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COMMENTS

QUI TAM SUITS UNDER THE FALSE CLAIMS AMENDMENTS ACT OF 1986: THE NEED FOR CLEAR LEGISLATIVE EXPRESSION

Congress developed the False Claims Act (the Act)¹ to strengthen the ability of the federal government to expose false claims against it and prosecute the wrongdoer.² First enacted during the Civil War, the Act allowed a private party to bring suit, in the name of the government, based on the individual's independent knowledge of fraud.³ The *qui tam* suit, as the private party's action is referred to, awarded the *qui tam* plaintiff, or relator, a portion of the money judgment for a successful suit.⁴ After initial popularity, *qui tam* actions under the Act fell into disuse and disfavor in the late 1800's and early 1900's,⁵ but were revived under the False Claims Amendments Act of 1986 (1986 Amendments).⁶ The 1986 Amendments, enacted by Congress to combat mounting fraud by government contractors,⁷ increased the award percentage that a successful relator could enjoy and removed some previously imposed restrictions on bringing suit.⁸

The drafters of the 1986 Amendments, while attempting to give the *qui tam* relator more authority to bring an action, were wary of past abuses

1. 31 U.S.C. §§ 3729-3733 (1988).

2. The False Claims Act was viewed as a weapon "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. REP. NO. 345, 99th Cong., 2d Sess. 1 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266 [hereinafter 1986 SENATE REPORT].

3. *Id.* at 5273-75.

4. *Id.* at 5275; Comment, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446, 454-55 (1972) [hereinafter *Tool of the Private Litigant*].

5. Patrick W. Hanifin, *Qui Tam Suits by Federal Government Employees Based on Government Information*, 20 PUB. CONT. L.J. 557, 563-64 (1990).

6. Pub. L. No. 99-562, 100 Stat. 3153 (1986).

7. "In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982. . . . In 1985, the Department of Defense Inspector General . . . testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses." 1986 SENATE REPORT, *supra* note 2, at 5267.

8. *Id.* at 5278-82.

under the Act.⁹ Private parties would often base their suits on criminal indictments filed by the federal government, creating “a race to the courthouse between the Government’s civil lawyers and private parties.”¹⁰ In such cases, the monetary incentive for private parties to bring *qui tam* actions interfered with the government’s mandate to handle criminal and civil actions.¹¹ The Supreme Court’s 1943 ruling in *United States ex rel. Marcus v. Hess*¹² supported these “parasitical” actions—suits based on information made public by the government—by holding that the Act did not require the relator to base his suit on original information.¹³ In response to *Marcus*, Congress amended the Act in 1943 to require that *qui tam* relators base their suits on information not already in possession of the government.¹⁴ The False Claims Amendments Act of 1986 sought to ease that restriction by allowing a relator to file suit if he was the “original source” of the information.¹⁵

The 1986 Amendments, while furthering the goal of encouraging private parties to pursue fraud, has had mixed success. Although the amount of civil recoveries under the Act has more than doubled,¹⁶ there have been seri-

9. See *infra* notes 57-70 and accompanying text. During the 1940’s, numerous *qui tam* actions were brought by relators who based their suits on information possessed by the federal government, contrary to the intent of the statute. 1986 SENATE REPORT, *supra* note 2, at 5275.

10. *Id.* at 5275-76.

11. Commenting on the False Claims Act as it existed prior to 1943, Justice Jackson observed:

[T]here is nothing in the text or history of this statute which indicates to me that Congress intended to enrich a mere busybody who copies a Government’s indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication.

United States ex rel. Marcus v. Hess, 317 U.S. 534, 558 (1943) (Jackson, J., dissenting).

12. 317 U.S. 537 (1943).

13. *Id.* at 545-48.

14. False Claims Act, Pub. L. No. 78-213, 57 Stat. 608, 608-09 (1943).

15. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3730, 100 Stat. 3153, 3157 (1986). Representative Berman, a sponsor of the 1986 Amendments, stated that “[a] person is an original source if he had some of the information related to the claim which he made available to the government or the news media in advance of the false claim being publicly disclosed.” 132 CONG. REC. 29322 (1986).

16. H.R. REP. NO. 837, 102d Cong., 2d Sess. 6 (1992) [hereinafter H.R. REP. NO. 837]. The 1986 Amendments have significantly increased the amount of recoveries in civil actions undertaken by the federal government. In 1985, the government recovered \$27 million, \$54 million in 1986, \$83 million in 1987, \$176 million in 1988, and \$225 million in 1989. *Qui Tam Provisions of the False Claims Act: Hearings Before the Subcomm. of Admin. Law and Gov’t Relations of the Senate Judiciary Comm.*, 101st Cong., 2d Sess. 2-3 (1990) [hereinafter *Hearings*] (statement of Stuart M. Gerson, Assistant Attorney General, Department of Justice). The Department of Justice reported recoveries of \$257 million in 1990 and \$340 million in 1991 for suits involving fraud against the government. 57 Fed. Cont. Rep. (BNA) at 8 (Jan. 6, 1992).

ous shortcomings. The federal government has found itself arguing against numerous *qui tam* relators, stating that the private claims undercut federal civil and criminal actions.¹⁷ Government employees, who were previously barred from filing a *qui tam* suit based on information learned during the course of their employment, have maintained successful suits despite protests by the federal government.¹⁸ Federal courts, faced with a paucity of legislative history under the 1986 Amendments, have unevenly interpreted the statutory language.¹⁹ As a result, many courts permit previously forbidden relators to sue under the Act while forbidding seemingly qualified *qui tam* plaintiffs from bringing a suit.²⁰

This Comment traces the development of *qui tam* actions under the False Claims Act, focusing on the problems that have arisen as a result of the False Claims Amendments Act of 1986. The Comment examines the legislative intent behind the 1986 Amendments and the subsequent interpretation of the Amendments by the federal courts. The Comment presents two contrasting viewpoints adopted by the federal courts in applying the False Claims Act: a restrictive view that limits otherwise qualified relators and a more moderate view that expands the opportunity for a potential relator to bring a *qui tam* suit. The Comment then examines two proposed legislative amendments to the False Claims Act and their potential impact on prior case holdings. The Comment concludes that one of the legislative proposals more directly addresses the original intent of Congress in the 1986 Amendments—to encourage private citizens to serve as a conduit to the government's fight against fraud.

17. See *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319-21 (2d Cir. 1992) (Government asserting that relator who gained information as result of government investigation was barred by False Claims Act); *United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 910 (E.D. Va. 1989) (Government arguing that legislative history of the False Claims Act prohibited relator's *qui tam* suit). *But cf.* *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992) (government declining to intervene in relator's *qui tam* suit).

18. See *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991).

19. See discussion *infra* part II.

20. Compare *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1419, 1159-60 (3d Cir. 1991) (holding that "public disclosure" under the Act included information from discovery) with *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins.*, 721 F. Supp. 1247, 1256 (S.D. Fla. 1989) (noting that "Congress was very specific in choosing the appropriate wording of the statute").

I. THE *QUI TAM* ACTION

The term “qui tam” is taken from the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitor*,” which translates to “who sues on behalf of the king as well as for himself.”²¹ The action is established by statute under which a private party brings an action against a wrongdoer for the commission or omission of some named act.²² The private party bringing the suit, the *qui tam* relator, sues for himself as well as the government, and is entitled under the statute to a percentage of the monetary recovery.²³ The concept was derived from English common law,²⁴ although under the nascent American system *qui tam* suits were more prevalent under statutory provisions.²⁵

A. *Development of Qui Tam under the English and American Legal Systems*

The English system of *qui tam* suits began as a common law action allowing a private party to pursue an interest on his own behalf, as well as the crown's,²⁶ and evolved into a suit authorized by statute.²⁷ Two distinct parties could bring suits as *qui tam* plaintiffs: injured parties and informers.²⁸ Injured parties were those who sought redress for wrongs they had suffered personally.²⁹ Parliament enacted statutes that allowed an aggrieved party to prosecute the violator for his loss and provided for the crown to receive a monetary fine.³⁰ In contrast, informers suffered no personal injury; their sole motivation was monetary reward.³¹ Informer suits went through a similar development, with the informer's action eventually provided for by statute.³²

21. Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83 (1972) [hereinafter *History and Development of Qui Tam*] (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1st ed. 1768)).

22. See, e.g., 31 U.S.C. § 3730(b) (1988) (establishing right of private party to bring civil action under the False Claims Act).

23. *Id.*

24. *History and Development of Qui Tam*, *supra* note 21, at 83.

25. *Id.* at 94-95.

26. *Id.* at 85. Early *qui tam* suits have been characterized as actions to “obtain a common law remedy in the royal courts for a private wrong that also affected the king's interests.” *Id.*

27. Valerie R. Park, Note, *The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?*, 43 STAN. L. REV. 1061, 1063-64 (1991); *History and Development of Qui Tam*, *supra* note 21, at 85-86.

28. *History and Development of Qui Tam*, *supra* note 21, at 84-85.

29. *Id.* at 84 n.17.

30. *Id.* at 86-87.

31. *Id.* at 84-85.

32. *Id.* at 88-89.

The informer could file an indictment or a popular action³³ against the defendant under the jurisdiction of a statute.³⁴ However, the informer statutes focused on the reward for the successful prosecution of a suit as opposed to the provision of a remedy for the injured party.³⁵ With the growth of informer *qui tam* suits came various abuses under the English system including the opportunistic prosecution of nebulous and inferior claims.³⁶ Parliament responded to the manipulation of *qui tam* suits and the unfavorable public reaction by limiting actions by an informer.³⁷ The restrictions began as an outright ban on *qui tam* suits brought by informers,³⁸ but developed into strict statutes of limitation, venue requirements, and penalties for statutory abuses.³⁹

The *qui tam* action was introduced to the American legal system with the adoption of English statutory and common law by the developing Colonial governmental and judicial structures.⁴⁰ American legislatures assumed and modified many of the English *qui tam* provisions,⁴¹ while American courts employed many of the English procedural devices used to handle *qui tam* suits.⁴² The American system made a number of changes designed to centralize in state and federal governments the authority to bring actions against wrongdoers. By empowering the government to prosecute fraud di-

33. A "popular action" refers to "those actions which were given upon the breach of a penal statute, and which any man that will may sue on account of the king and himself, as the statute allowed and the case required." BLACK'S LAW DICTIONARY 29 (6th ed. 1991).

34. *History and Development of Qui Tam*, *supra* note 21, at 87-88.

35. *Id.*

36. *Id.* at 89.

37. *Id.* at 89-90.

38. *Id.* at 89.

39. *Id.* at 89-91.

40. *Id.* at 91-97. "Statutes providing for actions by a common informer, who himself had no interest whatsoever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and this country ever since the foundation of our Government." *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

41. A number of early statutes authorized *qui tam* actions. See Act of July 31, 1789, ch. 5, §§ 29, 38, 1 Stat. 29, 44-45, 48 (1789) (import duties); Act of Sept. 1, 1789, ch. 11, § 21, 1 Stat. 55, 60 (1789) (vessel registration); Act of Mar. 1, 1790, ch. 25, § 2, §§ 3, 6, 1 Stat. 101, 102-03 (1790) (census); Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-25 (1790) (copyright infringement); Act of July 20, 1790, ch. 24, §§ 1, 4, 1 Stat. 131, 133 (1790) (seamen regulations) (codified in scattered sections of 46 U.S.C.); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137 (1790) (regulation of Indian trade); Act of Aug. 4, 1790, ch. 35, §§ 55, 69, 1 Stat. 145, 173, 177 (1790) (import duties); Act of Feb. 25, 1791, ch. 10, §§ 8, 9, 1 Stat. 191, 195-96 (1791) (regulation of the Bank of the United States); Act of Mar. 3, 1791, ch. 15, § 44, 1 Stat. 199, 209 (1791) (liquor duties) (cited in *Hanifin*, *supra* note 5, at 562 n.22).

42. *History and Development of Qui Tam*, *supra* note 21, at 94-97. In *Adams v. Woods*, 6 U.S. (2 Cranch) 336 (1805), the Supreme Court interpreted the language of two statutes authorizing informer rewards to permit *qui tam* actions. "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by a *qui tam* plaintiff] as well as by information [by the public prosecutor]." *Id.* at 341.

rectly, abuses of *qui tam* statutes by informers were curtailed and the government retained increased prosecutorial discretion.⁴³ By the mid-nineteenth century, statutory restrictions and judicial monitoring acted to decrease the rate of *qui tam* suits “[a]s the public agencies became more effective.”⁴⁴ By the advent of the Civil War, *qui tam* suits brought under common law were extinct and the action existed solely by statutory grant.⁴⁵

B. The Development of the False Claims Act

1. The False Claims Act

Congress adopted the False Claims Act in 1863 as a means for the federal government to counter fraud committed by Civil War defense contractors.⁴⁶ Congress sought to impose civil and criminal penalties on individuals who submitted false claims to the government.⁴⁷ The Act created liability for the commission of certain acts against the government, such as presentation for payment or approval of false claims against the government,⁴⁸ use of false documents to obtain payment of false claims,⁴⁹ and conspiracy to defraud the government through the presentation of false claims.⁵⁰ Penalties for vio-

43. *History and Development of Qui Tam*, *supra* note 21, at 97-98.

44. *Id.* at 101; see also Robert W. Fischer, Jr., Comment, *Qui Tam Actions: The Role of the Private Citizen in Law Enforcement*, 20 UCLA L. REV. 778, 785-86 (1973) (discussing the legislature's ability to abolish *qui tam* rights as a means of limiting abuses).

45. *History and Development of Qui Tam*, *supra* note 21, at 99. There was one reported *qui tam* suit under the 1863 version of the False Claims Act in which the court found that a Treasury agent was entitled to a portion of a judgment won on behalf of the federal government. *United States v. Carlisle*, 25 F. Cas. 293 (C.C.E.D. Mich. 1871) (No. 14,724).

46. See 1986 SENATE REPORT, *supra* note 2, at 5273; Park, *supra* note 27, at 1066; *Tool of the Private Litigant*, *supra* note 4, at 453.

47. 1986 SENATE REPORT, *supra* note 2, at 5273. The Act “provided for both civil and criminal penalties assessed against one who was found to knowingly have submitted a false claim to the Government.” *Id.*

48. The statute, prior to the 1986 Amendments, stated that an individual who shall: make or cause to be made, or present or cause to be presented, for payment or approval . . . any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim [makes or uses false documents] . . . knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . shall forfeit and pay to the United States the sum of \$2000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act
31 U.S.C. § 231 (1970).

49. *Id.*

50. *Id.*; see also *Tool of the Private Litigant*, *supra* note 4, at 452-53 (discussing the effectiveness of *qui tam* suits in prosecuting individuals who fraudulently use or misapply federal funds).

lating the statute included the imposition of fines equal to double the amount of damages sustained by the government, plus a forfeiture of \$2000 for each false claim submitted.⁵¹ To increase the scope of the government's ability to combat fraud, the Act provided that a private party could bring a *qui tam* suit both on his behalf and the government's behalf.⁵² The *qui tam* relator received an award of half of the damages and forfeitures as well as his costs for the successful prosecution of a suit.⁵³ The Act's usefulness went beyond the prosecution of wartime fraud, and the federal government expanded its application to counter general claims of fraud.⁵⁴ Despite the promise of substantial reward for successful relators, there were few recorded cases in the late nineteenth and early twentieth centuries,⁵⁵ and actual use of the Act by private parties was minimal.⁵⁶

2. The 1943 Amendments to the False Claims Act

The Act received renewed scrutiny after the Supreme Court's decision in *United States ex rel. Marcus v. Hess*,⁵⁷ which allowed a private relator to bring suit under the False Claims Act even when the suit was based on information and evidence obtained from the government.⁵⁸ The ruling, in essence, allowed an informer to copy the government's indictment and bring a separate *qui tam* suit to collect the statutory reward.⁵⁹ In response, Congress amended the False Claims Act to protect the United States "against being compelled to disclose its facts involved in any criminal prosecution it

51. 1986 SENATE REPORT, *supra* note 2, at 5273.

52. *Tool of the Private Litigant*, *supra* note 4, at 453 n.41 (stating that "238(B) . . . provides in part that '[a *qui tam*] suit may be brought and carried on by any person, as well for himself as for the United States'").

53. 1986 SENATE REPORT, *supra* note 2, at 5275.

54. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943). The Court in *Hess* observed that the Act was used to punish those who would "'cheat the United States.'" *Id.* (quoting CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863)).

55. *Tool of the Private Litigant*, *supra* note 4, at 455.

56. *Id.* at 453; *see also* Park, *supra* note 27, at 1064 (asserting that the potential for abuse caused *qui tam* actions to fall from favor); *History and Development of Qui Tam*, *supra* note 21, at 100 (discussing the general reduction of available general reformer provisions during the nineteenth century).

57. 317 U.S. 537 (1943).

58. *Id.* at 545-48.

59. The Court dismissed the government's argument that the statute forbids the use of government information by private relators:

The government presses upon us strong arguments of policy against [allowing the informer to utilize government information], but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. . . . Conditions may have changed, but the statute has not.

Id. at 546-47.

may have undertaken or is about to undertake.”⁶⁰ The 1943 Amendments prohibited federal court jurisdiction over a suit based on information or evidence in the possession of the federal government at the commencement of the suit.⁶¹ The *qui tam* relator was required to disclose the information to the Attorney General and give the government the option of bringing the suit itself within six months of the relator’s original disclosure.⁶² If the government intervened, the court could award the private party “fair and reasonable” compensation limited to one-tenth the amount of the suit’s proceeds.⁶³ If the government chose not to join the suit, the court could award a successful litigant one-fourth of the proceeds plus costs and reasonable expenses.⁶⁴

The 1943 Amendments reflect the development of the federal government’s ability to locate and prosecute fraud. *Qui tam* suits in the American legal system evolved in parallel fashion to suits under English law.⁶⁵ The governments of England and Colonial America recognized their inability to expose and prosecute fraud effectively and therefore relied upon the *qui tam* relator to prosecute fraud claims.⁶⁶ The 1943 Amendments evidence Congress’s belief that the federal government did possess sufficient capability to locate and handle false claims without the assistance of private relators.⁶⁷ The 1943 Amendments further reveal a shift to a view of *qui tam* relators as “opportunistic bounty hunters” in the wake of the *Marcus* decision.⁶⁸ Con-

60. S. REP. NO. 291, 78th Cong., 1st Sess. 1 (1943), reprinted in 1943 U.S.C.C.A.N. 2-324, 2-326 [hereinafter 1943 SENATE REPORT].

61. 1986 SENATE REPORT, *supra* note 2, at 5277. The Act stated that “[t]he court shall have no jurisdiction to proceed with any such suit . . . whenever it shall be made to appear that such suit was based on upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time the suits was brought.” False Claims Act, Pub. L. No. 78-213, § 3491, 57 Stat. 608, 609 (1943).

62. Section 3491, 57 Stat. at 608-09. Unlike the 1986 Amendments, no distinction was made in the 1943 Amendments to the relator’s status as an “original source” of the information that served as the basis of the suit, and the relator was required to disclose all information relating to a *qui tam* action to the federal government. See *infra* text accompanying notes 82-125 (discussing the 1986 Amendments); cf. 31 U.S.C. § 3730(e)(4)(b) (1988) (allowing suit by individual who had “direct and independent” knowledge of information).

63. 31 U.S.C. § 3730(e)(4)(b) (1988).

64. *Id.*

65. *History and Development of Qui Tam*, *supra* note 21, at 83-101.

66. *Id.* at 101.

67. 1943 SENATE REPORT, *supra* note 60, at 2-326. Congress based the restrictions on the belief that “adequate facilities in respect to handling such matters exist and . . . adequate investigations of fraud against the United States are being made.” *Id.*

68. As with the 1986 Amendments, the Department of Justice pressured Congress to amend the False Claims Act. In a letter to a member of Congress, the Attorney General focused on the resulting harm of the *Marcus* decision:

The result of [*Marcus*] is that whenever a grand jury returns an indictment charging fraud against the Government there may be a scramble among would-be informers to see who can be the first to file civil suit based on the charges in the indictment. There

gress was motivated by the belief that “informer suits have become mere parasitical actions”⁶⁹ that have led to an “unseemly race and scramble to the courthouse.”⁷⁰

One of the effects of the 1943 Amendments was to ban *qui tam* suits initiated by government employees.⁷¹ The Supreme Court in *Marcus* upheld a literal interpretation of the False Claims Act as codified in 1863, reasoning that the statutory language and history did not explicitly prevent suits by government employees.⁷² The amended False Claims Act incorporated a broad jurisdictional bar that prevented *qui tam* suits that were based on information already in the possession of the federal government, including information possessed by a government employee.⁷³ The restriction was based on the belief that the *qui tam* system under the original Act encouraged government employees to capitalize on evidence discovered by way of their employment.⁷⁴

3. *The False Claims Amendments Act of 1986*

In the early 1980's, as Congress increased appropriations and spending for government procurement, fraud committed against the government likewise

are now pending 19 such suits. In 18 of these suits the basic allegations of the informers' pleadings were copied from the indictments.

89 CONG. REC. 7571 (1943).

69. *United States v. Rippetoe*, 178 F.2d 735, 736 (4th Cir. 1949) (quoting Letter from Francis Biddle, Attorney General, to the Speaker of the House of Representatives (set forth in S. REP. NO. 1708, 77th Cong., 2d Sess. (1943))).

70. 89 CONG. REC. 7572 (1943). One senator commented that *qui tam* suits brought under the False Claims Act “[had] become one of the worst sources of racketeering since the days of Al Capone in the prohibition era.” *Id.* at 7571.

71. *See Hanifin, supra* note 5, at 567

72. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943). The Court stated: Neither the language of the statute nor its history lends support to the contention made by respondents and the government. “Suits may be brought and carried on by any person,” says the Act, and there were no words of exception or qualification . . . The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer

Id.

73. The statute as amended in 1943 barred suits “based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof.” False Claims Act, Pub. L. No. 78-213, 57 Stat. 608, 608-09 (1943).

74. One member of Congress remarked:

The temptation and the opportunity is tremendous under the present law for renegotiators, contracting officers of the various purchasing agencies of the Government, and the agents for collectors of internal revenue to take advantage of the information they discover in the course of the business to enrich themselves by instigating informers' suits. That is a temptation we wish to remove.

89 CONG. REC. 10849 (1943).

continued to rise.⁷⁵ A 1981 Government Accounting Office report estimated that fraud cost the federal government between \$150 and \$200 million dollars over a two-and-a-half-year period.⁷⁶ The government focused money and resources in an attempt to combat fraud, but concluded that its efforts alone were not adequate to contain the mounting occurrence of fraud.⁷⁷ In 1986, Congress set out to revise the False Claims Act to enhance the ability of the federal government to prosecute fraud effectively and to provide an incentive for private citizens with knowledge of fraud to expose the violations.⁷⁸ The False Claims Amendments Act of 1986 made changes to three major areas of the Act's prior language: damages and awards,⁷⁹ filing procedures,⁸⁰ and the status of the *qui tam* relator.⁸¹

a. Damages and Awards

The Act previously had required a defendant to pay a \$2,000 forfeiture and double damages on the injury suffered by the United States as a result of the false claim.⁸² Congress increased the initial penalty to \$10,000 based on the belief that a low minimum penalty would create inequities in the level of fines determined by district courts, and that fraudulent claims against the

75. One recent statistic cited a Justice Department study that projected levels of fraud at one-tenth the entire federal government's budget, or \$100 billion in fraud. Mark A. Thompson, *Stealth Law: Cashing In on Military Fraud*, CAL. LAW., Oct. 1988, at 33.

76. 1986 SENATE REPORT, *supra* note 2, at 5268.

77. The Senate report noted that "[d]etecting fraud [was] . . . very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." *Id.* at 5269.

78. The Senate report stated the Amendments were designed "to provide the Government's law enforcers with more effective tools . . . [and] to encourage any individual knowing of Government fraud to bring that information forward." *Id.* at 5266-67.

79. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156-57 (1986).

80. *Id.* § 3, 100 Stat. at 3154-55.

81. The revised language states, in relevant part:

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

(B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

Id. § 3, 100 Stat. at 3157.

82. *See supra* note 51 and accompanying text.

federal government required a strong governmental response.⁸³ In addition, the level of damages recoverable by the government was raised to treble the amount incurred.⁸⁴

The 1986 Amendments enlarged the percentage of the recovery that a relator received as the result of a successful *qui tam* suit. The prior amendments awarded the relator up to ten percent of the award when the government intervened and took over the suit.⁸⁵ The 1986 Amendments increased the range of the award to between fifteen and twenty-five percent, depending upon the relator's contribution to the suit.⁸⁶ For suits where the *qui tam* plaintiff retained control, the 1986 Amendments authorized an award of between twenty and thirty percent of the judgment,⁸⁷ increased from an upper limit of twenty-five percent.⁸⁸ Reflecting the view that private parties should be encouraged to prosecute fraud not known by the government, Congress set a ten percent recovery limit for suits arising from information publicly available through the news media or a government re-

83. 1986 SENATE REPORT, *supra* note 2, at 5282. The Report stated that "defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments." *Id.*

84. 31 U.S.C. § 3729(a) (1988).

85. *Id.* at § 3730(c)(1).

86. *Id.* at § 3730(d)(1). The amended language of the False Claims Act states:

If the Government proceeds with an action brought by a person under [§ 3730](b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156 (1986).

87. 31 U.S.C. § 3730(d)(2) (1988). The amended language states:

If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156-57 (1986).

88. 31 U.S.C. § 3730(c)(2).

port.⁸⁹ Successful relators were also awarded expenses and attorney's fees under the 1986 Amendments.⁹⁰

b. Filing Procedures

Congress amended the False Claims Act with the stated intent of generating more private suits, but changed the filing procedures to ensure that the federal government would not fall victim to historical abuses of the *qui tam* suit.⁹¹ The 1986 Amendments contained filing procedures that gave the federal government greater control over its level of involvement in a *qui tam* suit.⁹² Congress enacted the legislation in response to Justice Department concerns that the potential overlap of private and government suits could alert parties under investigation to pending criminal indictments.⁹³ The Act allowed the federal government to exercise more discretion in determining which *qui tam* suits would go forward and, ultimately, which defendants would be subject to prosecution.⁹⁴

89. *Id.* § 3730(d)(1). The amended language states:

Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds.

False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156 (1986).

90. 31 U.S.C. § 3730(d)(1). The amended language states that "[a]ny such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant." False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156 (1986).

91. 1986 SENATE REPORT, *supra* note 2, at 5288-89. Congress, while amending the Act "to encourage more private enforcement suits . . . recognize[d] the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters." *Id.*

92. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 (C.D. Cal. 1989). The court commented:

The 1986 [Amendments] continue[d] the evolution of greater executive control over *qui tam* lawsuits. . . . [T]he relator is given substantial authority to direct the initiation, conduct and termination of litigation in the name of the United States. However, the government is accorded much more authority to restrain the relator, if it chooses to do so. . . . [T]he Act's [1986] provisions are carefully crafted to enable the executive to enter the action and take control of the course of litigation.

Id.

93. 1986 SENATE REPORT, *supra* note 2, at 5279.

94. The amended language of the False Claims Act, setting out the language empowering a private citizen to act as a *qui tam* relator, simultaneously grants the government a check on this power.

The 1986 Amendments required the *qui tam* relator to serve the United States with his complaint and to file all material evidence *in camera* to remain under seal for sixty days.⁹⁵ The sixty-day period allowed the government to investigate the relator's claims but, more importantly, the filing requirement prevented private party suits that infringed upon the government's interests and injured the defendant's rights.⁹⁶ Upon a showing of good cause the court could extend the sixty-day period to allow the government to decide whether to litigate on its own behalf.⁹⁷ The government could choose to intervene and prosecute the defendant or allow the relator to proceed with the suit.⁹⁸ Further 1986 Amendments permitted the government to intervene in the suit at a later time.⁹⁹ The Act also required that the relator obtain court approval before serving the defendant with the com-

A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. *The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.*

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3154 (1986) (emphasis added).

95. 31 U.S.C. § 3730(b)(2). The amended language states:

A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed *in camera*, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3154-55 (1986).

96. 1986 SENATE REPORT, *supra* note 2, at 5289. The Senate Judiciary Committee believed that keeping the initial complaint under seal "protect[ed] both the Government and the defendant's interests without harming those of the private relator." *Id.*

97. 31 U.S.C. § 3730(b)(3). The amended language states:

The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions *in camera*. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3155 (1986).

98. 31 U.S.C. § 3730(b)(4). The amended language states:

Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall-

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3155 (1986).

99. 31 U.S.C. § 3730(c)(3).

plaint.¹⁰⁰ The filing procedure changes in the 1986 Amendments underscore Congress's belief that the federal government should retain the primary authority in prosecuting fraud under the False Claims Act, even when presented with unknown evidence by a private *qui tam* relator.¹⁰¹

c. *Status of the Qui Tam Relator*

The most significant changes brought about by the 1986 Amendments regard the *qui tam* relator.¹⁰² Prior to 1986, the False Claims Act limited the role that the *qui tam* relator could play in any potential litigation and enlarged the authority of the federal government to direct the action.¹⁰³ The drafters of the 1986 Amendments, cognizant of the restrictions enacted by the 1943 Amendments, broadly expanded the definition of the *qui tam* relator, lowering the jurisdictional requirements of the Act.¹⁰⁴ The contrasting statutory revisions of the 1986 Amendments exhibit Congress's view of the *qui tam* relator as both a powerful tool to combat fraud and a potential hindrance in the federal government's effective prosecution of wrongdoers, and reflect the attempt by Congress to balance the competing goals of the 1986 Amendments.¹⁰⁵

The legislative history of the Act states that the 1986 Amendments were designed to increase the *qui tam* relator's role in directing the suit's development.¹⁰⁶ This statement is tempered by the text of the Act, which subjects

100. *Id.* § 3730(b)(2).

101. 1986 SENATE REPORT, *supra* note 2, at 5289. The Senate report stated that "[k]eeping the *qui tam* complaint under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit." *Id.*

102. 31 U.S.C. §§ 3730(b)-(d).

103. *See supra* text accompanying notes 60-64.

104. While one section of the False Claims Act states that "[a] person may bring a civil action for a violation of [the Act] for the person and for the United States Government," 31 U.S.C. § 3730(b)(1), the section entitled "Certain actions barred" better defines the qualifications placed on the *qui tam* relator. The section prohibits suits against members of the armed forces, legislative, judicial or executive branches under certain circumstances, and those suits based on publicly disclosed information. *Id.* § 3730(e).

105. The Senate Report that accompanied the 1986 Amendments reflected the differing views of the *qui tam* relator by Congress. While the Report acknowledges that Congress intended to amend the False Claims Act "[i]n order to make the statute a more useful tool against fraud in modern times," 1986 SENATE REPORT, *supra* note 2, at 5266, the Report later traces the historical difficulties arising from relator suits under the Act during the period of the *Marcus* decision and the 1943 Amendments. *Id.* at 5276-77.

106. *Id.* at 5278-82. The Senate Report states that the 1986 Amendments are designed to encourage the *qui tam* relator to take a more active role in the exposure and prosecution of fraud. *Id.* One court remarked that "[o]ne theme recurring throughout the legislative history . . . is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991).

the *qui tam* relator to the priorities of the federal government to prosecute false claims.¹⁰⁷ The 1986 Amendments give the government the authority to control the direction of the suit.¹⁰⁸ The government may dismiss or settle the action over the objections of the relator.¹⁰⁹ In the event the government pursues the relator's claims and intervenes, the 1986 Amendments grant the federal government the primary responsibility for prosecuting the suit and subordinate the role of the *qui tam* relator.¹¹⁰ The 1986 Amendments saddle the persistent relator with court-imposed limitations on the ability to call and examine witnesses in the action.¹¹¹ In fact, the 1986 Amendments allow the defendant in a *qui tam* suit to request that the court limit the relator's participation when the relator too zealously pursues the claim.¹¹²

The Act grants the *qui tam* relator power to proceed with the action if the government declines to prosecute the defendant.¹¹³ However, the 1986 Amendments reserve to the government the choice to intervene at a later date and take control of the action.¹¹⁴ The government may also petition the court to stay discovery if it determines that the relator's actions would interfere with the government's investigation or prosecution of similar claims.¹¹⁵ Furthermore, the 1986 Amendments allow the government to pursue any alternate remedies available for redressing false claims.¹¹⁶

While the 1986 Amendments increased the federal government's discretion to handle a *qui tam* relator's claims, they nevertheless eased the restric-

107. Congress intended to fulfill a number of goals by granting the federal government the power of prosecutorial discretion in *qui tam* suits:

[These goals] were adopted primarily to allow the government first to ascertain in private whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene. The provisions were also designed to prevent alleged wrongdoers from being tipped off that they were under investigation. As secondary goals, Congress intended the new procedural requirements to rectify a statutory anomaly "under which the defendant may be forced to answer the complaint two days after being served, without knowing whether his opponent will be a private litigant or the Federal government" and to protect the defendant's reputation from unfounded public accusations.

United States *ex rel.* Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908, 912 (E.D. Va. 1989) (citations omitted) (quoting 1986 SENATE REPORT, *supra* note 2, at 5289).

108. *See supra* text accompanying notes 91-100.

109. 31 U.S.C. § 3730(c)(2)(A) (1988).

110. *Id.* § 3730(c)(1).

111. *Id.* § 3730(c)(2)(C).

112. *Id.* § 3730(c)(2)(D). The statute states that, "[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation of the person in the litigation." *Id.*

113. *Id.* § 3730(c)(3).

114. *Id.*

115. *Id.* § 3730(c)(4).

116. *Id.* § 3730(c)(5).

tions on the court's jurisdiction over a *qui tam* suit, thus expanding the ability of a private party to prosecute false claims.¹¹⁷ The 1943 Amendments required courts to dismiss all actions in which the government possessed the information utilized by the relator at the time the suit was brought.¹¹⁸ This broad jurisdictional bar prevented many potential *qui tam* relators from filing suit, resulting in a reduction of actions by qualified *qui tam* relators.¹¹⁹ By 1986, Congress was cognizant of the effect of the statute's jurisdictional bar on citizens who had valid knowledge of fraud, and sought to remedy the problem.¹²⁰

The 1986 Amendments removed the prior restrictions and broadened the statutory language to enable those individuals with knowledge of the false claims to bring a *qui tam* suit.¹²¹ The original Senate bill retained the bar on parasitical suits based on information disclosed by the government in the course of a separate action, by a congressional investigation, or in the news media.¹²² The bill did, however, allow a relator to base a suit on publicly-disclosed information if the government had not taken action within six months.¹²³ The Senate subsequently amended the bill's language, splitting

117. *Id.* § 3730(e). The Senate report stated that Congress "believe[d] that the [1986 Amendments] which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort." 1986 SENATE REPORT, *supra* note 2, at 5273.

118. False Claims Act, Pub. L. No. 78-213, 57 Stat. 608-09 (1943).

119. *See, e.g.,* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1106 (7th Cir. 1984) (holding that a state government that was required to report fraud to the federal government could not qualify as a relator under the Act); United States *ex rel.* Lapin v. International Business Mach. Corp., 490 F. Supp. 244, 248 (D. Haw. 1980) (holding that the jurisdictional bar applies even where a relator notifies the government of original allegations and the government does not investigate or take action).

120. 1986 SENATE REPORT, *supra* note 2, at 5269. The Senate report stated that the 1986 Amendments "are aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud." *Id.*

121. 31 U.S.C. § 3730(e)(4). The statute states:

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

Id.

122. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1164 (3d Cir. 1991).

123. S. 1562, 99th Cong., 1st Sess., § 2, at 4 (1985). The bill allowed the federal government six months to review the relator's claims and decide whether or not to intervene. *Id.* § 2.

the jurisdiction section to add an "original source" requirement.¹²⁴ The original source requirement barred suits based on information publicly disclosed through government sources or the media unless the party bringing the suit had direct and independent knowledge of the information and had informed the government of his knowledge.¹²⁵ Later changes to the bill's "original source" language removed the exemption for information disclosed through the news media.¹²⁶

The final bill adopted by Congress enlarged the pool of potential *qui tam* relators while tightening government control over the prosecution of a false claims action.¹²⁷ The "original source" language added by the 1986 Amendments undercut the prior ban on suits based on information possessed by the government.¹²⁸ A successful relator could now capitalize on publicly-disclosed information if he met the "original source" criteria.¹²⁹ While the statutory revisions gave the *qui tam* relator broader grounds on which to base a suit under the Act,¹³⁰ the relator's power to retain full and independent control over the action remained subsidiary to the government.¹³¹

124. 132 CONG. REC. 20531 (1986).

125. *Id.* Representative Berman, one of the sponsors of the Amendments, explained the addition of the original source language:

A person is an original source if he had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public as long as it is filed before an action is commenced by the Government.

Id. at 29322.

126. *Id.* at 28567.

127. *See supra* text accompanying notes 91-116.

128. *See* 31 U.S.C. § 3730(e)(4)(B) (1988) (stating that a successful relator could now capitalize on publicly disclosed information if he met the "original source" criteria). One court reflected on Congress's motivation in inserting the "original source" exception in the 1986 Amendments:

The original source language is clearly evocative of the failed 1943 Senate bill. This bill would have permitted suits based on "sources original" to the relator, and was described as allowing suits where the information was known to the government, but had been obtained from the relator. In 1986, Congress saw the lack of an original source exception as a major flaw in the 1943 Amendments. When the original source exception was added late in the legislative process, I believe it was designed primarily to protect people who publicly disclosed information themselves, just as the 1943 bill would have protected people who provided information to the government. I do not believe that it was inserted to bar recovery by "second-hand" sources only when public disclosure has occurred.

United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1173-74 (3d Cir. 1991) (Scirica, J., dissenting) (citations omitted).

129. 31 U.S.C. § 3730(e)(4)(B).

130. *See supra* notes 101-16 and accompanying text.

131. *See supra* notes 91-101 and accompanying text.

Congress clearly expressed that the 1986 Amendments were meant to encourage the cooperation of private parties in the prosecution of fraud.¹³² Statutory revisions created greater opportunities for *qui tam* relators to alert the government to false claims,¹³³ but Congress failed to define adequately jurisdictional boundaries of the Act.¹³⁴ The "original source" revision to the statute, which served as the primary vehicle for an increase in private suits, lacked a clear legislative statement as to the limits that Congress intended in its incorporation.¹³⁵ In the absence of a strong legislative foundation, only the traditional bars against certain *qui tam* actions remained.¹³⁶ The newly revamped ability of the private relator to capitalize on knowledge of false claims conflicted with the government's need to retain substantial authority to prosecute fraud.¹³⁷ The balance Congress sought to strike between increased opportunities for relators and paramount government control resulted in disharmony,¹³⁸ generating confusion in their application, particularly with the federal courts.

132. 1986 SENATE REPORT, *supra* note 2, at 5266-67. The 1986 Amendments were intended "to encourage any individual knowing of Government fraud to bring that information forward. In the face of sophisticated and widespread fraud, [Congress] believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." *Id.*

133. *Id.* at 5273. One commentator noted that "[the] United States recovered \$225 million in fiscal year (FY) 1989 under [the False Claims] Act compared to \$27 million in FY 1985; thirty-three *qui tam* actions were filed in FY 1987, ninety-three in FY 1989, and forty-five during the first three months of calendar year 1990." James Dever, *Double Jeopardy, False Claims, and United States v. Halper*, 20 PUB. CONT. L.J. 56, 58 n.8 (1990) (citations omitted).

134. *See infra* part II.

135. Courts reviewing *qui tam* suits have examined the "original source" language included in the 1986 Amendments in applying the False Claims Act, and one court noted that "[t]he legislative history does not conclusively establish the meaning of the words 'direct and independent knowledge.'" *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1173 (3d Cir. 1991) (Scirica, J., dissenting).

136. *See, e.g., id.* at 1160 (barring suit based on "publicly disclosed" information learned through "civil hearing"); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990) (requiring that a *qui tam* relator must have "directly or indirectly" been a source to the entity that disclosed information); *United States v. Rockwell Int'l Corp.*, 730 F. Supp. 1031 (D. Colo. 1990) (holding that a *qui tam* relator must be an "original source" to the information on which the suit is based).

137. One court observed that "[t]he 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992). Another court, reflecting on past difficulties with *qui tam* suits, stated that "the principal intent . . . was to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases, which precluded suit even by original sources." *Prudential*, 944 F.2d at 1154 (citations omitted).

138. *See infra* part II.

II. JUDICIAL INTERPRETATION OF THE FALSE CLAIMS AMENDMENTS ACT OF 1986: CITIZEN AS RELATOR OR A RETURN TO *MARCUS*?

The statutory revisions of the 1986 Amendments have created unintended results as *qui tam* relators not envisioned by Congress have brought successful suits under the False Claims Act.¹³⁹ The revised jurisdictional language in 31 U.S.C. § 3730(e)(4), which grants a *qui tam* relator standing under the Act, has been the focal point of judicial inquiry. Whereas the False Claims Act previously set strict limits on *qui tam* relators, the 1986 Amendments broadened the jurisdictional bar to encourage private citizens to expose false claims.¹⁴⁰ The 1986 Amendments changed the statutory language of three key elements of § 3730(e)(4): “public disclosure,”¹⁴¹ the categories of “public disclosure,”¹⁴² and “original source.”¹⁴³ Courts reviewing *qui tam* actions have differed in their interpretations of these elements, and the result has been an uneven application of the Act.

A. Public Disclosure

Section 3730(e)(4)(A) bars a *qui tam* relator from bringing an action “based upon the public disclosure of allegations or transactions” outlined in specific sources.¹⁴⁴ The section’s language reflects congressional intent that parasitic suits should remain forbidden.¹⁴⁵ Courts construing this language, however, have differed on the definition of “public disclosure.”¹⁴⁶ Some courts have focused on the congressional reaction to the Supreme Court’s affirmation of parasitic suits in *Marcus*, and therefore give the language

139. In the case of federal government employees serving as *qui tam* relators, the House report on the 1992 amendments to the False Claims Act reflects Congress’s lack of foresight:

The issue of whether federal government employees could sue under the *qui tam* provisions of the False Claims Act was not explicitly addressed in the 1986 amendments. According to the sponsors of those amendments, *the problem of government investigators and auditors using information they learned in the course of their duties as the basis of lawsuits in their own name*, rather than allowing their employer to investigate and prosecute the case, *was simply not contemplated*.

H.R. REP. NO. 837, *supra* note 16, at 5 (emphasis added).

140. The House Report remarked that “[i]n 1986, in order to modernize and enhance the False Claims Act as the government’s primary litigation tool to combat fraud, the Act was a [sic] substantially revised, including significant changes to the jurisdictional provisions that barred ‘honest informers.’” *Id.* at 4.

141. See discussion *infra* part II.A.

142. See discussion *infra* part II.B.

143. See discussion *infra* part II.C.

144. 31 U.S.C. § 3730(e)(4)(A) (1988).

145. Hanifin, *supra* note 5, at 570. “It is evident from reading § 3730(e)(4) that Congress intended to bar parasitic *qui tam* suits, that is, suits based on public information.” *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1159 (S.D. Fla. 1990).

146. See *infra* text accompanying notes 151-69.

broad sweep.¹⁴⁷ In contrast, other courts have noted the section's lack of legislative history and narrowly define the statutory language.¹⁴⁸ The end result has been a partial renewal of judicial support for suits that Congress expressly sought to outlaw in 1943.

While Congress intended to give private parties a greater opportunity to bring suit under the 1986 Amendments, it clearly did not mean to retreat from the historical ban on *qui tam* actions based on information known to the federal government or disclosed through the media.¹⁴⁹ The "public disclosure" language was aimed at achieving a balance between these concerns.¹⁵⁰ The lack of a clear statement of legislative intent, however, has caused many courts to focus on the historical restrictions of the Act and give a broad reading to the statute.¹⁵¹

In *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Insurance Co.*,¹⁵² the relator, an attorney, brought a *qui tam* suit based on information disclosed during the course of discovery in a separate legal pro-

147. See, e.g., *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (arguing that Congress intended an expansive reading of the "public disclosure" language as it did not prescribe narrow restrictions); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1159-60 (3d Cir. 1991) (holding that information learned during discovery constituted a "public disclosure"); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) (stating that a *qui tam* suit is barred under the False Claims Act if based on information "in the public domain"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Pan Am. Life Ins. Co.*, No. 90-411N, 1992 U.S. Dist. LEXIS 7990, at *6 (E.D. La. May 28, 1992) (holding that "because there is a presumption of public access to discovered materials . . . document production constitutes 'public disclosure' within the meaning of the [False Claims Act]").

148. See, e.g., *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992) (holding that information disclosed during discovery is not barred from use in a lawsuit under the "public disclosure" language); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991) (stating that the False Claims Act bars a *qui tam* suit based on "publicly disclosed" information "only in certain enumerated instances"); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield, Inc.*, 755 F. Supp. 1040, 1050 (S.D. Ga. 1990) (stating that the "plain meaning" of the statutory language limits the application of the "public disclosure" bar).

149. Hanifin, *supra* note 5, at 580-81. "[T]o avoid the blatant opportunism embodied in cases like *Marcus*, Congress enacted narrowly circumscribed exceptions to *qui tam* jurisdiction." *Doe*, 960 F.2d at 322.

150. One court noted the progression of the False Claims Act from a source of "unrestrained profiteering to a flaccid enforcement tool. . . . The 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud." *Doe*, 960 F.2d at 321.

151. The *Doe* court prefaced its review of the application of the False Claims Act with a discussion of the history of the Act, including the statement that "[c]learly, the purpose of the [1986] amendment[s] was to retain the 1943 Amendment's bias against parasitic lawsuits." *Id.* (citing Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L. REV. 525, 549 (1989)).

152. 944 F.2d 1149 (3d Cir. 1991).

ceeding.¹⁵³ The United States Court of Appeals for the Third Circuit eschewed a search of the 1986 Amendment's legislative history and looked instead to the principal intent of the Act—the bar on parasitic suits.¹⁵⁴ The court concentrated on the level of public accessibility to civil litigation documents in the absence of a protective order, and concluded that the disclosure of documents through discovery constituted a “public disclosure” under the Act.¹⁵⁵ The United States Court of Appeals for the Second Circuit in *United States ex rel. Doe v. John Doe Corp.*¹⁵⁶ adopted the reasoning in *Prudential* for application to “innocent” corporate employees exposed to allegations of fraud.¹⁵⁷ The court rejected the relator's contention that, because members of the public could not force the employees to divulge the information, there was no “public disclosure.”¹⁵⁸

153. *Id.* at 1151-52. Stinson, the relator, served as attorney for an individual injured in an automobile accident in a challenge against Provident Life & Accident Insurance Co. regarding Provident's failure to pay beneficiary claims, instead allowing Medicare to act as primary insurer. *Id.* at 1151. In the course of the *Provident* suit, Stinson obtained internal Provident documents suggesting that Provident and other insurance companies failed to act as primary insurers for the working aged as required under the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982). *Prudential*, 944 F.2d at 1151. Subsequently, Stinson brought *qui tam* actions against Provident and the other insurance companies under the False Claims Act. *Id.*; *accord* *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Pan Am. Life Ins. Co.*, No. 90-411N, 1992 U.S. Dist. LEXIS 7990 (E.D. La. May 28, 1992); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield, Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Pilot Life Ins. Co.*, C-90-29-G (M.D.N.C. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247 (S.D. Fla. 1989).

154. *Prudential*, 944 F.2d at 1154.

155. *Id.* at 1159-60.

156. 960 F.2d 318 (2d Cir. 1992). The relator, an attorney representing an indicted employee of defendant John Doe Corporation, filed the *qui tam* action when he learned that the federal government had not instituted a civil suit under the False Claims Act. *Id.* at 320. The Federal Government moved to have the suit dismissed, and the district court granted the Government's motion based on the grounds that despite the language of § 3730(e)(4)(A), the False Claims Act barred suits based on information possessed by the government when the suit was filed, and because the action was based upon information that had already been publicly disclosed. *Id.* at 320-21.

157. *Id.* at 322. The court drew a contrast between *Doe* and the type of public disclosure in *Prudential* where “any diligent member of the public could have gone to court and demanded to see the documents.” *Id.* In *Doe*, “the allegations of fraud were not just *potentially* accessible to strangers, they were *actually* divulged to strangers of the fraud, namely the innocent employees of John Doe Corp.” *Id.* Once informed of the fraud allegations, the employees were under no obligation to keep silent. The court stated: “We cannot accept the relator's argument that simply because other members of the public did not have a legal right to pry the allegations of fraud from the mouths of these innocent employees, there was no ‘public disclosure.’” *Id.* at 323.

158. *Id.* The court stated that “[w]ere this Congress' [sic] intent, we would expect a narrower exception to jurisdiction, one that bars only those actions based on generally accessible government documents and news media accounts. Section 3730(e)(4)(A) is not so circumscribed.” *Id.*

Other courts have looked beyond the broad restrictions of the False Claims Act and centered their inquiries on the motivating factor of the 1986 Amendments. While the legislative history suggests that Congress primarily sought to construct a jurisdictional barrier through the "public disclosure" language,¹⁵⁹ it directed more attention to creating an exception in the "original source" language, which would expand the pool of eligible *qui tam* relators.¹⁶⁰ Courts have seized upon this expansive intent of Congress to narrow the application of the "public disclosure" language.¹⁶¹ The district court in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield of Georgia*,¹⁶² faced with circumstances identical to those in *Prudential*,¹⁶³ restricted its reading of "public disclosure" to the qualifying language of the statute and allowed the *qui tam* relator to use material disclosed in discovery.¹⁶⁴

The United States Court of Appeals for the Ninth Circuit in *United States ex rel. Wang v. FMC Corp.*¹⁶⁵ similarly found no support under the "public disclosure" language for restricting information disclosed during discovery in the same suit.¹⁶⁶ The panel reasoned that the limitation would operate to

159. 1986 SENATE REPORT, *supra* note 2, at 5295. "Subsection (e)(4) prohibits *qui tam* suits based on information *not* in the possession of the Government." *Id.*

160. The 1986 Amendments sought to "allow and encourage assistance from the private citizenry [to] make a significant impact on bolstering the Government's fraud enforcement effort." *Id.* at 5273 (emphasis added).

161. See cases cited *supra* note 148. One court remarked that through the 1986 Amendments "Congress permitted one who publicly disclosed the information to bring a *qui tam* suit. There is nothing to suggest that Congress meant to do anything more than that, and some evidence that it meant to do less." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

162. 755 F. Supp. 1040 (S.D. Ga. 1990).

163. The memoranda obtained by the relator indicated that defendant Blue Cross Blue Shield of Georgia engaged in the same fraudulent Medicare practices as those alleged in the *Prudential* case. *Id.* at 1044.

164. *Id.* at 1050. Blue Cross Blue Shield, citing the *Prudential* decision, argued that the term "hearing" was synonymous with "proceeding," thereby broadening the scope of § 3730(e)(4). *Id.* The court disagreed, stating that "[r]ead against the 'object and policy' of the 1986 Amendments, however, it is clear that such a strained reading of 'hearing' contravenes that policy—to encourage people with direct knowledge of fraud perpetuated against the government to blow the whistle." *Id.* at 1049.

165. 975 F.2d 1412 (9th Cir. 1992).

166. *Id.* at 1416-17. Wang, a former employee of FMC Corporation, accused FMC of defrauding the federal government on four separate military contracts. *Id.* at 1415. The United States Court of Appeals for the Ninth Circuit held that allegations based on two of the projects did not qualify for review under § 3730(e)(4)(A) as the allegations had not been publicly disclosed. *Id.* at 1415-16. Wang learned of the allegations regarding the third project by "troll[ing] the massive number of documents made available to him during the discovery phase of his *qui tam* suit," leading the court to hold that "[e]vidence publicly disclosed during the discovery phase of a *qui tam* suit is not barred from use in that same suit by section 3730(e)(4)(A)." *Id.* at 1416. On the allegations regarding the fourth project, based upon allegations and information that had been publicly disclosed, the court ruled that § 3730(e)(4)(A)

discourage a relator from using discovery materials as a source of potential evidence of fraud.¹⁶⁷ In *United States ex rel. Williams v. NEC Corp.*,¹⁶⁸ the court relied upon Congress's intent to encourage private individuals to come forward with information on false claims in refusing to give an expansive reading to the statutory language.¹⁶⁹

B. Categories of Public Disclosure

Section 3730(e)(4)(A) strictly defines the types of public disclosures that trigger the jurisdictional bar under the Act as those "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media."¹⁷⁰ Despite the explicit language of the statute, courts have debated over the level of inclusiveness to be read into the language.¹⁷¹ In an attempt to expand the restrictions of the statute, some courts have interpreted the language to include judicial proceedings not otherwise listed.¹⁷² Conversely,

barred Wang's suit as "[only] those who 'directly or indirectly' disclose an allegation might qualify as its original source." *Id.* at 1419.

167. *Id.* at 1416-17. A bar on publicly disclosed material would cause "*qui tam* plaintiffs [to] have little choice but to waive their right to discovery for fear of disclosing information that would bar the claims for which they might wish discovery in the first place." *Id.* at 1416.

168. 931 F.2d 1493 (11th Cir. 1991). Williams worked as an attorney for the United States Air Force when he learned of alleged bidrigging by NEC Corporation on telecommunications contracts. *Id.* at 1494. Williams alerted his superiors to the fraud allegations and subsequently brought his *qui tam* action. *Id.* The United States Court of Appeals for the Eleventh Circuit disagreed with Government arguments that the *qui tam* relator must wait to file suit until the government has an opportunity to commence its own action, stating that "nothing in the False Claims Act mandates such deference." *Id.* at 1496 n.7.

169. *Id.* at 1499-1500. The Government also argued that because Williams was a government employee, his *qui tam* action violated the public disclosure language based on his "dual status" as government employee and private citizen. *Id.* at 1500 n.11. The court rejected this argument, stating that "[w]e simply cannot fathom the scenario suggested by the United States, wherein Williams-as-government-employee disclosed the information to Williams-as-private-citizen." *Id.*; see also *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990) (holding that the "public disclosure" language does not impose additional restrictions on government employees bringing *qui tam* actions), *cert. denied*, 111 S. Ct. 1312 (1991); *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1160 (S.D. Fla. 1990) (stating that a suit brought by a former government employee was not intended to be barred by "public disclosure" language).

170. 31 U.S.C. § 3730(e)(4)(A) (1988).

171. See *infra* notes 172-91 and accompanying text.

172. See, e.g., *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (holding that information disclosed during a criminal investigation was barred by the statutory language); *United States ex rel. Siller v. Becton Dickinson & Co.*, 813 F. Supp. 410, 413 (D. Md. 1993) (stating that "the term 'civil hearing' is broad enough to include complaints filed in a civil case, even if the matter does not come to full trial or otherwise involve a judicial hearing"); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1090 (C.D. Cal. 1989) (stating that the public disclosure bar operates where the government "has publicly disclosed the findings of an investigation"). One court has argued that "civil hear-

other courts that have refused to broaden the meaning of "public disclosure" have strictly adhered to the statutory language when examining the instances of public disclosure.¹⁷³

Two early cases indirectly established the underlying basis upon which later court decisions construed the statutory language to encompass other unnamed proceedings. In *United States ex rel. LaValley v. First National Bank of Boston*¹⁷⁴ the United States District Court for the District of Massachusetts assumed that a civil "proceeding" meant the same as "hearing" under the Act in ruling that a public disclosure had occurred.¹⁷⁵ The court cited a statement in *United States ex rel. Houck v. Folding Carton Administration Committee*¹⁷⁶ that treated the enumerated instances of public disclosure only as examples, and included civil hearings among those situations in

ing' has been read to 'encompass the full range of proceedings in a civil lawsuit.'" *United States ex rel. Herbert v. National Academy of Sciences*, No. 90-2568, 1992 U.S. Dist. LEXIS 14063, at *12 (D.D.C. Sept. 15, 1992) (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, No. 91-2081, slip op. at 7 (D.D.C. July 14, 1992)).

173. See, e.g., *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) (stating that equating a relator's contract work with an "administrative investigation" would "require[] a major extension of the term"); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991) (refusing to expand the scope of the statute beyond the statutory language); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1256-57 (S.D. Fla. 1989) (stating that civil litigation is probably not defined as a "hearing" under section 3730(e)(4)(A)).

174. 707 F. Supp. 1351 (D. Mass. 1988). LaValley, the relator, brought an action against First National Bank alleging that the bank had fraudulently induced the Farmer's Home Administration (FmHA) to accept a guaranteed loan of \$24.7 million. *Id.* LaValley was an investment banker seeking financial support for the project and claimed that the bank presented the FmHA false documents misrepresenting the bank's true belief that the loan would not be repaid. *Id.* at 1352-53.

175. *Id.* at 1366. LaValley argued for a narrow reading of "public disclosure" and cited the False Claims Act's legislative history. *Id.* He claimed that the legislative history suggested that "proceeding" was specifically dropped from the language of the 1986 Amendments, evidencing the intent of Congress that "public disclosure" be limited to those examples cited. *Id.* The court did not comment on LaValley's claims, ruling simply that a public disclosure had occurred. *Id.*

176. 1988 Trade Cas. (CCH) ¶ 68,176 (N.D. Ill. 1988). *Houck* concerns the disbursement of funds from a settlement fund arising from civil antitrust litigation. When excess funds were available after outstanding claims were paid, various methods of disposal for the remaining monies were debated. The reviewing court approved a plan to distribute one-half on a pro rata basis to original claimants and one-half to two or more Chicago-area law schools for research on antitrust litigation. *Houck*, who assisted claimants in filing and receiving claims from the fund, filed the *qui tam* suit alleging that the Folding Carton Administration Committee and its members as well as those who received money knowingly disbursed and received funds in violation of the original court order. *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 495-99, 503 (7th Cir. 1989), *cert. denied*, 494 U.S. 1025 (1990).

which public disclosure of materials could occur.¹⁷⁷ Using *LaValley* and *Houck* as touchstones, more recent decisions have gone beyond these cases to extend the statute's jurisdictional bar.¹⁷⁸ Relying upon the congressional reaction to the Supreme Court's ruling in *Marcus*, the United States Court of Appeals for the Third Circuit in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Insurance Co.*¹⁷⁹ found that the statutory language covered all instances of proceedings, including civil hearings.¹⁸⁰ The broad jurisdictional bar, which was created to prevent parasitic suits,¹⁸¹ has been harnessed by courts to override the competing intent of Congress that the False Claims Act encourage *qui tam* suits by private parties.¹⁸²

Other courts have been hesitant to forbid *qui tam* suits that arise from circumstances other than those enumerated in § 3730(e)(4)(A).¹⁸³ These courts reason that Congress did not intend an expansive reading of the statute and that the plain meaning of the language limits the jurisdictional bar.¹⁸⁴ The United States District Court for the Southern District of Geor-

177. *Houck*, 1988 Trade Cas. at 59,172. "[I]n its present form, the Act does not permit *qui tam* plaintiffs to bring actions based solely on open transactions publicly disclosed in, among other forums, civil proceedings and hearings." *Id.*

178. See cases cited *supra* note 172.

179. 944 F.2d 1149 (3d Cir. 1991).

180. *Id.* at 1155. "Only if the criminal 'hearing' to which subsection (e)(4)(A) refers is broad enough to cover the full range of proceedings in the course of civil, criminal, or administrative litigation would the type of lawsuit represented by *Marcus* and deemed parasitic by Congress be banned." *Id.*

181. "One of the principal goals of barring *qui tam* actions based on public disclosures is to prevent the 'parasitical' or 'copy cat' lawsuit." Kenneth D. Brody, *Recent Developments in the Area of "Qui Tam" Lawsuits*, FED. BAR NEWS & J., Dec. 1990, at 592, 595.

182. In *Prudential*, the relator argued that the legislative history of the 1986 Amendments indicated that Congress intended the "public disclosure" language to be narrowly applied because the term "hearing" replaced "proceeding," which had appeared in an earlier draft of the legislation. *Prudential*, 944 F.2d at 1156. The court disagreed, stating that "the legislative history does not reveal what Congress intended by the substitution, and the substitution of 'hearing' for 'proceeding' was part of a revision which expanded the jurisdictional bar by deleting the requirement that the disclosure be made by the government." *Id.*

183. See cases cited *supra* note 172.

184. One court prefaced its holding on the "public disclosure" language with an analysis of the legislative history of the 1986 Amendments:

Section 3730's jurisdictional edicts were part of the 1986 Amendments to the [False Claims Act]. The clear statutory policy behind the 1986 Amendments was "not only to provide the Government's law enforcers with mere [sic] effective tools, but to encourage any individual knowing of Government fraud to bring that information forward."

United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1048 (S.D. Ga. 1990) (quoting 1986 SENATE REPORT, *supra* note 2, at 5266-67). The court then stated that "Congress's use of the word 'hearing' is telling. 'Where Congress uses terms that have a settled meaning under . . . common law, a court *must* infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms.'" *Id.* at 1048-49 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981)).

gia in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield of Georgia*¹⁸⁵ declined to equate “hearing” with “proceeding” under the statute, and allowed the use of information disclosed during civil discovery.¹⁸⁶ The court based its conclusion on the fact that Congress could have included the term “proceeding” in the statutory language, or could have employed qualifying terms such as “for example” or “for instance.”¹⁸⁷ Other courts have stated indirectly that “public disclosure” is defined by and limited to the statutory examples.¹⁸⁸ In considering the ability of a government employee to file suit under the Act, the United States Court of Appeals for the First Circuit in *United States ex rel. LeBlanc v. Raytheon Co.*¹⁸⁹ held that the False Claims Act does not bar the court’s jurisdiction over disclosures other than those explicitly stated.¹⁹⁰ Rather than dissect the wording of the statute to broaden its range, the court kept a focus on the statutory

185. 755 F. Supp. 1040 (S.D. Ga. 1990).

186. *Id.* at 1049-50. *Blue Cross Blue Shield* urged the district court to find that the information learned by Stinson during the course of its litigation with Prudential should be barred under the “public disclosure of allegations or transactions in a criminal, civil, or administrative hearing” language of the statute. 31 U.S.C. § 3730(e)(4)(A) (1988); see *Blue Cross Blue Shield*, 755 F. Supp. at 1050. After reviewing both the False Claim Act’s legislative history and the plain meaning of the statutory language, the court held that “[a] literal reading of the commonly used term ‘hearing’ is not ‘demonstrably at odds’ with Congress’ [sic] overarching concern to curb government fraud tempered with a desire not to create windfalls for opportunistic litigants.” *Id.*

187. *Blue Cross Blue Shield*, 755 F. Supp. at 1050. The court remarked that “Congress easily could have said ‘proceeding’ if it meant ‘proceeding.’” *Id.*

188. See, e.g., *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-20 (9th Cir. 1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1256-57 (S.D. Fla. 1989).

189. 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991). LeBlanc observed violations of government contracts by Raytheon while working as an employee of the federal government’s Defense Contract Administrative Service. *United States ex rel. LeBlanc v. Raytheon Co.*, 729 F. Supp. 170, 171 (D. Mass.), *aff’d*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991). The district court denied LeBlanc’s *qui tam* action because LeBlanc learned of the fraud during his government employment. *Id.* at 175. “Because government employees maintain a dual status—arms of the government while at work, private citizens while not at work—a ‘public disclosure’ necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* lawsuit in his private capacity.” *Id.* The United States Court of Appeals for the First Circuit overruled the district court’s holding on public disclosure, putting forward three arguments. *LeBlanc*, 913 F.2d at 20. First, the language of § 3730(e)(4) bars both private citizens and government employees from using publicly disclosed information, but does not prevent either person from using non-disclosed information. *Id.* Second, the appeals court rejected the “schizophrenic” characterization of government employees, and emphasized the limiting language of § 3730(e)(4) over public disclosures. *Id.* Third, the filing of a *qui tam* suit is not a public disclosure in itself, as the False Claims Act requires that the action be filed under seal. *Id.*

190. *LeBlanc*, 913 F.2d at 20.

language in its entirety, effectively balancing the competing goals of the 1986 Amendments.¹⁹¹

C. Original Source

The jurisdictional bar under § 3730(e)(4)(A) incorporates an exception that allows a *qui tam* plaintiff who qualifies as an “original source” to file suit.¹⁹² The potential relator must meet two criteria to be an “original source.” First, the individual must have direct and independent knowledge of the information on which the allegations are based.¹⁹³ Second, the individual must have voluntarily provided the information to the government prior to initiating the *qui tam* suit.¹⁹⁴ The “original source” provision further evidences the dual intent of Congress to encourage private parties with information of fraud against the government to bring an action as a *qui tam* plaintiff.¹⁹⁵ As in the case of the “public disclosure” language, courts have given varying interpretations to the provision.¹⁹⁶ The difference in the judicial views stems from how each court perceives the 1986 Amendments as a retreat from the strong jurisdictional bars of the 1943 Amendments.

1. Direct and Independent Knowledge

The condition that the relator have direct and independent knowledge of the information reflects the congressional intent to bar “copycat” relators from using the False Claims Act to reap an unjust reward.¹⁹⁷ The majority of courts that have considered the “original source” requirement have adhered to a formalistic reading of the statute.¹⁹⁸ The relator must obtain “di-

191. *Id.* After listing the types of public disclosure under the False Claims Act, the court stated that the Act “does not deny jurisdiction over those actions based on disclosures other than those specified.” *Id.*

192. 31 U.S.C. § 3730(e)(4)(A) (1988).

193. *Id.* § 3730(e)(4)(B).

194. *Id.*

195. United States *ex rel.* LeBlanc v. Raytheon Co., 729 F. Supp. 170, 176 (D. Mass.), *aff’d*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1250 (S.D. Fla. 1989)

196. *See infra* notes 197-227.

197. One of the authors of the 1986 Amendments stated, “This amendment seeks to assure that a *qui tam* action based solely on public disclosures cannot be brought by an individual with no direct and independent knowledge of the information or who had not been the original source to the entity that disclosed the allegations.” 132 CONG. REC. 20536 (1986).

198. *See, e.g.*, United States *ex rel.* Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir.) (stating that the relator “must satisfy the limited exception” of the “original source” requirement), *cert. denied*, 113 S. Ct. 2962 (1993); United States *ex rel.* Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992) (holding that the requirements of the “original source” language “are plain, unambiguous and require no further scrutiny”), *cert. denied*, 113 S. Ct. 1364 (1993); United States *ex rel.* Siller v. Becton Dickinson &

rect" knowledge of the fraud without the benefit of an intermediary who introduces the information to the relator.¹⁹⁹ Similarly, courts characterize a relator's knowledge as "independent" when the information is not acquired through public disclosure or, in some instances, through the government.²⁰⁰ One court has ruled that information garnered through civil discovery failed the statute's knowledge prong because the relator obtained the documents through public disclosure and with the assistance of an intermediary.²⁰¹ Another court held that the statute barred a *qui tam* suit brought by a government employee because the employee's knowledge was not independent.²⁰² The court reasoned that as an employee of the government, the plaintiff had a duty to expose fraud, and therefore any rewards arising from such discoveries belonged to the government.²⁰³

Other courts have construed the "direct and independent knowledge" requirement to permit suits where the relator's knowledge is dependent on another party.²⁰⁴ In *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Co.*,²⁰⁵ the United States District Court for the Southern District of Florida upheld an action by a relator who developed a *qui tam* claim primarily through information obtained in civil discovery in an unrelated action.²⁰⁶ The plaintiff in *Provident Life* had taken discovery information of the fraud and combined it with his own research.²⁰⁷ The court interpreted prior decisions to allow a *qui tam* suit as long as the

Co., 813 F. Supp. 410, 412-13 (D. Md. 1993) (holding that the "[original source] bar is an attempt to forestall opportunistic *qui tam* actions based on publicly available information"); *United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 914-15 (E.D. Va. 1989) (analyzing a relator's status as an "original source" by outlining the exclusionary language of the statute).

199. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991). The *Prudential* court held that the relator was not an "original source" because the relator's knowledge of the fraud came through "the unknown Provident employee responsible for the telephone call and notation and the discovery procedure by which the memoranda were produced." *Id.*

200. Hanifin, *supra* note 5, at 594. See *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991); *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

201. *Prudential*, 944 F.2d at 1160-61.

202. *LeBlanc*, 913 F.2d at 20.

203. *Id.* "It was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer—the government." *Id.*

204. See *infra* notes 205-11 and accompanying text.

205. 721 F. Supp. 1247 (S.D. Fla. 1989).

206. *Id.* at 1258.

207. *Id.* at 1257. The *qui tam* plaintiff corresponded with an employee of the Health Care Financing Administration, the entity responsible for administering the Medicare program, and conducted research of complaints filed with the Indiana Insurance Department. *Id.* The court held that "[t]he information obtained by the Stinson firm can be characterized as 'direct.' Stinson does not seem to be a disinterested outsider and did not 'simply stumble across and

relator had not based the action solely on publicly disclosed information.²⁰⁸ The United States Court of Appeals for the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*,²⁰⁹ while declining to discuss the “original source” exception,²¹⁰ refused to ban actions by government employees who based their suits on information obtained during their government employment.²¹¹

2. Voluntary Disclosure

The statute’s requirement that the relator “voluntarily” provide the government with the information upon which the suit is based, although not explicitly stated in the legislative history, can be partially attributed to the 1943 Amendment’s bar against relators who were legally required to disclose their information.²¹² While the 1986 Amendments sought to encourage individuals to expose fraud, the “original source” language, and specifically the “voluntary disclosure” requirement, reflects this traditional jurisdictional bar.²¹³ The “voluntary” provision prevents parasitical relators from

interesting court file.’ . . . The Stinson information can also be characterized as flowing from a source ‘independent’ of the [original] litigation . . .” *Id.* at 1258 (citations omitted).

208. *Id.* at 1257 (citing *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990)). Expanding upon the notion of information that is barred under the False Claims Act, the court stated that “[p]ublication of general, non-specific information does not necessarily lead to the discovery of specific individual fraud which is the target of the *qui tam* suit.” *Id.* at 1258.

209. 931 F.2d 1493 (11th Cir. 1991).

210. *Id.* at 1501 n.14. The court’s reluctance stemmed from the Government assertion that “a government employee who brings an action based upon information he learns within the scope of his government duties can *never* qualify as an “original source.”” *Id.* The court stated that the Government argument was “simply incompatible” with the court’s holdings. *Id.* The court also cited the First Circuit’s stance on a government employee as an “original source” in *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991). After the *LeBlanc* court found that no public disclosure had occurred in the employee’s suit, the court considered the relator’s status as an “original source.” *Id.* The *Williams* court viewed the court’s action in *LeBlanc* as “one step too far. Once it found no ‘public disclosure,’ its inquiry should have ended and jurisdiction should have been acknowledged.” *Williams*, 931 F.2d at 1501 n.13.

211. *Williams*, 931 F.2d at 1501 n.14. “Such an assertion is simply incompatible with our holding that government employees are not barred from bringing *qui tam* actions based upon information acquired in the course of their government employment.” *Id.*

212. *See supra* text accompanying notes 62-64, 73-74.

213. *United States ex rel. LeBlanc v. Raytheon Co.*, 729 F. Supp. 170, 176 (D. Mass.), *aff’d*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991). “The ‘original source doctrine’ was designed to bridge Congress’ [sic] competing goals of *preventing opportunistic lawsuits* while at the same time encouraging the disclosure of information otherwise unavailable to the government.” *Id.* (emphasis added).

utilizing publicly disclosed information as an "original source" and ensures that the government is aware of claims of fraud.²¹⁴

Problems have arisen regarding the application of the "voluntary disclosure" provision to government employees. Prior to the 1986 Amendments, courts prohibited suits by government employees based on the statutory requirement that the information must not be in the possession of the government at the commencement of the suit.²¹⁵ The bar covered even those employees who would otherwise qualify as an "original source."²¹⁶ Neither the 1986 Amendments themselves nor their legislative history address the standing of government employees to sue under the Act, and courts have generally viewed this silence as an endorsement of *qui tam* suits by government employees.²¹⁷ One court has stated that only those government

214. Senator Grassley, one of the authors of the 1986 Amendments, described the "voluntarily" requirement of the "original source" language:

In the definition of "original source," the requirement that the individual "voluntarily" informed the Government . . . is meant to preclude the ability of an individual to sue under the *qui tam* section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations only because the individual was subpoenaed to come forward. However, those persons who have been contacted or questioned by the Government . . . and cooperated by providing information which later led to a public disclosure would be considered to have "voluntarily" informed the Government . . . and therefore considered eligible *qui tam* relators.

132 CONG. REC. 20536 (1986).

215. See *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984). The court in *Dean* noted that "the jurisdictional bar of [the statute] applies whenever the government has knowledge of the 'essential information upon which the suit is predicated.'" *Id.* (quoting *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980)); see also *Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978) (holding that "knowledge by the Government prior to suit bars the action, even if the plaintiff is the source of the knowledge"), *cert. denied*, 441 U.S. 943 (1979); *United States ex rel. Pettis v. Morrison-Knudsen Co.*, 577 F.2d 668, 670-71 (9th Cir. 1978) (asserting that the statutory bar of the False Claims Act "affords no crevice of ambiguity within which to nestle the exception" for a government relator with knowledge of fraud); *United States v. Pittman*, 151 F.2d 851, 852 (5th Cir. 1945) (holding that the statutory language of the False Claims Act provides a strict bar to a government relator when the government possesses the information), *cert. denied*, 328 U.S. 843 (1946); *United States ex rel. Vance v. Westinghouse Elec. Corp.*, 363 F. Supp. 1038, 1042 (W.D. Pa. 1973) (holding that "suits by informers are barred where the essential information upon which they are based is already in the hands of the government regardless of the government's source of the information").

216. *Dean*, 729 F.2d at 1103. The *Dean* court added that if the government possesses the relevant information, the bar would apply "even when the plaintiff is the source of that knowledge." *Id.*

217. H.R. REP. NO. 837, *supra* note 16, at 4. The 1943 Amendments to the False Claims Act imposed a bar on "parasitic" suits based on information in the possession of the government, and the bar functioned to restrict suits by government employees. *Id.* The 1986 Amendments "repealed the language that courts had held barred suits by government employees, but the new provisions contained no definitive statement regarding employee suits." *Id.* Courts have interpreted the relaxation of the jurisdictional bar to mean that "there is no blan-

employees charged with exposing fraud would be barred by the statute, but added that other employees may qualify under the "original source" language.²¹⁸

3. Information

In addition to the requirements of direct and independent knowledge and voluntary disclosure, one court has posited that a third requirement exists in the "original source" provision. The United States Court of Appeals for the Second Circuit in *United States ex rel. Dick v. Long Island Lighting Co.*²¹⁹ examined the language in sections 3730(e)(4)(A) and (B) and interpreted the use of "information."²²⁰ "Information" in paragraph (A), stated the court, referred to information that had been publicly disclosed, while "information" in paragraph (B), modified by "on which the allegations are based," referred to the information that served as the basis of the suit.²²¹ The more expansive definition of "information" in paragraph (B), combined with legislative statements on the "original source" language, led the court to believe that in addition to the stated requirements of direct and independent knowledge and voluntary disclosure, a *qui tam* plaintiff "must have directly or indirectly been a source to the entity that publicly disclosed the allegation on which a suit is based."²²² The court reasoned that the additional disclosure requirement supported Congress's aim of encouraging *qui tam* suits by coercing a potential relator to initiate the action before another party disclosed the information.²²³

The court's requirement that a relator must have actively participated in the public disclosure undermines the "original source" exception and the

ket exclusion of government employees as potential *qui tam* relators." *United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 912 (E.D. Va. 1989); *see also United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) (holding that "neither case law nor legislative history" support the bar on *qui tam* suits by government employees); *United States ex rel. McDowell v. McDonnell Douglas Corp.*, 755 F. Supp. 1038, 1040 (M.D. Ga. 1991) (stating that "under certain circumstances a government employee's *qui tam* action, based on information obtained during the course of her employment, may . . . fall within the subject matter jurisdiction of the court"); *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1160 (S.D. Fla. 1990) (stating that "Congress could have chosen to specifically exclude present and/or former government employees from bringing a *qui tam* action, but Congress did not").

218. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1501 n.14 (11th Cir. 1991).

219. 912 F.2d 13 (2d Cir. 1990).

220. *Id.* at 16.

221. *Id.* at 16-17.

222. *Id.* at 16.

223. *Id.* at 18. The court concluded that the extra requirement "discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time." *Id.*

intent of Congress to expand the base of qualified relators.²²⁴ Those individuals who have extensive knowledge of fraud will be excluded as a *qui tam* relator if some small portion of their information is made available to the public by another individual.²²⁵ This new disclosure rule also contradicts those court decisions that allow an individual who obtains his information through civil discovery to bring a *qui tam* suit.²²⁶ In such instances the relator has no hand in disclosing the information, either directly or indirectly. The disclosure requirement formulated by the Second Circuit in *Dick* serves to discourage individuals from researching possible evidence of fraud and retreats to the broad jurisdictional bar that the 1986 Amendments sought to alleviate.²²⁷

The judicial interpretation of the jurisdictional language in § 3730(e)(4) has resulted in an emphasis on Congress's desire to restrict abuses of *qui tam* suits at the expense of qualified *qui tam* relators. Congress intended the revised statutory language to create opportunities previously denied to private citizens with knowledge of fraud.²²⁸ While Congress did not contemplate a retreat from the historical prohibition against parasitic suits in the

224. A 1992 House of Representatives report that accompanied proposed amendments to the False Claims Act pointed to the *Dick* court's imposition of additional standards on *qui tam* relators as a source of "ambiguity" that was contrary to the original intent of Congress in the 1986 Amendments. H.R. REP. NO. 837, *supra* note 16, at 14. "The [proposed legislation] clarifies that an original source is not required to be a direct or independent source to the entity that discloses the allegations." *Id.*

225. Some courts have taken a strong position on the disclosure of a relator's information: [A]ll those who "directly or indirectly" disclose an allegation might qualify as its original source. Anyone who helped to report the allegation to either the government or the media would have "indirectly" helped to publicly disclose it. If, however, someone *republishes* an allegation that already been publicly disclosed, he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence," and not their mimics.

United States *ex rel.* Wang v. FMC Corp., 975 F.2d 1412, 1419 (9th Cir. 1992) (citations omitted); *see also* United States *ex rel.* Fine v. University of California, 821 F. Supp. 1356, 1361 (N.D. Cal. 1993) (stating that to qualify as an "original source," the *qui tam* relator "must demonstrate that his was one of the voices that led to the disclosure of the alleged fraud").

226. *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield, Inc., 755 F. Supp. 1040, 1050 (S.D. Ga. 1990); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258 (S.D. Fla. 1989).

227. *See False Claims Amendments Act of 1992: Hearings on H.R. 4563 Before the Subcomm. on Administrative Law and Governmental Relations of the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (statement of John R. Phillips, Esq.).

228. "Congressional intent [in the 1986 Amendments] was clear: it sought to expand the *qui tam* provisions to 'encourage more private enforcement suits.'" United States *ex rel.* Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908, 917 (E.D. Va. 1989) (citing 1986 SENATE REPORT, *supra* note 2, at 5288-89).

1986 Amendments,²²⁹ it failed to lay an adequate foundation on which courts could expand the scope of the False Claims Act.²³⁰ Courts have exacerbated the problem by denying qualified relators an opportunity to prosecute fraud unknown to the government, and, in the case of the court in *Dick*, have gone beyond the language of the statute to impose restrictions not envisioned by Congress.²³¹

III. CURRENT LEGISLATIVE PROPOSALS TO THE FALSE CLAIMS ACT

In early 1992, Congress introduced two bills to address problems that have arisen since the enactment of the False Claims Amendments Act of 1986.²³² One of the bills, which originated in the House of Representatives, limits the ability of a government employee to file suit under the Act, redefines the jurisdictional requirements that a relator must meet, and eases certain restrictions that courts have imposed in the wake of the 1986 Amendments.²³³ The other bill, which originated in the Senate, creates a strict ban on all *qui tam* suits brought by government employees who base their actions on information obtained in the course of their government employment.²³⁴ The Senate bill, clear in its goal, does little to alleviate more serious questions that have arisen since the enactment of the 1986 Amendments. The House bill, more attuned to the lack of a clear legislative expla-

229. The legislative history of the False Claims Amendments Act of 1986 makes clear that Congress drafted language that would not revisit parasitic suits outlawed under the 1943 Amendments. See 1986 SENATE REPORT, *supra* note 2, at 5278-82. One court commented:

It is evident from reading § 3730(e)(4) that Congress intended to bar parasitic *qui tam* suits, that is, lawsuits based on public information. By allowing a relator to collect money for his role in a *qui tam* action, the government obviously hopes to encourage private persons to report incidents of fraud against the government.

United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1159 (S.D. Fla. 1990).

230. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 163 (3d Cir. 1991) (Scirica, J., dissenting). Judge Scirica noted that "[o]ne difficulty in interpreting the 1986 amendments is that Congress was never completely clear about what kind of 'parasitic' suits it was attempting to avoid." *Id.*

231. In reviewing the judicial application of the 1986 Amendments, the House of Representatives commented that "[t]he clarifications found in [the proposed legislation] are necessary in light of a number of incorrect interpretations of the parasitic suit ban in the current Act." H.R. REP. NO. 837, *supra* note 16, at 12. The report cited the *Prudential* decision as an incorrect interpretation of the bar against suits based on public disclosures. "Where the information is obtained in a purely private proceeding . . . it is unlikely that the Government is aware of the information. In such instances, *qui tam* lawsuits should be encouraged." *Id.* at 13. The report also pointed to the *Dick* court's formulation of the additional requirement that the relator must have directly or indirectly been a source to the entity that disclosed the allegations. *Id.* at 15. The report stated that "[t]he [proposed legislation] clarifies that an original source is not required to be a direct or independent source to the entity that discloses the allegations." *Id.* at 14.

232. S. 2785, 102d Cong., 2d Sess. (1992); H.R. 4563, 102d Cong., 2d Sess. (1992).

233. H.R. REP. NO. 837, *supra* note 16, at 3.

234. S. 2785, 102d Cong., 2d Sess. § 3 (1992).

nation behind the changes in the 1986 Amendments, redrafts relevant language of the statute and goes further toward accomplishing Congress's 1986 goal of creating greater opportunities for *qui tam* relators.

A. H.R. 4563

The proposed False Claims Amendments Act of 1992, H.R. 4563, seeks primarily to prevent government employees from filing *qui tam* suits based on information learned during their government employment unless they follow strict notification guidelines.²³⁵ Differing judicial applications of the False Claims Act requirements for suits brought by government employees prompted Congress to propose the legislative amendments.²³⁶ The bill re-

235. H.R. REP. NO. 837, *supra* note 16, at 3. The bill amends § 3730(b)(4) by adding a section that reads:

Before the expiration of the 60-day period or any extensions obtained under [section 3730(b)](3), the Government may move to dismiss from the action the person bringing the action if such person learned of the information that underlies the alleged violation of section 3729 that is the basis of the action, in the course of the person's employment by the United States, and the following has not occurred:

(i) In a case in which the employing agency has an Inspector General, such person, before bringing the action—

(I) disclosed in writing substantially all material evidence and information that relates to the alleged violation and that the person possessed, to such Inspector General, and

(II) notified in writing the person's supervisor and the Attorney General of the disclosure under subclause (I).

(ii) In a case in which the employing agency does not have an Inspector General, such person, before bringing the action—

(I) disclosed in writing substantially all material evidence and information that relates to the alleged violation and that the person possessed, to the Attorney General, and

(II) notified in writing the person's supervisor of the disclosure under subclause (I).

(iii) 12 months have elapsed since the disclosure of the information and notification under either clause (i) or (ii) were made and the Attorney General has not filed an action based on the information. Prior to the expiration of such 12-month period and upon notice to the person who has disclosed information and provided notice under either clause (i) or (ii), the Attorney General may file a motion seeking an extension of such 12-month period. Such 12-month period may be extended by a court for an additional period of not more than 12 months upon a showing by the Government that the additional period is necessary for the Government to decide whether or not to file such action. Any such motion may be filed *in camera* and may be supported by affidavits or other submissions *in camera*.

H.R. 4563, 102d Cong., 2d Sess. § 2 (1992).

236. H.R. REP. NO. 837, *supra* note 16, at 6-7. The report cites decisions in *LeBlanc*, *Williams* and *CAC-Ramsay* as evidence of the differing judicial interpretations of the False Claims Act. The report states:

In sum, the courts have rendered at least four different interpretations of the application of Section 3730(e)(4) to federal employee suits: (1) permitting all or nearly all federal employee suits; (2) prohibiting all such suits; (3) permitting them only if the

quires that the employee disclose the information at least twelve months prior to the filing of any *qui tam* suit.²³⁷ Additionally, the statutory revisions obligate the employee to provide the Inspector General of the employee's agency with all relevant facts regarding the fraud, and to submit written notice of the disclosure to the Attorney General and the employee's supervisor.²³⁸ The government then has twelve months to bring an action against the offending party, and upon the expiration of the twelve-month period, a government employee may maintain a *qui tam* suit by demonstrating compliance with the disclosure requirements.²³⁹

Despite its concentration on suits by government employees, H.R. 4563 addresses the judicial dissension over the jurisdictional limits created by the 1986 Amendments.²⁴⁰ The bill streamlines the jurisdictional bar language in § 3730(e)(4)(A) to prohibit suits based entirely on information disclosed to the public through reports in the news media, as well as through documents either created by the government, filed in a lawsuit in which the government is a party, or relating to an ongoing government investigation.²⁴¹ The bill retains the "original source" exception and clarifies it to allow a party to initiate a suits if he has knowledge of "material facts and allegations" independent of the restricted sources and has voluntarily disclosed the information to the government.²⁴² The bill adds to the current "original source"

federal employee relies on information he discovered but which he was not obliged to uncover or report; and (4) permitting federal source suits even if the employee relied on information he did not discover but acquired from government records.

Id. at 7.

237. H.R. 4563, 102d Cong., 2d Sess. § 2 (1992).

238. *Id.*

239. *Id.* The proposed legislative changes do not affect the power of the government to intervene in the *qui tam* action at a later date. See 31 U.S.C. § 3730(c)(3) (1988).

240. H.R. REP. NO. 837, *supra* note 16, at 7; see *supra* note 233 and accompanying text.

241. H.R. 4563, 102d Cong., 2d Sess. § 3 (1992). As amended, section 3730(e)(4) would read:

(A) No court shall have jurisdiction over an action brought under subsection (B) in which all of the material facts and allegations are obtained from a new media report or reports, or a disclosure to the general public of a document or documents—

(i) created by the Federal Government;

(ii) filed in a lawsuit to which the Federal Government is a party; or

(iii) relating to an open and active investigation by the Federal Government; unless the person bringing the action is an original source of such facts and allegations.

(B) For purposes of this paragraph, an individual is an "original source" of material facts and allegations if such individual has knowledge, independent from the sources listed in subparagraph (A), of such facts and allegations and has voluntarily provided them to the government. The person bringing the action shall also be considered an original source of any material facts or allegations developed as a result of information provided to the Government by that person.

Id.

242. *Id.*

language the assurance that a party will not be barred under the statute in instances where the government develops the information disclosed by the individual to construct a larger case against the fraudulent party.²⁴³

In a report on the bill, Congress reasserts that the False Claims Act is intended to bar only those suits where the government was actively pursuing the prosecution of fraud.²⁴⁴ The 1986 Amendments sought to encourage suits where the government had no knowledge of the fraud or was aware of the fraud but chose not to act.²⁴⁵ Because courts interpret the 1986 Amendments to impose a rigid jurisdictional bar on otherwise valid suits, Congress drafted the proposed language of the House bill to reestablish the Act's primary intent.²⁴⁶ The proposed bill seeks to express more clearly the extent of the Act's jurisdictional boundaries, which was poorly developed in the 1986 Amendments,²⁴⁷ and to restore the Act's primary function as a mechanism for exposing fraud unknown to the government.²⁴⁸

B. S. 2785

The Senate counterpart to the House bill, S. 2785, contains a more limited purpose. The bill adds language to the existing False Claims statute to prohibit *qui tam* suits brought by government employees who base their suit on information obtained during the course of their government employment.²⁴⁹

243. *Id.*

244. H.R. REP. NO. 837, *supra* note 16, at 12. The report cites the *Dean* decision as an example of the overextension of the ban by the courts, stating that "[t]hese results are contrary to the basic purpose of the jurisdictional ban." *Id.*

245. The primary purpose of the *qui tam* action is to provide the government with an additional weapon to combat fraud unknown or undiscovered by its own sources. *See* 1986 SENATE REPORT, *supra* note 2, at 5266-67. The 1986 Amendments contained a secondary goal in ensuring that those who committed fraud would be prosecuted under the False Claims Act. One of the 1986 Amendments' authors stated:

[T]here may be many cases where evidence is somewhere in the hands of some Government official, even if the Government does not have the evidence in organized form or even knows it has the information. [The 1986 Amendments] allow[] the court to dismiss a citizen's action brought upon evidence previously disclosed under certain circumstances, *but also provide[] that the court shall permit the suit if the Government was aware of the information for 6 months and took no action.*

132 CONG. REC. 22340 (emphasis added); *see also* H.R. REP. NO. 660, 99th Cong., 2d Sess. 22-23 (1986).

246. *See* H.R. REP. NO. 837, *supra* note 16, at 14. The House report states that "the amendments . . . will increase incentives for bringing *qui tam* actions and remove barriers against their more widespread use." *Id.*

247. *See supra* notes 223, 240 and accompanying text.

248. *See* H.R. REP. NO. 837, *supra* note 16, at 10. "Where the Government is not even aware of the information, or where it has the information in its possession but is declining to pursue any claim, *qui tam* suits should not be barred." *Id.* at 12.

249. The proposed revisions states: "No court shall have jurisdiction over an action under subsection (b) of this section that is based, in whole or in part, upon information obtained in the course or scope of government employment." S. 2785, 102d Cong., 2d Sess. § 3 (1992).

The Senate developed the bill in reaction to the *Williams*²⁵⁰ and *Hagood*²⁵¹ decisions, which both allowed government employee relators to maintain successful suits using information learned through their employment.²⁵² No additional substantive changes are made to the existing statutory language.

IV. THE 1992 AMENDMENTS TO THE FALSE CLAIMS ACT: CREATING SHORT-TERM SOLUTIONS FOR LONG-TERM PROBLEMS

The proposed legislative amendments to the False Claims Act take a reactive stance to the problems that have arisen since the 1986 Amendments rather than addressing more fundamental and substantive difficulties of the Act. Proposed changes to the qualifying language of § 3730(e)(4) and restrictions imposed on government employees focus on areas of judicial dissonance created by the 1986 Amendments. But the resurrection of the False Claims Act in 1986 altered the role of the private citizen in combatting fraud against the federal government by granting more prosecutorial power to the *qui tam* relator.²⁵³ The 1986 Amendments restructured the False Claims Act to create incentives for private citizens that neither Congress nor the federal government could foresee, and the proposed legislation fails to respond to the changes in the relationship between the relator and the federal government.

Qui tam suits brought by government employees who use information learned during the course of their government employment have been a major impetus to the revisions of the False Claims Act.²⁵⁴ Suits by government employees under the False Claims Act, which have been widely litigated and generally upheld, have encountered strong resistance from the federal government.²⁵⁵ Both the House and Senate bills reflect the views of the federal

250. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493 (11th Cir. 1991).

251. United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991).

252. Senator Thurmond, sponsor of the bill, remarked that "[t]he problem that this bill addresses is that Federal courts have determined that Government employees may also file 'qui tam' suits and share in the recovery." 138 CONG. REC. S7217 (daily ed. May 21, 1992) (statement of Sen. Thurmond).

253. See *infra* notes 275-82 and accompanying text.

254. The House of Representatives proposed H.R. 4563 "to amend the False Claims Act to provide certain limitations on Federal employees filing qui tam actions." H.R. REP. NO. 837, *supra* note 16, at 1. The Senate bill seeks to "correct[] several Federal court decisions which have held that the False Claims Act permits Government employees to file Government fraud law suits for a personal reward of up to 30 percent of the Government's recovery." 138 CONG. REC. S7217 (daily ed. May 21, 1992) (statement of Sen. Thurmond).

255. See *Hagood*, 929 F.2d at 1417; United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1494 (11th Cir. 1991); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1159 (S.D. Fla. 1990). The argument of the Federal Government in *Hagood* to dismiss Hagood as relator is typical of the government's stance in such suits:

government in opposition to government employees as *qui tam* relators,²⁵⁶ and impose severe restrictions on suits initiated by government employees under the Act.²⁵⁷ The bills have the practical effect of eviscerating the potential of the government employee as guardian against fraud and reducing the incentive to pursue false claims.²⁵⁸

Apart from the proposed changes to the Act affecting government employees, the House bill addresses practical concerns associated with *qui tam* suits. H.R. 4563 attempts to alleviate adverse judicial decisions on public disclosures under the Act by reasserting that the jurisdictional bar of § 3730 applies to only two types of actions: public disclosures through the news media or through the release to the general public of documents created either by the government, relating to an open and active government investigation, or filed in a lawsuit to which the government is a party.²⁵⁹ The bill is directed at decisions such as *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Insurance Co.*,²⁶⁰ in which the court barred the relator's suit because the information was derived from a "civil hearing."²⁶¹ H.R. 4563 would permit the suit because the information upon which the

The United States argues that when Hagood became involved in preparation of the disputed contract he was engaged in an "administrative investigation," so that the words of the statutory exclusion [of § 3730(e)(4)] are met. The United States further argues that the "public disclosure" required by the statute occurred when Hagood as a government employee "disclosed" to himself as a member of the public the information on which he based his suit.

Hagood, 929 F.2d at 1419.

256. The House report summarizes the testimony of government witness against *qui tam* suits by government employees:

They said that permitting such suits undermined the incentive for such employees to report all evidence of fraud to responsible government officials; that there were numerous avenues to encourage such reports; and that government employee cases do not add to the Government's knowledge of illegal behavior since the employees' information can be considered to be already in the hands of the Government under principles of agency. They argued that current employees of the Government would compete in a race to the courthouse, undermine government investigations that were not yet ripe, and obtain compensation in cases that the Government was pursuing with vigor.

H.R. REP. NO. 837, *supra* note 16, at 8-9.

257. See *supra* notes 236-39, 249-52 and accompanying text.

258. The House bill requires that the employee screen all potential suits with an inspector general or other government official, and then imposes a twelve-month waiting period on the employee to file suit. H.R. 4563 at § 2. The Senate bill creates a strict jurisdictional bar that prohibits all suits based on information learned during the course of government employment. S. 2785 at § 3.

259. H.R. 4563 at § 3. The House report states that the purpose of the Act "is to prohibit *qui tam* lawsuits only in those instances where it is clear that the Government is already pursuing a proceeding based on the fraud in questions." H.R. REP. NO. 837, *supra* note 16, at 12.

260. 944 F.2d 1149 (3d Cir. 1991).

261. *Id.* at 1156-57.

relator based his suit was not known to the general public, nor was the government a party to the suit from which the relator obtained the information.²⁶² H.R. 4563 specifically targets an overly restrictive reading of the jurisdictional bar so as to encourage private parties to expose fraud otherwise unknown to the government.²⁶³

The bill revises the "original source" language to eliminate confusion over additional court-imposed requirements that the relator must meet to gain standing under the Act.²⁶⁴ The House report on H.R. 4563 emphasizes that a court will consider the "original source" exception only when the information upon which the suit is based falls within the prohibited categories of § 3730(e)(4)(A).²⁶⁵ The revised statute would no longer require that the relator have "direct and independent knowledge" of the false claims, instead mandating that the suit not be parasitic.²⁶⁶ The statute consistently employs the term "material facts and allegations" to prevent a requirement similar to the one imposed by the court in *Dick*²⁶⁷ that the relator have directly or indirectly been a source to the entity that disclosed the information.²⁶⁸

The revisions to the "public disclosure" and "original source" language do not cure all difficulties arising from application of the False Claims Act. The proposed language of H.R. 4563 revisits old problems associated with *qui tam* suits under the Act. The requirement that the jurisdictional bar of § 3730(e)(4)(A) apply to actions in which "all material facts and allegations"²⁶⁹ upon prohibited sources creates the opportunity for uneven judicial interpretation. The bill would apparently authorize an action by a relator who begins with publicly disclosed information and supplements it with other facts and allegations.²⁷⁰ The result could be the statutory authorization of *qui tam* suits that closely resemble the parasitic suits upheld under *United States ex rel. Marcus v. Hess*²⁷¹ and banned under the 1943 Amend-

262. *Id.* at 1151-52.

263. "Where the information is obtained in a purely private proceeding . . . it is unlikely that the Government is aware of the information. In such circumstances, *qui tam* lawsuits should be encouraged." H.R. REP. NO. 837, *supra* note 16, at 13.

264. *Id.* at 14-15.

265. "[T]he question of whether the relator is an 'original source' arises only after it has been determined that the case is otherwise parasitic under section 3730(3)(4)." *Id.* at 14

266. *Id.*

267. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990).

268. H.R. 4563 at § 3. The House report states that the proposed language is aimed at "eliminating any textual difference that might be inferred from the distinction between 'allegations or transactions' and 'information.'" H.R. REP. NO. 837, *supra* note 16, at 14.

269. H.R. 4563 at § 3.

270. The House report states that "[a] False Claims action which is developed from 'facts' derived from public sources, such as documents obtained through Freedom of Information Act requests, is not a 'parasitic lawsuit' that this provision is intended to bar." H.R. REP. NO. 837, *supra* note 16, at 13.

271. 317 U.S. 537 (1943).

ments.²⁷² Second, the House bill provides the federal government with a potential escape mechanism for documents "relating to an open and active investigation by the government."²⁷³ For example, in grand jury investigations, during which the government withholds information from the general public, the *qui tam* relator may not be cognizant of active government investigations on false claims and later find that the suit is barred because the information upon which the suit is based is a "public disclosure" under the Act.²⁷⁴

The proposed House bill does include measures that address to a limited degree tensions underlying the False Claims Act that have developed as a result of the 1986 Amendments.²⁷⁵ Throughout the statute's history there has been the need to balance the right of the federal government to retain sufficient power to prosecute fraud successfully against the need to encourage the private citizen to act as a surrogate of the federal government to locate fraud.²⁷⁶ The 1986 Amendments, which lowered the standards to bring a suit, inadvertently shifted the balance in favor of the private relator.²⁷⁷ In amending the Act in 1986, Congress created a catalyst for an

272. In the *Marcus* case, "[t]he government argued that the informer's *qui tam* action should be barred because he brought no information of his own to the suit." *United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 916 (E.D. Va. 1989). Congress responded by amending the False Claims Act to bar suits based on information in possession of the government. False Claims Act, Pub. L. No. 78-213, 57 Stat. 608-09 (1943). The 1986 Amendments eased the restrictions by incorporating four specific exclusions, including the "original source" language. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (1986). The amendments proposed in H.R. 4563 would allow the relator to base a suit on publicly disclosed information as long as the federal government is not a source. *See* H.R. 4563 at § 3.

273. H.R. 4563 at § 3.

274. A statement in the House report reinforces the probability that a *qui tam* relator's action may be preempted by an ongoing government action:

Special note should be taken that the [Judiciary] Committee intends the bar on suits based on disclosure to the general public of a document or documents "relating to an open and active investigation by the Federal Government" to be strictly construed. . . . Only where the document that is the basis of the suit is disclosed to the general public from an investigation that is part of a good faith effort to bring about a prosecution of the Government's claim in the near future should a suit based on such a disclosure be barred.

H.R. REP. NO. 837, *supra* note 16, at 13.

275. *See infra* notes 276-82 and accompanying text.

276. The legislative history of the 1986 Amendments notes that Congress intended to encourage an increased number of *qui tam* suits by private relators but sought to ensure that the federal government would not encounter interference in ongoing criminal investigations. 1986 SENATE REPORT, *supra* note 2, at 5288-89. "While the [Judiciary] Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters." *Id.* at 5289.

277. *See, e.g., United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield, Inc.* 755 F. Supp. 1040 (S.D. Ga. 1990) (interpreting the False Claims Act to

increased number of suits by private citizens who employ the *qui tam* statute as a device for monetary gain or revenge against an employer.²⁷⁸ The result has been the creation of a class of private "attorneys general" who determine which false claims will be pursued.²⁷⁹ The increase in *qui tam* actions has strained the resources of the federal government,²⁸⁰ and forced the Justice Department to take a reactive posture to screen the suits in deciding whether to intervene, rather than focusing on its own investigations of fraud.²⁸¹ The proposed House bill restores more discretionary power to the federal government, but *qui tam* suits under the False Claims Act remain "tools of the

allow use of information learned during civil discovery as the basis of a *qui tam* suit); *United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989) (allowing a *qui tam* suit brought by a government employee).

278. Some commentators have remarked that the 1986 Amendments have "created a modern class of bounty hunters, made up largely of disgruntled or well-meaning but ill-informed employees There is no question that over the last few years more and more employees have used the law to point the finger at their employers." Richard W. Stevenson, *Workers Who Turn In Bosses Use Law to Seek Big Rewards*, N.Y. TIMES, July 10, 1989, at A1, C3. Another commentator called the False Claims Act "nothing but a treasure chest for unthinking scoundrels of the defense industry." Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46.

279. The 1986 Amendments, because of relaxed jurisdictional requirements and filing procedures, allow the private relator a greater level of discretion in proceeding with a claim. Stevenson, *supra* note 278, at C3. One commentator noted that "[t]here is something basically wrong about having private individuals operating their own 'off-the-shelf' private Justice Departments." France, *supra* note 278, at 46.

280. In the wake of the 1986 Amendments, 33 suits were filed under the Act in fiscal year (FY) 1987, 60 suits in FY 1988, 93 suits in FY 1989, and in excess of 100 in FY 1990. *Hearings*, *supra* note 16, at 3. By 1990, the number of Justice Department attorneys working on *qui tam* suits had grown from 29 to 42, spending approximately 11,000 hours in a six-month period. *Id.* at 4-5.

281. Many members of the Justice Department believe that the 1986 Amendments "intrude[] on the department's ability to set its own investigative priorities and that [the 1986 Amendments] force[] the department to spend considerable time investigating groundless claims." Stevenson, *supra* note 278, at C3. Stuart M. Gerson, an Assistant Attorney General at the Justice Department, stated:

One problematic aspect of *qui tam* litigation is that the Executive Branch no longer is exclusively able to set the priorities for its investigations. Upon receiving a *qui tam* complaint we ask for a recommendation from the affected agency and this will usually require an investigation. Because of the statutory deadlines on the government's decisions, managers of agency investigative resources have lost flexibility in deciding which investigations should be conducted and in what order.

Likewise, we had always thought that the government's right to investigate after a *qui tam* complaint was filed was for the government's benefit, to aid in its decision on whether to proceed with the case or let the relator proceed, and to help determine how extensive an investigation to conduct. Accordingly, we believed the scope and nature of such investigation was within the discretion of the Department.

Hearings, *supra* note 16, at 7-8.

private litigant" rather than a "weapon in the federal government's arsenal in the fight against fraud."²⁸²

The Senate bill, reacting against judicial decisions that have generally supported the standing of government employees under the False Claims Act as *qui tam* relators, ignores the majority of problems that have arisen since the 1986 Amendments. Documents accompanying the bill stress the detrimental impact that suits by government employees have on the federal government's efforts to combat fraud.²⁸³ As reviewing courts have noted, government employees do not possess split personalities, half government employee and half public citizen.²⁸⁴ If the government refuses to act on evidence of false claims known by a government employee, even if learned during the course of employment, the employee should be entitled to proceed in the initiation of a *qui tam* suit under the Act. H.R. 4563's twelve-month statutory restriction on suits better addresses the rights of the government employee as it ensures that the federal government will have the primary opportunity to prosecute the wrongdoer.²⁸⁵

V. CONCLUSION

The False Claims Amendments Act of 1986 attempted to achieve the dual goals of retaining traditional government controls on *qui tam* actions and

282. One of the major complaints of government attorneys is the six-month period in which the government must decide to intervene or allow the relator to proceed. *Hearings, supra* note 16, at 5-6. H.R. 4563 imposes a one year waiting period on government employees bringing suit under the Act and allows the government to seek a twelve-month extension upon good showing. H.R. 4563 at § 2. The bill, however, does not grant the government the ability to delay judicial proceedings instituted by non-government employees.

283. Senator Thurmond, author of S. 1562, stated:

Clearly, Government employees who fortuitously happen to be working on fraud cases and manage to rush to the courthouse first, should not be permitted to divert millions of dollars from the Treasury for their own personal gain. When the Congress amended the False Claims Act in 1986, it surely did not intend to give Government employees this type of windfall for performing their Government jobs.

138 CONG. REC. S7217 (daily ed. May 21, 1992) (statement of Sen. Thurmond).

284. The federal government has argued against allowing *qui tam* suits by government employees on the theory that a public disclosure of information occurs when a government employee files suit under the Act. See *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 1312 (1991). The Ninth Circuit Court of Appeals responded:

The notion that we should subdivide Hagood into his governmental self and his non-governmental self is too metaphysical a contention for the interpretation of a plain congressional enactment. Hagood does not base his suit on any public disclosure made to him or to anyone else. He bases his suit on information that he acquired in preparing the contract; the information was not publicly disclosed.

Hagood, 929 F.2d at 1419.

285. H.R. 4563 at § 2.

encouraging private citizens to expose cases of fraud unknown to the government. Federal courts applying the post-1986 False Claims Act have deviated from the intent of Congress by excluding qualified relators to bring *qui tam* suits while allowing certain actions and relators previously forbidden under the Act. Rather than create broader opportunities under the False Claims Act, the 1986 Amendments have generated dissension and statutory revision by the federal courts.

The need for legislative revision to the False Claims Act is crucial for its effective implementation to yoke the assistance of private citizens to counter fraud against the government. The proposed House bill approaches the problem by revising relevant language, which should give clearer guidance to federal courts in handling *qui tam* suits under the False Claims Act. The proposed amendments fail, however, to restore adequate control to the federal government to ensure that *qui tam* actions adhere to the original intent of Congress. Congress must act to announce clear legislative guidelines of the False Claims Act that emphasize the mutual goal of the federal government and the private relator in prosecuting government fraud.

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