Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C. L. REV. 855, 875-81, nn.156-58 & 172 (1989); Bucy, *Information as a Commodity, supra* note 21, at 905, 940-41.

217. *See supra* note 156.

218. Frederick M. Morgan, Jr. and Jennifer M. Verkamp, *Notes from the Field: Practicalities of the Qui Tam "Working Partnership" Under the 1986 False Claims Act Amendments*, 29 TAF Q. REV. 29, 33 ("There is a perception afield that there are too many overzealous, 'under-helpful,' financially-driven relators with weak or non-existent cases, the investigation of which depletes, rather than augments, federal resources."); *see, e.g.*, *False*

manage this so that the FCA remains more of a strength than a weakness to R is to ensure that R has flexibility to conduct a minimal review of P's information when R deems such review appropriate.[219]

R will incur the costs it incurred in Game One when R opted not to investigate allegations of T's wrongdoing but had no inside information about T's wrongdoing from P: (1) R's decision will empower T to the extent T is aware of R's decision; (2) R's decision will empower other businesses to the extent they are aware of R's decision; (3) R's decision will allow T time to refine its malfeasance strategies; (4) R's decision will allow more victims to be hurt. There are two additional costs to R in Game Two from Game One because of P's participation: (5) Because of our assumption that T is engaged in wrongdoing, it is safe to assume that multiple Ps within T know at least something about T's wrongdoing. Unlike Game One where there is no P, R's disregard of P's information in Game Two signals to all future Ps, inside or outside of T, that R is not responsive, supportive or interested in whistleblowers.[220] This signaling almost certainly will discourage other Ps from coming forth; and (6) If T knows that P has provided R with information, R's passivity in the face of such information may encourage T and other aware businesses to retaliate against Ps within their ranks.

For these reasons, R's costs outweigh R's benefits in Game Two when R opts to do only a minimal investigation of T upon learning of T's possible wrongdoing.[221] Also, because of P's participation in Game Two and the additional signaling R's strategy now conveys, R's costs of conducting only a minimal investigation of T increase in Game Two from Game One when P was not a player.

At Node II in Game Two where R opts to actively investigate T, R reaps the following benefits: (1) Deterrence of T's wrongdoing; (2) Deterrence of other observant businesses in their wrongdoing or planned wrongdoing; and (3) Development of institutional knowledge. These benefits are amplified in Game Two from Game One. The first benefit, deterring T's wrongdoing, will be enhanced in Game Two if T is aware that R is working with P because T will know that

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Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 10-12 (1990) (statement of Stuart M. Gerson, Asst. Attorney General, Dep't. of Justice), 30-32 (statement of Richard P. Kusserow, Inspector General, Dep't Health & Human Services), 68-71 (statement of John R. Phillips, Hall & Phillips).

219. Granted, such an approach is contrary to the *capture* theory that supports giving those outside R the ability to monitor R for decisions motivated by laziness or corruption, rather than merit. Until there is greater reason to believe the DOJ is captured by such influences, saving R's resources weighs in favor of recognizing the merit of R exercising such discretion.

220. *See generally supra* note 151.

221. *See infra* app. A chart 18, at 685.

when P, an informed insider, is working with R, R's case against T will be stronger. The value of this deterrence will not be enhanced greatly however because it is not likely, at the investigation stage, that T will know that P is working with R. Neither R nor P will want to disclose P's involvement to T, or to anyone. R will want to keep P's identity as a whistleblower secret so that P can continue to gather information that assists R's investigation.[222] P will want to maintain secrecy because of the retaliation and ostracization P is likely to face if others know of P's assistance to R. The third benefit, developing institutional knowledge within R about T's wrongdoing and that of other actors in T's industry, is considerably enhanced in Game Two because of P's information about T's behavior and about T's industry.

Also, in Game Two, where P is a player, there is a new benefit for R when R chooses to actively investigate T. By working with P, R signals to future Ps that R responds and supports Ps, thereby encouraging future Ps to come forward.[223]

R's cost in opening and actively investigating T in Game Two is the same type of cost R experienced in Game One (investigative costs, the allocation of which prevent R from investigating other Ts), but it hurts R less. This cost decreases from Game One because of P's assistance in Game Two, at least in the twenty-seven percent of the cases where P is helpful.[224] In these cases, P will be able to explain to R what wrongdoing is taking place within T; interpret and explain T's policies and procedures; identify who within T is involved in the wrongdoing and who is likely to serve as credible, knowledgeable witnesses; describe what documents, records and correspondence exist to corroborate R's case and where those documents may be stored; and alert regulators as to where T's assets are held or are being funneled.[225] Because of P's assistance, R's investigation will be more efficient and focused than it was in Game One and R's overall investigative costs will be less.[226] For this same reason, R's opportunity cost of not pursuing other defendants because of the resources R allocated to pursue T is reduced. Since R's case against T will be stronger in Game Two with P's help, the likelihood of foregoing better investiga-

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222. *See, e.g.*, United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 442, 447 (E.D. Pa. 1998).

223. *Cf.* POSNER, *supra* note 151, at 149.

224. *See supra* note 156.

225. *See supra* notes 86-91 and accompanying text.

226. Inside information is crucial to successful investigation and proof of complex economic wrongdoing. Knowledgeable insiders can produce information about inchoate or ongoing malfeasance of which law enforcement is unaware. Such insiders can also save enormous amounts of law enforcement resources by focusing governmental investigations and case preparation. Cutting down on unproductive investigations not only helps law enforcement, but also aids defendants and putative defendants who are spared financial and reputational costs in responding to misguided investigations. Bucy, *Information as a Commodity, supra* note 21, at 940-47.

tions decreases. With P's help, R will be proceeding in a strong case against T.

For these reasons, R's benefits outweigh R's costs when R opts to actively investigate T in Game Two upon learning from P of T's possible wrongdoing.[227]

2. Nodes III and IV: Whether R Intervenes in P's Lawsuit Against T

The FCA permits R to intervene at the inception of P's case and continue as the primary plaintiff throughout the duration of the case or, alternatively, to intervene fully or for limited purposes at any stage of the case.[228] R can, for example, intervene solely to seek dismissal of P's case or to litigate an issue on appeal.

At Node III, R opts not to intervene in P's action. R realizes the following benefits with this strategy: (1) R saves resources. By declining to intervene, R recognizes a significant benefit even in light of our assumption that T is engaged in wrongdoing *if* R makes this decision in the appropriate cases—those in which P's information is not helpful. Conversely, if R chooses not to intervene in those cases in which P's information is helpful, this benefit is minimal. For purposes of assessing this benefit we will assume that in the majority of cases that R makes an appropriate decision and declines to intervene when P's information is not helpful; and (2) Even if R makes an inappropriate decision and decides against intervention in a meritorious case, R can still realize a benefit. Under the FCA, if R does not intervene in a case brought by a P, R still collects a hefty percentage (seventy to seventy-five percent) of the judgment if P successfully pursues the case.[229] Although historically it is unusual for relators in non-intervened cases to prevail, it is possible.[230]

R will incur the following possible costs by declining to intervene.[231] These are *possible* costs because R incurs them only if R has

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227. *See infra* app. A chart 19, at 686.

228. 31 U.S.C. § 3730(c)(3) (2002); *See, e.g.*, United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 46 F. Supp. 2d 546 (E.D. La. 1999) (allowing government to intervene for purposes of appeal after declining intervention in the case); Juliano v. Fed. Asset Disposition Assoc., 736 F. Supp. 348, 350-51 (D.D.C. 1990) (allowing government to intervene solely to move for dismissal of the case).

229. 31 U.S.C. § 3730(d)(2).

230. The total amount paid to relators, from October 1, 1986 through September 30, 2000, as their statutory share when the government has intervened is $576 million. The total amount paid to relators over this same time period when the government has not intervened is $35.3 million. Only 2.1% (12 out of 570) of qui tam cases in which the government has intervened have been dismissed; 71.1% (1357 out of 1907) of qui tam cases in which the government has not intervened have been dismissed. Letter from the U.S. Dep't of Justice, to Author, FOIA Request 145-FOI-6072 (Oct. 20, 2001) (on file with author). Of the 3202 qui tam cases filed since 1987, the government has intervened or otherwise pursued 17.8% (570 out of 3202). *Id.*

231. WEST, *supra* note 31, at 46.

incorrectly assessed the merits of P's case and failed to intervene when it should have: (1) R's decision will cause P's case to fail. Few Ps have adequate litigative and investigative resources to fully and successfully pursue a case alone. Sometimes, courts assume that P's case is not meritorious if R does not intervene. Thus in most situations, R's non-intervention decision will doom P's case to dismissal, or to less success than might otherwise be possible. This is a cost only when P's case is meritorious. Otherwise, it is a benefit.

Secondly, by not intervening, even for limited purposes,[232] R loses the opportunity to guide and direct P's exercise of prosecutorial discretion. Allowing Ps to pursue inappropriate cases or urge irresponsible interpretations of the FCA has significant collateral costs, such as creating unnecessary expense and damage for defendants, generating hostility toward the FCA among policy makers, and creating precedent that binds R and responsible Ps in all FCA cases.[233] R's careful monitoring of Ps' qui tam actions is also important for constitutional reasons. The FCA is vulnerable under the "Appointments"[234] and "take-care"[235] clauses if R does not maintain adequate supervision over Ps.[236]

Thirdly, by declining to intervene, R may empower T and other observant businesses to continue their wrongdoing *if* T and other businesses are aware that P has presented information of T's wrongdoing to R and that R has declined to intervene. There are two ways T and other businesses could learn of R's non-intervention decision. The first is through R's investigation of T. If R investigates T before making its non-intervention decision by serving subpoenas, interviewing T's personnel, or engaging in discussion with T's counsel, T will obviously learn of R's investigation. When R does not sue T, or when P continues with P's suit against T alone, after R has declined to join the case, T will know that R did not believe the suit was meritorious.

Fourthly, by not intervening and by abdicating inappropriate prosecutorial discretion to Ps, R may be losing an opportunity to

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232. The FCA allows R to intervene for limited purposes such as to move for dismissal of a non-meritorious case, or to urge a particular interpretation of the FCA on appeal. 31 U.S.C. § 3730(c)(3).

233. Bucy, *supra* note 20, at 62-68.

234. The "Appointment" clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, . . . but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

235. The President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

236. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 950-58 (2002).

shape society's norms. R is able to send powerful signals to economic actors through its regulatory agenda—what conduct is wrong, why it is wrong, and what substitute conduct is permissible.[237] To the extent that R allows Ps, who are motivated by the prospect of a large recovery rather than by public interest, to initiate and pursue cases of questionable merit, R allows muddled signals to be sent to economic actors. This confused message may lead actors to adopt nonproductive strategies that damage their competitiveness and hurt the national economy.

For these reasons, R's costs at Node III outweigh R's benefits when R opts not to intervene in P's lawsuit against T.[238]

At Node IV, where R intervenes in P's action against T, R achieves the same types of benefits R realized in Game One where R brought an action against T alone: (1) Enhanced credibility for R among T and observant businesses; (2) Enhanced credibility for R among potential witnesses against T; (3) Enhanced morale within R; (4) Minimizing, if not preventing, harm to victims; (5) Deterring T's wrongdoing; and (6) Deterring wrongdoing by other observant businesses. These benefits are amplified in Game Two since with P's information it is more likely, at least in twenty-seven percent of the cases,[239] that R will discover the full extent of T's wrongdoing and that R will ultimately prevail in the action. There is also a new benefit in Game Two: (7) By working with P, R sends a powerful signal of support and encouragement to future whistleblowers.

In Game Two, R incurs the same types of costs it incurred in Game One where R brought an action against T without P's involvement: (1) Investigative expenses; and (2) Opportunity cost—by pursuing T, R is unable to pursue other targets. Both of these costs decrease in Game Two from Game One. P's information makes R's investigation more focused and efficient, thus reducing the resources R must devote to pursue T. When P's counsel is experienced, assistance to R by P's counsel further reduces the amount of resources R must devote to T's case. Both phenomena will allow R to put more of its resources into other investigations, thereby reducing R's opportunity cost.

For these reasons, R's benefits outweigh R's costs in Game Two when R opts to intervene in P's suit against T.[240]

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237. *See supra* notes 169, 174.
238. *See infra* app. A chart 20, at 686.
239. *See supra* note 156.
240. *See infra* app. A chart 21, at 687.

3. Nodes V and VI: R Wins or Loses the Action It Brought with P Against T

At Node V, when R, working with P, prevails in the action it brought against T, R achieves the same types of benefits it obtained with its victory in Game One: (1) Public acknowledgment that T's behavior is wrong; (2) Education of relevant industry as to permissible and impermissible behavior; (3) Enhanced credibility for R; (4) Payment by T of judgment, fines, and penalties; (5) Deterrence of T's wrongdoing; and (6) Deterrence of wrongdoing by other observant businesses. These benefits are amplified in Game Two from Game One. With P's information, it is likely in Game Two that R will resolve the case against T more thoroughly and more advantageously to R than R could have done without P's information and assistance, at least in the twenty-seven percent of cases where P's information is helpful.[241] Also, as noted *supra*, there is an additional benefit to R in winning the action in Game Two: (7) R's success in the action will signal encouragement to future whistleblowers.

Although R prevails in the action it brought with P against T, R will incur costs with its victory: (1) The opportunity cost of foregoing actions against other Ts. As noted, because R's resources are limited and R does not have adequate resources to pursue all deserving Ts, pursuit of one T necessarily means R cannot pursue other Ts. (2) Depending on T's assets and the judgment ordered or settlement reached, R may not be able to recoup all of its investigative and litigative expenses from T as part of the settlement of the case.

Both of these costs decrease for R in Game Two from Game One where R did not work with P. R's investigative and litigative costs will not be as great in Game Two because P's information makes R's case against T more focused and efficient, and because assistance from P's counsel supplements R's resources. This will free up more of R's resources to pursue other Ts, thus reducing R's opportunity cost. Additionally, reduced investigative and litigative costs make it less serious for R if R is unable to recoup all of its costs from T after R prevails.

For these reasons, R's benefits at Node V are significantly greater than its costs when R wins the action it brought, with P, against T.[242]

At Node VI, in Game Two when R, working with P, loses the action it brought against T, R still achieves two benefits: (1) An end to R's investigative and litigative cost; and (2) Possibly, some deterrence of T and other observant businesses *if* these actors view the costs of responding to R's investigation and action as so significant that they

241. *See supra* note 156.
242. *See infra* app. A chart 22, at 687.

opt to operate their businesses more honestly in the future so as to avoid R's scrutiny.

R incurs the same types of costs in Game Two as it incurred in Game One: (1) Lost credibility; (2) Lost tangible and intangible expenses incurred in pursuing the action against T; (3) Opportunity cost of not pursuing other deserving T's by allocating resources to pursuing T; and (4) Signaling to T and other observant businesses that they can continue their wrongdoing with impunity. The first cost, lost credibility, is amplified in Game Two from Game One. In Game Two, R loses more credibility than in Game One because R has, by its failure, not only lost a specific case but has demonstrated, for all to see, the failure of a regulatory scheme that strives to partner private parties with regulators in pursuit of wrongdoers.

As noted throughout Game Two, R incurs an additional cost because of the enhanced *signaling* to other players that occurs in Game Two. Since Game Two is *played* with the participation of P, R's loss in the action signals to future Ps that it may not be worth their while to bring information about T's wrongdoing to R, or to work with R to investigate or litigate against T. No Ps want to endure the hardship they will by becoming whistleblowers only to lose the actions they pursue with R.

For these reasons R's costs outweigh R's benefits when R and P lose the action they have brought against T.[243]

E. Game 2(B): Regulatory Game with the FCA: From T's Perspective

Game 2(B) looks at Game Two from T's perspective. The triggering event is T's commission of wrongdoing. From this event, T faces the decision of whether to disclose its wrongdoing (Nodes I, II), whether to cooperate with R when R opens an investigation of T (Nodes III, IV), or whether to cooperate with R (Nodes V, VI) or with P (Nodes VII, VIII). At Nodes IX and X, T either wins or loses the action brought against it.[244]

1. Nodes I and II: Whether T Discloses Its Wrongdoing to R

At Node I where T decides not to disclose its wrongdoing to R, T's benefits in Game Two are the same T realized in Game One: T possibly avoids (1) any finding of culpability, (2) imposition of sanctions, and (3) collateral consequences that may flow from culpability and sanctions. T's costs in adopting a non-disclosure strategy are: (1) Uncertainty in not knowing whether R will investigate T in the future, and resulting difficulty planning; (2) Lost opportunity to influence

243. *See infra* app. A chart 23, at 688.
244. *See infra* app. B, at 702 (diagramming Game 2(B)).

R's assessment of T's culpability; (3) Lost opportunity to influence the sanctions R will seek against T; (4) Lost opportunity to influence the collateral consequences, such as publicity, that will flow from R's assessment of T's culpability and the imposition of sanctions on T; and (5) Lost opportunity to minimize and manage the costs T will incur when responding to R if R learns of T's wrongdoing. These are the same types of costs T incurred in Game One. In Game Two they simply hurt T more. As noted in Game One, the value of T's costs in adopting a non-disclosure policy depend upon the likelihood of T getting caught in the future. This is where the presence of P as a player makes a difference in Game Two. When P, an insider who has knowledge of T's wrongdoing, is willing to give information to R and to work with R in pursuing T, the chances of T getting caught increase significantly, at least in those cases where P's information is helpful. Thus, the costs to T of adopting a non-disclosure strategy increase in Game Two from Game One.[245]

At Node II, where T decides to disclose its wrongdoing to R, T experiences the converse of its costs and benefits at Node I.[246]

2. Nodes III and IV: Whether T Cooperates in R's Investigation

Once R opens an investigation of T, T must decide whether to cooperate with R. As in Game One, T obtains the following benefits by deciding not to cooperate with R's investigation: (1) T avoids a finding of culpability; (2) T avoids sanctions; and (3) T avoids collateral consequences of sanctions R may seek. Because of the presence in Game Two of P, these benefits decrease in value for T in Game Two since as noted, their value depends upon whether R learns about T's wrongdoing. The benefits of non-disclosure are not worth much if R discovers T's wrongdoing, and the chances of R discovering T's wrongdoing increase in Game Two with P's information about T's wrongdoing. Thus in Game Two, T's benefits of non-disclosure become more speculative and less valuable.

T incurs the same types of costs in Game Two as T sustained in Game One when it adopted a non-cooperation policy: (1) Uncertainty in not knowing whether R will initiate an action against T; (2) Lost opportunity to affect R's assessment of T's culpability; (3) Lost opportunity to affect the severity of sanctions that may be imposed on T; (4) Lost opportunity to affect collateral consequences flowing from the sanctions that may be imposed on T; and (5) Lost opportunity to minimize and manage the resources T expends in responding to R's investigation. With one exception, all of these costs are greater for T in Game Two. The one exception is the cost of not knowing what R

245. *See infra* app. A chart 24, at 688.
246. *See infra* app. A chart 25, at 689.

may do. This uncertainty decreases in Game Two, since with P as a player, it becomes *more* certain that R will initiate an action against T. The remaining four costs all increase, however, for the same reason. The more likely it is that R will initiate an action against T, the greater the opportunities lost for T in adopting a non-cooperation policy.

For these reasons, T's costs of adopting a non-cooperation strategy in Game Two outweigh the benefits of choosing such a strategy.[247]

The converse is true at Node IV of Game Two where T decides to cooperate with R. P's participation in Game Two, which makes it more likely that R's investigation will be focused, efficient and will result in successful action against T, increases the benefits T obtains by cooperating with R. One of T's costs of cooperating, expenditure of resources, decreases in Game Two because of P's participation. The resources T spends in responding to R's investigation are likely to be less in Game Two, since with P's guidance, R's investigation will be more focused and efficient. The other cost T incurs because it adopts a cooperation strategy, cutting back on its wrongdoing, remains the same in Game Two as in Game One; P's presence should not affect this.

For these reasons, the benefits to T of cooperating with R when R opens an investigation of T outweigh T's costs in doing so.[248]

3. Nodes V and VI: Whether T Adopts a Strategy of Cooperation with R After R Has Intervened in P's Suit

After R's investigation, T faces slightly different steps in Game Two than in Game One. This is because P and R face different choices in Game Two and their decisions affect T. Because of the structure of the FCA, R doesn't get to decide whether it will initiate an action against T after it has investigated T. In Game Two, P has already seized the initiative and R is left to decide whether it will intervene in the action P has already filed. Granted, R can file an amended complaint if it chooses to intervene in the action brought by P, but the point is that P, not R, has seized the initiative in choosing to pursue T. If R does not intervene in P's lawsuit, P has the option of continuing the lawsuit on her own. Thus, T's decision whether to cooperate after an action has been filed against it, is two-fold. T must decide whether it will cooperate with R if R intervenes in P's already-filed action. If R declines to intervene in P's lawsuit but P continues it alone, T must decide whether to cooperate with P.

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247. *See infra* app. A chart 26, at 689.
248. *See infra* app. A chart 27, at 690.

Adoption by T of a non-cooperation strategy with R after R has intervened in P's case presents T with the following benefits: (1) R, now working with P, will have to prove its case against T without T's help. If R and P are unable to do so, T's non-cooperation strategy succeeded. (2) It is possible that even with P's help, R's action will fail to identify all of T's wrongdoing. By continuing a non-cooperation policy, T maximizes this chance. This benefit is tempered by the fact that if R wins the action against T, regulators will gain enough access to T's internal records that R almost certainly will discover the rest of T's wrongdoing and T will suffer even greater consequences for not fully disclosing its activity to R (and possibly for concealing it, depending on T's testimony at trial or comments during settlement conferences).[249] (3) When R intervenes in P's action, T obtains the benefit of knowledge—about R's focus, devotion of resources, and strength of case. The presence of P in Game Two enhances T's prospects for obtaining information about the case against it. Under the FCA practice, T may be able to gain, through discovery, the "evidence and information" P supplied to R when P initially filed P's lawsuit. Potentially this could provide T with considerable information about R's case against it. In addition, if P and R have disagreements over strategy and those disagreements are resolved by a court after hearings, T may gain further access to information about the case against it through R and P's squabbles.

The costs T incurs in Game Two by adopting a non-cooperation strategy are: (1) Uncertainty in how R's action will be resolved; (2) Lost opportunity to influence R's assessment of T's culpability; (3) Lost opportunity to influence R's choice of sanctions; (4) Lost opportunity to influence the collateral consequences that flow from the sanctions; and (5) Lost opportunity to minimize or manage the resources T expends in responding to R's action. As noted *supra*, these opportunity costs increase from Game One where P was not a player because P's participation in Game Two increases R's chances of success in the action. This, in turn, increases the value of the opportunities lost when T chooses not to cooperate. In Game Two, R faces another cost. Now that R has filed an action and it becomes more likely that a court (administrative or judicial) will become involved and the court may be more inclined to impose harsh sanctions on T if R prevails in the action. The court may view T's non-cooperation as waste-

249. Ronald A. Sarachan & Charles A. DeMonaco, *U.S. Department of Justice: Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Disclosure Efforts by the Violators*, *in* CORPORATE COMPLIANCE 2000 739, 748-50 (PLI Corp. Law & Practice Corse Handbook Series No. B-1177, 2000), *available at* WL 1177 PLI/Corp 739.

ful of R's and the court's time and resources. For these reasons, T's costs exceed T's benefits at Node V.[250]

At Node VI, where T opts to cooperate with R after R has filed an action against T, T's benefits and costs are the converse of those just noted, yielding a net benefit to T of opting to cooperate with R.[251]

4. Nodes VII and VIII: Whether T Cooperates with P if P Continues with the Case Alone After R Declines to Intervene

If P continues its case against T after R declines to intervene, T must once again decide if it will cooperate, this time with P. The benefits to T of adopting a non-cooperation strategy remain, as before, as the opportunity to avoid: (1) liability, (2) sanctions, and (3) collateral consequences flowing from the sanctions. The value of these benefits increases considerably for T when the sole plaintiff is P. Historically, once the DOJ has declined to intervene in an FCA suit brought by a P, the suit has little chance of success. This could be for a variety of reasons: the suit was not meritorious to begin with (which is why the DOJ declined to intervene); the suit is meritorious, but P is unable to fully investigate or litigate it without R's help; or the suit is meritorious, but courts assume that it is not if the DOJ declines to intervene.[252] Whatever the reason, because *declined* FCA actions have had little chance of success, T's strategy of non-cooperation almost certainly will be more beneficial to T than if R had intervened.

The costs to T of not cooperating with P are the same types of costs any defendant experiences when sued, whether by a private party (P) or regulatory authority (R): (1) Uncertainty of not knowing if P will prevail; (2) Lost opportunity to affect P's assessment of liability; (3) Lost opportunity to affect P's request for sanctions; (4) Lost opportunity to affect the collateral consequences that flow from the judgment P may obtain; and (5) Lost opportunity to minimize or manage the resources T expends in responding to P's suit. Given P's unlikely chance of success in P's suit against T, however, these costs are worth considerably less than when R is bringing an action against T.

For the reasons noted, T's benefits outweigh T's costs if T adopts a non-cooperation strategy with P when P decides to pursue the action against T alone after R has declined to intervene.[253]

T's benefits and costs at Node VIII when T adopts a cooperation strategy with P are the converse of those at Node VII, where T

250. *See infra* app. A chart 28, at 690.
251. *See infra* app. A chart 29, at 691.
252. WEST, *supra* note 31, at 46.
253. *See infra* app. A chart 30, at 691.

adopted a non-cooperation strategy with P. Given the historically poor chance P has of succeeding against T, the costs to T of adopting a cooperation strategy with P outweigh T's benefits in doing so.[254]

5. Nodes IX and X: Whether T Loses or Wins the Action Brought Against It

T achieves the same benefits in Game Two when it loses the action brought against it as T obtained in Game One: (1) An end to the tangible and intangible expenses T was incurring to litigate; (2) An end to the uncertainty created for T by the ongoing litigation; and (3) Possible restructuring within T that could make T a more effective business entity.

T incurs the same costs with its loss in Game Two as it did in Game One: (1) Lingering effects of the investigation and action that are detrimental to T; and (2) Fines, damages, penalties, and mandated internal restructuring. There are, however, two additional costs that T will incur in Game Two. Both result from the presence of P as a player: The first is the encouragement to future Ps that R's success against T will convey. The second additional cost is more global. T's loss of an enforcement action brought by an industry insider with R may generate greater intolerance of corporate financial aggression than would a victory brought only by R. The ability of regulatory actions to impact our *norms* of acceptable corporate behavior may increase if respected, or at least knowledgeable insiders are part of the *enforcement team*. Such intolerance may manifest in more shareholder derivative lawsuits, less job security for CEOs, more scrutiny by Boards of Directors, and less flexibility for corporate leaders to pursue risky business opportunities. For these obvious reasons, T's costs outweigh T's benefits when T loses the action brought against it.[255]

At Node X where T prevails in the suit brought against it by R and P, or just by P, T achieves the converse benefits and costs T experienced when losing the case with the addition of one additional benefit and one additional cost. The additional benefit is that publicity of T's success *and* P's resulting failure may well discourage future Ps from coming forward, especially if publicity about the case reveals hardships P almost certainly encountered when bringing the action. The additional cost T incurs in Game Two results from this same publicity. Although coverage of T's win (and P's participation and loss) will probably discourage some future Ps from coming forward, it will also inform others about the existence of such actions. For these

254. *See infra* app. A chart 31, at 692.
255. *See infra* app. A chart 32, at 692.

obvious reasons, T's benefits outweight T's costs when T wins the action brought against it.[256]

F. Game 2(C): Regulatory Game with the FCA: From P's Perspective

Game 2(C) views Game Two from P's perspective. As in Game One, the triggering event is P's knowledge of T's wrongdoing. Whereas P had only three options for conduct in Game One, P has these three options plus many more in Game Two. As in Game One, P has the option of doing nothing (Node I), reporting the wrongdoing internally (Node II), and reporting the wrongdoing externally (Node III). The *reporting externally* option changes slightly in Game Two because P reports externally not by going to the press or to multiple regulatory bodies but by filing a qui tam lawsuit (under seal) and providing a written report of all "information and evidence" P possesses to the United States Department of Justice.[257] If P chose this last option, P must next decide whether to work actively with R as R investigates the matter (Nodes IV and V), whether to continue in the case with R if R intervenes (Node VI), whether to pursue the case alone if R does not intervene (Node VII), and whether to dismiss the action if R does not intervene (Node VIII). The benefits and costs to P of winning or losing the action are assessed at Nodes IX and X.[258]

1. Node I: P Does Nothing Upon Learning of T's Wrongdoing

P's strategy at Node I of doing nothing upon learning of T's wrongdoing presents the same benefits and costs for P in Game Two as in Game One. P reaps the following benefits: (1) P will not precipitate retaliation by T; (2) P will not incur T-imposed personal or professional hardships because of P's whistleblowing.[259] P incurs the following costs: (1) T's wrongdoing may undermine P's professional security; (2) P ultimately may be held culpable for T's wrongdoing; (3) P may experience personal angst for not reporting T's wrongdoing.

P will experience one additional cost and two enhanced costs in Game Two. The enhanced costs are a greater likelihood that T's wrongdoing will undermine P's professional security, and a greater likelihood that P will be held personally culpable for T's wrongdoing. The fact that all knowledgeable Ps are encouraged to come forward and alert the government to T's malfeasance enhances these two costs if P adopts a do-nothing strategy. Because all Ps have incentive to report T's wrongdoing to R in Game Two, it is more likely that R

256. *See infra* app. A chart 33, at 693.

257. In fact, under the FCA, relators cannot disclose the information they have included in their qui tam lawsuit until the seal has been lifted. WEST, *supra* note 31, at 17.

258. *See infra* app. B, at 703 (diagramming Game 2(C)).

259. *See supra* notes 204-05.

will learn of T's wrongdoing and act upon it. Once exposed, T's existence, or at least T's profitability, may be threatened. This could jeopardize P's professional security if P is a T employee. In addition, once other Ps report T's wrongdoing, Ps who may have been involved in the wrongdoing, even tangentially, have lost the opportunity to demonstrate their good faith, remorse, or minimal culpability by alerting regulators to it. With broad theories of liability such as conspiracy and complicity, there could be a serious problem for P since such theories ensnare those tangentially involved in wrongdoing.[260] The significance of these costs depends upon the likelihood that multiple Ps are aware of T's wrongdoing.

The additional cost for P in Game Two when P adopts a do-nothing strategy is a lost opportunity. The FCA gives successful Ps a share of any judgment recovered as a result of P's efforts.[261] Thus, Ps who decide to do nothing, or Ps who report only internally, lose the opportunity to share in any judgment recovered. Moreover, because the FCA gives only the first-reporting P the opportunity to become a qui tam relator and share in the judgment,[262] Ps who ultimately report T's wrongdoing after initially opting to do nothing risk preemption by other Ps.

For these reasons, P's benefits of adopting a do-nothing strategy remain the same in Games One and Two, but P's costs increase in Game Two.[263]

2. Node II: P Reports Internally

P's strategy of reporting internally has the same benefits in Game Two as in Game One: (1) Possible prevention of future problems for T; (2) P is viewed as demonstrating leadership and advances within T; (3) P minimizes or prevents P's personal angst for failing to report; (4) In Game Two, P obtains an additional benefit. Because the FCA provides statutory protection for Ps against retaliation by employers and because internal reporting activates this protection in most

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260. Conspiracy punishes the act of agreeing to commit a crime and everyone who agreed is guilty. Conspiracy liability includes actors who only agreed that another co-conspirator would commit the crime and did nothing beyond the act of agreement to further the crime intended. BUCY, *supra* note 166, at 5-6. *Pinkerton* liability goes even further, making a co-conspirator liable for all substantive crimes committed by another co-conspirator if such crimes were in furtherance of the conspiracy and were reasonably foreseeable as part of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 646 (1946). Complicity liability makes a person guilty for having the intent that another person commit a crime and rendering aid or assistance to that person. Such assistance can be as minimal as encouraging the other person. United States v. de la Cruz-Paulino, 61 F.3d 986, 999 (1st Cir. 1995) (citing United States v. Ortiz, 966 F.2d 707, 712 (1st Cir. 1992)).

261. *See supra* notes 41-44 and accompanying text.

262. 31 U.S.C. § 3730(b)(5) (2002).

263. *See infra* app. A chart 34, at 693.

situations,[264] P can obtain this protection in Game Two by reporting T's wrongdoing internally (assuming P is an employee of T).

By reporting internally in Game Two, P incurs the same costs P experienced in Game One: (1) Possible retaliation by T or others within the relevant industry; (2) Expenditure of P's time and energy; and (3) Personal and/or professional hardships resulting from internal reporting. (4) In Game Two, P incurs an additional cost, however. Because the FCA rewards only Ps who come forward by using the FCA's procedure (file a qui tam suit under seal, provide information to the Department of Justice) and because only the first P to file such a suit may proceed, the FCA, in effect, disadvantages Ps who report internally. The FCA only rewards Ps who report externally and only those who do so using FCA procedure. Thus, by reporting internally, Ps lose the opportunity to reap the benefits of using the FCA model. This is a somewhat speculative cost since it is not clear how many Ps know of T's wrongdoing and, of those, how many are willing to expose themselves to the personal and professional costs of reporting wrongdoing.

For these reasons, P's benefits and costs increase in Game Two when P opts to report internally.[265]

3. Node III: P Reports Externally

P's strategy of reporting T's wrongdoing externally presents the same benefits in Game Two as in Game One: (1) Possible prevention of future problems for T; (2) P is viewed as demonstrating leadership and advances within T; (3) Minimizes or prevents P's personal angst for failure to report; (4) Allows P to show P's nonculpability, or at least, to negotiate favorably with regulators regarding P's culpability; (5) Obtains some protection against T's retaliation of P; and (6) Moti-

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264. The FCA provides that:

> 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 . . . in 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, including litigation costs and reasonable attorneys' fees.

31 U.S.C. § 3730(h). It is not necessary that an individual file a lawsuit under the FCA to receive this protection. *See, e.g.*, Dookeran v. Mercy Hosp., 281 F.3d 105, 108 (3rd Cir. 2002); United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 741 (D.C. Cir. 1998); Neal v. Honeywell, 33 F.3d 860, 864-65 (7th Cir. 1994). All that is necessary (at least in some circuits) is that an employee make intra-corporate complaints of fraud. *Neal*, 33 F.3d at 864; *see also* Hopkins v. Actions, Inc., 985 F.Supp. 706, 708-09 (S.D. Tex. 1997). *But see* Smith v. Mitre Corp., 949 F. Supp. 943 (D. Mass. 1997) (holding that purely intra-corporate complaints do not constitute acts in furtherance of an FCA suit).

265. *See infra* app. A chart 35, at 694.

vates T to remedy the situation. Of these, the fourth benefit will be amplified in Game Two since the FCA supplies protection against retaliation by employers against employees for whistleblowing actions that fall within the FCA. While P *probably* qualifies for this protection by reporting internally (at Node II), P *clearly* qualifies for this protection by reporting T's wrongdoing externally.[266]

There are three additional benefits to P of reporting externally in Game Two than were available in Game One. The first is that the FCA provides P not with just another external reporting source, but with a particularly effective external source. The United States Department of Justice (DOJ) is especially effective for several reasons. The FCA has a practice, within the DOJ, for receiving, evaluating, and working with Ps.[267] Being able to contact a federal agency that is experienced in receiving and processing P's information makes it less likely that a whistleblower's information will get lost in a maze of bureaucracy. Also, the DOJ has resources to improve upon and supplement P's information—experienced and trained attorneys and investigators and helpful discovery tools (like Certificates of Demand)[268] that are not available outside of the DOJ.[269] These resources can build upon P's information. Lastly, the DOJ has considerable power *vis á vis* Ts. The DOJ can levy sanctions on Ts such as administrative penalties, initiate actions such as civil suits for penalties and damages, and seek criminal charges. Because of this power, the DOJ can be quite productive in extracting concessions and settlements from T. For all of these reasons, the DOJ is a formidable ally for P.[270]

The second benefit P obtains in Game Two that was not available to P in Game One arises from the fact that in Game Two, P almost certainly will need counsel who is experienced in FCA cases. This can be beneficial when counsel is able to alert P to what lies ahead and to provide guidance that helps P cope with difficulties P will face as a whistleblower. Counsel can also direct P to a wealth of sources that provide financial, social, and emotional support for Ps.[271] P is more

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266. The FCA protects "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done . . . in furtherance of an action under this section." 31 U.S.C. § 3730(h). The FCA provides for an award of double backpay damages plus attorneys fees and costs for such violations. *Id.*

267. Bucy, *supra* note 20, at 69, n.372; *see, e.g.*, *supra* text accompanying notes 45-79 (discussing United States ex rel. Alderson v. Quorum Health Group, 171 F. Supp. 2d 1323 (M.D. Fla. 2001), 114-40 (discussing United States ex rel. Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D. Pa. 2000)).

268. 31 U.S.C. § 3733 (2002).

269. *See supra* notes 80-101.

270. WEST, *supra* note 31, at 26; Kreindler, *supra* note 156, at 10.

271. There are growing numbers of groups that provide support for whistleblowers, many started by former whistleblowers. Clyde H. Farnsworth, *The Bureaucracy: Aid and*

likely to need counsel in Game Two than in Game One because reporting T's wrongdoing to the DOJ under the FCA requires considerable sophistication. Failing to adequately follow FCA requirements could lead to any variety of strategic missteps, such as disqualification of P under the FCA's jurisdictional bar provision,[272] R's declination to intervene in P's suit,[273] or preemption by another P.[274]

The third and most significant benefit available to P in Game Two that was not present in Game One is that P is entitled to share in a percentage of any recovery obtained.

In Game Two, P's strategy of reporting externally presents the same types of costs P incurred in Game One: (1) Possible retaliation by T and/or others within the relevant industry, resulting in personal and professional hardship; (2) Expenditure of P's time and energy; and (3) P's personal discomfort in becoming a public figure. The value of these costs is likely to change, however. The first cost, retaliation and resulting hardships, probably will increase in Game Two from Game One simply because the stakes are higher for T if P reports using FCA protocol. The potential liability imposed by the FCA on Ts is huge.[275] These higher stakes lead to increased publicity, tension, and although the FCA contains protection against it, increased chances of retaliation against P.

In addition to enhanced costs in Game Two, P is likely to see an additional cost. This is the cost of retaining counsel. As noted *supra*, proceeding under the FCA necessitates retention of experienced counsel. The out-of-pocket cost to P of retaining counsel will be minimal since relators' counsel tend to represent relators on contingency fee arrangements based upon a negotiated percentage of any award the relator may receive,[276] plus attorneys fees and costs

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Comfort for Whistleblowers, N.Y. TIMES, Dec. 4, 1985, at A28 (reporting on the growing support network for whistleblowers). For example, such support takes the form of legal assistance, Farnsworth, *supra*, at A28, practical advice, *see, e.g.*, Government Accountability Project, *Survival Tips for Whistleblowers*, *at* http://www.whistleblower.org/www/tips.htm (last visited Oct. 21, 2003), and financial assistance, *see, e.g.*, Taxpayers Against Fraud (TAF), *at* http://www.taf.org (last visited Oct. 21, 2003). A staffer of one such public interest group explained: "'There's a definite whistleblower's community out there—and it's growing . . . . We know where to find each other . . . . We know where to go for help. There's a safety net.'" Farnsworth, *supra*, at A28 (internal quotation marks omitted).

272. *See* 31 U.S.C. § 3730(e)(4).

273. Bucy, *supra* note 20, at 51-52.

274. *See* 31 U.S.C. § 3730(b)(5).

275. *See supra* notes 41-44 and accompanying text.

276. For example, in *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032 (6th Cir. 1994), relator's counsel and relator agreed that counsel would receive twenty-five percent of the relator's share. *Id.* at 1036. This percentage was in addition to attorneys' fees and costs awarded by the court pursuant to the FCA. The total amount awarded to relator's counsel in this case was $4 million. *Id.* This amount was questioned as excessive by the court and the case was remanded for a determination of whether the total fee was appropriate. *Id.* at 1045-49; s*ee also* 31 U.S.C. § 3730(d)(1).

awarded by the court and paid by the defendant under the terms of the FCA. Nevertheless, this is a possible cost necessitated in Game Two.

For the above reasons, P's benefits in reporting externally in Game Two outweigh P's costs.[277]

4. Nodes IV and V: Whether P Works Actively with R as R Investigates T

P's next options depend upon what R does in response to P's reporting of T's wrongdoing. If R actively investigates T, P must decide to what extent it will work with R. The benefits to P of working closely with R are: (1) P's percentage of any judgment obtained will increase, within the statutory range, proportional to P's helpfulness to R in pursuing the matter against T.[278] (2) P's counsel will urge P to adopt a *work-with-R-actively* strategy. This is for two reasons. First, P's counsel wants the case to succeed and active assistance by P and P's counsel can facilitate success. As noted *supra*, historically, R's intervention is crucial to the ultimate success of an FCA case. P's active assistance, as well as P's counsel's active assistance to R during R's investigation of T, could encourage R to intervene in P's case. Since Ps' counsel's fee consists, at least in part, of a percentage of P's award, P's counsel wants the case to be as successful as possible. Second, when P's counsel actively assists R, P's counsel generates greater attorneys fees which the FCA requires defendants to pay. For these reasons, experienced counsel may be unwilling to represent P if P does not commit to a *work-with-R-actively* strategy. Thus, P may have to adopt such a strategy in order to retain experienced counsel. (3) P has a greater chance of influencing the remedy in the case by working actively with R. It may be important to P, for example, that certain changes be made within T so that similar wrongdoing is less likely to occur. Or, P may feel strongly that T should engage in community service as part of the judgment. (4) P may feel personal and professional satisfaction in working with R to expose T's wrongdoing, to deter T and other observant businesses from engaging in such wrongdoing, and to protect victims and possible future victims from T's wrongdoing and other similar wrongdoing.[279]

The costs to P of working actively with R are (1) expenditure of P's time and energy and (2) P's emotional stress.[280]

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277. *See infra* app. A chart 36, at 694.

278. U.S. DEPARTMENT OF JUSTICE, RELATOR'S SHARE GUIDELINES, *reprinted in* United States *ex rel.* Merena v. SmithKline Beecham Corp. 205 F.3d 97, 104-05 (3rd Cir. 2000). The DOJ Guidelines are also available at the website of Taxpayers Against Fraud at http://www.taf.org.

279. Bucy, *Information as a Commodity, supra* note 21, at 961-62.

280. *See supra* notes 207-08.

For these reasons, the benefits to P significantly outweigh the costs if P adopts a *work-actively-with-R* strategy.[281] The benefits and costs to P of *not* working actively with R are the converse of those just noted. Thus, the costs significantly outweigh the benefits if P chooses not to work actively with R once R begins to investigate T.[282]

5. Nodes VI, VII and VIII: Whether P Proceeds with the Case After R Completes Its Investigation

After R investigates P's allegations of T's wrongdoing, R will decide whether to intervene in P's lawsuit against T (under seal thus far).[283] If R intervenes, P is entitled to continue as a plaintiff with R.[284] Node VI addresses this option. The benefits of doing so are so overwhelming that remaining as a plaintiff in the suit is almost a non-decision for P: (1) Now that R has opted to intervene in P's lawsuit, P (now joined by R) probably will win the case.[285] (2) P will not have to expend many tangible resources to litigate the case once R intervenes. Either R will bear the brunt of the expense in pursuing the case, or P's counsel will be willing to do so since counsel works on a contingency fee and will recognize the case's chance of success given R's intervention.[286] (3) Although P has been protected under the FCA from retaliation by T since at least the point at which P filed her qui tam action, R's intervention further solidifies such protection.

Costs to P in continuing as a plaintiff once R has intervened would most likely result from the publicity that follows R's intervention. Such publicity may highlight P's role and cause greater ostracization of P by P's friends, professional colleagues, and future employers. Although the FCA protects P from professional retaliation by T for P's whistleblowing activity, the FCA cannot protect P from subtle discrimination by colleagues and friends, or from other business that may shun P and make P's employment in the industry problematic.[287] One of these difficulties, finding future employment, can be alleviated considerably if P receives a generous recovery from the qui tam suit.[288] With such a financial cushion, P may gain the flexibility to pursue a variety of professional options.

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281. *See infra* app. A chart 37, at 695.
282. *See infra* app. A chart 38, at 695.
283. 31 U.S.C. § 3730(b)(2) (2002).
284. *Id.*
285. Bucy, *supra* note 20, at 51.
286. Many FCA cases, in fact, settle as soon as R intervenes as a result of extended negotiation among R, T and P prior to R's intervention. WEST, *supra* note 31, at 26. Thus, most of the costs in pursuing an FCA case have been borne during the investigation.
287. *See supra* notes 207-08.
288. *See supra* notes 41-44.

Thus, P's benefits at Node VI in remaining in the case as co-plaintiff once R intervenes are significant and P's costs are minimal.[289]

If R declines to intervene in P's action, P still has the option under the FCA of pursuing the action alone. P opts for this strategy at Node VII. The benefits to P of doing so are: (1) P still has a chance, albeit slim,[290] of winning the FCA action. (2) If P prevails in a case, P qualifies under the FCA for a higher statutory range (25-30 percent of judgment) than if R had intervened (15-25 percent of judgment).

The costs to P of pursuing a qui tam action alone instead of dismissing it after R has declined to intervene are: (1) P's chances of prevailing in the lawsuit are poor.[291] (2) P will incur significant tangible and intangible expenses in pursuing the case to conclusion. These costs will include P's time, emotional strain, and distraction from work, family, and recreation.[292] (3) P may lose experienced counsel, who, aware of P's minimal chance of success once R opts not to intervene,[293] declines to represent P once R has made a non-intervention decision. If P wishes to continue, P may have to do so alone, or with less experienced counsel. Given the complexity of most FCA cases, losing experienced counsel may further doom P's chances in the case. (4) P may become subject to greater risks of retaliation. Although T incurs liability under the FCA if T retaliates against P,[294] T may nevertheless feel empowered to do so once R has decided not to intervene in the case, especially with subtle retaliation that may escape FCA liability.

Thus, at Node VII the benefits to P of pursuing a qui tam action after R has declined intervention are minimal while the costs are significant.[295] Conversely, at Node VIII, where P decides to dismiss the action after R has declined to intervene, the benefits are significant while the costs are minimal.[296]

6. Node IX and X: Whether P (with or without R) Prevails in the Action Brought

The benefits to P of winning the action P (alone or with R) has brought are significant: (1) P will receive monetary recovery as a percentage of the judgment obtained against T. This recovery may be

289. *See infra* app. A chart 39, at 696.
290. Bucy, *supra* note 20, at 51.
291. *Id.*
292. *See supra* notes 207-08.
293. *Cf.* WEST, *supra* note 31, at 46.
294. 31 U.S.C. § 3730(h) (2002).
295. *See infra* app. A chart 40, at 696.
296. *See infra* app. A chart 41, at 697.

quite large.[297] (2) P may be publicly vindicated. (3) P will see an end to what probably has been an emotionally draining and traumatic experience.[298]

The costs for P of prevailing in the lawsuit are: (1) Possible emotional hardship in pursuing litigation that incriminates friends and colleagues, or otherwise jeopardizes the livelihood of people P cares about;[299] and (2) Difficulty obtaining future employment within the relevant business or industry.[300]

For these reasons, benefits to P of winning the action at Node IX are significant while the costs are minimal.[301]

The benefit-cost analysis at Node X, if P loses the action it brings, whether with or without R, is not the converse of P's winning the action because the costs of losing are so significant. The ostracization P may face from friends and colleagues and the difficulty P may have finding employment, are likely to be considerably worse after losing the action. Moreover, the psychological and physical stress of serving as a whistleblower will be exacerbated by the loss since the verdict likely will be seen as a statement that P's allegations were unfounded. The only benefit to P in losing the action, an end to the traumatic experience of serving as a qui tam relator, will be considerably offset by these costs. Thus, P's costs in losing the action are significantly greater than P's benefits.[302]

IV. WHAT GAME THEORY TELLS US ABOUT THE MERITS OF INCLUDING PRIVATE PARTIES IN THE REGULATORY GAME

It does not take Game Theory to see that introducing private parties into regulatory efforts affects such efforts in two obvious ways: a new player is added to the regulatory *game*, and the strategies of existing players, the regulators, and targeted businesses become more complicated. Game Theory enriches these observations, however, by showing that integrating private parties into public regulatory efforts raises the stakes for all players and alters the Nash Equilibrium for all players.

A. Raising the Stakes

Playing the Games in this Article shows that all parties' potential gains and losses increase when private parties join the regulatory game. Not surprisingly, of all of the players, private parties have the

297. *See supra* notes 41-44.
298. *See supra* notes 207-08.
299. *See supra* note 208.
300. *See supra* note 208.
301. *See infra* app. A chart 42, at 697.
302. *See infra* app. A chart 43, at 697.

most to gain by joining the regulatory game. As Chart C4 shows,[303] a private party's greatest possible gain in Game One where private parties are not included as players is 40; in Game Two, where they are included, the greatest possible gain soars to 325, an increase of 712%. Private parties' potential costs when joining the regulatory game increase even more, however. The greatest loss a private player could sustain in Game One is 0; in Game Two it is -480,[304] an increase of 480%. Regulators' benefits and costs also change when private parties join the regulatory game. The greatest benefit regulators could achieve in Game One is 250; in Game Two it is 480, an increase of 92%. The greatest loss regulators could sustain in Game One is -180; in Game Two, it is -280,[305] an increase of 55%. Targeted businesses are affected the least when private parties join the regulatory game. The greatest benefit a targeted business could achieve in Game One was 275; in Game Two, it is 345, an increase of 25%. The greatest loss a targeted business could sustain in Game One is -370; in Game Two it is -450,[306] an increase of 21%.

What causes this shift in potential gains and losses when private parties join regulators? There are different factors for different players. As Game Theory shows, the factors that impact the payoffs for private parties are the opportunities to obtain a large financial recovery, secure statutory protection from retaliation, acquire public vindication, achieve personal satisfaction in highlighting and helping deter wrongdoing that harms innocent victims, demonstrate leadership and possibly advance professionally, protect employers' profitability or existence, protect themselves from being held complicit in the wrongdoing, and develop a support system of legal counsel and whistleblower groups. Additional factors are retaliation, animosity, ostracization among professional colleagues and personal friends, loss of one's job, financial hardship, and significant psychological and physical maladies from stress. It is interesting to think about why the potential cost for private parties who join the regulatory game is so much greater than it is for regulators and targeted businesses. As we saw, potential cost for private parties increases so much more in Game Two than does the potential cost for the other players. After all, P's potential losses increase 480%, R's potential losses increase 55%, and T's potential losses increase 21% when P becomes a player. One possibility is that the costs regulators and targeted businesses experience are impersonal and are spread among many individuals within an organization. By comparison, a private party's costs are borne by a single individual, and they are wrenching: personal and

303. *See infra* app. C chart C4, at 706.
304. *See id.*
305. *See infra* app. C chart C2, at 705.
306. *See infra* app. C chart C3, at 705.

professional hardships, ostracization by friends, disdain by colleagues and potential employers, and enmity by the community.

As Game Theory has shown, the factors affecting regulators' payoffs are the opportunities to acquire investigative and litigative assistance from P's counsel, institutional knowledge about T and T's industry, and inside information about the wrongdoing: what was going on, who was involved, and how best to investigate and prove it. Additional factors include the waste of resources caused by private parties who present incomplete or inaccurate information, the loss of initiative to determine who to charge and for what conduct, and damage to regulatory efforts by irresponsible private parties.

B. Altering the Nash Equilibria

Game Theory shows how entry of private players into the regulatory game alters the Nash Equilibria—the optimal strategies players pursue given the likely strategies pursued by other players.

1. Impact on Regulators

R's optimal strategy in a regulatory world where P is not a player is to make its decisions within R, among R personnel, and under a cloak of secrecy.[307] This tradition of confidentiality exists, in part, from habit and self-interest, but also for valid policy reasons such as protecting the reputation of innocent individuals or businesses under investigation, protecting witnesses who may be harmed or evidence that may disappear,[308] safeguarding national security,[309] and allowing enough time and opportunity for R to determine whether liability is appropriate.[310] When private parties participate in regulatory efforts, R must modify this tradition of confidentiality if R wishes to benefit from P's information.[311] Examples from Game Theory demonstrate this. In Game Two, when R brings an action against T while working with P, R's net benefit is 190. In Game One, when R brings an action

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307. *See, e.g.*, JAMES B. STEWART, THE PROSECUTORS 10 (1987):

> Much of what prosecutors do is shrouded in secrecy. . . . Because the deliberations and decisions of a prosecutor and his staff might, if made public, affect a defendant's right to a fair trial, they are invariably kept secret. Practically anything a prosecutor does, if discovered, can become the subject of attack by a savvy defense lawyer.

308. *See supra* notes 80-88.

309. Michael Waldman, *Time to Blow the Whistle?*, NAT'L L. J., Mar. 25, 1991, at 13-14.

310. Interview with John T. Boese, Partner Fried Frank, in Washington, D.C., *in* CORP. CRIME REP., Mar. 2, 1998, at 13.

311. For the FCA to work, regulators and relators must work with each other, and trust each other. As federal agents who work on qui tam cases explain, "[t]here is . . . a direct correlation between the successful resolution of [an FCA qui tam] case and the relationship between the investigators and relators during th[e] investigation, and this relationship can be summed up by one word—trust." Mason & Leonard, *supra* note 138, at 12.

against T without P's involvement, the net benefit is 100. Similarly, R's net benefit in Game Two when R, working with P, wins the action against T, is 480, while R's benefit when winning in Game One, where P is not present, is only 250.

Game Theory suggests an additional optimal strategy for regulators once private parties join in regulatory efforts. Game Two showed that regulators can incur a significant cost when private players join the regulatory game. They can lose valuable resources by investigating misguided, ill-conceived, or incorrect information presented by private parties. To avoid this cost, regulators need to distinguish between helpful and unhelpful information. They also need to discourage private parties, by sanctions or otherwise, who bring unhelpful information to regulators.

In short, Game Theory shows how R's optimal strategy changes from cloaking R's decision-making process in confidentiality to opening it to include P. Game Theory also shows that it is costly for R to work with poorly informed or mistaken Ps, and suggests that developing more efficient techniques for dealing with such Ps is important to the continued viability of including Ps in regulatory efforts.

2. Impact on Targeted Business

The entry of P as a player in the regulatory game affects T's optimal strategies in two ways: the extent to which T cooperates with R and the type of corporate compliance plan T implements. P's presence adds incentive for T to cooperate with R and to cooperate early. When P becomes a player in the regulatory game, providing R information and assistance, R is more likely to pursue T and is more likely to win any action R brings against T. As long as there is a reasonable chance that T will not be caught or found liable, it makes sense for T not to cooperate with R. But once the chances of getting caught and found liable increase, the more T stands to gain by cooperating with R. Game Theory shows this. In Game One, where P is not a player, T achieves a net benefit of 100 when it chooses to disclose its wrongdoing to R; in Game Two, where P is a player, T achieves a net benefit of 150 by disclosing. In Game One, T achieves a net benefit of 200 by cooperating with R once R opens an investigation; in Game Two, T achieves a net benefit of 330 by adopting this cooperation strategy. In Game Three, T achieves a net benefit of 135 by cooperating with R after R files an action against T; in Game Two, T achieves a net benefit of 170 with such cooperation.

Game Theory also demonstrates how, whether P is a player or not, T benefits more by cooperating with R once R has opened an investigation than by waiting until R files an action against T. In Game One, T obtains a benefit of 200 by cooperating with R when R

opens an investigation of T. Game Two, where P is a player, shows the same thing, just with higher stakes: T obtains a benefit of 330 by cooperating with R when R opens an investigation of T but only a benefit of 170 by waiting to cooperate when R files suit against T. This is for two reasons: the further the matter proceeds, the more resources R has had to devote to it and the less valuable T's help is, and also, when T waits until R has discovered enough to file an action against T, T simply looks expedient, not remorseful, when T decides to cooperate. As Game Theory shows, the terms and practice of the FCA encourage T to cooperate with R. The FCA requires that defendants pay successful relators' attorneys fees and costs, and by resolving the matter early, T minimizes these payments. Also, under FCA custom and practice, R often invites T to discuss T's potential liability very early—as soon as R has completed its investigation of P's information.[312] During these discussions, T is given the opportunity to review and respond to R's evidence and to present additional information to R.[313] This invitation for dialog is unusual but, for a variety of reasons, makes sense for R under FCA practice.

The second way that P's entry into the regulatory game affects T's Nash Equilibrium is by encouraging T to implement effective corporate compliance plans. Because the FCA rewards Ps who come forward and work with R, Ts need to be concerned about whistleblowers within their midst. Ts can minimize the risk that whistleblowers will come forward, or that they will have anything to blow the whistle on, by increasing the effectiveness of internal governance. Ts can increase this effectiveness in two ways. If T's internal culture encourages employees to violate the law, engage in fraud, or look the other way when they see illegality occurring,[314] T should change its cul-

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312. R officers seek a lifting, or partial lifting, of the seal on P's case so as to allow a discussion between R and T of R's case against T and to give T an opportunity to explain. This opportunity occurs early, before R decides whether to intervene. McDermott, *supra* note 107, at 25.

313. *Id.* at 26. On June 3, 1998, Eric H. Holder, Jr., Deputy Attorney General issued guidelines entitled, *Guidance on the Use of the False Claims Act in Civil Health Care Matters*, to all Department of Justice attorneys who handle FCA cases. Known as the *Holder Guidelines*, this directive instructs DOJ attorneys to contact a health care provider before concluding the DOJ's analysis of liability, "notify a provider of their potential exposure under the False Claims Act and to offer the provider an opportunity to discuss the matter." Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All United States Attorneys et al. (June 3, 1998), *available at* http://www.usdoj.gov/04foia/readingrooms/chcm.htm (last vistited Jan. 10, 2004).

314. *See, e.g.*, Marc Meltzer & Julie Knipe Brown, *Bitter Pill: He Blew the Lid Off Lab*, PHILA. DAILY NEWS, Feb. 25, 1997, at C3 (When Robert Merena, a computer analyst who became a qui tam whistleblower, raised questions about billing irregularities, he was told by his bosses: "[w]e don't pay you to think, we pay you to do your job."); Jim Smith, *Penn Whistle-Blower Collects $2M for Warning About Scam*, PHILA. DAILY NEWS, Aug. 31, 2000, at C12 (recounting how mental health counselors were told by their employer that they would lose their jobs if they did not increase the enrollment of patients).

ture.[315] In addition, Ts should ensure that they have an effective corporate compliance plan,[316] which not only discourages wrongdoing within T but also encourages rapid, internal reporting of wrongdoing instead of resorting to qui tam suits.[317]

In short, Game Theory shows how the FCA enhances businesses' already existing incentives to cooperate with R, adds significant encouragement and opportunity for Ts to cooperate earlier in the matter, and compels businesses to establish internal systems to discourage future wrongdoing and to encourage internal reporting by employees instead of resorting to qui tam suits.

3. Impact on Private Parties

Of the three players, P is affected the most by the FCA. First and most obviously, the FCA encourages Ps to abandon what was P's optimal strategy of not reporting T's wrongdoing, in favor of reporting such information to R. As noted, in Game One, P reaped the greatest benefit (40) by not reporting T's wrongdoing to anyone. In Game Two, such a *do-nothing* strategy yields P a net cost of -70, while reporting to R yields a net benefit of 200.[318] The FCA also encourages Ps to work actively with R. The FCA does so by tying the amount of money P receives at the conclusion of the case to P's helpfulness to R in un-

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315. Robert Vogel, *Deterrent Effects of Whistleblower' Lawsuits Justify False Claims Act*, AVIATION WEEK & SPACE TECH., Nov. 4, 1991, at 73:

> As these successful [FCA qui tam] cases are publicized and people become increasingly aware of the qui tam statute, dishonest contractors will set up internal procedures to prevent renegade employees from committing fraud for which the contractor could be held responsible. In the long run, this will result in savings to the taxpayer, and improvements in the defense industry that far outweigh the costs of dealing with the baseless lawsuits.

See also Phillips Interview, *supra* note 3, at 11 ("The prophylactic affect of this law will be the biggest payoff. You are not going to find people willing to take such risks when they expose themselves to this kind of action.").

316. John T. Boese & Beth C. McClain, *Scope of Civil False Claims Act Is Cause of Strife*, N.Y. L.J., Nov. 8, 1999, at S1 ("Recipients of federal funds are stepping up compliance programs to protect themselves from the potentially devastating impact of an FCA suit . . . ."); Raspanti & Laigaie, *supra* note 14, at 53 ("The threat posed by *qui tam* relators also has had a major impact on corporate regulatory compliance. Many responsible government contractors, in an effort to avoid *qui tam* actions, have placed regulatory compliance on the top of the corporate agenda."); *Compliance Programs Key to Limiting Exposure to Qui Tam Suits*, BUREAU OF NAT'L AFFAIRS, 1 HEALTH CARE FRAUD REP., Apr. 9, 1997 ("Health care providers' first line of defense against lawsuits brought by whistleblowers is to have in place a compliance program to effectively detect fraud and abuse . . . .").

317. Components of an effective plan typically include a hot-line that protects a whistleblower's identity while also gathering enough facts to rule out quacks and falsehoods, an ombudsman, constant efforts to educate employees about the regulations that govern T's business, and reminders to employees of their internal reporting obligation and viable avenues for such reporting. FABRIKANT, ET AL., *supra* note 47, § 9.03.

318. *See supra* notes 259-96 and accompanying text.

covering and proving T's wrongdoing. FCA practice reinforces this.[319] Experience under the FCA shows how collaboration between R and P can strengthen the case against T, especially if P is still employed at T.[320]

Game Theory also reveals a sad fact for Ps. There are costs for Ps once they are invited to participate in the regulatory game. For example, the greatest cost P incurred in Game One where P was not a

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319. For example, R often is willing to review P's complaint prior to filing. As one AUSA experienced in qui tam cases explained, "[I]t is advisable [for relators] to contact the U.S. Attorney's Office prior to filing the *qui tam* Complaint. . . . [Its attorneys] can offer valuable assistance in ensuring that the procedural mechanics operate smoothly." McDermott, *supra* note 107, at 22.

320. P can explain and interpret T's policies and procedures, deliver otherwise difficult-to-obtain documents to R, even wear electronic monitoring equipment. For example, Robert Merena, a financial analyst at SmithKline Beecham Clinical Laboratories (SBCL), remained so employed for eighteen months after he filed his qui tam lawsuit and had begun working closely with federal agents and attorneys. United States *ex rel.* Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 442 (E.D. Pa. 1998). He produced numerous helpful documents for the agents, including an internal SBCL directory which listed key personnel at each of SBCL's twenty-seven laboratories, located nationwide. *Id.* at 447. He also produced a copy of SBCL's 1993 monthly Billing and Accounts Receivables Reports. *Id.* In another instance, Walsh, manager of General Electric Company's overseas aircraft operations in Israel who discovered diversion of federal funds, smuggled relevant records out of Israel to Switzerland. United States v. Gen. Elec. Co., 808 F. Supp. 580 (S.D. Ohio 1992).

Removing documents and delivering them to investigators examining fraud charges can be risky. If the employee taking them does not have access to such records and authority to move them as part of his employment duties, such a practice could subject the employee to disciplinary action or even criminal charges of theft. In addition, if law enforcement officials directed such removal in contexts that constitute an illegal search and seizure, the evidence likely will be suppressed and the agents could face disciplinary action, if not legal liability under the Civil Rights Act, 42 U.S.C. § 1983 (2002).

In *United States ex. rel Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F. 3d 1032, 1037-38 (6th Cir. 1994), Walsh, a General Electric employee assigned to serve as GE's liaison to the Israeli military on contracts for F110 fighter engines, discovered fraud upon the U.S. government by a high ranking Israeli military officer and a GE executive. Before reporting the fraud, Walsh collected documents and secretly monitored conversations. *Id.* at 1037. After Walsh filed a qui tam action, he wore recording equipment at the DOJ's request, collecting further evidence. *Id.* at 1038.

Federal Agents explain how early contact by a relator helped in their investigation of a defense corporation (XYZ) for FCA violations:

> Another extremely important factor to the success of the investigation was the detail to which the complaint alleged criminal activity and documented specific acts on behalf of conspirators. The detail included references to meetings and other events that could be verified through subsequent investigation. The relators also kept detailed notes and records in the normal course of business which provided much of the substantiating documentation for the historical facts. Once [we] became involved, the relator still employed at XYZ was able to provide specific, day-to-day information as the case progressed, and to record conversations. These conversations and information were later used to persuade other individuals to cooperate, to provide probable cause for affidavits for search warrants, and used in court documents filed in support of the settlement.

Mason & Leonard, *supra* note 138, at 13.

player, was -225.[321] When P works with R, however, the greatest cost P could possibly incur is -500.[322] Thus, although P's potential benefits increase significantly when P is invited to join regulatory efforts, so do P's costs, mostly in the form of greater potential for retaliation.

Game Theory also demonstrates how the FCA affects P's optimal strategy for dealing with T when P is an employee of T. In Game One, where P is not a player and does not have the FCA's protection against T's retaliation, P's optimal strategy is to not report T's wrongdoing or to challenge T in any way. Because the FCA gives power and protection to employees who are willing to blow the whistle, Ps become significant threats to Ts that are engaged in wrongdoing. This means that Ts risk much more if they discount, marginalize, or penalize Ps who then alert R to possible wrongdoing within T. Such leverage may strengthen P's position on multiple employment issues with T.[323]

V. CONCLUSION

This Article began with two goals. The first was to explore how a private attorney general model such as the FCA alters the regulatory world and whether the alteration is for better or worse. To examine this issue, we asked three questions, beginning with why regulators would be willing to compromise their independence, prosecutorial discretion, and valued secrecy to work with private parties. Game Theory shows the reason: doing so delivers more benefits than costs. The benefits for regulators include obtaining information about wrongdoing that regulators otherwise would not know about, developing a stronger case against wrongdoers, and conserving investigative and litigative resources.

The second question was why private individuals would want to work with regulators when doing so almost certainly creates personal, professional, and financial hardships. Game Theory offers the same answer: the benefits of cooperating outweigh the costs of not doing so. In part, this calculus is because the costs increase for all Ps in *not* reporting wrongdoing. Once Ps are empowered by a regulatory mechanism like the FCA, there are many Ps who may blow the whistle; those who knew of the wrongdoing but stood by may find themselves being held liable. Mostly, however, this is because the benefits offered to private parties who choose to participate with R are huge; they include the potential of collecting a generous financial reward,

321. *See supra* notes 201-12 and accompanying text.

322. *See supra* notes 252-302 and accompanying text.

323. The possibility that Ps may use FCA cases for leverage in other lawsuits or disagreements P may have with T is troublesome to the DOJ when the DOJ is making its intervention decision and determining how closely it will work with P. WEST, *supra* note 31, at 49.

the satisfaction of *doing the right thing*, and protecting oneself from blame.

The last question we asked was how the private-public partnership produced by the FCA affects the decisions and strategies of targets. Game Theory shows that this partnering does two things: it encourages targets to cooperate with R, and it encourages T to implement effective corporate compliance plans.

Answering these three questions tells us that when the FCA or any similar mechanism that pulls private parties into the public regulatory effort, is good, it is very good. When it is bad, it is very bad. The key lies with the private party. If the private party brings information to regulators of real fraud, identifies real wrongdoers, and brings valuable resources to regulators, the FCA—or any similar mechanism—works enormously well. When the private party diverts regulators' resources and creates unnecessary costs for honest businesses by bringing information about mistakes, not fraud, made by legitimate businesses, it is disruptive, oppressive, and irresponsible. Understanding these dynamics makes FCA practice more efficient and productive, and offers tantalizing opportunities for expansion of an FCA-like model into other regulatory avenues.[324]

The second goal of this Article was to demonstrate the effectiveness of Game Theory for analyzing legal issues. I leave it to the reader whether this goal has been achieved.

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324. Bucy, *supra* note 20, at 79-150.

Appendix A

Chart 1 Game 1(A); Node I R Does Nothing	
Benefits	**Value**
R saves investigative resources	30
T may be deterred	5
Total Benefits	35
Costs	
T is encouraged, emboldened if learns of R's decision not to investigate	-10
T will have time to revise, improve upon its malfeasance strategies	-25
More victims will be hurt	-25
Other Ts will be encouraged, emboldened if they learn of R's decision not to investigate	-10
Total Costs	-70
Net Cost	-35

Chart 2 Game 1(A); Node II R Opens Investigation	
Benefits	**Value**
R deters T	25
R deters other observant businesses	25
R's opening of an investigation makes it difficult for T to continue refining its wrongdoing methodology	25
R's opening of an investigation makes it less likely T will expand its wrongdoing to include more victims	25
R develops institutional knowledge of T's behavior	25
Total Benefits	125
Costs	
R's investigation is inefficient, unfocused and unlikely to achieve full success	-25
R incurs an opportunity cost: inability to investigate other deserving Ts	-25
Total Costs	-50
Net Benefit	75

Chart 3 Game 1(A); Node III R Finds Nothing; Closes Investigation	
Benefits	**Value**
R ends its investigative costs	25
R generates institutional knowledge	25
Total Benefits	50
Costs	
R has incurred investigative expenses with no result	-25
R is unable to protect the public	-25
R loses credibility	-25
Morale within R suffers	-25
R signals encouragement to T	-25
R signals encouragement to other observant Ts	-25
Total Costs	-150
Net Cost	-100

Chart 4 Game 1(A); Node IV R Initiates Action	
Benefits	**Value**
Enhanced credibility for R among T and other observant businesses	25
Enhanced credibility for R among potential witnesses against T (T's employees and competitors)	25
Enhanced morale within R	25
Minimize, if not prevent, more harm to victims	25
Deter T's wrongdoing	25
Deter wrongdoing by other observant businesses	25
Total Benefits	150
Costs	
Action may not be successful due to lack of inside info.	-25
Significant investigative and litigation costs due to lack of inside information	-25
Total Costs	-50
Net Benefit	100

Chart 5 Game 1(A); Node V R Wins the Action	
Benefits	**Value**
Public acknowledgment that T's behavior was wrong	50
Education of relevant industry as to permissible and impermissible behavior	50
Payment by T of judgment, fines, penalties	50
Enhanced credibility for R	50
Deterrence of T's wrongdoing	50
Deterrence of wrongdoing by other observant businesses	50
Total Benefits	300
Costs	
Opportunity costs: R was unable to pursue other Ts by allocating resources to this T	-25
Possible inability to recoup investigative and litigative costs from T	-25
Total Costs	-50
Net Benefit	250

Chart 6 Game 1(A); Node VI R Loses the Action	
Benefits	**Value**
An end to R's costs	25
Possible deterrence of T	10
Possible deterrence of other observant businesses	10
Total Benefits	45
Costs	
Lost credibility	-50
Lost out-of-pocket investigative and litigative costs	-50
R incurs opportunity costs: inability to investigate other Ts	-50
R's loss signals to T and other observant businesses that they can continue their wrongdoing with impunity	-75
Total Costs	-225
Net Cost	-180

Chart 7 Game 1(B); Node I T Does Not Disclose Wrongdoing	
Benefits	**Value**
Avoids a finding of culpability	50
Avoids R sanctions	50
Avoid consequences that flow from R's sanctions	50
Total Benefits	150
Costs	
Uncertainty of when or if R will learn of T's wrongdoing	-25
Likelihood that R will impose greater sanctions on T if it learns of T's wrongdoing and that T had adopted a policy of nondisclosure	-25
Opportunity cost: T loses the ability to influence R's assessment of T's liability	-25
Opportunity cost: T loses the ability to influence the collateral consequences of R discovering T's wrongdoing and imposing sanctions	-25
Opportunity cost: T loses the chance to minimize or manage resources T expends in responding to R	-25
Total Costs	-125
Net Benefit	25

Chart 8 Game 1(B); Node II T Discloses Wrongdoing	
Benefits	**Value**
End the uncertainty of whether R will discover T's wrongdoing	25
Influence R's assessment of T's culpability	50
Influence the sanctions R will seek	50
Influence the collateral consequences that flow from culpability and sanctions	50
Minimize or manage resources T spends responding to R	25
Minimize or avoid liability T, or T's executives, may incur for failing to disclose T's wrongdoing	25
Total Benefits	225
Costs	
Opportunity cost: forgoes the possibility that R would never learn of T's wrongdoing	-25
Sanctions R imposes	-50
Consequences of a finding of liability and sanctions R imposes	-50
Total Costs	-125
Net Benefit	100

Chart 9 Game 1(B); Node III T Does Not Cooperate After R Opens an Investigation	
Benefits	Value
Avoids R's finding out about T's wrongdoing	25
Avoids R's sanctions	25
Avoids collateral consequences of R's sanctions	25
Total Benefits	75
Costs	
Prospect that R will uncover T's wrongdoing	-25
Opportunity cost: loss of ability to affect R's assessment of T's liability	-50
Opportunity cost: loss of ability to affect severity of sanctions R seeks	-50
Opportunity cost: loss of the ability to impact the consequences that flow from R's imposition of sanctions	-50
Opportunity cost: loss of ability to minimize or at least manage the resources T will expend in responding to R's investigation	-50
Total Costs	-225
Net Cost	-150

Chart 10 Game 1(B); Node IV T Cooperates After R Opens an Investigation	
Benefits	Value
T can make more informed decisions about strategy	50
T may be able to influence R's assessment of T's culpability	50
T may be able to influence the sanctions R imposes on T	50
T may be able to influence the collateral consequences for T of R's sanctions	50
Ability to minimize and manage, at least somewhat, the resources T expends in responding to R's investigation	50
Total Benefits	250
Costs	
T will have to stop or cut back on wrongdoing	-25
T will spend resources in responding to R's investigation	-25
Total Costs	-50
Net Benefit	200

Chart 11 Game 1(B); Node V T Does Not Cooperate After R Files Action	
Benefits	**Value**
T forces R to prove its case against T; T may escape liability if R cannot	25
T gets information about R's case, commitment	25
Total Benefits	50
Costs	
Uncertainty of not knowing how the action R has initiated will be resolved	-25
Opportunity cost: loss of ability to affect the finding of culpability on the part of T	-50
Opportunity cost: loss of ability to affect severity of R's sanctions if R prevails in the action	-50
Opportunity cost: loss of ability to impact the consequences that flow from R's imposition of sanctions	-50
Opportunity cost: T will be less able to manage and control its expenditures of resources in responding to R's action	-100
Total Costs	-300
Net Cost	-250

Chart 12 Game 1(B); Node VI T Cooperates After R Files an Action	
Benefits	**Value**
Enhanced ability to make an informed decision about future strategies	75
Ability to influence R's assessment of T's culpability in resolving the action	25
Ability to influence R's selection of sanctions against T	35
Ability to influence the consequences that befall T because of the sanctions R imposes on T	35
Ability to minimize and manage, at least somewhat, the resources T expends in response to R's initiation of an action	15
Total Benefits	185
Costs	
T will have to stop or curtail its wrongdoing	-25
T will expend resources responding to and cooperating with R's investigation	-25
Total Costs	-50
Net Benefit	135

Chart 13 Game 1(B); Node VII T Loses the Action Brought By R	
Benefits	**Value**
An end to the tangible and intangible costs T was incurring in litigating the action against R	10
An end to the uncertainty in which T was operating since R first opened its investigation	10
Restructuring within T that possibly renders T a more effective business overall	10
Total Benefits	30
Costs	
Lingering effects of T's response to R's investigation and action	-100
Fines, damages, mandated internal restructuring	-300
Total Costs	-400
Net Cost	-370

Chart 14 Game 1(B); Node VIII T Wins the Action Brought By R	
Benefits	**Value**
Avoids sanctions that accompany a finding of liability	200
Enhances T's image as a "winner"	50
Obtains acquiescence to the behavior of T that was in question (if propriety of such behavior was an issue)	20
An end to the uncertainty about and within T after R opened its investigation	20
Total Benefits	290
Costs	
Possible lingering effects of the expense (tangible and intangible) in responding to the investigation and defending the action brought	-15
Total Costs	-15
Net Benefit	275

Chart 15 Game 1(C); Node I P Does Nothing Upon Learning of T's Wrongdoing	
Benefits	Value
P will not precipitate retaliation by T	50
P will not incur T-imposed personal or professional hardships associated with whistleblowing	50
Total Benefits	100
Costs	
T's wrongdoing may undermine P's professional security	-20
P may end up being held culpable for T's wrongdoing	-20
P may experience personal angst for not reporting T's wrongdoing	-20
Total Costs	-60
Net Benefit	40

Chart 16 Game 1(C); Node II P Reports T's Wrongdoing Internally	
Benefits	Value
Possible prevention of future problems for T	40
Demonstrating leadership; as a result, P advances within T	40
Minimizing or preventing P's personal angst	20
Total Benefits	100
Costs	
Possible retaliation by T and/or others within the relevant industry	-40
P's time and energy	-20
Personal and/or professional hardships as a result of reporting the wrongdoing	-40
Total Costs	-100
Net Benefit	0

Chart 17 Game 1(C); Node III P Reports T's Wrongdoing Externally	
Benefits	**Value**
Possible prevention of future problems for T	50
Demonstrating leadership; as a result P advances within T	30
Minimizing or preventing P's personal angst for failure to report	30
Demonstrate P's non-culpability	50
Obtains some protection against T's retaliation of P	50
Motivate T to remedy the situation	50
Total Benefits	260
Costs	
Possible retaliation by T and/or others within relevant industry; personal or professional hardships result for P	-160
P's time and energy	-40
Personal discomfort at becoming a public figure	-25
Total Costs	-225
Net Benefit	35

Chart 18 Game 2(A); Node I R Conducts Only a Minimal Investigation	
Benefits	**Value**
T is deterred from its wrongful activity if T learns that R is aware of T's activity	100
Saves resources	5
Total Benefits	105
Costs	
T is encouraged, emboldened if learns of R's decision to only do a minimal investigation	-10
Other Ts will be encouraged, emboldened if they learn of R's decision to only do a minimal investigation	-10
T will have time to revise, improve upon its malfeasance strategies	-25
More victims will be hurt	-25
Signals to possible Ps within T that R is not responsive to them	-25
Signals to Ps in general that R is not responsive	-25
Encourages T and other aware businesses to retaliate against Ps	-25
Total Costs	-145
Net Cost	-40

Chart 19 Game 2(A); Node II R Actively Investigates T	
Benefits	**Value**
R deters T	35
R deters other observant businesses	35
R develops institutional knowledge	50
R signals support to future Ps	50
Total Benefits	170
Costs	
Investigative costs	-35
Opportunity cost: inability to investigate other deserving Ts	-15
Total Costs	-50
Net Benefit	120

Chart 20 Game 2(A); Node III R Declines to Intervene in P's Action	
Benefits	**Value**
Save resources	125
Chance of sharing in any judgment P obtains	25
Total Benefits	150
Costs	
Doom meritorious P case to dismissal or realization of less success than case warrants	-35
Less able to guide P's exercise of prosecutorial discretion	-40
Empower T and observant businesses	-75
Lose opportunity to shape norms (i.e., to encourage view of whistle blowers as courageous persons, not traitors)	-75
Total Costs	-225
Net Cost	-75

Chart 21 Game 2(A); Node IV R Intervenes in P's Action	
Benefits	**Value**
Enhanced credibility for R among T and other observant businesses	30
Enhanced credibility for R among potential witnesses against T (T's employees and competitors)	30
Enhanced morale within R	30
Minimize if not prevent more harm to victims	30
Deter T's wrongdoing	30
Deter wrongdoing by other observant businesses	30
Signals encouragement to future Ps	30
Total Benefits	210
Costs	
Investigative costs	-10
Opportunity cost: R cannot pursue other deserving Ts	-10
Total Costs	-20
Net Benefit	190

Chart 22 Game 2(A); Node V R and P Win the Action	
Benefits	**Value**
Public acknowledgment that T's behavior was wrong	75
Education of relevant industry as to permissible and impermissible behavior	75
Enhances R's credibility	75
Payment by T as judgment, fines, penalties	75
Deterrence of T's wrongdoing	75
Deterrence of other observant businesses	75
Signal encouragement to future Ps	75
Total Benefits	525
Costs	
Opportunity cost: lost opportunity to pursue other Ts	-15
Investigative and litigative costs	-15
Total Costs	-30
Net Benefit	495

Chart 23 Game 2(A); Node VI R and P Lose the Action	
Benefits	Value
An end to R's investigative and litigative costs	25
Possible deterrence of T and other observant businesses	20
Total Benefits	45
Costs	
Lost credibility	-75
Lost tangible and intangible expenses in pursuing the action	-50
Opportunity cost: unable to pursue other deserving Ts	-50
R and P's loss signals to T and other observant businesses that they can continue their wrongdoing	-75
R signals discouragement to future Ps	-75
Total Costs	-325
Net Cost	-280

Chart 24 Game 2(B); Node I T Does Not Disclose	
Benefits	Value
Avoids a finding of culpability	35
Avoids R sanctions	35
Avoid consequences that flow from R's sanctions	35
Total Benefits	105
Costs	
Uncertainty in whether R will learn of T's wrongdoing	-35
Opportunity cost: loss of ability to impact R's assessment of T's culpability	-35
Opportunity cost: loss of ability to impact the severity of sanctions R seeks against T	-35
Opportunity cost: loss of ability to impact the collateral consequences of a finding of culpability and imposition of sanctions	-35
Opportunity cost: loss of ability to minimize or manage the resources T will expend in responding to R's investigation	-35
Total Costs	-175
Net Cost	-70

Chart 25 Game 2(B); Node II T Discloses	
Benefits	**Value**
End the uncertainty of whether R will discover T's wrongdoing	50
Affect R's assessment of T's culpability	100
Affect R's assessment of what sanctions to seek if T is found culpable	100
Affect the collateral consequences that flow from a finding of culpability for T and imposition of sanctions on T	100
Minimize or manage the resources T expends in responding to any investigation R might initiate	50
Total Benefits	400
Costs	
Opportunity cost: foregoes the possibility that R would never learn of T's wrongdoing	-50
Sanctions	-100
Collateral consequences that flow from a finding of culpability and sanctions	-100
Total Costs	-250
Net Benefit	150

Chart 26 Game 2(B); Node III T Does Not Cooperate When R Begins an Investigation	
Benefits	**Value**
Avoids a finding of culpability	10
Avoids R's sanctions	10
Avoids collateral consequences of sanctions	10
Total Benefits	30
Costs	
Uncertainty in not knowing if R may initiate an action against T	-20
Opportunity cost: loss of ability to influence R's assessment of T's liability	-75
Opportunity cost: loss of ability to affect the severity of R's sanctions	-75
Opportunity cost: loss of ability to impact the collateral consequences that flow from R's sanctions	-75
Opportunity cost: loss of ability to minimize or mange resources T expends in responding to R's investigation	-75
Total Costs	-320
Net Cost	-290

Chart 27 Game 2(B); Node IV T Cooperates When R Begins an Investigation	
Benefits	**Value**
T can make more informed decisions about strategy	75
Ability to influence R's assessment of T's culpability	75
Ability to influence the sanctions R seeks to impose on T	75
Ability to influence the collateral consequences for T of R's sanctions	75
Ability to minimize and manage, at least somewhat, the resources T expends in responding to R's investigation	75
Total Benefits	375
Costs	
T will spend resources in responding to R's investigation	-25
T will have to stop or cut back on wrongdoing	-20
Total Costs	-45
Net Benefit	330

Chart 28 Game 2(B); Node V T Does Not Cooperate When R Joins P's Action	
Benefits	**Value**
T forces R and P to prove their case against T without T's help	15
Information about the case against T	35
Total Benefits	50
Costs	
Uncertainty of not knowing how the action R has initiated will be resolved	-10
Opportunity cost: loss of ability to influence R's assessment of T's culpability	-25
Opportunity cost: loss of ability to affect severity of R's sanctions if R prevails in the action	-100
Opportunity cost: loss of ability to impact the consequences that flow from R's imposition of sanctions	-100
Opportunity cost: loss of ability to minimize or manage expenditure of resources in responding to R's action	-100
Encourage the adjudicating authority to impose harsher sanctions on T if liability is found on grounds that T's noncooperation unnecessarily consumed judicatory resources	-30
Total Costs	-365
Net Cost	-315

Chart 29 Game 2(B); Node VI T Cooperates When R Initiates Action	
Benefits	**Value**
Enhanced ability to make an informed decision about future strategies	75
Ability to influence R's assessment of T's culpability	25
Ability to influence R's selection of sanctions against T	40
Ability to influence the consequences that befall T because of the sanctions R imposes on T	40
Ability to minimize and manage, at least somewhat, the resources T expends in response to R's initiation of an action	40
Total Benefits	220
Costs	
T will have to stop or curtail its wrongdoing	-25
T will expend resources responding to and cooperating with R's investigation	-25
Total Costs	-50
Net Benefit	170

Chart 30 Game 2(B); Node VII T Does Not Cooperate When P Continues the Action	
Benefits	**Value**
Opportunity to avoid liability	60
Opportunity to avoid sanctions	50
Opportunity to avoid collateral sanctions	50
Total Benefits	160
Costs	
Uncertainty of whether P will prevail	-5
Opportunity cost: to influence settlement	-20
Opportunity cost: to influence collateral consequences of the settlement	-20
Opportunity cost: to minimize and manage resources T devotes to responding to P's suit	-20
Encourages the adjudicating authority to impose harsher sanctions on T if T is found liable	-5
Total Costs	-70
Net Benefit	90

Chart 31 Game 2(B); Node VIII T Cooperates When P Continues the Action	
Benefits	**Value**
Learn more about P's case; enhanced ability to make informed decisions about future strategy	25
Ability to favorably influence settlement	15
Ability to favorably influence collateral consequences of settlement	15
Ability to minimize, manage T's resources consumed by responding to P's suit	15
Total Benefits	70
Costs	
Helping P when P couldn't win otherwise	-200
T has stop or curtail wrongdoing	-25
Resources (tangible and intangible) expended to cooperate	-25
Total Costs	-250
Net Cost	-180

Chart 32 Game 2(B); Node IX T Loses the Action	
Benefits	**Value**
An end to the tangible and intangible expenses T was incurring in litigating the action brought against it	10
An end to the uncertainty created for T because of the ongoing litigation	10
Restructuring within T that could make T a more effective business entity	30
Total Benefits	50
Costs	
Lingering effects of the investigation and action	-100
Fines, damages, mandated internal restructuring	-300
Empowering whistle blowers to come forward	-50
Greater intolerance of financial aggression and resulting consequences	-50
Total Costs	-500
Net Cost	-450

Chart 33 Game 2(B); Node X T Wins the Action	
Benefits	**Value**
Avoids the consequences that accompany a finding of liability	200
Enhances T's image as a "winner"	40
Obtains acquiescence to the behavior of T that was in question (if propriety of such behavior was in question)	40
An end to the uncertainty created for T because of the ongoing litigation	40
Generates publicity that may discourage future whistleblowers	50
Total Benefits	370
Costs	
Lingering effects of the expenditure of costs in defending itself	-15
Publicity may inform future whistle blowers	-10
Total Costs	-25
Net Benefit	345

Chart 34 Game 2(C); Node I P Does Nothing Upon Learning of T's Wrongdoing	
Benefits	**Value**
P will not precipitate retaliation by T	75
P will not incur T-imposed personal or professional hardships associated with whistleblowing	75
Total Benefits	150
Costs	
T's wrongdoing may undermine P's professional security	-50
P may be held culpable for T's wrongdoing	-50
P may experience personal angst for not reporting T's wrongdoing	-20
Opportunity cost: P will lose the opportunity to be a qui tam relator and share in any judgment obtained	-100
Total Costs	-220
Net Cost	-70

Chart 35 Game 2(C); Node II P Reports T's Wrongdoing Internally	
Benefits	**Value**
Possible prevention of future problems for T	40
P is viewed as demonstrating leadership; as a result, P advances within T	40
Minimizing or preventing P's personal angst	20
Secures protection under the FCA against retaliation by T	50
Total Benefits	150
Costs	
Possible retaliation by T and/or others within relevant industry	-30
P's time and energy	-20
P suffers personal and/or professional hardships as a result of reporting internally	-30
Risks preemption by a P who reports externally	-40
Total Costs	-120
Net Benefit	30

Chart 36 Game 2(C); Node III P Reports T's Wrongdoing Externally	
Benefits	**Value**
Possible prevention of future problems for T	60
P is viewed as demonstrating leadership; as a result P advances within T	40
Minimizing or preventing P's personal angst for failure to report	40
Demonstrates P's non-culpability	60
Secures protection under the FCA against retaliation by T	60
Motivates T to remedy the situation	60
Through the FCA, P obtains a mechanism for reporting T's wrongdoing to a particularly effective outside source, the DOJ	75
Obtains benefit of counsel and support organizations counsel will know about	25
May qualify as qui tam relator who will share in any judgment obtained in a qui tam lawsuit	50
Total Benefits	470
Costs	
Increased likelihood of personal or professional hardship resulting from P's whistleblowing, especially ostracization by colleagues	-200
P's time and energy	-40
P's discomfort in becoming a public figure	-25
Cost of counsel (not compensated otherwise)	-15
Total Costs	-280
Net Benefit	190

Chart 37 Game 2(C); Node IV P Works Actively With R	
Benefits	**Value**
Increases P's percentage of any judgment obtained T by actively working with R	50
P's counsel will encourage P to work actively with R	50
P has a greater chance of influencing the outcome of the case by actively working with R	50
P increases P's personal and professional satisfaction by actively working with R	50
Total Benefits	200
Costs	
P's time and energy	-25
Emotional stress	-25
Total Costs	-50
Net Benefit	150

Chart 38 Game 2(C); Node V P Decided Not to Work Actively With R	
Benefits	**Value**
Conserves P's time and energy	25
Minimizes P's emotional stress	25
Total Benefits	50
Costs	
Opportunity cost: P loses the opportunity to increase the percentage of recovery P is possibly awarded	-50
Opportunity cost: P's counsel loses the opportunity to earn larger attorneys fees compensated under the statute and a larger percentage of recovery; P may lose experienced counsel	-50
Opportunity cost: P loses the opportunity to influence R's conduct of the case	-50
Opportunity cost: P loses the opportunity to gain personal and professional satisfaction by working actively with R	-50
Total Costs	-200
Net Cost	-150

Chart 39 Game 2(C); Node VI P Continues in the Case as Co-Plaintiff With R After R Intervenes	
Benefits	**Value**
P (with R) will likely prevail in the suit	100
P will prevail without expending significant tangible resources	100
P will be protected against retaliation by T under the FCA	50
Total Benefits	250
Costs	
P's time and energy	-25
Emotional stress	-25
Ostracization by friends, colleagues	-25
Future employment difficulties	-25
Total Costs	-100
Net Benefit	150

Chart 40 Game 2(C); Node VII P Pursues Action Alone After R Declines to Intervene	
Benefits	**Value**
P may win the action	15
If P wins the action, P would be statutorily entitled to a larger percentage of the judgment (25-30%) if P pursues the action alone than if R joins (15-25%)	15
Total Benefits	30
Costs	
Poor chance P will win the action	-100
Tangible and intangible costs in pursuing action without R	-100
Loss of experienced counsel	-25
Greater risk of retaliation	-25
Total Costs	-250
Net Cost	-220

Chart 41 Game 2(C); Node VIII P Dismisses the Action After R Declines to Intervene	
Benefits	**Value**
P avoids tangible and intangible costs	50
P minimizes the risk of retaliation	20
Total Benefits	70
Costs	
Opportunity cost: P may win the action	-5
Opportunity cost: If P won the action, P would be entitled to a larger percentage of the recovery because P pursued the case alone	-5
Total Costs	-10
Net Benefit	60

Chart 42 Game 2(C); Node IX P Wins the Action	
Benefits	**Value**
Monetary recovery	300
Public vindication	75
An end to an emotionally draining experience	50
Total Benefits	425
Costs	
Emotional strain	-50
Ostracization by colleagues, friends and within one's profession	-50
Total Costs	-100
Net Benefit	325

Chart 43 Game 2(C); Node X P Loses the Action	
Benefits	**Value**
End an emotionally draining experience	20
Total Benefits	20
Costs	
Opportunity cost: lost opportunity for a large financial recovery	-125
Ostracization from friends, colleagues	-125
Difficulty finding new employment	-125
Lingering effects (psychological and physical) from the emotional strain of serving as a whistleblower	-125
Total Costs	-500
Net Cost	-480

Appendix B, Game 1(A)

Appendix B, Game 1(B)

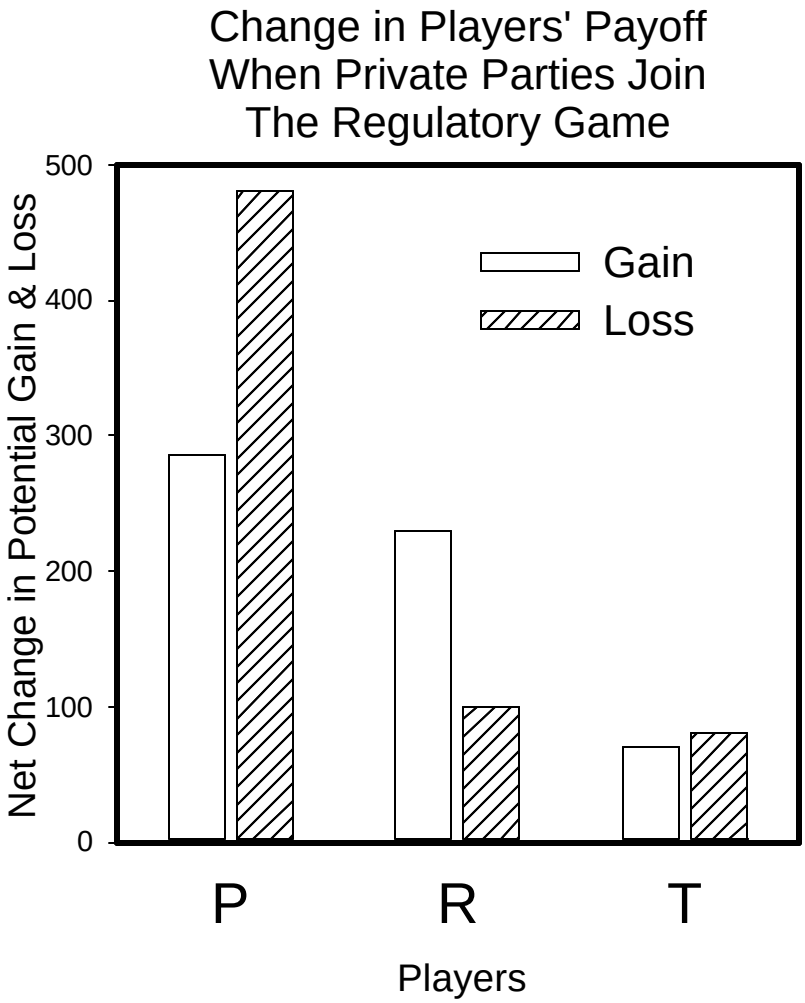
Appendix B, Game 1(C)

Appendix B, Game 2(A)

Appendix B, Game 2(B)

Appendix B, Game 2(C)

Appendix C, Chart C1



Appendix C, Chart C2

Games From R's Perspective			
Node	Event	Game 1 (A) No FCA	Game 2 (A) With FCA
Node I	R does nothing	-35	-40
Node II	R opens investigation	75	120
Node III	R closes investigation	-100	(R Declines to intervene) -75
Node IV	R initiates action	100	(R intervenes) 190
Node V	R wins	250	495
Node VI	R loses	-180	-280

Chart C3

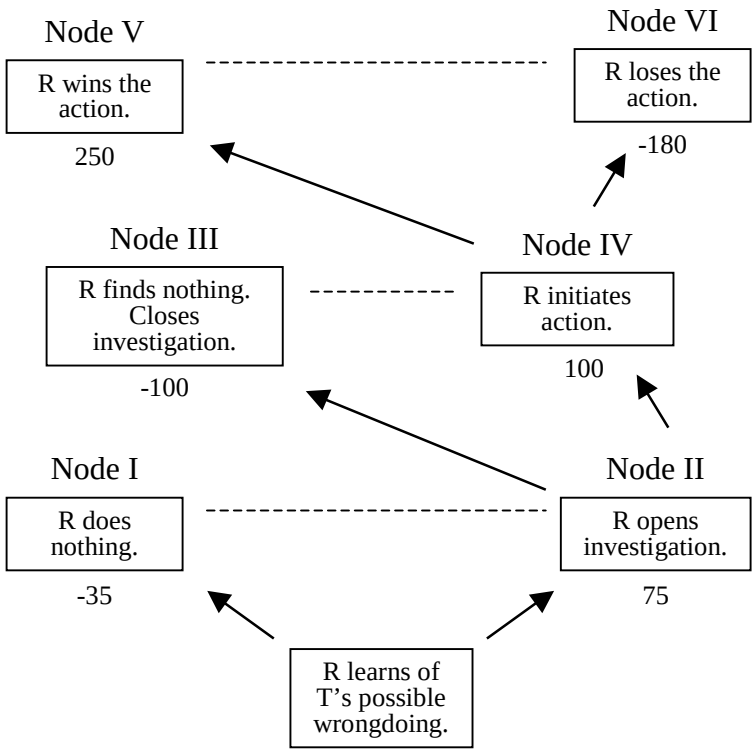
Games From T's Perspective			
Node	Event	Game 1 (B) No FCA	Game 2 (B) With FCA
Node I	T does not disclose	25	-70
Node II	T discloses	100	150
Node III	T does not cooperate in investigation	-150	-290
Node IV	T cooperates in investigation	200	330
Node V	T does not cooperate after suit is filed	-250	-315
Node VI	T cooperates after suit filed	135	170
Node VII	T does not cooperate with P after R declines to intervene	-------	95
Node VIII	T cooperates with P after R declines to intervene	-------	-180
Node IX	T loses	-370	-450
Node X	T wins	275	345

Note: For comparison purposes, Game 1(B) nodes VII and VIII are listed as nodes IX and X respectively in Chart C3.

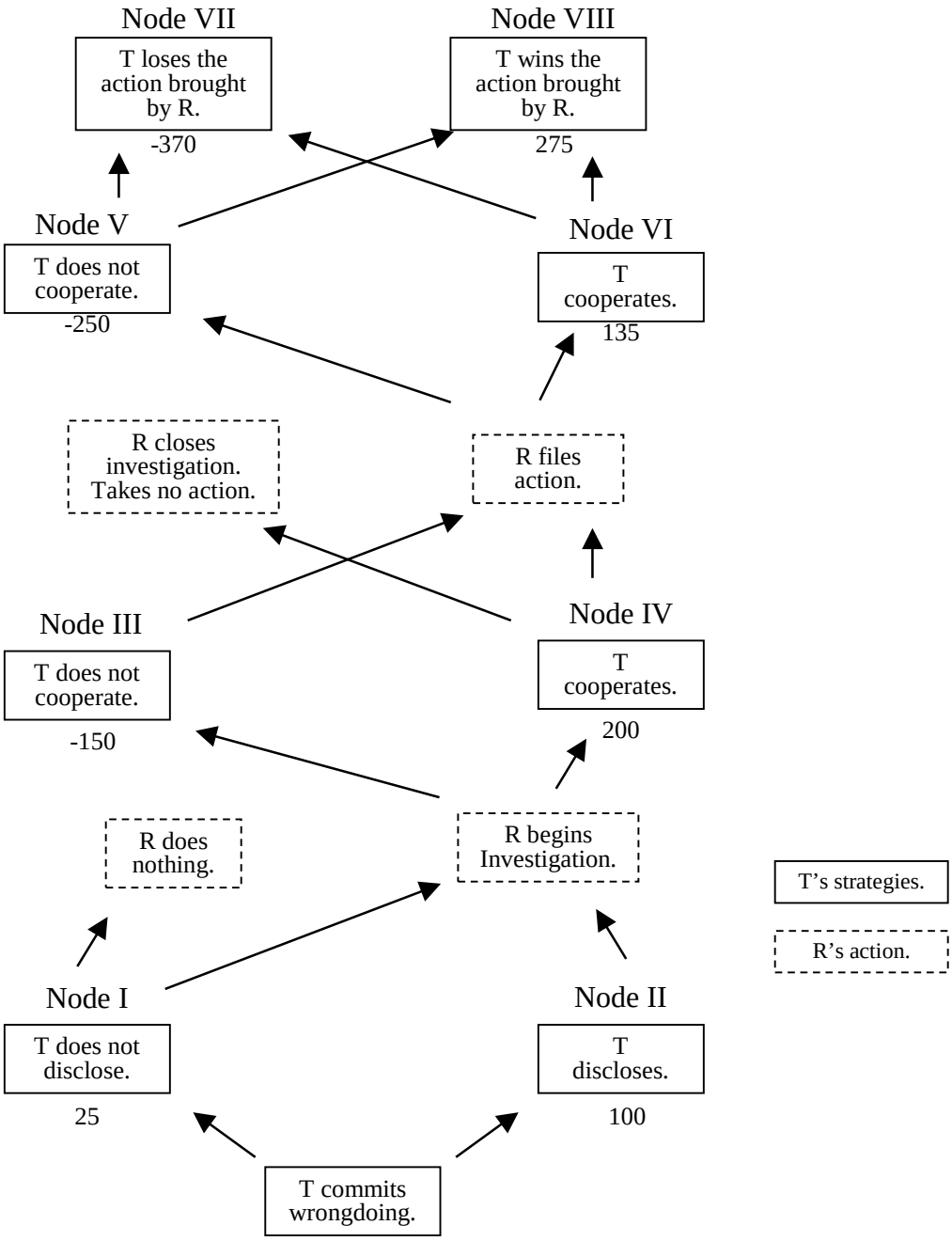
Appendix C, Chart C4

Games From P's Perspective			
Node	Event	Game 1 (C) No FCA	Game 2 (C) With FCA
Node I	P does nothing	40	-70
Node II	P reports internally	0	30
Node III	P reports externally	35	190
Node IV	P works actively with R during investigation	-------	150
Node V	P chooses not to work with R in investigation	-------	-150
Node VI	P continued in case as a co-plaintiff	-------	150
Node VII	P pursues action alone	-------	-220
Node VIII	P dismisses action	-------	60
Node IX	P wins action	-------	325
Node X	P loses action	-------	-480

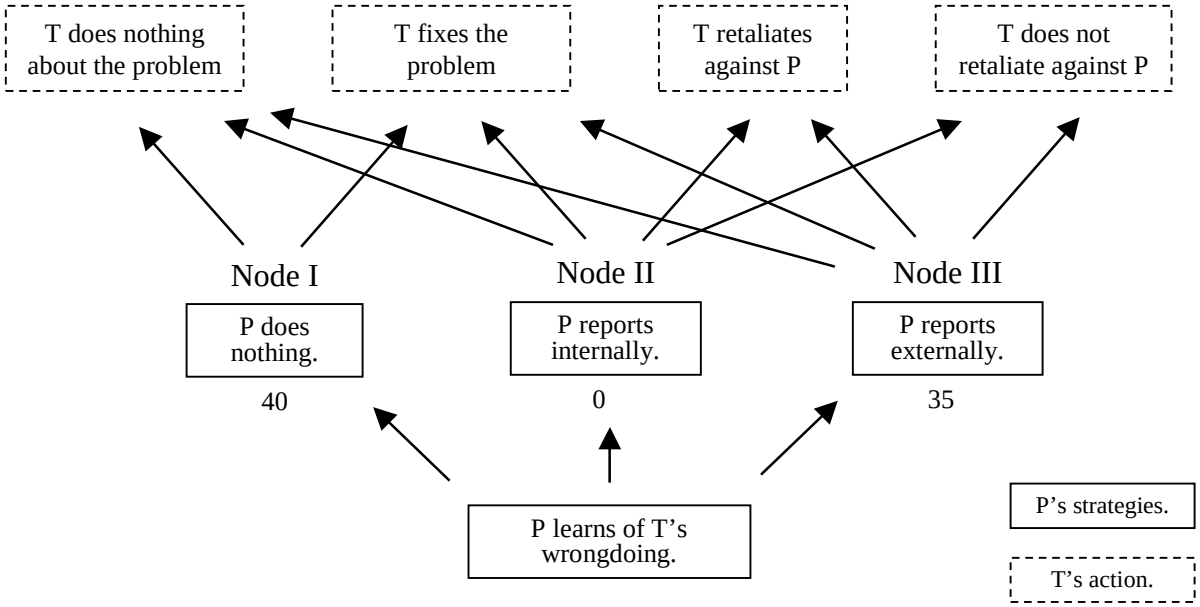
Game 1 (A)
Regulatory Game Without FCA:
From R's Perspective



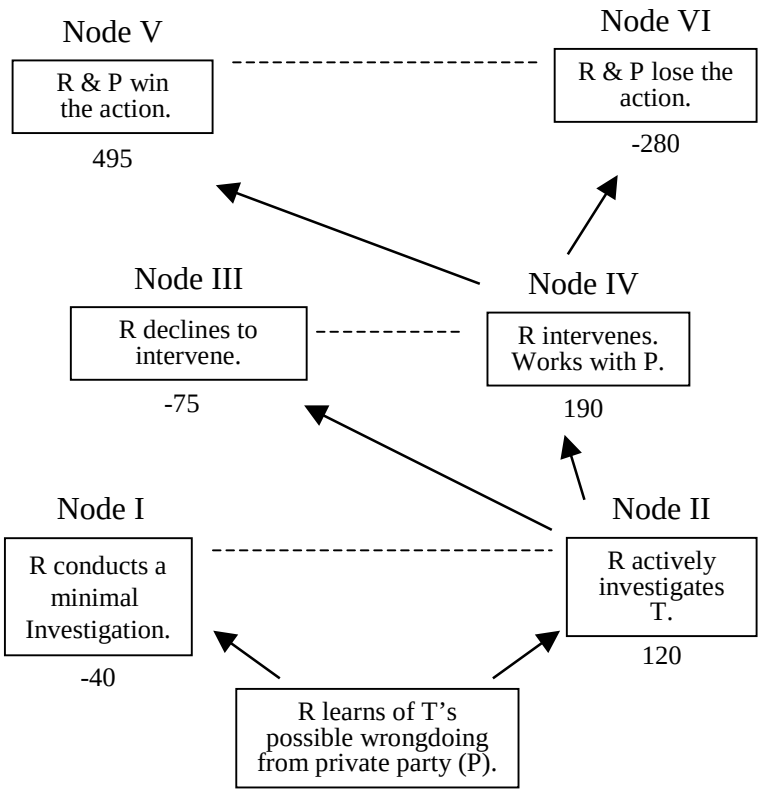
Game 1(B)
Regulatory Game Without FCA:
From T's Perspective



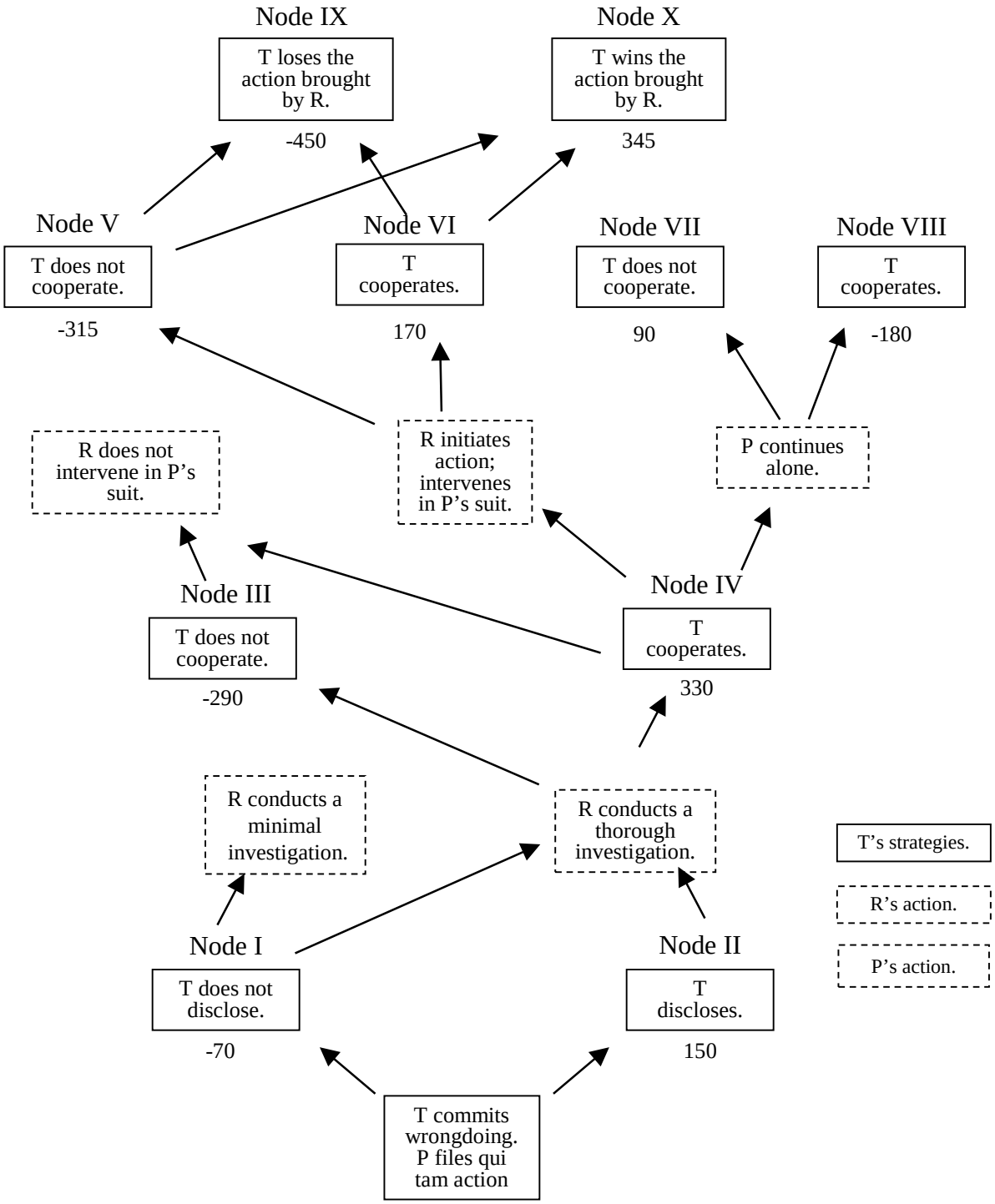
Game 1 (C)
Regulatory Game Without FCA:
From P's Perspective



Game 2 (A)
Regulatory Game With FCA:
From R's Perspective



Game 2 (B)
Regulatory Game With FCA:
From T's Perspective



Game 2(C)
Regulatory Game With FCA:
From P's Perspective