

July 2015

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Recommended Citation

Oparil, Richard J. (1989) "The Coming Impact of the Amended False Claims Act," *Akron Law Review*: Vol. 22 : Iss. 4, Article 3.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol22/iss4/3>

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Oparil: The Coming Impact of the Amended False Claims Act
**THE COMING IMPACT OF THE AMENDED
FALSE CLAIMS ACT**

by

RICHARD J. OPARIL*

INTRODUCTION

Fraud upon the federal government is not a new phenomenon. Individuals have long sought to take advantage of government programs and purchasing requirements.¹ However, in recent times, the number of incidents of government fraud have been increasing.² The Pentagon contract fraud scandal³ may prove to have cost the federal treasury millions, if not billions, of dollars in unnecessary expenditures--at a time when the budget deficit is at an all time high.

However, in 1986, Congress enacted, and the President signed, legislation designed to strengthen one of the primary weapons in the fight against fraud. The False Claims Act ("FCA")⁴ allows the government or private "qui tam" plaintiffs⁶ to bring suits in federal courts to recover on "false claims"⁶ which were submitted for payment. The Amendment will allow a wider range of individuals to act as plaintiffs and generally encourages the filing of FCA complaints. Indeed, one business publication has written about the FCA suits being filed as a result of the 1986 Amendment, and the fact that at least one plaintiff's counsel is specializing in the area.⁷ The impact of such lawsuits is already being felt. For example, after a FCA

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¹ See generally False Claims Reform Act of 1985, S. REP. No. 345, 99th Cong., 2nd Sess., reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5266, (hereinafter S. REP.). See also *Federal Securities Laws and Defense Contracting: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. (1985).

² S. REP., *supra* note 1, at 2-8.

³ See *infra* note 17.

⁴ The amended version of the civil False Claims Act is codified at 31 U.S.C.A. § 3729-3733 (West Supp. 1988). The prior version of the Act was codified at 31 U.S.C. § 3729-3731 (1982). There is also a criminal False Claims Act which provides that "[w]hoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than \$10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 287 (1982). This article will primarily discuss the civil statute.

⁵ "A *qui tam* action is one in which the plaintiff sues for himself and on behalf of the government to recover a penalty under a statute which provides that part of the penalty is awarded to the party bringing the suit and the remainder of the penalty is awarded to the government." United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1102 n.1 (7th Cir. 1984). See also United States *ex rel.* Vance v. Westinghouse Electric Corp., 363 F. Supp. 1038, 1040 n.1 (W.D. Pa. 1973).

⁶ See discussion *infra* at notes 30 to 49 and accompanying text.

⁷ "Stealth" Eludes Radar, but not the Scrutiny of Litigating Mr. Hafif, Wall St. J., May 12, 1988, at 1, col. 1.

suit was filed against Northrop Corporation, the primary contractor for the Stealth bomber, one congressional committee cut the budget for the program and the company is under investigation.⁸

The strengthened FCA may have additional impact on how government paid business is conducted. For example, one of the first suits filed after the FCA was amended alleged that a doctor billed the Medicare program for surgery that was either not performed or was unnecessary.⁹ An article discussing the suit noted that the private plaintiff could receive up to \$1.5 million if the action is successful.¹⁰ The publicity surrounding these cases, including the potential rewards for plaintiffs and counsel (by way of attorneys fees)¹¹ will clearly result in the filing of such lawsuits. As a result, individuals and corporations who deal with the government will have to take greater steps to protect against the increased possibility of liability under the FCA.

This article will first generally describe the background of the FCA and the 1986 Amendment. It will then outline the substantive and procedural areas changed by the Amendment and discuss the manner in which those changes may lead to an increased utilization of the FCA.

PURPOSE OF THE FCA AND THE 1986 AMENDMENT

The FCA is designed to combat government fraud and corruption.¹² The original version of the FCA was enacted in 1863 because of rampant fraud in civil war defense contracts.¹³ “[T]his statute has been used more than any other in defending the [f]ederal treasury against unscrupulous contractors and grantees.”¹⁴ However, in the 1980s, there was concern that the FCA had not been effective as it might have been in rooting out fraudulent conduct involving government contracts and payments.¹⁵ Indeed, the legislative history of the 1986 Amendment reflects this

⁸ *Id.*

⁹ See generally Complaint, United States *ex rel.* Taxpayers Against Fraud v. Scripps Clinic Medical Group, No. 87-2698 (C.D. Cal. filed Apr. 29, 1987).

¹⁰ *Doctor May Profit in Fraud Suit Against Colleague*, New York Times, Sept. 10, 1987, at A23, col. 1.

¹¹ See *supra* note 7.

¹² See generally S. REP., *supra* note 1, at 2-8.

¹³ *Id.* at 8. The legislation was signed into law by President Lincoln. Act of Mar. 2, 1863, ch. 67 § 3, 12 Stat. 698.

¹⁴ S. REP., *supra* note 1, at 4. “Although the Government many also pursue common law contract remedies, the False Claims Act is a much more powerful tool in deterring fraud.” *Id.* The government does have various other statutory tools available to combat fraud against the government. For example, 18 U.S.C. § 1001 (1982) prohibits the making of false statements to government agencies. See generally, Note, *Judicial Reluctance to Enforce the Federal False Statements Statute in Investigatory Situations*, 51 FORDHAM L. REV. 515 (1982). The Program Fraud Act, 31 U.S.C.A. § 3801-12 (West Supp. 1988), provides a system for imposing civil penalties for submitting false claims or statements through administrative adjudications. For a brief analysis of this Act, see Scheininger and Landfair, *New Statute Assists in Pursuit of Fraud, But at What Cost?*, Legal Times, Aug. 17, 1987, at 16-17.

¹⁵ The Senate Report noted that since the FCA’s last major amendment in 1943, several court rulings have limited the statute’s effectiveness. S. REP., *supra* note 1, at 4.

deep concern:

Evidence of fraud in Government programs and procurement is on a steady rise. In 1984, the Department of Defense conducted 2,311 fraud investigations, up 30 percent from 1982. Similarly, the Department of Health and Human Services has nearly tripled the number of entitlement program fraud cases referred for prosecution over the past 3 years.

Detected fraud is, of course, an imprecise measure of how much actual fraud exists. The General Accounting Office in a 1981 study found that "most fraud goes undetected." Of the fraud that is detected, the study states, the Government prosecutes and recovers its money in only a small percentage of cases.

Fraud permeates generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs. While fraud is obviously not limited to any one Government agency, defense procurement fraud has received heightened attention over the past few years. 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. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors . . . have been convicted of criminal offenses while another . . . has been indicted and awaits trial.¹⁶

Of course, all of this concern was expressed two years before the huge Pentagon defense contractor scandal was revealed.¹⁷ The 1986 Amendment was designed to make the FCA a more effective weapon against such activity by, *inter alia*, correcting restrictive judicial interpretations of the standard of liability, burden of proof, and *qui tam* jurisdiction.¹⁸

Because of this concern with fraud,¹⁹ Senators Charles Grassley, Dennis DeConcini and Carl Levin introduced The False Claims Reform Act (S. 1562).²⁰ The

¹⁶ *Id.* at 2-3 (footnotes omitted).

¹⁷ See, e.g., *Another Teapot Dome Brewing*, Wash. Post, June 17, 1988, at A2; *Contracts Scramble that Spawned a Scandal*, Financial Times, June 22, 1988, § I, at 4; *Payoffs at the Pentagon*, Newsweek, June 27, 1988, at 3.

¹⁸ *Id.* at 4.

¹⁹ See *supra* note 16 and accompanying text.

²⁰ S. 1562, 99th Cong. 1st Sess. (1985). In introducing S. 1562, Senator Grassley said: "Current law puts the Government at a critical disadvantage in fraud cases. Contractors have us over a barrel. Our choice is inexorably clear. If we like being over a barrel, I would suggest we leave the law the way it is and instead grin and bear continued rapes and pillages of the Treasury. The alternative is true reform that shifts the advantage back to the Government where it belongs, and deal with fraud as those who elect us would expect." 131 Cong. Rec. 22322 (Aug. 1, 1985).

bill was largely based on legislation proposed by the Department of Justice in 1979 during the Carter administration and again in 1985 as part of the Department's Anti-Fraud Enforcement Package.²¹

Subcommittee hearings were held on the proposed amendments in 1985.²² The bill received support from public interest group representative, whistleblowers, and qui tam plaintiffs.²³ Justice Department officials also generally supported the proposal, but expressed some concern regarding the broadness of the qui tam provisions. The subcommittee unanimously reported out a revised bill on November 7, 1985.²⁴ On December 14, the full Senate Judiciary Committee approved an amended version of S. 1562.²⁵ On August 11, 1986, the committee version was passed by the Senate.²⁶ The House of Representatives then passed a companion version of the bill.²⁷ On October 3, the Senate agreed to the House bill, with certain amendments.²⁸ Final approval was given by the House on October 7,²⁹ and President Reagan signed the legislation on October 27, 1986.

There are several specific issues which the Amendment addressed. Some of

²¹ S. REP., *supra* note 1, at 13. S. 1562 was also modeled after a bill sponsored by Senator DeConcini (S. 1981, 99th Cong., 1st Sess.). That bill was approved in 1980 by the Senate Judiciary Committee, but was never considered by the Senate.

²² *False Claims Reform Act: Hearings on S. 1562 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985).

²³ See generally *id.*

²⁴ S. REP., *supra* note 1, at 14. The revised bill looked more like the Justice Department proposal. It included revised language regarding scienter ("reason to know"), granting the ability to litigate counterclaims based on the FCA in the U.S. Court of Claims, subjecting military employees to FCA liability, making persons liable for material misrepresentations to avoid paying money to the government ("reverse false claims"), prejudgment attachment provisions, etc. S. REP., *supra* note 1, at 14-15.

²⁵ The revisions concerned removing an amendment to Fed. R. Crim. P. 6(e) regarding access to grand jury information, redefining constructive knowledge, preventing whistleblower protections from being abused, and allowing federal district courts to determine non-Justice Department agency access to Civil Investigative Demand (CID) information. *Id.* at 17.

²⁶ 132 Cong. Rec. S11238-50 (daily ed. Aug. 11, 1986).

²⁷ 132 Cong. Rec. H6474-88 (daily ed. Sept. 9, 1986).

²⁸ 132 Cong. Rec. S15054-64 (daily ed. Oct. 3, 1986). The Senate version made clear that a qui tam plaintiff could, with certain limitations, continue to participate in the action even if it was taken over by the government. *Id.* at S15059-60. Senator Grassley described the impact of the House change:

Upon a showing by the Government that unrestricted participation during either an administrative or judicial proceeding of a qui tam would interfere with or unduly delay the action, the court may, in its discretion, impose limitations on the qui tam's participation. Upon a showing by the defendant that the action would be for purposes of harassment or would cause undue burden or unnecessary expense, the court may similarly limit the qui tam's participation. Additionally, an administrative law judge has great discretion in an administrative proceeding to consider the cause of action in an expeditious fashion, and the legislation contemplates that administrative proceedings should be conducted with a minimum of undue delay or interference by qui tam relators.

Id. at S15064. For a discussion of this provision, see *infra* note 171.

²⁹ 132 Cong. Rec. H9382-89 (daily ed. Oct. 7, 1986). The final version of the legislation contained compromised of the differences in the versions of the bills originally passed by both houses. First, a provision allowing the recovery of consequential damages was deleted. The award of treble damages was authorized. Double damages were authorized where the defendant voluntarily came forward, disclosed the false claim and cooperated with the government. In addition, Senate amendments allowed a qui tam plaintiff to participate in cases where the government has entered the action, but limited their role. *Id.* at H9388.

those areas will be discussed in the next section.

SUBSTANTIVE AREAS ADDRESSED BY THE 1986 AMENDMENT

The Meaning of "Claim"

One issue, perhaps resolved by the 1986 Amendment, is what constitutes a "claim" which gives rise to a FCA action. The FCA "was not designed to reach every kind of fraud practiced on the [g]overnment."³⁰ The Supreme Court, nevertheless, has held that the term "claim" should be broadly construed.³¹

In *United States v. Neifert-White Co.*³² the United States brought an action against a grain storage bin dealer who allegedly overstated a purchase price to induce the Commodity Credit Corporation (CCC) to extend loans to its customers. The dealer's false invoices were submitted to the CCC together with the loan applications. The loans were subsequently made, and the government sought \$2,000 for each of twelve alleged FCA violations.³³

The dealer argued the FCA did not apply to claims for favorable loan action by the United States but that the statute is limited to claims for payments "due and owing" from the government. The district court agreed with the dealer and dismissed the action and the Ninth Circuit affirmed. The Supreme Court reversed. Justice Fortas wrote that: "This remedial statute reaches beyond claims which might be legally enforced to all fraudulent attempts to cause the [g]overnment to pay out sums of money. We believe the term "claims," as used in the statute, is broad enough to reach the conduct alleged by the [g]overnment in its complaint."³⁶

³⁰ *United States v. McNinch*, 356 U.S. 595, 599 (1958). See also *Hageny v. United States*, 570 F.2d 924 (Ct. Cl. 1978) (FCA did not include liability for the unauthorized cutting and removal of trees from a national forest).

³¹ *United States v. Neifert-White Co.*, 390 U.S. 228 (1968). See also *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-45 (1943).

³² 390 U.S. 228 (1968).

³³ *Id.* at 230.

³⁴ *Id.*

³⁵ *Id.* at 229.

³⁶ *Id.* at 233. The opinion of the Court was unanimous. Justice Fortas believed that a narrow reading of the Act would be inconsistent with its history and purposes. He wrote:

The original False Claims Act was passed in 1863 as a result of investigations of the fraudulent use of government funds during the Civil War. Debates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. [See Cong. Globe, 37th Cong., 3d Sess. 952-58.] In its present form the Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, or who makes a false "bill, receipt, . . . claim, . . . affidavit or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval of" such a false claim. In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.

Thus, courts were required to read “claims” broadly. For example, in *United States v. Bouchet*,³⁷ the district court held that the presentation of a government check by a party who is not entitled to it constitutes a presentation of a false claim within the meaning of the FCA.³⁸ Such a decision can be easily justified: the false presentment of a check requires that the United States pay money to someone not entitled to it. This activity was clearly intended to be governed by the FCA.

In *United States v. Etrick Wood Products Inc.*,³⁹ the district court concluded that the FCA applies to false applications for loan guarantees which result in the disbursement of government funds. “It is difficult to imagine what type of behavior would constitute a ‘claim’ if a fraudulent application that results in government financial detriment did not constitute a violation of the Act.”⁴⁰

Courts have, however, limited the ability of plaintiffs to utilize the FCA in appropriate circumstances. One case involved an action challenging the tax-exempt status of the defendant.⁴¹ The plaintiff alleged that the defendant made false statements to the Internal Revenue Service to obtain that tax exempt status. The complaint was dismissed on the ground, *inter alia*, that plaintiff did not allege that any fraudulent claims for payment were made to the federal government. The court held this was fatal to the action, and provided a guide to what conduct constituted a “claim”:

Plaintiff only asserts that defendant fraudulently obtained tax-exempt status. To violate the False Claims Act, however, a person must knowingly present a false or fraudulent claim for payment or approval make a false record or statement to get a false claim paid, or conspire to defraud the government by getting a false claim paid. See 31 U.S.C. § 3729. Here defendant has not been alleged to have made any claim or demand for money. According, defendant cannot be said to have violated the False Claims Act.⁴²

The opinion appears to hold that unless a defendant seeks payment of money to it by the government, there is no “claim” within the meaning of the FCA. Therefore, tax or other “negative” benefits would not fall under the FCA. Assuming that this is a valid distinction, a large class of potential cases are removed from the FCA.

³⁷ No. 85 Civ. 8530 (S.D.N.Y. May 21, 1987) (LEXIS, Genfed library, Dist. file).

³⁸ See also *United States v. Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969); *United States v. Silver*, 384 F. Supp. 617 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir. 1975); *United States v. Fowler*, 282 F. Supp. 1 (E.D.N.Y. 1968).

³⁹ 683 F. Supp. 1262 (W.D. Wis. 1988).

⁴⁰ *Id.* at 1263.

⁴¹ *United States ex rel. U.S.-Namibia (Southwest Africa) Trade & Cultural Council, Inc., v. Africa Fund*, 588 F. Supp. 1350 (S.D.N.Y. 1984).

⁴² *Id.* at 1351. Judge Duffy’s opinion also held that a *qui tam* action could not be used to secure the collection

Another restrictive case in this area is *United States ex rel. Weinberger v. Equifax, Inc.*⁴³ There, the qui tam plaintiff sought a declaratory judgment that the government's employment of defendant to provide information on its prospective employees violated federal law,⁴⁴ and that defendant's bill to the United States constituted a false claim for payment. The district court dismissed the action and the Fifth Circuit affirmed. The court wrote that: "The [FCA] statute is primarily directed against government contractors' billing for nonexistent or worthless goods or charging exorbitant prices for delivered goods . . . Equifax plainly did not submit a false claim under this reading of the statute: no one has suggested that Equifax's reporting activities for the government were not properly carried out. Weinberger has alleged no false claim in this sense."⁴⁵

Thus, even though the Supreme Court has commanded that FCA's definition of "claim" must be read broadly, courts have been unwilling to find that simply dealing with the government can trigger a FCA claim. For example, in *Hansen v. National Commission on the Observance of International Women's Year*,⁴⁶ the Ninth Circuit refused to find the definition of claim met. Where, a member of Congress sued to enjoin the spending of federal funds for allegedly prohibited lobbying activities. The district court's dismissal of the suit was affirmed.⁴⁷

The 1986 Amendment has, however, now provides a clearer definition of "claim":

For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise for money or property which is made to a contractor grantee, or other recipient in the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.⁴⁸

This definition is to makes clear that the FCA allows suits for false claims made to states, localities and other recipients of federal money.⁴⁹ The revised

⁴³ 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978).

⁴⁴ The Anti-Pinkerton Act prohibits any individual employed by the Pinkerton Detective Agency or a similar organization from also being employed by the United States. 5 U.S.C. § 3108 (1970). Plaintiff argued that because defendant, a credit reporting agency, obtained information through certain investigate techniques it fell within the Anti-Pinkerton Act prohibition.

⁴⁵ 557 F.2d at 460 (citations omitted). The Court also refused to rule that defendant misrepresented its qualification for government employment and thus made a false claim. 557 F.2d at 461.

⁴⁶ 628 F.2d 533 (9th Cir. 1980).

⁴⁷ The court ruled that FCA actions must be dismissed unless the plaintiff alleges that defendant's "fraudulently took the money from the United States." 628 F.2d at 534-35. The FCA is "limited to actions involving false demands for either the payment of money or the transfer of property that has been presented to an official of the United States for approval." *Id.* at 534.

⁴⁸ 31 U.S.C.A. § 3729(c) (West Supp. 1988).

⁴⁹ S. REP. *supra* note 1, at 21. The amendment was intended to overrule cases which held that once federal

Section also makes clear that a claim means any request or demand for payment. Thus, under the Amendment, a critical element of a FCA action will be easier to prove.

Scienter

Prior to 1986, the statute provided for civil liability for “knowingly” submitting a false claim for payment.⁵⁰ Courts have split over the issue of whether proof of intent to defraud is necessary to recover under the FCA.⁵¹ In *Blusal Meats, Inc. v. United States*,⁵² for example, the government’s FCA allegations were found adequate where the government alleged only that the defendant “knew the claim was false or fraudulent.” In *Bouchet*,⁵³ the district court granted summary judgment on the government’s FCA claim, finding that knowledge of falsity could be inferred when a small corporation received a second government check for over \$54,000 within a one week period.⁵⁴ Other circuits have not uniformly agreed that the form of this allegation is, in fact, sufficient.⁵⁵

The 1986 Amendment, however, should resolve some of this confusion. Section 3729(d) provides that no specific intent to defraud is required to show liability. Moreover, “knowing” and “knowingly” are now defined to mean that a person, with respect to information who “(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information. . . .”⁵⁶

The legislation was intended to preclude “ostrich” type situations, where an individual has “buried his head in the sand” and failed to make any inquiry which would have revealed the false claim.⁵⁷ One congressional sponsor of the FCA

funds had been turned over to the grantee, the FCA no longer applied. *See, e.g., United States ex rel. Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D.N.Y. 1938). The amendment was also designed to ensure that Medicaid and Medicare program claims would be covered by the FCA. S. REP., *supra* note 1, at 21.

⁵⁰ 31 U.S.C. § 3729(1) (1982).

⁵¹ *See, e.g., United States v. Cooperative Grain and Supply*, 476 F.2d 47 (8th Cir. 1973); *United States v. Bouchet*, No. 85 Civ. 8530 (S.D.N.Y. May 21, 1987) (LEXIS, Genfed library, Dist file).

⁵² 638 F. Supp. 824, 827 (S.D.N.Y. 1986), *aff’d*, 817 F.2d 1007 (2d Cir. 1987).

⁵³ *See supra* note 37 and accompanying text.

⁵⁴ *Bouchet* also clearly stated that a corporation may be found liable under the Act for the actions of its employees. Judge Leisure wrote that if defendant’s bookkeeper deposited the second government check, knowing the company was not entitled to that check, defendant could still be held to answer. “[T]he deposit of such a sum of money certainly benefited [defendant] and was within the scope of a bookkeeper’s duty to his employer.” *Bouchet*, No. 85 Civ. 8530 (LEXIS, Genfed library, Dist file at [17]). *See also Grand Union Co. v. United States*, 696 F.2d 888, (11th Cir. 1983); *United States v. Hangar One, Inc.*, 563 F.2d 1155 (5th Cir. 1977).

⁵⁵ *Cf. United States v. Rapoport*, 514 F. Supp. 519, 523 n.8 (S.D.N.Y. 1981).

⁵⁶ 21 U.S.C.A. § 3729(d) (West Supp. 1988).

⁵⁷ S. REP., *supra* note 1, at 21. While the original Senate version of the Amendment (S. 1562) was different, including permitting a finding of constructive knowledge on a showing of gross negligence, there is no reason to believe courts will not read section 3729(d) broadly. S. REP., *supra* note 1, at 20-21.

Amendment explained the new scienter standard:

While the Act was not intended to apply to mere negligence, it is intended to apply in situations that could be considered gross negligence where the submitted claims to the government are prepared in such a sloppy or unsupervised fashion that resulted in overcharges to the government. The Act is also intended not to permit artful defense counsel to require some proof of intent as an essential ingredient of proof. This section is intended to reach the "ostrich-with-his-head-in-the-sand" problem where government contractors hide behind the fact they were not personally aware that such overcharges may have occurred. This is not a new standard but clarifies what has been the standard of knowledge required.⁵⁸

Thus, actual knowledge is not a prerequisite to liability. Constructive knowledge will now plainly be sufficient. As a result, plaintiffs will be encouraged to bring FCA suits.

Qui Tam Jurisdiction

One of the most important questions involving the FCA has been the class of persons able to bring a qui tam action under that statute. For example, can a plaintiff bring a FCA suit against a defendant if he or she contributed nothing to the discovery of the fraud against the government? In 1943, the U.S. Supreme Court answered that question in the affirmative in *United States ex rel. Marcus v. Hess*.⁶⁰ While the 1943 as well as the 1986 Amendments appear to say no, the 1986 provision should allow an expanded class of plaintiffs to maintain FCA actions.

This 1986 change was probably the most important. Therefore, the history of the judicial and legislative changes in the qui tam provision will be reviewed at length.

1. *United States ex rel. Marcus v. Hess*

In *Marcus*, defendants were electrical contractors hired for Public Works Administration projects in Pennsylvania. While their contracts were actually

⁵⁸ 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986) (statement of Rep. Bernar).

⁵⁹ However, discovery and trial may still be complicated because of the need to find the evidence necessary to meet the intent element now set forth in the statute. Courts will also be required to interpret just how broad that element was meant to reach. For example, in *United States v. Davis*, 809 F.2d 1509 (11th Cir. 1987), the court re-affirmed, in a civil case brought by the government, that the FCA requires a "specific intent to work a deceit upon the government." *Id.* at 1512. In *Davis*, the jury returned a verdict in the defendant's favor on the FCA count, but the district court granted a judgment notwithstanding the verdict. The Eleventh Circuit reversed, holding that the credibility of the defendant's testimony as to his state of mind was a jury question.

⁶⁰ 317 U.S. 537 (1943).

entered into with local governments, most of their payments came from the federal government. The plaintiff, in a FCA complaint, alleged that defendants obtained the contracts through collusive bidding, thus defrauding the federal government. The plaintiff prevailed at trial and received a verdict in the amount of \$315,000.

The Third Circuit reversed. It agreed that the government was defrauded, but held that the FCA did not apply because the contracts at issue were entered into by localities and not the federal government. The Supreme Court then reversed the Third Circuit. It first held that it was defrauded because the U.S. government contributed a "large portion" of the money paid to the defendant contractors.⁶¹

The Court then considered whether the plaintiff was a proper plaintiff under the FCA. Prior to the filing of the FCA suit, defendants were indicted for defrauding the government. They plead *nolo contendere* and were fined \$54,000.⁶² Defendants argued the information used to prepare the suit came from the criminal case, without further investigation by the plaintiff and that the statute did not permit the action to proceed.⁶³ The plaintiff replied that he did not rely on the information developed in the criminal case and asserted that he conducted his own investigation.⁶⁴

The Court ruled the question of whether or not the plaintiff conducted an independent investigation was irrelevant. The FCA, according to Justice Black, provided, without limitation, that suits could be brought by "any person."⁶⁵ Moreover, the action would result in the recovery of money paid out by the government. Thus, the suit brought by this plaintiff fulfilled the purpose of the FCA.⁶⁶ The district court judgment was reinstated.⁶⁷

⁶¹ *Id.* at 542-45.

⁶² *Id.* at 545.

⁶³ *Id.* Defendants' position was supported by an *amicus curiae* brief filed by the government. *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 546.

⁶⁶ *Id.* at 545. The Court noted that the plaintiff undertook the risk of having to bear the cost of the litigation if he lost. *Id.* at 545-46. Justice Black also pointed out that this was not a case where the government filed an action prior to that of the private plaintiff's.

⁶⁷ The Court had also held that the *qui tam* action was not barred by the double jeopardy clause of the Fifth Amendment. *Id.* at 548-52. However, a recent district court case held that double jeopardy could be implicated where the amount of the statutory penalty substantially exceeds the loss by the government resulting from the fraud. In *United States v. Halper*, 664 F. Supp. 852 (S.D.N.Y. 1987), *prob. juris. noted*, 108 S. Ct. 2818 (1988), the court held that the imposition of penalties in the amount of \$130,000 violated the double jeopardy clause where the government's out-of-pocket loss amounted to only \$585. The court granted summary judgment in favor of the government against a pro se defendant on 65 claims of Medicare fraud under the FCA. The court imposed a penalty of \$16,000. The government moved for reconsideration seeking the statutory penalty of \$2,000 for each of the 65 FCA claims. The court rejected the requested amount. Judge Sweet wrote that: "A penalty 220 times the actual and easily measurable loss bears no rational relation to the Government's loss. Thus, the \$130,000 penalty sought in this case amounts to a criminal penalty for violations for which [the defendant] has already been punished." 664 F. Supp. at 855. *Halper* has implications for the amended FCA which has increased the penalties beyond the \$2,000 amount. See discussion *infra* at note 198 and accompanying text. Double jeopardy issues are likely to become more prevalent in some FCA cases if *Halper* is followed by other courts.

Justice Jackson dissented. He interpreted the statute to mean that only an individual who contributed fresh information to an investigation has the right to sue under the FCA. He wrote that:

Informers who disclose law violations even for the worst of motives play an important part in making laws effective. But there 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 in the process of vindication.⁶⁸

Regardless of which side was correct as a matter of statutory interpretation, the *Marcus* majority opinion would clearly have the potential of causing numerous qui tam suits to be filed in which the plaintiff had no new information to contribute. Such plaintiffs could ride the coattails of prosecutors, government investigators, the press, or others and obtain a substantial windfall. Many persons believed this was not the result intended by the drafters of the original FCA and the Supreme Court was simply wrong, and a movement began to change the statute. That movement resulted in a major amendment to the FCA enacted in 1943.

2. The 1943 Amendment

There is little doubt that the 1943 Amendment to the FCA was designed with one purpose in mind: to legislatively overrule the qui tam holding in *Marcus*. That codified version of the amendment provided that: "Unless the government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the government had when the action was brought."⁷⁰ Thus, the effect of the Amendment was to remove subject matter jurisdiction when the government "possessed" the information underlying the qui tam suit.⁷¹

The reasons for that amendment are relatively clear in the legislative history. As of September 1943, there were about 25 qui tam actions pending, with a total ad damnum demand of approximately \$150 million. Attorney General Biddle informed Congress that he considered most of the suits to be "parasitic" -- ones in

⁶⁸ 664 F. Supp. at 858. Judge Jackson wrote that he would hold that "the rich rewards of this kind of proceeding are reserved for those who actually and in good faith have contributed something to the enforcement of the law and the protection of the United States." *Id.* at 862.

⁶⁹ See *supra* notes 60 to 67 and accompanying text.

⁷⁰ 31 U.S.C. § 3730(b)(4) (1982). The original version of the Amendment provided that: "The court shall have no jurisdiction to proceed with any [FCA] suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or any agency, officer or employee thereof at the time such suit was brought." 31 U.S.C. § 232(C) (1976). The 1986 Amendment relating to qui tam jurisdiction is set forth *infra* at text accompanying note 151.

⁷¹ See, e.g., *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F. Supp. 1038, 1041 (W.D. Pa. 1973).

which a plaintiff brought a *qui tam* action based merely on an indictment, government report or other published information.⁷² The Attorney General sought repeal of the entire *qui tam* provision,⁷³ and a bill to this end was introduced in the House of Representatives.⁷⁴

A majority of the Senate disagreed, believing that broad *qui tam* suits still were useful. The Senate legislation took the compromise approach that the jurisdiction should be limited if the information which was the basis for the *qui tam* suit was already in the government's possession. If the Attorney General refused to then bring a FCA suit, the private plaintiff could then proceed.⁷⁶ The conflict between the houses went to a conference committee, and the Senate proposal, with some modifications, was reported and enacted.⁷⁷ The purpose of the compromise bill was

⁷² See United States *ex rel.* Weiss v. Schwartz, 546 F. Supp. 422, 424 (N.D. Cal. 1982).

⁷³ The Attorney General wrote to Congress that:

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

To offset this condition the Department of Justice has undertaken to file civil actions at the same time that indictments are returned. But this has been found impractical. The exact time an indictment will be returned can rarely be anticipated. Moreover, this make-shift practice does not give adequate time in which to prepare proper pleadings.

I believe that Congress should by legislation put a stop to this unseemly and undignified scramble. The Government should have sufficient time in which carefully to consider the advisability of bringing such suits and the nature and content of the pleading to be filed, instead of being forced to proceed in the hasty manner which alone is now available.

Letter from Attorney General Biddle to Senator Van Nuys (Mar. 22, 1943), *reprinted* in 89 Cong. Rec. 7571 (1943), *quoted* in Weiss, *supra* note 72, 546 F. Supp. at 425.

⁷⁴ See United States v. Pittman, 151 F.2d 851, 853 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946).

⁷⁵ Under the Senate legislation, *qui tam* actions could proceed if based on information "not then in the possession of the United States, unless obtained from such person (bringing the suit) by the United States in the course of any investigation by a grand jury, Congressional Committee, or other public body, or before a United States Commissioner or other proceeding instituted or conducted by it." 89 Cong. Rec. 10,845 (1943).

⁷⁶ *Id.* at 10,745.

⁷⁷ *Id.* at 10,844. The Conference Report stated that: "Jurisdiction is denied to the court to proceed with any suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought. *Id.* at 10,845."

One of the members of the Conference Committee from the House explained the purpose of the compromise:

We feel that by enacting this compromise legislation the United States will be amply protected and at the same time there will not be this ever-present invitation to relators [*qui tam* plaintiffs who took advantage of the FCA after *Marcus*] to examine indictments, to examine reports of the Truman [Senate investigating] committee, or if you please, for dishonest and unscrupulous investigators to turn over information to their friends or co-conspirators for the purpose of bringing suit against our citizens on information that either comes to them by reading an indictment or a bill of complaint or through testimony before some committee or which comes to them in their official capacity as a representative of the United States.

Id. at 10,846 (statement of Rep. Walter).

stated by Rep. Hancock, who said during the debate that: "The temptation and opportunity is tremendous under the present law for renegotiators, contracting officers of the various purchasing agencies of the government, and agents for collectors of internal revenue to take advantage of the information they discovered in the course of the business to enrich themselves by instigating informer's suits. That is a temptation we wish to remove."⁷⁸

The legislative history is clear on the purpose of the Amendment. However, very little guidance was provided concerning the meaning of the new provision. For example, the most important unanswered question is when does the government "possess" information, thereby resulting in the dismissal of a qui tam suit for lack of subject matter jurisdiction? That question had to be answered by several subsequent court decisions.

3. Qui Tam Possession Cases

The 1943 Amendment generated a substantial amount of litigation over exactly what that statute meant. Because the 1986 Amendment did not completely abrogate the 1943 Amendment, many of those cases are worthy of discussion.

One of the first "possession" cases decided after the 1943 Amendment was *United States ex rel. Sherr v. Anaconda Wire & Cable Co.*⁷⁹ The action alleged fraudulent conduct by the defendant in falsifying test results for material to be supplied to the Army. Prior to the filing of the complaint, the defendant corporation and certain of its officers were indicted by federal grand juries based on similar allegations. The criminal charges were reported by the media, and less than a month after the qui tam suit was filed, the United States began a civil action, and later filed another.⁸⁰ In one of the criminal cases, the defendants plead nolo contendere and were convicted in the other case after a trial.

The government entered an appearance in the qui tam action and moved for an order determining that the action was based on information in the possession of the government when the suit was filed, and dismissing the action on grounds that the court lacked subject matter jurisdiction.⁸¹ The court agreed and dismissed the action. It held that, because of the 1943 Amendment and plaintiff's concession, it had no jurisdiction to entertain the case.⁸²

⁷⁸ *Id.* at 10,849.

⁷⁹ 57 F. Supp. 106 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir.), *cert. denied*, 326 U.S. 762 (1945).

⁸⁰ *Id.* at 107.

⁸¹ *Id.* at 108. In fact, the plaintiff filed an affidavit conceding that his suit was based on information in the possession of the United States at the time the suit was filed. *Id.*

⁸² *Id.* at 109. The court relied on a decision of the Second Circuit, in which Judge Augustus Hand wrote that: "The amendment further provided that the court should have no jurisdiction to proceed with such a suit whenever it should appear that the suit was based upon evidence or information in possession of the United States at the time the suit was brought." *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 144 F.2d 186, 187 (2d Cir. 1944). In *Sherr*, because of the plaintiff's admission, the district court believed it

However, in *United States v. Rippetoe*,⁸³ the court of appeals reversed summary judgment granted in favor of the defendants. There, plaintiff alleged that a false claim was presented for payment and that certain government officials knew of, and participated in, the fraud. The district court held that the allegation of knowledge by government officials resulted in a lack of jurisdiction to hear the suit.⁸⁴ The Fourth Circuit reversed, writing that:

[W]e do not think that knowledge on the part of a government official who is implicated in the fraud precludes suit by the informer. The whole history of the provision shows that its purpose was, not to bar bona fide suits by informers merely because corrupt officials of the government might have participated in the fraud or refused to prosecute it, but to prevent the bringing of parasitical actions by those who sought to profit from governmental investigations or prosecutions by using the evidence which these had developed. . . .⁸⁵

Significantly, however, the court also held that plaintiff does not have the burden of alleging or proving a lack of knowledge in the possession of the government at the time the FCA suit was filed.⁸⁶

Summary judgment was granted in favor of the defendant in *United States ex rel. McCans v. Armour & Co.*⁸⁷ There, the defendant allegedly violated the Emergency Price Control Act of 1942 by selling meat to government war procurement agencies at a price that exceeded the maximum ceiling price. Defendant denied the allegations.⁸⁸ The qui tam plaintiff who brought the action under the FCA was a claims examiner in the Quartermaster General's office. Her duties consisted, in part, of auditing meat contracts, examining the invoices and payment vouchers of defendant. After reviewing that material, she alleged that she determined that defendant was overcharging the government. She said that the overcharges were brought to the attention of her superiors. Plaintiff was fired in 1951, and brought this action in 1954.⁸⁹ After the FCA suit was filed, she was given access to Department of Justice files on the meat contracts, which she used to file an amended complaint identifying each specific transaction.⁹⁰

Defendant's summary judgment motion was predicated on the court's lack of

had no alternative but to dismiss the action. 57 F. Supp. at 109. The court also held that the qui tam plaintiff had "vested rights" in the suit because it was filed before the 1943 Amendment was enacted. *Id.* at 109-10. This ruling was affirmed by the Second Circuit. 149 F.2d 680.

⁸³ 178 F.2d 735 (4th Cir. 1949).

⁸⁴ *Id.* at 736.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

⁸⁸ *Id.* at 547.

⁸⁹ *Id.* at 547-48.

⁹⁰ *Id.* at 548.

subject matter jurisdiction. It asserted that the evidence on which the action was based was already in the possession of the United States when the suit was brought. Thus, under the 1943 Amendment, the court was precluded from hearing the case.⁹¹ Defendant, in effect, conceded that if the language of the 1943 Amendment was read literally, the court lacked jurisdiction.⁹² However, the district court found that it did not have to decide whether the amendment had to be read literally. It granted the summary judgment motion, writing that:

[I]f the language be not literally read and be construed to exclude instances where, although the evidence or information was latently in the possession of the United States, it had to be pointed out or analyzed to make it of value to the United States, as contended by relator, this court would still have no jurisdiction because relator did on occasions during her employment by the United States bring her claim of overceiling prices charged against defendant to the attention of her superiors. This was sufficient to point out the wrongdoing and make the evidence or information already in its possession of value⁹³

The district court also ruled that the action could not lie on the ground that it was based on information obtained by reason of plaintiff's government employment. Thus, a government employee would be forbidden from using the FCA to "take advantage" of his or her official position.⁹⁴

Armour demonstrates the judicial hostility to qui tam suits that resulted from the 1943 Amendment. It is odd that a government employee, who diligently conducts her duties and discovers fraud or illegal conduct, reports that conduct to her supervisors, but nothing is done, is unable to bring a lawsuit and force a recovery. *Armour* would be an excellent case for proponents to cite in support of the 1986 Amendment. Indeed, under the more limited jurisdictional bar enacted in 1986, the *Armour* action would have been allowed to proceed.⁹⁵

Another case which could be cited as support for the recent amendment is *United States v. Aster*.⁹⁶ In that case, the district court found that the qui tam plaintiff turned over to the government all the relevant information upon which the suit was based before the complaint was filed. The district court dismissed the action and the Third Circuit affirmed because the information was in the government's possession

⁹¹ *Id.* at 549. The court noted that defendant argued that "the contracts of purchase and sale, invoices, vouchers, [Office of Price Administration] regulations, files, etc., are the basis, and only basis, for the suit, and relator's [plaintiff's] deposition makes it undeniable that they were in the possession of the United States." *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 549-50.

⁹⁵ See note 151 and accompanying text.

⁹⁶ 275 F.2d 281 (3d Cir.), cert. denied, 364 U.S. 894 (1960).

before the FCA action was filed. The district court thereby lacked jurisdiction.⁹⁷

Aster clearly reads the statute very literally, and perhaps incorrectly.⁹⁸ As discussed above, the primary purpose of the 1943 amendment was to preclude plaintiffs from bringing actions based solely on material in government indictments, reports or files. Here, the *qui tam* plaintiff did not do that: he supplied the material to the government. He was not seeking to latch onto a government investigation and personally profit. Therefore, a fair reading of the FCA would have allowed this case to proceed. However, the *Aster* conclusion was reaffirmed in subsequent cases, including *Safir v. Blackwell*, decided by the Second Circuit 18 years after *Aster*.⁹⁹ In *Safir*, the plaintiff previously provided information on which his FCA suit was based to government agencies and congressional committees. The Second Circuit followed *Aster* and affirmed dismissal.¹⁰⁰

Another such case is *Pettis ex rel. United States v. Morrison-Knudsen Co.*,¹⁰¹

⁹⁷ The court's rationale was based on the following:

Had Congress wished to provide an exception to the clause dealing with jurisdiction, or lack of jurisdiction, of the courts, it is reasonable to assume that it would have done so with the same care as found in the remainder of the section. The steps set forth require that when such cause is brought the relator shall serve a copy of the bill of complaint on the United States Attorney for the district in which the suit is brought and mail a copy of the bill together with a written disclosure of substantially all material evidence and information in the possession of the relator to the Attorney General of the United States. This presumes that the information has not already been made available to the government. The appellant here chose to impart his material information to the United States for its use rather than first bringing an action on his own initiative as provided for in Section 232(B). By doing so he has brought himself within the jurisdictional prohibition of Section 232(C).

Id. at 283.

⁹⁸ This argument is supported by the legislative history of the 1943 amendment. During the House debate, the following exchange occurred:

MR. KEFAUVER: [I]f the [qui tam plaintiff] has information and gives it to the Government, and the Government does not proceed in due course, provision is made here where that suit can be brought and where he can get some compensation?

MR. HANCOCK: That is correct.

MR. KEFAUVER: So this bill, then, protects the Government and it protects the corporation or contractor from being defrauded and harassed by shysters or people who might bring suit without any information or with little information; and yet if the Government does not act, there is still a protection or a means whereby they can proceed.

MR. HANCOCK: The gentlemen have correctly stated the question better than I have been able to do.

89 Cong. Rec. 10,849 (1943), *quoted in Pettis ex rel. United States v. Morrison-Knudsen Co. Inc.*, 577 F.2d 668, 672 (9th Cir. 1978). *Pettis*, however, suggested that Reps. Hancock and Kefauver were referring to the situation in which a *qui tam* suit has been filed and the plaintiff *then* turns over the evidence and information to the government. 577 F.2d at 672. *See also* *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244, 247 (D. Haw. 1980).

⁹⁹ 579 F.2d 742 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979).

¹⁰⁰ In his opinion for the court, Judge Friendly did note that while "a case may arise when the literalism of *Aster* would be so offensive to the intention of Congress as to demand a more liberal approach, we do not think this to be one." 579 F.2d at 747.

¹⁰¹ 577 F.2d 668. The *qui tam* plaintiff was an engineer on a road project in Peru funded, in part, by the U.S. Agency for International Development (AID). Plaintiff discovered that redesign and repeat construction

where the Ninth Circuit expressly stated it was following the Third Circuit's interpretation of the statute in affirming dismissal of an action where the qui tam plaintiff provided all relevant information to the government in advance of the suit.¹⁰² The court held that the government had no duty to warn potential qui tam plaintiffs that providing information would lead to the loss of the ability to later maintain an action under the FCA.¹⁰³ *Pettis*, however, did teach that there are limits to the jurisdictional bar. For example, if a corrupt official "possesses" the information, lack of jurisdiction will not be invoked.¹⁰⁴

In addition, a court has to decide whether or not the suit is *based* on material already in the possession of the government. The evidence possessed by the government and the plaintiff does not have to be identical for there to be a finding of lack of jurisdiction. Moreover, a case should not be dismissed where the plaintiff possesses evidence but the government has only rumors. The ninth circuit stated that the answer lay between these two extremes. It wrote that:

[T]he answer rests in that area where it is possible to say that the evidence and information in the possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute. Obviously to refer to an "area" rather than a "point" lacks definiteness; but prudence requires this sacrifice. Each case requires careful analysis not likely to be aided by asserting that the evidence and information sufficient to invoke the bar must be "substantial," "essential," or "significant."¹⁰⁵

The court held that under the admittedly imprecise standard, jurisdiction was

work was being improperly charged under the contract. Plaintiff provided officials in the United States and Peru with information about the improprieties. Both AID and the General Accounting Office audited the project. FCA suites were subsequently filed by plaintiff in different venues against the project's general engineer and general contractor. The Judicial Panel on Multidistrict Litigation consolidated the actions in the District of Idaho for pretrial proceedings. *Id.* at 670. Defendants then moved to dismiss based on lack of subject matter jurisdiction. Plaintiff provided no substantive reply, and the district court granted the motion. The Ninth Circuit affirmed. *Id.*

¹⁰² *Id.* at 673.

¹⁰³ *Id.* at 673. Judge Sneed wrote that such a duty to warn was not contained expressly in the statute and was not mentioned in the legislative history. *Id.* The court of appeals also decided that an evidentiary hearing need not be held before a FCA suit is dismissed for want of jurisdiction, even where the plaintiff does not submit factual or legal material in response to a motion to dismiss, but instead requests a hearing and the district court dismisses the case without notification that a hearing will not be held. *Id.* at 674.

¹⁰⁴ The court wrote that: "[A] different situation exists when the corruption out of which the false claim arose also serves to protect government action, as where, for example, a corrupt public official who is a party to the fraud prevents governmental action by concealment or otherwise. Under such conditions it is highly artificial to insist that the government "possesses" the information for the purposes of invoking the jurisdictional bar."

Id. at 673. The court did note that such a situation was not presented in this case. See also *United States v. Rippetoe*, *supra* note 83 and accompanying text.

¹⁰⁵ 577 F.2d at 674.

properly found to be lacking.¹⁰⁶

Aster and its progeny clearly establishes that if the government comes to possess information on which the FCA suit is built before the suit is filed, that action must be dismissed.¹⁰⁷ The district court would, nevertheless, have to ensure that the information provided would have allowed an adequate government investigation of the merits of the claim to occur before it may properly dismiss the action for lack of jurisdiction.

A more liberal view of the FCA jurisdictional requirement is reflected in *United States ex rel. Vance v. Westinghouse Electric Corp.*¹⁰⁸ There, plaintiff brought an action against the defendant, alleging that as a government subcontractor it included consulting fees on an unrelated project in the amount it charged the government. It was also alleged that other charges for unrelated costs and equipment were billed to the government.¹⁰⁹ Defendant moved to dismiss on the ground that the information upon which the suit was based was already in the government's possession.

After extensively reviewing *Marcus*¹¹¹ and the legislative history of the 1943 Amendment, the district court ruled that: "The absolute language of the act controls regardless of congressional intent, and 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 information."¹¹³

However, the court was quick to point out that the quoted language would not dispose of the motion, but had to be applied to the facts.¹¹⁴ It appears that the defendant had argued that the government already "possessed" the requisite information because it had the bills and invoices reflecting defendant's overcharges. The district court rejected that argument. It found that mere "possession" of such accounting material "does not necessarily show that the government had the

¹⁰⁶ *Id.*

¹⁰⁷ See also *United States ex rel. Lapin v. International Business Machines Corp.*, 490 F. Supp. 244 (D. Haw. 1980) (action dismissed, following *Pettis*, where qui tam plaintiff did not even allege that he had more information than the government). One district court case reached the opposite conclusion. See *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144 (S.D. Cal. 1976). That decision was expressly rejected by the Ninth Circuit in *Pettis*, *supra* note 89, 577 F.2d at 673 n.3.

¹⁰⁸ 363 F. Supp. 1038 (W.D. Pa. 1973) (defendant's motion to dismiss denied (with leave to renew) because government did not possess all of the information upon which the claims were based at the time the suit was brought).

¹⁰⁹ *Id.* at 1044. Plaintiff allegedly was employed by defendant for 29 years, but was forced into early retirement after he objected to the accounting procedures that were the basis of this FCA claim. *Id.* at 1040.

¹¹⁰ At the time the motion was made, defendant had already filed an answer and material not contained in the complaint was placed in the record. The court easily found it could treat the motion to be seeking summary judgment. *Id.* at 1040-41.

¹¹¹ See *supra* notes 60 to 68 and accompanying text.

¹¹² See *supra* notes 69 to 78 and accompanying text.

¹¹³ 363 F. Supp. at 1042.

¹¹⁴ *Id.*

underlying facts in its possession to show that claims were padded or fabricated as the case may be.”¹¹⁵ In *Vance*, there was no showing that the government knew that the bills presented for payment contained improper overcharges. Therefore, the motion was denied.

Vance continued to read the 1943 Amendment to require dismissal for lack of jurisdiction where it could be shown that the information upon which the suit was based was in the government’s possession. That case was significant in that it implicitly recognized that the jurisdictional bar should only apply when the government “possesses” information in a meaningful way. In *Vance*, for example, government files contained all of the improper bills and invoices and an audit of those charges. However, that material did not, and could not, reveal the fraud. Plaintiff supplied the missing information. Therefore, there should have been no question (assuming the above was true) that the action should have been allowed to continue. *Vance* was correctly decided.

That case can be contrasted with *United States v. Burmah Oil Co.*,¹¹⁶ where the Second Circuit affirmed dismissal of a FCA complaint. Plaintiff sought to recover damages on behalf of the United States based on fraudulent applications made by defendants to the Maritime Administration for subsidies and loan guarantees.¹¹⁷ The qui tam plaintiff filed her complaint six weeks after an article regarding the fraudulent activity appeared on the front page of the *New York Times*.¹¹⁸ In her submission to the Department of Justice¹¹⁹ she disclosed ten documents in her possession that would be relevant to the action; only one of those ten documents was not already in the physical possession of the government. The district court dismissed the action because the information in the *Times* report was in the public domain and all relevant information was already in the government’s files, and, therefore, in its possession. The court of appeals affirmed.¹²⁰

In addition, the court rejected plaintiff’s argument that jurisdiction existed because of the service she provided in “assembling, organizing and integrating” the information in the possession of the government. The *per curiam* opinion stated that:

The statute is clear and explicit. Jurisdiction is defeated by the government’s possession of the information. Only where the process of organization produced new information, such as the disclosure of the existence or nature of a fraud, could it arguably provide a sufficient

¹¹⁵ *Id.* at 1043.

¹¹⁶ 558 F.2d 43 (2d Cir.), *cert. denied*, 434 U.S. 967 (1977).

¹¹⁷ *Id.* at 45. Only United States citizens are eligible for Maritime Administration subsidies and guarantees. Defendants were alleged to be foreign corporations and thus ineligible. *Id.*

¹¹⁸ *Id.*

¹¹⁹ As required by 31 U.S.C. § 232(C) (1976), a qui tam plaintiff had to submit to the department a written disclosure of substantially all the information in his or her possession which is material to the effective prosecution of the lawsuit. See discussion *infra*, at notes 158 to 160 and accompanying text.

¹²⁰ 558 F.2d at 46.

predicate for jurisdiction. Here, no new information concerning either the existence or the nature of the fraud was disclosed as a result of relator's efforts.¹²¹

Thus, factually, *Vance* and *Burmah Oil* are very different cases. The *Vance* court refused to dismiss the complaint because it appeared that without plaintiff's knowledge the fraud would never have been uncovered—even though documentary evidence was contained in government files. In *Burmah Oil*, conversely, the plaintiff had nothing to contribute: the fraudulent conduct came to light in a newspaper article and the government already possessed most of the important documentary evidence. Thus, while both cases reached different results, the rationale in each is identical and they can be reconciled.

Another case involving cooperation with the government is *United States ex rel. MacFarlane v. Hutchinson*.¹²² Plaintiffs¹²³ brought the qui tam action alleging that the defendant, Dr. Hutchinson, knowingly submitted 58 false Medicaid claims over a 12 year period. In 1979, the Department of Health and Human Services (HHS) began a Medicare fraud investigation of the Hutchinson. He was later indicted and plead guilty to misdemeanor counts of filing false claims.¹²⁴

During the Medicare investigation, government agents also obtained certain Medicaid forms submitted by Hutchinson to the state of Colorado. Colorado provided the government agents with 75 to 100 Medicaid forms. Certain patients were interviewed, and four case files were developed. This and other information relating to the possible Medicaid fraud was then provided to the Colorado Medicaid Fraud Control Unit. That unit then began investigating Hutchinson and subsequently recommended that Hutchinson be prosecuted. However, while no criminal case was ever brought, the FCA suit was filed.¹²⁵ Hutchinson moved to dismiss on the ground of lack of jurisdiction. The district court agreed.

A state investigator testified at an evidentiary hearing that the four Medicaid cases developed by HHS were excluded in preparing that action. However, the 58 allegedly false Medicaid claim forms were in the possession of HHS before the suit was filed.¹²⁶ The federal government investigated some of the allegedly false claims and had ample opportunity to investigate others. Therefore, the court ruled it was

¹²¹ *Id.* at 46 (footnote omitted).

¹²² 519 F. Supp. 563 (D. Colo. 1981).

¹²³ Qui tam plaintiffs were Colorado and its Attorney General.

¹²⁴ 519 F. Supp. at 563-64.

¹²⁵ *Id.* at 564.

¹²⁶ The court ruled that the jurisdictional bar could still apply even though the government did not physically possess the information on the exact day that suit was filed. It is enough if, at some time prior to the commencement of the action, the government possessed the information and had the opportunity to investigate the case. *Id.* at 565 n.2. The judge also found that the federal government's motives in beginning and ending its limited Medicaid investigation were irrelevant. *Id.* at 565.

without jurisdiction to hear the case.¹²⁷

It is interesting that the court again penalized a qui tam plaintiff which cooperated with a government investigation and voluntarily turned over information. Here again we see the situation where the 1943 Amendment resulted in the frustration of government corruption investigations because potential qui tam plaintiffs are better off not cooperating until after their lawsuits are filed.

Indeed, *MacFarlane* is easily contracted with *United States ex rel. Woodward v. Country View Care Center, Inc.*,¹²⁸ a Medicaid fraud FCA case again brought by the State of Colorado and its Attorney General. Here, however, the state learned its lesson from *MacFarlane*. No information was turned over to the federal government until after the FCA complaint was filed. The Tenth Circuit had no trouble upholding a finding of jurisdiction in that situation.¹²⁹

At least one court has refused to find an exception to the jurisdictional bar for a state government *required* to turn over information to the federal government. Medicare fraud was again at issue in *United States ex rel. State of Wisconsin v. Dean*.¹³⁰ Dr. Dean, the defendant, was found guilty in 1980 in Wisconsin state court of making fraudulent claims for Medicare reimbursement. The state then filed a FCA suit, alleged that Dean submitted over 900 false claims. The district court denied a motion to dismiss based on lack of subject matter jurisdiction. The Seventh Circuit reversed.

The district court and court of appeals agreed with defendant that the federal government possessed the requisite information at the time the suit was filed. The Wisconsin Medicaid Fraud Control Unit provided reports relating to its fraud investigation to HHS. Many of those reports were required by HHS regulation.¹³¹ In addition, the criminal proceeding was reported in local newspapers, and the assistant district attorney who tried the case was also acting as a United States Special Attorney.¹³² Thus, it was clear that the federal government was in possession of the information.

Why then did the district court not dismiss the action? It determined, based on its reading of the legislative history, that Wisconsin could continue its suit because it was the source of the information in the possession of the government, which the state was required by federal regulation to furnish. The court wrote that

¹²⁷ *Id.* at 565.

¹²⁸ 797 F.2d 888 (10th Cir. 1986).

¹²⁹ *Id.* at 891-92. After the suit was filed, a copy of the complaint was served on the United States Attorney for the District of Colorado. A letter was also sent to the U.S. Attorney General describing the evidence forming the basis of the FCA complaint. Both steps were taken in compliance with the notification provision. *Id.* See discussion *supra* notes 158 and 160 and accompanying text.

¹³⁰ 729 F.2d 1100 (7th Cir. 1984).

¹³¹ See 42 C.F.R. § 455.17 (1980); 729 F.2d at 1104.

¹³² 729 F.2d at 1104.

a different result “would frustrate the purpose of Congress in protecting the United States against false claims.”¹³³

The court of appeals had no trouble rejecting the district court’s analysis. The express language of the statute and its previous judicial interpretation¹³⁴ does not contain any exception to the jurisdictional bar. The only inquiry is whether the government possessed the information on which the suit was based. If the answer is in the affirmative, then the action must be dismissed for lack of subject matter jurisdiction. “If the State of Wisconsin desires an exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption.”¹³⁵ Indeed, as will be seen below, the 1986 Amendment carefully addresses the *Dean* case scenario.¹³⁶

The reach of the FCA was furthered by *United States ex rel. Joseph v. Cannon*.¹³⁷ The complaint in that case alleged that former Senator Howard Cannon authorized payment of a government salary to his administrative assistant during a period in which the assistant was working “extensively and exclusively” on the Senator’s re-election campaign.¹³⁸ The claim was dismissed by the district court based on the jurisdictional bar because the government possessed the information on which the suit was based. (The files of the Secretary of the Senate contained Senator Cannon’s written designation of the administrative assistant to administer campaign contributions.)¹³⁹

The court of appeals disagreed with the district court’s reasoning, but nevertheless affirmed the result. “Merely because the Government holds some information related to an allegedly false claim does not mean that suit under the Act is barred by Section 232(C).”¹⁴⁰ The Senator’s designation revealed only that the aide was authorized to solicit and administer campaign contributions, not that official staff duties were being neglected or ignored. Therefore, the district court erroneously dismissed the claim based on the applicability of the jurisdictional bar.¹⁴¹

The D.C. Circuit did, however, hold that the claim must be dismissed. The court was concerned that the inner workings of the office of a United States senator

¹³³ *Id.* at 1103.

¹³⁴ See discussion *supra* notes 96 to 107 and accompanying text.

¹³⁵ 729 F.2d at 1106. See also *United States ex rel. State of Wisconsin v. Dean: A Request for an Amendment to the False Claims Act*, 12 J. LEGIS. 112 (1985). Of course, the result in *Dean* would be different after the enactment of the 1986 Amendment. See discussion, *infra* at notes 151 to 152 and accompanying text.

¹³⁶ See discussion, *infra* notes 151 to 152 and accompanying text.

¹³⁷ 642 F.2d 1373, 1375 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

¹³⁸ *Id.* The complaint also alleged that other members of the Senator’s staff were required to perform personal, non-governmental services for the Senator and his family. *Id.* This count of the complaint was dismissed for failure to state a claim. *Id.* at 1375 n.5.

¹³⁹ *Id.* at 1377.

¹⁴⁰ *Id.* at 1377.

¹⁴¹ *Id.* at 1378.

was a political question, inappropriate for judicial review. At the time the case was brought, there were no standards for a court to apply when reviewing Senate staff participation in a political campaign.¹⁴² Therefore, the court held that plaintiff's complaint did not state a claim.

Despite its statements to the contrary, the D.C. Circuit's ruling will have the effect of exempting members of Congress from liability under the FCA.¹⁴³ The court could easily have held that the FCA would apply in this situation. The "standard" is readily determinable: false claims may not be submitted for payment. At that time, there was no provision in the statute exempting members of Congress.¹⁴⁴ Therefore, allowing an assistant to be paid his normal government salary without performing any of his or her usual official duties could clearly constitute a violation of the Act. Moreover, this does not seem to constitute a political question. FCA complaints regularly name executive branch officials.¹⁴⁵ In addition, the complaint,¹⁴⁶ alleged that Senator Cannon's aide worked "exclusively" on the re-election campaign.¹⁴⁷ There was no "mix" of official and campaign duties--the aide was exclusively working on non-official business, but being paid a government salary. Thus, this was not a case in which a congressional assistant is carrying out his official duties, while also working on matters that would be considered political, which situation would arguably involve courts in how congressional representatives conduct their legislative duties. *Joseph* presented the clear-cut case.

These cases are universal in ruling that the 1943 Amendment to the FCA meant what it said and was, in fact, intended to limit the bringing of actions under that Act. These cases, and some of their absurd results (such as penalizing entities for cooperating with government investigations and turning over files), lead directly to a reaction against that amendment.

¹⁴² *Id.* at 1383. *But see id.* at 1381-83.

¹⁴³ In the absence of any discernible legal standard--or even of a congressional policy determination--that would aid consideration and decision of the question raised by appellant's first count, we are loathe to give the False Claims Act an interpretation that would require the judiciary to develop rules of behavior for the Legislative Branch. We are willing to conclude that Congress gave the courts a free hand to deal with so sensitive and controversial a problem, or invited them to assume the role of political overseer of the other branches of Government. Accordingly, we affirm the District Court's dismissal of appellant's first claim. In doing so, we do not, of course, say that Members of Congress or their aides may defraud the government without subjecting themselves to statutory liabilities.

Id. at 1383.

In fact, Congress exempted itself from most FCA actions in section 3730(e)(2)(A) when it enacted the 1986 Amendment. *See* discussion *infra* note 183 and accompanying text.

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g.,* United States *ex rel.* Biosjoly v. Morton Thiokol, Inc., No. NC-87-91 (D. Utah Aug. 31, 1988).

¹⁴⁶ On a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(10), a court is not restricted to the pleadings, but may review other evidence to resolve factual disputes concerning the existence of jurisdiction. *See, e.g.,* Crawford v. United States, 796 F.2d 924 (7th Cir. 1986).

¹⁴⁷ United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1375 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982).

4. 1986 Amendment

Many of the above cases would become irrelevant in light of the October 1986 Amendment.¹⁴⁸ The 1943 Amendment language is removed by the legislation.¹⁴⁹ However, the Congress declined to return to the pre-1943 days, and there are significant jurisdictional limitations remaining.¹⁵⁰ The statute now provides that: “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 [sic] 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.”¹⁵¹

In essence, this legislation creates a new jurisdictional bar: if the information is in the public domain, and the *qui tam* plaintiff was not the source of that information, then the action is barred. A congressional sponsor of the Amendment explained how the new provision works:

Before the relevant information regarding fraud is publicly disclosed through various government hearings, reports and investigations . . . or through the news media, any person may file such an action as long as it is filed before the government filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an “original source” may bring the action. 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

¹⁴⁸ See *infra* notes 151 and 152 and accompanying text.

¹⁴⁹ Section 3730 was completely re-written by the 1986 Amendment. False Claims Amendment Act of 1986, Pub.L. No. 99-562, § 3, 100 Stat. 3153, 3154-3157; S. REP., *supra* note 1, at 23.

¹⁵⁰ See discussion *infra* notes 151 to 152 and accompanying text.

¹⁵¹ 31 U.S.C.A. § 3730(e)(4)(A) (West Supp. 1988) For purposes of the provision, “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.* at § 3730(e)(4)(B) (West Supp. 1988). It is interesting that for such a significant portion of the Amendment, its legislative history is virtually non-existent. S. REP., *supra* note 1, at 30.

¹⁵² This provision is similar to the initial Senate version of the 1943 Amendment. See *supra* note 75. The 1986 Senate Judiciary Committee report noted that with regard to that version:

The Senate specifically provided that jurisdiction would be barred on *qui tam* suits based on information in the possession of the Government unless the relator was the original source of that information. Without explanation, the resulting conference report dropped the clause regarding original sources of allegations and courts have since adopted a strict interpretation of the jurisdictional bar as precluding any *qui tam* suit based on information in the Government’s possession, despite the source. S. REP., *supra* note 1, at 12.

long as it is filed before an action is commenced by the government.¹⁵³

Clearly, the purpose of the amendment was to retain the 1943 Amendment's bias against parasitic lawsuits. The amendment has the salient feature of allowing a person who supplied information to the government or the media to sue based on that information if the fraud is ignored by the Department of Justice.

However, the legislation may deter individuals or entities from bringing a FCA action if the purported fraud has been highly publicized. That plaintiff has to prove that he had "direct and independent" knowledge of the false claim and voluntarily disclosed the information to the government. First, proof of such prior knowledge may be difficult, if not impossible, especially in cases where records have been destroyed or not kept. In addition, an employee of a government agency or private contractor who knows of false claims may be reluctant, at least initially, to voluntarily disclose information which could result in his being fired. Some protection is afforded by the statute to "whistleblowers,"¹⁵⁴ but employees may not wish to be unemployed while a separate lawsuit is pursued. However, the amended FCA damage provisions may provide enough incentive for such cases to be filed.¹⁵⁵

Thus, while the amended FCA *qui tam* provisions will make bringing certain cases easier, there has not been a wholesale return to the pre-1943 Amendment days. Obstacles to *qui tam* FCA suits remain. Other procedural obstacles have been removed or liberalized as part of the 1986 enactment. Those changes are discussed in the next section.

FALSE CLAIMS ACT PROCEDURES

This section of the article discusses the basic procedural requirements of the False Claims Act after the 1986 Amendment.¹⁵⁶ Significant differences between the old and new versions of the statute will be noted.

In a *qui tam* action, the plaintiff is still required to bring the action in the name of the United States. However, the action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for

¹⁵³ 132 Cong. Rec. H9388 (daily ed. Oct. 7, 1986) (statement of Rep. Berman).

¹⁵⁴ 31 U.S.C.A. § 3730(h) (West Supp. 1988). In a prepared statement, Rep. Berman explained the applicability of the whistleblower provision: "The whistleblower protection section of the bill is extremely important and is designed to protect the person from any retaliatory action taken by his employer. This section is intended to afford full protection to the employee if the retaliatory action is in any way connected to a person's activities pursuant to this law. It does not have to be the primary reason for the employer's actions. As long as the retaliatory action by the employer is motivated in part because of the person's actions under this law, then all the protection specified in that whistleblower section shall be applicable." 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986).

¹⁵⁵ See *infra* notes 198 to 227 and accompanying text.

¹⁵⁶ The procedural provisions of the FCA are generally found in 31 U.S.C. § 3730 (1982 and West Supp. 1988).
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consenting.”¹⁵⁷

The pre-October 1986 provision requires that the plaintiff serve on the government a copy of the complaint¹⁵⁸ and provide “written disclosure of substantially all material evidence and information the person possesses. . . .”¹⁵⁹ That requirement is identical in both versions. However, the 1986 Amendment now requires that the complaint be filed in camera and under seal, and that it remain under seal for at least sixty days.¹⁶⁰ No order of the court is required to maintain the file under seal.¹⁶¹ It may *not* be served on the defendant without order of the court.¹⁶² Further, the government may, upon a showing of good cause, request an extension of time during which the complaint is sealed.¹⁶³

The amended version was intended to address Department of Justice concerns that a civil lawsuit not interfere with an on-going sensitive criminal investigation. Public filing of a civil suit could “tip off” an individual that he is under investigation and provide an opportunity to flee or destroy evidence.¹⁶⁴ The Senate Judiciary Committee recognized the “necessity for some coordination of disclosures in civil proceedings in order to protect the Government’s interest in criminal matters.”¹⁶⁵

The sixty-day period also gives the government time to decide whether or not it wishes to take over the action. Under the new version of the FCA, it has two options: (1) proceed with the action, in which case the action shall be conducted by the Government; or (2) notify the court that it declines to take over the action, in

¹⁵⁷ *Id.* at § 3730(b)(1) (West Supp. 1988); see also S. REP., *supra* note 1, at 23.

¹⁵⁸ Because an FCA claim is in the nature of an action for fraud, the complaint must be plead with particularity pursuant to Fed. R. Civ. P. 9(b). See *United States ex rel. Boisjoly v. Morton Thiokol, Inc.* No. Nc-87-91 (D. Utah Aug. 31, 1988) (FCA allegations relating to Space Shuttle disaster not plead with particularity); *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385-86 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 999 (1982) (FCA count dismissed where allegations generalized and vague).

¹⁵⁹ 31 U.S.C. § 3730(b)(2) (1982).

¹⁶⁰ 31 U.S.C.A. § 3730(b)(3) (West Supp. 1988). The 60-day period does not begin to run until both the complaint and the disclosure of material evidence and information is received by the government. S. REP., *supra* note 1, at 23.

¹⁶¹ See *In re Application of the United States ex rel. Navarette*, 661 F. Supp. 506 (D. Colo. 1987).

¹⁶² 31 U.S.C.A. § 3730(b)(3) (West Supp. 1988). The defendant’s answer to an FCA complaint will not be due until 20 days after the complaint is sealed and he or she is served pursuant to Fed. R. Civ. P. 4. *Id.* According to the legislative history, this clause is intended to protect a defendant’s rights. S. REP., *supra* note 1, at 24.

¹⁶³ 31 U.S.C.A. § 3730(b)(3) (West Supp. 1988). The legislative history cautioned courts against routinely granting such extensions of time: the government “should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the *qui tam* action.” S. REP., *supra* note 1, at 25. Moreover, the Committee wrote that “good cause” would not be established based only on the existence of a criminal investigation. Existence of such an investigation does not act as an automatic bar to unsealing. *Id.*

¹⁶⁴ *Cf.* S. REP., *supra* note 1, at 23-24.

¹⁶⁵ S. REP., *supra* note 1, at 24. Keeping 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 and determine both if that suit involves matters that Government is already investigating and whether it is in the Government’s interest to intervene and take over the civil action. *Id.*

which case the person bringing the action shall have the right to conduct the action.¹⁶⁶

Under the old version of the statute, the government had sixty days from the notification by the qui tam plaintiff to enter its appearance. The qui tam plaintiff, however, could proceed with the action if the government did not enter any appearance or notified the court that it did not intend to appear. The plaintiff could also proceed with the action if the government entered an appearance but did not “proceed with the action with reasonable diligence” within six months after entering the action.¹⁶⁷ Now, if the government decides to take over the action, it has the primary responsibility for litigating the case, and will not be bound by any act of the qui tam plaintiff.¹⁶⁸ The government has the right to dismiss¹⁶⁹ or settle¹⁷⁰ the case. The qui tam plaintiff may, however, continue as a party to the action.¹⁷¹

Moreover, even if the government does proceed with the FCA action, it may utilize any other available remedies, including administrative proceedings, to obtain a recovery against the defendant. Interestingly, the qui tam plaintiff would have the right to participate in that administrative proceeding, object to any dismissal or settlement, and have the same rights as he or she would have if the government entered an appearance in the FCA case. The reason for the provision is that any finding of fact or conclusion of law finally determined in the action is binding on the government as well as the qui tam plaintiff.¹⁷²

¹⁶⁶ 31 U.S.C.A. § 3730(4) (West Supp. 1988).

¹⁶⁷ 31 U.S.C. § 3730(2)(B) (1982). The six month time period could be extended by court order. *Id.*

¹⁶⁸ 31 U.S.C.A. § 3730(c)(1) (West Supp. 1988).

¹⁶⁹ *Id.* § 3730(c)(2)(A) (West Supp. 1988). The qui tam plaintiff must be given notice of a motion to dismiss and an opportunity for a hearing. The provision allowing the government, which has taken over a cases, to dismiss it is significant. Under the old FCA, at least one court held that Congress did not give the government the power to terminate lawsuits after it intervened to take them over. *United States ex rel. Weiss v. Schwartz*, 546 F. Supp. 422 (N.D. Cal. 1982).

¹⁷⁰ 31 U.S.C.A. § 3730(2)(B) (West Supp. 1988). The settlement must be approved if the court after a hearing finds that it is fair, adequate and reasonable under all the circumstances. This settlement provision was tested in *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 109 S.Ct. 250 (1988). There, a qui tam plaintiff brought an action against General Electric (GE). The United States entered into a settlement agreement with GE. A magistrate recommended approval, but after an evidentiary hearing, the district court rejected the proposal settlement. The government “took every step possible” to frustrate the participation of the qui tam plaintiff, including opposing discovery. The court also wrote that: “The Department of Justice and the General Electric Company propose to settle all claims by the payment of \$234,000.00. In light of the provision in the 1986 amendments for increased penalties, a lesser burden of proof and no requirement for proof of specific intent, the Court determined from the totality of the proceeding thus far such a settlement is inadequate.” *Id.* at 1165. If the *Gravitt* court’s decision is an indication, courts will take their settlement approval obligations very seriously. The government will have to demonstrate that it pursued the allegations and that the proposed settlement is fair and adequate in light of that investigation.

¹⁷¹ 31 U.S.C.A. § 3730(c)(1) (West Supp. 1988). However, the qui tam plaintiff’s participation in the case can be limited by the court upon a showing that the participation would interfere with or unduly delay the litigation, or that it would be repetitious, irrelevant, or result in of harassment. *Id.* at § 3730(c)(2)(C) (West Supp. 1988). A defendant may also move to limit the participation of the qui tam plaintiff. *Id.* § 3730(c)(2)(D) (West Supp. 1988).

¹⁷² *Id.* § 3730(c)(5) (West Supp. 1988).

The amended FCA also provides that if the government should decide not to pursue the action, the qui tam plaintiff may then proceed.¹⁷³ The government is not a party to a qui tam action in which it elects not to intervene,¹⁷⁴ but it may move the court for an order staying discovery in the action for up to 60 days. The government would need to show that quick discovery would interfere with a criminal or civil investigation arising out of the same facts at issue in the FCA suit.¹⁷⁵

Other procedural changes in the 1986 legislation also broaden the reach of the FCA. New or amended provisions regarding statute of limitations, jurisdiction and venue, burden of proof, and others will make the FCA an easier tool for plaintiffs to utilize. For example, the October 1986 legislation changed the statute of limitations period. The prior version of FCA simply stated that an action must be brought within six years from the date the violation is committed.¹⁷⁶ The new version is more complex:

A civil action under section 3730 may not be brought--(1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.¹⁷⁷

The purpose of the new addition is to include an express tolling provision in the statute.¹⁷⁸ Now, the limitations period will not begin to run until the material facts are known or should have been known by the appropriate government official.¹⁷⁹

The amendment also included new jurisdiction and venue provisions. Section 3732 was added to the statute to recognize "the existence of multi-defendant and multi-district frauds against the Government."¹⁸⁰ FCA now can be brought in any

¹⁷³ *Id.* § 3730(c)(3) (West Supp. 1988). The 1986 amendment provides that if the qui tam plaintiff takes over an action, the government has the right to receive copies of all pleadings and deposition transcripts. The government may later be permitted to intervene, on a showing of good cause and without limiting the status and rights of the plaintiff. *Id.* The reason for this provision is that new evidence, discovered after the expiration of the 60-day period, could cause the government to reevaluate its initial decision, especially where the new evidence would make it difficult for the plaintiff to litigate alone.

¹⁷⁴ *See, e.g.,* Public Interest Bounty Hunters v. Board of Governors of the Fed. Reserve System 548 F. Supp. 157, 161 (N.D. Ga. 1982).

¹⁷⁵ 31 U.S.C.A. § 3730(c)(4) (West Supp. 1988). The 60-day period may be extended on a further showing that in camera "that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings." *Id.*

¹⁷⁶ 31 U.S.C. § 3731(b) (1982).

¹⁷⁷ 31 U.S.C.A. § 3731(b) (West Supp. 1988).

¹⁷⁸ S. REP., *supra* note 1, at 30.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

judicial district where *one* defendant can be found, resides or transacts business, or in any district in which any proscribed false claim occurred.¹⁸¹

District court jurisdiction is also expanded to include state law claims to recover money paid by a state or local government if the action arises from the same transaction and occurrence as the FCA claim¹⁸². The provision makes it clear that the doctrine of pendant jurisdiction applies to FCA suits.

However, Congress did not give unlimited jurisdiction to the courts to hear FCA actions. For example, it denied jurisdiction for suits against members of Congress, judges or senior executive branch officials "if the action is based on evidence or information known to the Government when the action was brought."¹⁸³ Further, FCA actions by present or former members of the armed forces against a present member for actions arising out of military service are completely barred.¹⁸⁴ Jurisdiction is also denied to a *qui tam* plaintiff when the government is already party to a civil suit or administrative proceeding designed to recover a monetary penalty.¹⁸⁵

The 1986 Amendment also eased the standard of proof. The FCA plaintiff has the burden of proof in cases brought under the Act.¹⁸⁶ In the past, there had been some question as to the proper standard of proof to be applied in FCA actions. Circuits split on whether to apply the preponderance of the evidence standard¹⁸⁷ or the clear and convincing evidence standard.¹⁸⁸

The 1986 legislation addressed and resolved this open question. Now, the FCA plaintiff must prove all essential elements of the action, including damages, by the easier preponderance of the evidence standard.¹⁸⁹

Moreover, in some cases, this standard may become simple to satisfy. The

¹⁸¹ 31 U.S.C.A. § 3732(a) (West Supp. 1988). A summons may be served any place within or outside the United States. *Id.*

¹⁸² *Id.* § 3732(b) (West Supp. 1988).

¹⁸³ *Id.* § 3730(e)(2)(A) (West Supp. 1988). This section preserves the jurisdictional bar for high government officials. S. REP., *supra* note 1, at 29. Thus, those officials could only be sued by a *qui tam* plaintiff if information on which the suit was based was not in the government's possession when the action was brought. *Id.* at 30. The Judiciary Committee report also noted that a remedy for official wrongdoing is contained in the Ethics in Government Act, 28 U.S.C. 591 (1982). S. REP., *supra* note 1, at 29.

¹⁸⁴ 31 U.S.C.A. § 3730(e)(1) (West Supp. 1988). The government could still bring a FCA action. *Id.* at § 3729(a) (West Supp. 1988). S. REP., *supra* note 1, at 18, 29.

¹⁸⁵ 31 U.S.C.A. § 3730(e)(3) (West Supp. 1988).

¹⁸⁶ *See, e.g.,* United States *ex rel.* Sacks v. Philadelphia Health Management Corp., 519 F. Supp. 818 (E.D. Pa. 1981).

¹⁸⁷ *See, e.g.,* Federal Crop Ins. Corp. v. Hester, 765 F.2d 723 (8th Cir. 1985); United States v. Thomas, 709 F.2d 968 (5th Cir. 1983); United States v. Cato Bros., 175 F. Supp. 811 (E.D. Va.), *rev'd on other grounds*, 273 F.2d 153 (4th Cir. 1959), *cert. denied* 362 U.S. 927 (1960).

¹⁸⁸ *See, e.g.,* United States v. Milton, 602 F.2d 231 (9th Cir. 1979); United States v. Ekelman & Assoc., 532 F.2d 545 (6th Cir. 1976); United States v. Foster Wheeler Corp., 447 F.2d 100 (2d Cir. 1971); Hageny v. United States, 570 F.2d 924 (Ct. Cl. 1978); United States v. Lawson, 522 F. Supp. 746 (D.N.J. 1981).

¹⁸⁹ 31 U.S.C.A. § 3731(c) (West Supp. 1988).

Amendment allows a guilty verdict or pleas of guilty or *nolo contendere* in a criminal fraud or false statements case to collaterally estop that defendant in the FCA action.¹⁹⁰ The Amendment changes the familiar rule that a *nolo contendere* plea may not be used against the person in a civil or criminal proceeding.¹⁹¹ Again, the rationale for the change is to make recover easier. The Senate Report states that:

The Committee feels that given the high priority which should be afforded to the effective prosecution of procurement fraud cases, an exception to this general rule should be made for False Claims Act cases. Moreover, even when the criminal prosecutor wants to pursue his case fully and gain a guilty verdict, the court could still accept a *nolo* plea over the Government's objection, thus requiring the Civil Division to relitigate the issue. The Committee believes that this would be an unacceptable result; individuals who cheat the Government should be unable to hide behind a *nolo* plea.¹⁹²

Thus, not only does the FCA plaintiff have an easier burden of proof to meet, but also benefits substantially from a more liberal collateral estoppel rule.

Finally, the 1986 Amendment granted new investigative powers to the Department of Justice. Section 3733¹⁹³ authorizes the Department to issue Civil Investigative Demands (CID) for documents or testimony relevant to a FCA investigation. The Act now provides that:

Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

- (A) to produce such documentary material for inspection and copying,
- (B) to answer in writing written interrogatories with respect to such documentary material or information,
- (C) to give oral testimony concerning such documentary material or information, or

¹⁹⁰ *Id.* § 3731(d) (West Supp. 1988).

¹⁹¹ *See* FED. R. CRIM. P. 11(e)(6); FED. R. EVID. 410. There is no doubt that, even before the Amendment, the collateral estoppel doctrine applied to FCA cases when there was a criminal conviction or guilty plea. *See, e.g., Sell v. United States*, 336 F.2d 467 (10th Cir. 1964); *United States v. Kates*, 419 F. Supp. 846 (E.D. Pa. 1976). In *Kates*, because criminal and FCA cases involved the same conspiracy, the court ruled that the jury's guilty verdict conclusively established all of the factual issues as to the liability of the convicted defendants under the consistency counts in the FCA complaint. 419 F. Supp. at 852.

¹⁹² S. REP., *supra* note 1, at 32.

¹⁹³ 31 U.S.C.A. § 3733 (West Supp. 1988).

(D) to furnish any combination of such material, answers, or testimony.¹⁹⁴

Before this amendment, the Department gained access to evidence in FCA cases primarily through the work of agency Inspectors General and the use of grand jury information.¹⁹⁵ However, the latter avenue for fraud investigations was cut off when the Supreme Court restricted the access of government civil litigators to grand jury information.¹⁹⁶ Thus, "CID authority would permit the Civil Division to gain access to evidence of fraud which might currently be unavailable to it due to the Supreme Court's interpretation [of the Federal Rules of Criminal Procedure] . . ."¹⁹⁷

This new authority will provide the government with a powerful investigative and litigative tool. The defendant, however, will be disadvantaged because the government can build its case early. The government will now be able to gather evidence for its civil FCA case before any complaint is filed. Thus, discovery in FCA cases brought by the government will no longer be as critical.

Therefore, the October 1986 Amendment, in addition to easing the ability of qui tam plaintiffs to bring FCA actions, also liberalized the procedural aspects of the law. This liberalization should contribute to an increased usage of the statute.

FCA RELIEF PROVISIONS

There are a number of different damage, penalty and forfeiture provisions in the FCA. For example, the fixed statutory penalty for submitting a false claim now ranges from \$5,000 to \$10,000.¹⁹⁸ The award also includes "3 times the amount of damages which the Government sustains because of the act of that person . . ."¹⁹⁹ The older provision only allowed the imposition of double damages.²⁰⁰ Both versions of the FCA subject a defendant for liability to the government for the costs of the civil action brought.²⁰¹

The amended triple damage provision does allow for certain exceptions if the court finds that:

(A) the person committing the violation of this subsection fur-

¹⁹⁴ *Id.* § 3733(a)(1) (West Supp. 1988).

¹⁹⁵ S. REP., *supra* note 1, at 33.

¹⁹⁶ *United States v. Sells Eng'g Inc.*, 463 U.S. 418 (1983) (interpreting FED. R. CRIM P. 6 (e)).

¹⁹⁷ S. REP., *supra* note 1, at 33. The CID authority granted under section 3733(a) is virtually identical to that given to the Antitrust Division under 15 U.S.C. § 1311-14 (1982). The Judiciary Committee Report stated its intent that the legislative history and case law interpreting that statute also apply to the amendment. S. REP., *supra* note 1, at 33.

¹⁹⁸ 31 U.S.C.A. § 3729(a) (West Supp. 1988). The pre-1986 version of the statute provided for a civil penalty of \$2,000. See also note 67, *supra*, for a discussion of the double jeopardy implications of this increase.

¹⁹⁹ 31 U.S.C.A. § 3729(a) (West Supp. 1988).

²⁰⁰ 31 U.S.C. § 3729(a) (1982).

²⁰¹ *Id.* at § 3729(a) (1982 and West Supp. 1988).

- nished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
- (B) such person fully cooperated with any Government investigation of such violation; and
 - (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.²⁰²

If such a finding is made by the court, then the person would only be subject to double damages. If the provision is designed to encourage potential false claim defendants to come forward and cooperate with the government,²⁰³ that purpose is unlikely to be fulfilled. A potential defendant would have to voluntarily disclose the fact that a false claim was submitted without any knowledge that he or she was under investigation and then cooperate with the government in any subsequent investigation. Then, having done all that, the person would still be subject to a civil penalty and an award of double damages. A false claimant could easily conclude that the benefit or incentive for such early disclosure is just not worth the risk. The exception provision either should have been excluded entirely or changed to reflect the reality of how voluntary government cooperation in detecting fraud is obtained.

Cases brought under the earlier version of the FCA demonstrate how broadly the forfeiture and penalty provisions are interpreted. There can be multiple forfeitures in the same False Claims Act case. For example, the U.S. Supreme Court has held that where there are multiple acts which cause false claims to be submitted, there can be multiple forfeitures.²⁰⁴

In *Bornstein*, the Supreme Court also noted that double damages play an important role in compensating the United States where it has been defrauded.²⁰⁵ Thus, the Court gave a liberal interpretation to how such damages would be calculated. It ruled that:

[I]n computing the double damages authorized by the Act, the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received by the Govern-

²⁰² 31 U.S.C.A. § 3729(a) (West Supp. 1988).

²⁰³ The Senate Report does not give a reason for the exception provision. S. REP., *supra* note 1, at 17.

²⁰⁴ *United States v. Bornstein*, 423 U.S. 303 (1976) (liable for three \$2,000 statutory forfeitures when three shipments of falsely branded tubes caused submission of false claims).

²⁰⁵ *Id.* at 314.

ment from any source. This method of computation, which maximizes the deterrent impact of the double-damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision, best comports in our view with the language and purpose of the Act.²⁰⁶

Thus, according to this decision, the government may use the FCA and obtain windfall damages, especially since its litigation costs are paid by the unsuccessful defendant.²⁰⁷

However, in *United States ex rel. Woodard v. Country View Care Center, Inc.*,²⁰⁸ the Tenth Circuit held that in a Medicaid case, where payments are split between the federal and state governments, “it is the federal government’s share of the overpayment which must be doubled to arrive at the proper amount of double damages awarded to the United States.”²⁰⁹ Thus, if a false claim was submitted in the amount of \$100,000 and the federal government paid 60% of that amount and a state government paid 40%, then \$60,000 would be subject to doubling (now tripling).

Under *Woodward*, the state government does not lose out. In addition to the FCA qui tam awards,²¹⁰ the court held that the losses of that qui tam plaintiff would also be recoverable under the FCA. The panel majority reached this conclusion by liberally interpreting section 3730(b)(1), which provides that a civil action may be brought “for the person and for the United States Government.”²¹¹ The court then wrote that:

By allowing the *qui tam* plaintiff here to recover for itself its share of the fraudulent overpayment (not doubled) and the United States to recover its amount doubled provides an allocation of damages in accord with the shared funding of the program which paid the fraudulent claims. It is acknowledged that in the traditional “informer” type *qui tam* action the plaintiff will have suffered no economic loss but where, as here, the *qui tam* plaintiff’s injury occurs simultaneously with the federal government’s injury the state should not have to pursue a state law claim in

²⁰⁶ *Id.* at 316-17 (footnotes omitted). The Court noted that, in that case involving inferior goods, “actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality.” [citations omitted] *Id.* at 316 n.13. See also *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888, 893 (10th Cir. 1986) (FCA measures the injury of the government “as the difference between what the government actually paid and the amount it would have paid in the absence of the fraudulent claim.”); *United States v. Ekelman & Assoc.*, 532 F.2d 545 (6th Cir. 1976); *United States v. Globe Remodeling Co.*, 196 F. Supp. 652 (D. Vt. 1960). See generally 35 ALR Fed. 805.

²⁰⁷ See *infra* note 222 and accompanying text.

²⁰⁸ 797 F.2d 888.

²⁰⁹ *Id.* at 893.

²¹⁰ See discussion *supra* notes 218 and 223 and accompanying text.

²¹¹ 31 U.S.C. § 3730(b)(1) (1982) (emphasis supplied). The clause is the same in the amended FCA.

another proceeding.²¹²

The case was remanded for the recalculation of the judgment.

Judge Seymour vigorously dissented from this portion of the majority opinion. He concluded that the words "for the person" were not intended to be a grant of jurisdiction, but were making clear that the qui tam plaintiff could recover a portion of the award pursuant to section 3730(c). However, since Congress in the 1986 Amendment did not change the "for the person" language, it can be assumed that *Woodward* is still good law.

The amended FCA provides still more incentive for persons to bring qui tam actions. Under the pre-October 1986 version, qui tam plaintiffs could be awarded, by the court, a "reasonable" amount for collecting the civil penalty and damages if the government did not take over the action.²¹³ That amount could not exceed twenty-five percent of the judgment or settlement, and was paid out of those proceeds.²¹⁴ The qui tam plaintiff also could have been awarded reasonable expenses and costs.²¹⁵

If the government decided to take over an action, the person who initiated the suit "may receive an amount the court decides is reasonable for disclosing evidence or information the Government did not have when the action was brought."²¹⁶ That amount was capped at ten percent of the judgment or settlement amount, also payable out of the proceeds.²¹⁷

The amended statute now provides that if the government does not proceed with the action, the qui tam plaintiff may receive a reasonable amount "not less than twenty-five percent and not more than thirty percent of the proceeds of the action or settlement"²¹⁸ In addition, the FCA now clearly provides that as part of the award of reasonable expenses, the plaintiff is entitled to receive reasonable attorneys' fees.²¹⁹ Thus, there is a stronger incentive for plaintiffs to bring and counsel to take on FCA cases. If the government takes over the case, the initiating plaintiff can receive an award of at least fifteen percent but not more than twenty-five percent of the judgment or settlement amount.²²⁰ The exact amount depends on the extent

²¹² 797 F.2d at 894.

²¹³ 31 U.S.C. § 3730(c)(2) (1982).

²¹⁴ *Id.*

²¹⁵ *Id.* The government is never liable for the expenses of a qui tam plaintiff. *Id.* at § 3730(d) (1982).

²¹⁶ *Id.* § 3730(c)(1) (1982).

²¹⁷ *Id.*

²¹⁸ 31 U.S.C.A. § 3730(d)(2) (West Supp. 1988).

²¹⁹ *Id.* The term "reasonable attorneys' fees" is intended to mean that counsel should be paid at "marketplace rates for all time reasonably spent." 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986) (statement of Rep. Berman).

²²⁰ 31 U.S.C.A. § 3730(d)(1) (West Supp. 1988). The reason for this portion of the amendment is clear: "If a potential plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff

to which the person “substantially contributed to the prosecution of the action.”²²¹ Again, reasonable expenses, including attorneys’ fees, are awarded.²²²

However, *qui tam* plaintiff will be able to receive no more than ten percent where the government has taken over the action and

[W]here 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 [sic] 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.²²³

Clearly, the amended FCA will encourage the bringing of actions, despite the jurisdictional limitations,²²⁴ based solely on evidence already in the public domain. Even a small percentage of a large fraud case would constitute incentive to file a complaint.²²⁵ Moreover, that *qui tam* plaintiff would be reimbursed for reasonable expenses—including attorneys’ fees and costs.²²⁶

Therefore, the amended damage provisions virtually guarantee an award of some amount of money to a *qui tam* plaintiff when the defendant loses an FCA action.²²⁷ Plus, because attorneys’ fees may also be recovered, *qui tam* plaintiffs

may decide it is too risky to proceed in the face of a totally unpredictable recovery.” S. REP., *supra* note 1, at 28.

²²¹ 31 U.S.C.A. § 3730(d)(1) (West Supp. 1988).

²²² *Id.*

²²³ *Id.* at § 3730(d)(1) (West Supp. 1988).

²²⁴ See discussion *supra* at notes 151 to 152 and accompanying text.

²²⁵ The rationale for this provision, which could result in a windfall to *qui tam* plaintiffs who merely read the newspaper and file a complaint, was stated by the Senate Judiciary Committee: “The Committee believes that a financial reward is justified in these circumstances if but for the relator’s suit, the Government may not have recovered.” S. REP., *supra* note 1, at 28.

²²⁶ 31 U.S.C.A. § 3730(d)(1) (West Supp. 1988).

²²⁷ There is some good news for successful defendants in the FCA statute. If the government does not take over the suit, and the *qui tam* plaintiff loses, the court may award the defendant its reasonable expenses and attorneys’ fees. *Id.* § 3730(d)(3) (West Supp. 1988). However, in order to make such an award, the court must find the plaintiff’s claim was “clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.” *Id.* The legislative history indicates that the clause was designed to provide a “strong disincentive” for using the *qui tam* provisions of the FCA for improper purposes. The Judiciary Committee urged courts to “strictly apply” this provision as well as sanctions available under Fed. R. Civ. P. 11. See S. REP., *supra* note 1, at 29. See also 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986) (statement of Rep. Berman). However, apart from the difficulty in providing that the action was brought for improper purposes, it would be highly unlikely that an individual *qui tam* plaintiff would have the financial resources to pay even a small percentage of attorneys’ fees in a case that proceeded to the summary judgment or trial stages. The possibility of Rule 11 sanctions may provide a better deterrent to the filing of bad faith lawsuits.

should have little difficulty finding counsel willing to provide representation. It is likely that these provisions, more than any others in the amended statute, will result in an increased filing of FCA lawsuits.

There is some question as to whether the new penalty and damage provisions will be applied to cases filed before their effective date. Courts have held that the 1986 amendment was not intended to be applied retroactively.²²⁸ However, other district courts have applied the 1986 Amendment retroactively.²²⁹

CONCLUSION

This Article has attempted to show that the amended False Claims Act has the potential of being a powerful tool in the hands of imaginative qui tam plaintiffs and their counsel. The looser jurisdictional and procedural provisions of the statute will allow more proceedings to be initiated and litigated successfully than would have been the case prior to October 1986. Moreover, the Pentagon contracting scandal may create an atmosphere in which courts will not look with favor on false claim defendants. Therefore, counsel representing government contractors will have to be especially sensitive to the impact of plea bargaining in criminal fraud cases.

²²⁸ *United States ex rel. Boisvert v. FMC Corp.*, No. 86-20163 (N.D. Cal. Sept. 9, 1987) (LEXIS, Genfed library, Dist file); *United States v. Bekhrad*, 672 F. Supp. 1529 (S.D. Iowa 1987).

²²⁹ *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied*, 109 S.Ct. 250 (1988); *United States v. Ettrick Wood Products, Inc.* 683 F. Supp. 1262 (W.D. Wis. 1988); *United States v. Oakwood Downriver Medical Center*, No. 87-CV-72500-DT (E.D. Mich. May 20, 1988) (LEXIS, Genfed library, Dist file); *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987).