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Game Theory and the Civil False Claims Act: Iterated Games and Close-knit Groups

By Pamela H. Bucy*

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I. INTRODUCTION

In the 1980's, a lieutenant colonel of the Israeli Air Force embezzled \$11 million of United States military aid and funneled it into Swiss bank accounts.¹ Using aliases and smuggled records, a United States

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1. United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1037 (6th Cir. 1995).

citizen living and working in Israel gathered information about the embezzlement and reported it to the United States Department of Justice (“DOJ”)² under the civil False Claims Act (“FCA”)³ as a co-plaintiff with the DOJ.⁴ As a result of their partnership, the United States Treasury collected \$75 million from the guilty parties and the whistleblower collected \$11.3 million.⁵

This Article uses game theory⁶ to analyze the public-private partnership created by the civil FCA. Because of the FCA’s enormous success in detecting and deterring white collar crimes, and its prospect for detecting and deterring even more,⁷ understanding this partnership is important. Part II of this Article provides a brief overview of the civil FCA, focusing on the unusual public-private dynamic created by the Act. Part III highlights basic principles of game theory, identifying two game theory concepts especially pertinent to FCA practice: “iterated,” or repeated, games and game-playing within “close-knit” groups. Part IV applies these game theory concepts to the partnership created by the civil FCA and concludes by offering suggestions for optimal strategies to be pursued by the players in the FCA game.

II. OVERVIEW OF THE CIVIL FALSE CLAIMS ACT

Angry at contractors who were supplying the Union Army with defective supplies, President Lincoln lobbied hard for the FCA,⁸ which is aimed at government contractors who cheat the federal government.⁹

2. *Id.*

3. 31 U.S.C. §§ 3729–3733 (2000).

4. *Gen. Elec. Co.*, 41 F.3d at 1037–38.

5. *Id.* at 1036.

6. See generally Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603 (2004) [hereinafter Bucy, *Games and Stories*] (providing an in-depth examination of game theory principles).

7. Currently, the FCA applies only in the government contracting context, but its model could be expanded effectively to other areas, such as protection of financial and securities markets and protection of the environment. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 58, 76–77 (2002) [hereinafter Bucy, *Private Justice*].

8. 31 U.S.C. §§ 3729–3733. For a history of the False Claims Act, see J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 565–607 (2000); Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 909–19 (2002) [hereinafter Bucy, *Information as a Commodity*]. See also David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. REV. 103, 103–08 (1996), for a discussion of the English shift from private prosecution to public prosecution, and Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83–91 [hereinafter *Qui Tam History*], which offers an overview of the linguistic origin, legal structure, and historical development of English qui tam actions.

9. 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman). According to an 1863 investigation, 1000 mules delivered to the Union Army were “unfit for the services, and

The FCA creates a civil cause of action against any person who files a “false claim” against the government, such as falsely alleging the amount or quality of the products supplied.¹⁰ The FCA provides that a private party, known as a “relator,” may serve as a plaintiff, along with the United States, in a lawsuit brought under the FCA against the contractors.¹¹ This private party need not be injured personally or even affected by the defendant’s false claim. Rather, she is deemed to have standing on an assignment theory—that the federal government, as the injured party, may assign to the relator its right to sue.¹² These private actions are called *qui tam* suits, deriving their name from the Latin phrase, “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means he “who pursues this action on our Lord the King’s behalf as well as his own.”¹³

The procedure for pursuing *qui tam* actions is unusual.¹⁴ An individual who believes she can prove that a defendant has submitted false claims to the federal government files a *qui tam* action in federal court.¹⁵ The complaint is sealed and not served on the defendant or made public in any way.¹⁶ The complaint is, however, served on the United States DOJ, and the action is stayed while the DOJ decides whether to join the suit as a co-plaintiff.¹⁷ If the DOJ intervenes, it assumes “primary responsibility”¹⁸ for the lawsuit, though the relator

almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased.” *Id.* See generally *False Claims Act Amendments: Hearings on H.R. 3334 Before the Subcomm. on Admin. Law and Government Relations of the House Comm. on the Judiciary*, 99th Cong. 1 (1986).

10. 31 U.S.C. § 3729(a).

11. *Id.* § 3730(b).

12. See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (“[A]dequate basis for the relator’s suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.”).

13. *Id.* at 768 n.1; see also *Qui Tam History*, *supra* note 8, at 83 (citing 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1768)).

14. See *Bucy, Private Justice*, *supra* note 7, at 49–52 (noting the uniqueness of the *qui tam* action and explaining *qui tam* action procedures).

15. 31 U.S.C. § 3730(b). The FCA provides that “any person” may bring a civil action under the FCA. Typical private plaintiffs, known as relators, include current or former employees, competitors, competitors’ employees, state and local governments, special interest groups (such as Taxpayers Against Fraud), attorneys, and law firms that discover fraud in the course of representing clients in other matters. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.01[B] (2d ed. 2002).

16. 31 U.S.C. § 3730(b)(2).

17. See *id.*

18. *Id.* § 3730(c)(1). This dual-plaintiff system creates interesting dynamics. When the government intervenes, *qui tam* actions become three-party lawsuits. The co-plaintiffs (the federal government and the relator) are united on some aspects of the litigation (gathering

retains certain rights, including the right to object and be heard on motions to dismiss or settle.¹⁹ If the federal government elects not to intervene, the relator may proceed with the action as the sole plaintiff.²⁰

When the government intervenes, the relator is guaranteed at least 15% of any judgment or settlement, and the court can award more—up to 25%.²¹ If the government does not join the lawsuit, the relator is guaranteed 25% and could receive up to 30%.²² Only in cases in which evidence is based on publicly disclosed information or the relator is partially at fault for the violations does the relator get less.²³ Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments,²⁴ relators' percentages involve substantial sums.²⁵

information of fraud and opposing most defense strategies and motions), but the government and relator become pitted against each other when, for example, the government seeks to have the relator jurisdictionally barred. *See, e.g., United States ex rel. Fine v. Chevron*, 72 F.3d 740, 745 (9th Cir. 1995). Such disagreement also might occur if the government disagrees with the award the relator seeks upon conclusion of the case. *See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 52 F. Supp. 2d 420, 429–30 (E.D. Pa. 1998); *United States v. Gen. Elec. Co.*, 808 F. Supp. 580, 583–84 (S.D. Ohio 1992), *aff'd in part, rev'd in part sub nom. United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032 (6th Cir. 1995).

For a more in-depth discussion of the tension between the DOJ and relators in qui tam cases, see Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 36–37, 47–53 (1998).

19. 31 U.S.C. § 3730(c)(2). Some relators have successfully objected to proposed settlements between the government and qui tam defendants. *See, e.g., Gravitt v. Gen. Elec. Co.*, 680 F. Supp. 1162, 1165 (S.D. Ohio 1988).

20. 31 U.S.C. § 3730(c)(3). The federal government may request to receive copies of all pleadings filed and deposition transcripts (at the government's expense). *Id.* Upon a showing of "good cause," the court may permit the government to intervene "at a later date." *Id.*

21. *Id.* § 3730(d)(1).

22. *Id.* § 3730(d)(2).

23. *Id.* § 3730(d)(1), (3).

24. For example, recent judgments in FCA qui tam cases include a \$745 million settlement with HCA Healthcare Corporation to resolve some of the FCA violations pending against HCA, a \$385 million settlement with National Medical Care, Inc., a \$325 million settlement with SmithKline Beecham Clinical Laboratories, a \$324 million settlement with National Medical Enterprises, and a \$110 million settlement with National Health Laboratories. BOESE, *supra* note 15, § 1.05[A].

25. *See* Response from U.S. Dep't of Justice to FOIA Request 145-FOI-6072 (Oct. 20, 2001) [hereinafter FOIA Response] (on file with author) (listing the following decisions: *United States ex rel. Durand N. v. Tap Holdings, Inc.* (awarding \$95.1 million), *United States ex rel. Johnson v. Shell Oil Co.* (awarding \$64.3 million), *United States ex rel. McLendon v. Columbia/HCA Healthcare Corp.* (awarding \$44.1 million), *United States ex rel. Ven-A-Care v. Nat'l Med. Care, Inc.* (awarding \$40 million)). Historically, relators who proceed on their own after the DOJ has declined to intervene have enjoyed little success. *See* FOIA Response, *supra*. Their cases are dismissed more often and their recoveries are substantially less. *Id.* For example, the aggregate amount paid to relators through fiscal year ending September 30, 2002, as the relators' statutory share when the government intervened, was \$917.6 million. PHILLIPS & COHEN LLP, ALL

In 1986, Congress substantially amended the FCA, invigorating qui tam actions.²⁶ The amendments did so in two major ways.²⁷ First, the qui tam relator is allowed to remain actively involved in the case even if the federal government joins as a plaintiff.²⁸ Previously, if the government decided to enter the lawsuit, the qui tam relator retained only a minor role with no power to influence the course of the lawsuit.²⁹ The second substantial change made by the 1986 amendments increased the amount of recovery allowed the qui tam relator and guaranteed a minimum percentage.³⁰ The 1986 amendments made a remarkable

ABOUT QUI TAM, THE FALSE CLAIMS ACT, at http://www.all-about-qui-tam.org/fca_stats.shtml (last visited May 19, 2004) (citing DOJ statistics as of September 30, 2002); TAF EDUC. FUND, THE FALSE CLAIMS ACT LEGAL CENTER, at <http://www.taf.org/statistics2002.html> (last visited May 19, 2004) (reporting DOJ statistics for fiscal year ending September 30, 2002). The aggregate amount to relators during this same time period *when the government did not intervene* was \$70.2 million. PHILLIPS & COHEN, *supra*. Also, only 2.1% (12 out of 570) of qui tam FCA cases in which the government has intervened have been dismissed, whereas 71.1% (1357 out of 1907) of qui tam FCA cases in which the government has not intervened have been dismissed. *Id.*

26. BOESE, *supra* note 15, § 1.04[H]; *see* False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended at 31 U.S.C. §§ 3729–3133).

27. Other provisions in the 1986 amendments increased the amount of recovery a relator could obtain, and established a (fairly generous) mandatory minimum recovery for relators. 31 U.S.C. § 3730; *see supra* text accompanying notes 21–22 (noting that (as a result of the 1986 amendments) a relator is guaranteed 15 to 25% of the judgment when the government intervenes and 25 to 30% when it does not). The relator's amount may be reduced to 10% if the FCA case is based upon information in addition to that provided by the relator. 31 U.S.C. § 3730(d)(1). This amount may be reduced to nothing if the relator is convicted of conduct arising from his or her role in the FCA violation. *Id.* § 3730(d)(3). The amendments relaxed provisions that had prevented many relators from filing suit. Bucy, *Private Justice*, *supra* note 7, at 47 (discussing the relaxation of the mens rea requirement). The amendments also provided a cause of action for relators who suffer retribution from their employers for whistleblower activities related to the FCA. 31 U.S.C. § 3730(h). Other amendments made FCA cases easier to prove overall, thereby improving all plaintiffs' chances of success. These amendments included relaxing the mens rea requirement, *id.* § 3729(b), establishing that the burden of proof is by a preponderance of evidence rather than the clear and convincing standard in FCA cases, *id.* § 3731(c), and expanding the statute of limitations, *id.* § 3731(b).

28. 31 U.S.C. § 3730(c)(1) (stating that the relator continues as a party even if government joins as a plaintiff); *see also id.* § 3730(c)(2)(A) (stating the relator is entitled to a hearing before the case is dismissed); *id.* § 3730(c)(2)(B) (stating that the relator is entitled to a hearing before the case is settled).

29. The significance of this change is demonstrated dramatically in a 1989 Ohio case in which the government, which chose to join in a fraud suit initiated by a qui tam relator against General Electric, was not allowed to settle the case because the qui tam relator objected to the settlement amount of \$234,000. *Gravitt v. Gen. Elec. Co.*, 680 F. Supp. 1162, 1162–65 (S.D. Ohio 1988). "Later, on the eve of trial, the case was settled, with the qui tam relator's consent, for \$3.5 million." PAMELA H. BUCY, *WHITE COLLAR CRIME, CASES AND MATERIALS* 715 (2d ed. 1998). "The qui tam relator received \$770,000—22% of the government's recovery." *Id.*

30. Prior to the 1986 amendments, if the government joined the action, the qui tam relator could receive no more than 10% of the recovery, and the qui tam relator's share depended on what the court thought was an appropriate amount. *See* 31 U.S.C. § 3730(c)(1) (1982). The 1986

difference in the use of the FCA. Before 1986, the DOJ received about six qui tam cases per year.³¹ Since the 1986 amendments went into effect, and through fiscal year 2000, 3326 qui tam FCA lawsuits have been filed and \$4.024 billion has been recovered through the FCA.³² Eyeing the success of the 1986-invigorated FCA, states are passing similar statutes covering false claims submitted to state governments.³³

The FCA has proven highly effective for three reasons: (1) it provides a way for regulators to gain access to high-level, detailed, inside information about wrongdoing;³⁴ (2) it provides a mechanism for private parties and their counsel to supplement regulators' resources;³⁵ and (3) it has significant potential to control the quality of private party participation in regulatory efforts.³⁶ However, the FCA is no panacea. Because qui tam actions empower private parties—regardless of their ability or ethics—to bring significant lawsuits against businesses in the name of the United States, they are subject to abuse.³⁷

amendments guarantee that even if the government joins the lawsuit, the qui tam relator gets at least 15% of any judgment or settlement, and the court can award more—up to 25%. 31 U.S.C. § 3730(d)(1) (2000). If the government does not join the lawsuit, the qui tam relator is guaranteed 25%. *Id.* § 3730(d)(2). Only in cases in which the evidence is based on publicly disclosed information does the qui tam relator get 10% or less. *Id.* § 3730(d)(1).

31. Steve France, *The Private War on Pentagon Fraud*, A.B.A. J., Mar. 1990, at 46, 48; cf. WILLIAM L. STRINGER, *THE FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT* 23 (1996) (consisting of an economic study commissioned by the Taxpayers Against Fraud and stating that “[i]n the period between 1943 and 1986, the Department of Justice records show only three qui tam cases (with a total recovery of \$54 thousand) and, although there could have been more if records had been able to identify qui tam cases, there were undoubtedly very few.”).

32. FOIA Response, *supra* note 25.

33. See, e.g., CAL. GOV'T CODE §§ 12650–12656 (West 1992 & Supp. 2001) (establishing California's version of the False Claims Act); DEL. CODE ANN. tit. 6, §§ 1201–1209 (Supp. 2002) (creating liability for false claims to the state and establishing reporting guidelines); FLA STAT. ANN. §§ 68.081–.092 (West 1997 & Supp. 2004) (providing remedies for obtaining treble damages and civil penalties when money is obtained from state government under a false claim); HAW. REV. STAT. ANN. § 661-21 (Michie 2002) (outlining requirements for qui tam actions or recovery of false claims to the state); 740 ILL. COMP. STAT. 175/1–175/8 (2002) (creating false claim liability in Illinois); NEV. REV. STAT. ANN. 357.010–.250 (Michie 2000) (allowing for recovery for submission of false claims to state or local government); cf. LA. REV. STAT. ANN. §§ 437.1–440.3 (West 1999) (applying to false claims regarding health care only); TENN. CODE ANN. §§ 71-5-181 to -5-185 (2002) (applying to false claims regarding health care under Medicaid programs only).

34. See Bucy, *Private Justice*, *supra* note 7, at 53; Bucy, *Information as a Commodity*, *supra* note 8, at 940–47.

35. See Bucy, *Private Justice*, *supra* note 7, at 54–56, 61–62.

36. *Id.* at 68–76.

37. *Id.* at 62–68 (discussing how frivolous False Claims Act cases create difficulties for business, regulators, and the judicial system).

III. RELEVANT PRINCIPLES OF GAME THEORY

Game theory looks at how people make decisions. Like all economic modeling, game theory simplifies social situations and offers insights from the simplification.³⁸ It was developed in the early and mid-twentieth century by a mathematician, John von Neumann, and an economist, Oskar Morgenstern.³⁹ Game theory arises from the notion that routinized, describable habits and behaviors govern day-to-day interactions much as rules govern parlor games such as bridge and poker.⁴⁰ Like other rational choice theories, game theory assumes that decision-makers are rational actors who pursue their self-interest.⁴¹ Game theory further assumes that when making decisions, actors take into account what they expect other rational self-interested decision-makers to do.⁴² This assumption leads to a key concept in game theory, the Nash equilibrium.

The Nash equilibrium posits that each player will choose a strategy that is best for that player given the fact that other players are also choosing the strategy that is best for them.⁴³ The movie *A Beautiful Mind*, based upon the life of John Nash, included a bar scene with an example of the Nash equilibrium.⁴⁴ Nash and several of his college friends are at a crowded bar when a group of attractive college coeds enter. There are the same number of females in the group as there are males in Nash's group. In the movie, Nash and his friends are taken with a particularly attractive blond in the female group. As the males watch the coeds enter, Nash suggests to his friends that they decide among themselves which coed each will approach, rather than all competing for the blond. He explains why—that at best only one of them will be successful wooing the blond, and that their obvious competition for her will anger the other girls so much that none of them

38. DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 7, 15 (1994); MORTON D. DAVIS, *GAME THEORY* 6–8 (1983); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW, HOW NEIGHBORS SETTLE DISPUTES* 157 (1991).

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

40. DAVIS, *supra* note 38, at xv.

41. ELLICKSON, *supra* note 38, at 156–59; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 19–23 (5th ed. 1998).

42. BAIRD ET AL., *supra* note 38, at 11–12; ELLICKSON, *supra* note 38, at 156–64; MARTIN J. OSBORNE & ARIEL A. RUBINSTEIN, *A COURSE IN GAME THEORY* 1 (1994).

43. John F. Nash, Jr., *The Bargaining Problem*, 18 *ECONOMETRICA* 155–62 (1950); *cf.* BAIRD ET AL., *supra* note 38, at 19–28; DAVIS, *supra* note 38, at 119–123; AVINASH K. DIXIT & BARRY J. NALEBUFF, *THINKING STRATEGICALLY* 85–86 (1991); HERBERT GINTIS, *GAME THEORY EVOLVING* 6 (2000); OSBORNE & RUBINSTEIN, *supra* note 42, at 155–57.

44. *A BEAUTIFUL MIND* (Universal Pictures 2001).

will be amenable to the males' subsequent efforts to charm them. This is the Nash equilibrium: in selecting their strategy for wooing the coeds, Nash and his friends take into account what the girls are likely to be thinking—resentment at being chosen second. Thus, Nash and his friends revise their initial strategy of competing for the blond to a strategy of agreeing among themselves which coed each male will approach. In this sense, the Nash equilibrium advises players in any game that, when choosing their strategies, they should take into account what other players are likely to do.

Two game theory principles are particularly relevant to FCA practice. The first is that the FCA is an iterated game with repeat players. The DOJ is the obvious repeat player in the FCA game because the DOJ will deal with many FCA cases, FCA counsel, and FCA defendants over time. Because of the specialized nature of FCA practice, most private attorneys (plaintiff and defense) who handle FCA cases also will be repeat players. Even some of the defendants, especially large defense contractors, will be repeat players. The second game theory principle seen in FCA practice is that its players, especially counsel, are part of a close-knit group.

IV. APPLYING GAME THEORY TO THE CIVIL FALSE CLAIMS ACT

A. *Repeated or Iterated Games*

Considerable scholarship has been devoted to the way game strategies change when games repeat. Robert Axelrod pioneered scholarship of iterated games with his analysis of computer generated games⁴⁵ modeled after the Prisoner's Dilemma.⁴⁶ Axelrod solicited computer games from game theory experts.⁴⁷ The only two choices of play allowed in the two-player games he solicited were cooperation

45. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 109 (1984).

46. The Prisoner's Dilemma is the most well-known game used to demonstrate the interdependence of decisions. DIXIT & NALEBUFF, *supra* note 43, at 11–13. Two prisoners are held in separate cells and they are not allowed to communicate with each other. *Id.* Each is given the choice of confessing (and implicating the other prisoner) or refusing to confess. *Id.* If both prisoners refuse to confess, they both go free. *Id.* Otherwise, the prisoner who confesses first gets a short prison sentence and the nonconfessing (or second-to-confess) prisoner gets a lengthy prison sentence. *Id.* Thus, even though each individual prisoner has an incentive to defect (to be the first to confess) and do it quickly, both prisoners are better off if they cooperate and refuse to confess. *Id.* While the first to defect benefits himself, he benefits himself more by cooperating from the beginning with the other prisoner. *Id.* Thus, mutual cooperation is the best strategy for both prisoners. *Id.*

47. AXELROD, *supra* note 45, at xi–xii.

with the other player and noncooperation, or defection.⁴⁸ Axelrod played the games against each other in computer generated tournaments.⁴⁹ The winning strategy in every tournament was the simplest strategy submitted—Tit-for-Tat.⁵⁰ A player using a Tit-for-Tat strategy begins play by cooperating with the other player and thereafter copying whatever strategy the other player used on the prior move.⁵¹ Thus, a player begins by cooperating and continues to cooperate as long as the other player cooperates.⁵² A player is never the first to defect but responds with defection when presented with defection.⁵³

Axelrod's observations about optimal strategies in iterated games have become game theory lore. First, in the short-run, each player has incentive not to cooperate, but in the long-run, players benefit most by cooperating.⁵⁴ Second, a player should not cooperate with another player if the other player becomes uncooperative,⁵⁵ but a player should respond to noncooperation with noncooperation, and return to cooperation only when the other player returns to cooperation.⁵⁶ Third, in zero-sum games (where one player wins only if the other player loses), hiding one's strategy is beneficial, but in non-zero-sum games (where both parties have the potential to win), clearly communicating one's strategy of cooperation is best.⁵⁷ Fourth, clarity in one's strategy is essential in pursuing optimal strategies in repeating games;⁵⁸ thus each player's strategy should be "eminently comprehensible to the other player."⁵⁹

To demonstrate how Axelrod's observations apply to FCA practice, we will focus on the DOJ and the game moves available to the DOJ. There are, at most, five key decisions the DOJ must make in any FCA case brought to the DOJ by a relator: (1) whether to investigate the information the relator brings;⁶⁰ (2) how thorough of an investigation to

48. *Id.* at 30.

49. *Id.*

50. *Id.* at 31.

51. *Id.* at 136–37.

52. *Id.* at 36–39.

53. *Id.* at 113–20.

54. *Id.* at 109.

55. *Id.* at 118–20.

56. *Id.* at 118–19.

57. *Id.* at 122–23.

58. *See id.* at 120.

59. *Id.* at 122.

60. If the information does not appear to be credible, the DOJ likely will do little or nothing to further investigate the allegations.

conduct;⁶¹ (3) whether to intervene in the case; (4) whether to oppose the relator's case, in whole or part, if the DOJ does not intervene;⁶² and (5) what to recommend as to the percentage of judgment allocatable to relator.⁶³

Axelrod's principles for optimal game playing suggests that at each of these key points, the DOJ should begin by working with each relator and the relator's counsel cooperatively.⁶⁴ A DOJ cooperation strategy would include facilitating contact between the DOJ and relators'

61. ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER 41 (2001). If the information of wrongdoing appears credible, the DOJ likely will investigate the matter further through subpoenas or interviews. *Id.* Such investigation may be for criminal or civil liability or both. If the DOJ investigates the matter, it must decide how much to involve the relator. Those relators who are insiders—whether to the targeted business or just the industry—can be extremely helpful in identifying relevant transactions, records, or individuals to speak with. Knowledgeable insiders can also be helpful in explaining industry practices and trends. According to one experienced relator's counsel:

The role of relator's counsel will depend in large part on whether the government lawyers need and want assistance. In some cases, due to shortage of resources or attorney inexperience, the government may choose not to litigate the case aggressively; in this event, counsel for the relator may wish to take up the laboring oar.

Id. at 69. There are innumerable examples in which a relator's counsel has conducted considerable work on an FCA case jointly pursued by the DOJ and the relator. For example, in one qui tam FCA case, six law firms devoted twenty full-time lawyers to the case and incurred \$1 million per month in investigative costs, just to prepare the case for filing. John R. Phillips, Remarks at the 2001 A.B.A. National Institute on the Civil False Claims Act and Qui Tam Enforcement, Panel on FCA Enforcement in the Post-Stevens World (Nov. 29, 2001).

In another recent qui tam FCA case, in which there were 125 defense attorneys and fifteen relators' attorneys, plus DOJ attorneys, the federal courthouse was not large enough to accommodate the group for docket calls. Scott A. Powell, Remarks at the Mealey's Conference, Litigating Whistleblower Cases Under the Qui Tam Provisions of the False Claims Act, Panel on Reports from the Field, Developments on Notable Cases (June 11, 2001) (referring to United States *ex rel.* Johnson v. Shell Oil Co., 33 F. Supp. 2d 528 (E.D. Tex. 1999)). The defendant, Shell Oil Company, produced 7000 banker boxes of records. *Id.* One of the relator's attorneys took responsibility for handling all documents in the case. *Id.* Doing so took 5000 square feet of warehouse space (with the record boxes stacked seven feet high). *Id.* This relator's attorney organized the records so that the plaintiffs could respond within thirty days to any defense request for identification of any record pertaining to a particular claim by producing a CD containing the requested records. *Id.* This case settled on February 4, 2000, with a recovery to the U.S. Treasury of \$400 million and a relators' share of \$64 million. FOIA Response, *supra* note 25.

62. If the DOJ decides not to participate in the matter, either because the case lacks merit or because the DOJ lacks resources, the DOJ must decide how to respond if the relator opts to continue the case. Under the FCA statute and evolving practice, the DOJ has the authority to intervene for limited purposes in a case, such as moving for dismissal of the case. 31 U.S.C. § 3730(c)(2)(A) (2000); *see also* Bucy, *Private Justice*, *supra* note 7, at 70–72.

63. *Cf.* WEST, *supra* note 61 at 41–55 (outlining the DOJ's issues); Bucy, *Private Justice*, *supra* note 7, at 51–52 (discussing relator's goals vis-à-vis the DOJ).

64. *See supra* note 54 and accompanying text (noting Axelrod's first principle—that players benefit in the long run by cooperating with other players).

counsel⁶⁵ and involving relators and relators' counsel in the investigation to the extent feasible.⁶⁶ Axelrod's principles further suggest that the DOJ should cease cooperating with relators and relators' counsel only when they cease to cooperate with the DOJ.⁶⁷ A relator's lack of cooperation could range from minor (e.g., not being available to meet with DOJ personnel when promised), to significant (e.g., providing inaccurate or incomplete information to the DOJ), to catastrophic (e.g., alerting suspects and assisting in a cover-up of the problem). Following the lesson of Tit-for-Tat, the DOJ should respond to relators' defections in kind, with noncooperation strategies that match the seriousness of the relators' defections.⁶⁸ Given the significance of a relator's defection (destruction of evidence, for example), the DOJ's appropriate response may be complete discontinuation of cooperation with the relator. Only if a relator returns to a trustworthy, cooperative strategy after a defection should the DOJ return to a cooperation strategy.⁶⁹

Not only is the message the DOJ sends to potential relators and relators' counsel important, but, because the FCA is a non-zero sum game, so is clarity in sending the message.⁷⁰ FCA *qui tam* actions present non-zero-sum games, at least as between the DOJ and the relator, since both the DOJ and the relator can "win" by working cooperatively to detect, investigate, and pursue fraudulent defendants.

The press can be helpful in communicating the DOJ's Tit-for-Tat strategy in FCA cases by publicizing the opportunities for and virtues of

65. The FCA has gone a long way in establishing these protocols. It directs the plaintiffs to file their complaints under seal, thereby giving the government time and opportunity to investigate the plaintiffs' claims. 31 U.S.C. § 3730(b)(2). It requires the plaintiffs to serve the government with a copy of their complaints *as well as* "written disclosure of substantially all material evidence and information" the relator possesses, thereby enabling the government to more efficiently utilize the relator's information. *Id.* The FCA also requires the government to respond to a relator's case within a set time period. *Id.* § 3730(b)(2)–(3). Also, the FCA has established a mechanism for relators and the government to proceed as dual plaintiffs. *See id.* § 3730(c)(1). Finally, if the government chooses not to join the case, the government has the power to monitor a relator's litigation of the case. *Id.* § 3730(c)(2).

Individual DOJ offices have developed additional protocols for communicating with relators prior to and after a relator's case is filed and throughout the government's investigation, so as to keep a relator informed of the case's status. WEST, *supra* note 61, at 47–50, 53–56.

66. *See, e.g.,* FED. R. CRIM. P. 6(e) (providing limits on disclosing grand jury evidence).

67. *See supra* note 55 and accompanying text (noting Axelrod's second principle—that players should not cooperate with uncooperative players).

68. *See supra* notes 50–53 and accompanying text (discussing the Tit-for-Tat strategy).

69. *See supra* notes 55–56 and accompanying text (discussing Axelrod's second principle, which states that players should not cooperate with uncooperative players).

70. *See supra* notes 58–59 and accompanying text (explaining Axelrod's fourth principle, which states that clarity in communicating one's strategy to other players is important).

serving as a relator.⁷¹ For this reason, the DOJ's strategy when dealing with the press in FCA cases should be making information about the DOJ's practices and strategies accessible through press releases, reports, knowledgeable government personnel, and conferences that inform and educate the public about the FCA.

Although the mainstream press effectively can convey the fairly simple message that serving as a relator can be beneficial and that the DOJ is ready, willing, and able to work with relators,⁷² the press is not equipped to convey more subtle messages about the DOJ's FCA practice. The private bar can do so, however. The FCA bar consists of relators' counsel and defense attorneys. Both groups are likely to be repeat players.⁷³ Like the press, the private bar can communicate the general message that the DOJ is ready, willing, and able to work with relators and their counsel and that, for many, the benefits of working with the DOJ outweigh a relator's costs.⁷⁴ The private bar, especially relators' counsel, can do even more, however. Relators' counsel can screen FCA cases by discouraging relators from going forward in nonmeritorious cases.⁷⁵ Counsel does so by refusing to take such cases.

71. Bucy, *Information as a Commodity*, *supra* note 8, at 969.

72. See France, *supra* note 31, at 46. News stories often report on relators' experiences with the False Claims Act. See, e.g., Kurt Eichenwald, *He Blew the Whistle and Health Giants Quaked*, N.Y. TIMES, Oct. 18, 1998, § 3, at 1, available at LEXIS, News Library, The New York Times File; Ralph Vartabedian, *Teledyne's Legal Ills Mounting*, L.A. TIMES, Nov. 16, 1992, at D1, available at 1992 WL 2838306; *Whistleblower Gets \$13 Million*, CHI. TRIB., Dec. 5, 1992, at 10, available at 1992 WL 4546091; *Whistle-blowers Win Against Lockheed*, CHI. TRIB., Nov. 16, 1990, at 2, available at 1990 WL 2884280.

73. Cf. Bucy, *Private Justice*, *supra* note 7, at 58–59 (describing the sophistication of FCA cases and the result that inexperienced counsel does not undertake FCA cases).

74. See Bucy, *Information as a Commodity*, *supra* note 8, at 948–58 (discussing the costs of becoming a whistleblower).

75. See, e.g., Mitchell R. Kreindler, *So You Wanna Be a Whistleblower's Lawyer?* 2 (n.d.) (unpublished manuscript, on file with author).

Matching cases to your firm's resources is always a critical skill and nowhere is it more critical than in representing *qui tam* relators. Unlike other contingent fee practices, like personal injury, *qui tam* is unlikely to ever become a high volume practice. Combine that with the fact that most *qui tam* cases take three to five years to resolve and it is clear that picking viable cases is the lifeblood of a successful *qui tam* practice.

Id. Perhaps unwittingly referring to what is one of the key features of a repeated game—protection of one's reputation—Kreindler explains how carefully choosing cases affects a relator's attorney's reputation:

Not only is it important to your financial health to pick 'good' cases, it is also important to your reputation with the government. If you can develop a reputation for bringing meritorious cases, the reception you receive from the government will be far different than the one you will receive if you throw every *qui tam* claim you can find

Relators' counsel generally take FCA cases on a contingency basis and front all or most investigation expenses.⁷⁶ Because of their complexity, FCA cases are expensive to prepare and lengthy to resolve.⁷⁷ Aware of the risks inherent in such cases, experienced relators' attorneys screen out many non-meritorious cases before they reach the DOJ or the courts.⁷⁸

Relator's counsel can also help control difficult or demanding relators⁷⁹ while optimizing the information a relator can provide. Many

against the wall in the hope that something will stick. The quality of case selection may be the most important attribute of a successful *qui tam* attorney.

Id.

76. Bucy, *Information as a Commodity*, *supra* note 8, at 971–72. For example, in *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1036 (6th Cir. 1994), the relator's counsel and the relator agreed that counsel would receive 25% of the relator's share. This percentage was in addition to attorney fees and costs awarded by the court pursuant to 31 U.S.C. § 3730(d)(1). *Id.* The total amount awarded to the relator's counsel in this case exceeded \$4 million. *Id.*

John R. Phillips, an experienced relators' attorney and generally credited as one of the architects of the 1986 FCA Amendments, discussed in a *Wall Street Journal* letter to the editor the financial risk relators' counsel take on. John R. Phillips, Letter to the Editor, *The Taxpayers Win When the Whistle Blows*, WALL. ST. J., Feb. 10, 1995, at A9. Phillips was responding to a prior article in the *Wall Street Journal*, the point of which is obvious from Phillip's response:

You suggest that lawyers who bring these [qui tam] lawsuits may be making too much money. You fail to take into consideration the financial risks lawyers take to sustain the cases over years of litigation as they do battle with deep-pocket defendants For example, from 1987 to 1994, private attorneys in our cases . . . spent more than 100,000 hours (more than 60 attorney years)—not to mention the huge out-of-pocket costs—bringing outlaw corporations to justice. I, personally, went deeply into debt risking everything I own to finance these cases, coming within weeks of having no idea of how I was going to meet the next payroll.

Id.

77. Bucy, *Information as a Commodity*, *supra* note 8, at 940.

78. See *supra* note 75 and accompanying text.

79. Experienced relators counsel describe relators as persons under tremendous stress, suffering from professional, personal, marital, and family tensions brought on by their whistle blowing. Kreindler, *supra* note 75, at 2–3. They are often “paranoid . . . tired . . . lonely . . . beat-up, frustrated and isolated.” *Id.* at 3. They “require more personal attention . . . than most other clients.” *Id.* Relators tend to be “exceedingly bright and inquisitive . . . assertive and tenacious . . . outraged . . . suspicious of the government . . . suffering from nagging doubts [that they are] ‘crazy.’” WEST, *supra* note 61, at 30–31.

DOJ attorneys rely on a relator's counsel to educate the relator about the risks and difficulties that likely lie ahead in an FCA *qui tam* action. As one experienced Assistant United States Attorney noted:

The relator should be educated to the risks of whistle blowing and investigative process, particularly in speculative, marginal cases. [For example,] [t]he seal provisions of the statute provide only temporary anonymity. Accordingly, even after the government declines to intervene and the relator determines not to proceed there is

members of the relators' bar are former federal prosecutors with extensive experience investigating and preparing the type of complex, sophisticated, and economically motivated wrongdoing the FCA involves.⁸⁰ These attorneys are experienced enough to take the information a relator has and package it in a way that is helpful to the DOJ. Such packaging includes piecing together complex transactions, investigating lengthy paper trails, and controlling, cajoling, and counseling difficult clients.⁸¹ Such efforts by private counsel can conserve scarce DOJ resources.⁸²

As an aside, it is interesting to note that the communicative functions of the FCA private bar feed an interesting dynamic of competition among United States Attorney's offices for relators. Because of their size and complexity, FCA cases often are of national scope and offer multiple venue options. This means that relators' counsel can steer relators to certain DOJ offices and away from others. Assistant U.S. Attorneys vie for meritorious FCA *qui tam* cases because the greater FCA recoveries that an office can garner, the more resources and recognition within the DOJ that office obtains.⁸³ In addition, individual attorneys within the DOJ advance their careers, inside the DOJ and beyond, by handling high profile, large-dollar FCA cases. U.S. Attorney's offices and individual DOJ attorneys vary considerably in their treatment of relators, their willingness to advise relators about procedures and a case's viability, the resources they can devote to *qui tam* FCA cases,⁸⁴ and their expertise and comfort-level in working with

a danger that the public record will reveal the filing of suit that both the relator and the United States declined to pursue.

Kathleen McDermott, *Qui Tam, An AUSA's Perspective*, FALSE CLAIMS ACT & QUI TAM Q. REV., Oct. 1997, at 20, 23.

80. See *infra* note 127 (providing a chart showing that 48.3% of the private FCA bar has prior DOJ experience).

81. WEST, *supra* note 61, at 53–56.

82. See *id.* at 47.

83. Cf. JAMES B. STEWART, *THE PROSECUTORS* 128 (1987) (explaining that the DOJ apportioned more resources to offices that posted results garnering favorable media attention).

84. As one experienced relators' attorney explained:

Methods for dealing with *qui tam* cases vary greatly from one U.S. Attorney's Office to another. [For example,] [s]ome U.S. Attorney's Offices encourage relators' attorneys to contact them with their allegations before filing suit when they can informally exchange information regarding *qui tam* procedures and discuss the potential merits of the suit. This informal exchange of information often prevents the filing of bad *qui tam* lawsuits and improves the quality of the suits which are filed. . . .

Some U.S. Attorney's offices are also better at obtaining resources—investigators, primarily—from other agencies. Obviously, your client is better served if you are able to file her case in a jurisdiction where significant resources can be devoted to the case.

Kreindler, *supra* note 75, at 7.

relators and relators' counsel. Jurisdictions vary in applicable precedent and favorable or knowledgeable jurists.⁸⁵ Relators' counsel weigh these issues in determining where to file their clients' cases.

B. Iterated Games in Close-knit Groups

1. Game Theory Principles Applicable to Close-knit Groups

Robert Ellickson has conducted the leading work in game theory on how games are affected when the players are members of a close-knit group.⁸⁶ To study this phenomenon, Ellickson conducted field research in Shasta County, California, on how neighbors interact with each other.⁸⁷ Shasta County is in north-central California, bordered by the Cascade Mountains.⁸⁸ The major economic activity in Shasta County is cattle-raising.⁸⁹ Ellickson's study focused on Shasta County neighbors' interactions over the cattle that roam in Shasta county.⁹⁰

Most of Shasta County is designated as open range, where cattle roam free.⁹¹ In open-range areas, cattle owners generally are not legally

85. For example, the Fourth, Tenth, and Eleventh Circuits adopt statutory interpretations on key issues in FCA cases that are more favorable to relators, while the First, Second, and Third Circuits adopt statutory interpretations more favorable to defendants. *Compare* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1521 (10th Cir. 1996) (holding that information—a report in the files—potentially available to the public does not activate the jurisdictional bar provisions), *with* United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1159–60 (3d Cir. 1991) (holding that information—discovery in unrelated case—potentially available to the public activates the jurisdictional bar provision); *compare* United States *ex rel.* LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990) (holding that a government employee with responsibility for uncovering fraud cannot qualify as a *qui tam* relator), *with* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991) (holding that a government employee may qualify as a relator); *compare* United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992) (holding that a relator is barred if the complaint reflects publicly held information even if relator did not rely upon it or base her complaint on it), *with* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1349 (4th Cir. 1994) (holding that a relator's complaint is not barred even if it reflects publicly held information where the relator received his information elsewhere and did not base his complaint on the publicly held information).

86. *See* ELLICKSON, *supra* note 38, at vii–viii (studying how close-knit groups, primarily in the context of cattle ranchers, farmers, and other rural residents in Shasta County, California, resolve disputes over trespassing cattle without resorting to the legal system).

87. *Id.* at vii. Shasta County was a prime area to study neighbor disputes because immediately prior to Ellickson's study, it had seen tremendous growth, which presented great potential for conflicts between the older, established residents of the county and newer residents. *Id.* at 19–25.

88. Much of the county is mountainous or consists of foothills leading to the mountains. *Id.* at 15. The soil is generally poor: only one percent of the county's land is devoted to agricultural crops. *Id.* at 16–17. The area is also arid in the summer, receiving very little rain. *Id.* at 15.

89. *Id.* at 16.

90. *Id.* at 1–3.

91. *Id.* at 3.

liable for damages arising from cattle trespassing on unfenced land.⁹² Portions of Shasta County, however, have been designated as closed range.⁹³ In closed-range areas, cattle owners are strictly liable for damage caused by their wandering cattle.⁹⁴

Problems arise when cattle trespass.⁹⁵ They eat grass and, if they can get to it, devour stored feed.⁹⁶ They destroy expensive landscaped property and vegetable gardens.⁹⁷ The most serious problems occur when the cattle venture onto roadways and cause vehicle accidents.⁹⁸ Wandering cattle create problems for their owners as well as neighbors.⁹⁹ They sustain injuries, get stolen, and consume their owners' time when their owners have to retrieve them.¹⁰⁰ Wandering bulls, because they are more aggressive than cows, create even more problems.¹⁰¹ Bulls charge property owners¹⁰² and impregnate cows, resulting in calves of undesired pedigree.¹⁰³

The earliest residents of Shasta County established large ranches that have a significant current market value (most over \$1 million), but generate modest income.¹⁰⁴ The families that own these ranches live simply, in unassuming homes, and work seven-day work weeks raising cattle as their livelihood.¹⁰⁵ Most of the new Shasta County residents, who own "ranchettes" consisting of parcels of land ranging from five to forty acres, generally do not raise cattle.¹⁰⁶

Among the cattle-raisers there are two groups: the traditionalists, who let their cattle roam freely over ranch lands or on higher-elevation, unfenced property leased from timber companies,¹⁰⁷ and modernists, who tend to fence in their property and irrigate it so that there is adequate feed year-round.¹⁰⁸ Although the modernists have less to lose

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 25-26.

96. *Id.* at 40-41.

97. *Id.* at 41.

98. *Id.* at 82-85.

99. *Id.* at 25-26.

100. *Id.*

101. *Id.* at 41.

102. *See id.*

103. *Id.* at 26, 41.

104. *Id.* at 20.

105. *Id.* at 20-21.

106. *Id.* at 21.

107. *Id.* at 22-23.

108. *Id.* at 24-25.

if additional portions of Shasta County are designated closed range, they tend to side with the traditionalists in opposing efforts to close additional portions of the county.¹⁰⁹

Ellickson began his study researching animal-trespass laws applicable in Shasta County.¹¹⁰ He also interviewed residents and Shasta County animal-trespass experts such as insurance claims adjusters, law enforcement officials, and lawyers.¹¹¹ Ellickson found that the residents of Shasta County rarely used available legal remedies or even followed the law's allocation of liability when resolving problems caused by trespassing cattle.¹¹² Instead, they used informal norms of civility and neighborliness to resolve problems even when the norms were to their legal disadvantage.¹¹³ Accordingly, in Shasta County, trespass incidents are resolved by an exchange of civilities that follow a set protocol: the victim of the trespass notifies the cattle owner,¹¹⁴ the cattle owner apologizes to the victim and thanks the person for calling, and the cattle owner promptly removes his animals.¹¹⁵ Ellickson found that resort to these informal norms rather than to legal remedies benefited everyone.¹¹⁶ Time, money, and hard feelings were saved when neighbors resolved problems without pursuing available legal remedies.¹¹⁷

Ellickson sought to determine what led the Shasta County neighbors to use informal norms.¹¹⁸ He found the existence of a close-knit group to be the key. In this context, a "close knit group" exists where there are interactions among repeat players who share common characteristics and informal norms and exchange information easily, where each player possesses power within the group, and where the group employs sanctions to discipline members who fail to follow the group's informal norms.¹¹⁹ In Shasta County, these sanctions include (in escalating order): (1) self-help retaliation,¹²⁰ (2) reporting offenses through

109. *Id.* at 25.

110. *Id.* at 42–48.

111. *Id.* at 40 n.1.

112. *Id.* at 52–56.

113. *Id.* at 52–53.

114. *Id.* at 53. The victim generally notifies the owner by phone not as a complaint, but as a service, as in "I found one of your animals." *Id.*

115. *Id.*

116. *Id.* at 10, 52, 283.

117. *See id.* at 56–64.

118. *Id.* at 9–10.

119. *Cf. id.* at 48–64 (describing the close-knit group of Shasta County neighbors).

120. *Id.* at 57. Shasta County residents discipline deviant neighbors in several ways: spreading truthful negative gossip about noncooperative neighbors; herding trespassing animals

“truthful negative gossip,”¹²¹ (3) requesting compensation for damage created,¹²² and (4) resorting to legal means.¹²³

2. Application of Close-knit Group Theory to False Claims Act Practice

The FCA bar meets Ellickson’s definition of a close-knit group. Its members are repeat players who share common characteristics and informal norms, exchange information easily, possess power within the group, and employ sanctions to enforce the group’s informal norms.¹²⁴

a. Repeat Players

Attorneys with the DOJ are obvious repeat players in FCA practice. All FCA cases in the United States are handled by specialists within the DOJ’s Civil Division who either are assigned to cases directly or supervise cases based in various U.S. Attorneys’ offices.¹²⁵ The private bar, both relators’ counsel and defense counsel, are repeat players primarily because of the complexity, risk, and sophistication of FCA cases.¹²⁶ Even defendants can be repeat players, often as reconstructed corporate entities.

b. Shared Characteristics

The FCA bar, which includes DOJ attorneys, relator’s counsel, and defense counsel, is a surprisingly close-knit group. The attorneys in this group share common characteristics in addition to their experience in

to places from which it is inconvenient for their owners to retrieve them; threatening to harm, even kill, offending animals (e.g., one irate neighbor threatened to castrate a wandering bull); actually harming animals; and “borrowing” needed equipment belonging to the animal owner. *Id.* at 56–59, 80. Cattle rustling apparently was a common response to an especially notorious rancher, Frank Ellis, who allowed his herds to roam freely, damaging many neighbors’ property. *Id.* at 56–59. One Shasta County resident who lived in Oak Run, an area especially tormented by Ellis’s trespassing cattle, suggested that Ellis print t-shirts saying “Eat Ellis Beef. Everyone in Oak Run does!” *Id.* at 59.

121. *Id.* at 57; *see also id.* at 59 (explaining that residents occasionally report a cattle trespass to county officials, such as animal control officers or brand inspectors).

122. *Id.* at 57, 60–61. The Shasta County norm is to use “in-kind” compensation, such as replanting damaged crops, rather than cash payments. *Id.* at 61.

123. *Id.* at 57, 62–64.

124. *See infra* Part IV.B.2.a–e (describing the FCA bar’s close-knit group characteristics).

125. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS MANUAL 4-4.120 (1998); Kreindler, *supra* note 75, at 7.

126. Telephone and Internet Research of Faculty at American Bar Association National Institute on The Civil False Claims Act and *Qui Tam* Enforcement (1998–2001) [hereinafter Telephone and Internet Research] (research on file with author). Among FCA specialists, 68.5% primarily or exclusively represent defendants, 28.8% primarily or exclusively represent relators, and 1.4% represent both relators and defendants. *Id.*

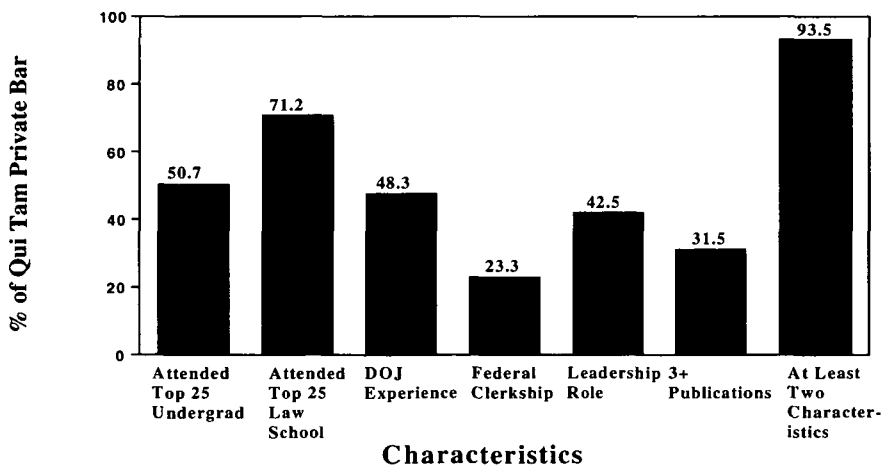
FCA cases. A survey of the FCA private bar shows that 93.5 % share at least two of the following professional characteristics: (1) 50.7% attended a “top 25” undergraduate institution, (2) 71.2% attended a “top 25” law school, (3) 48.3% served in the DOJ prior to entering private practice, (4) 23.3% served as a law clerk to a federal judge, (5) 42.5% possess a leadership role in their law firm, and (6) 31.5% have authored three or more publications in the FCA field.¹²⁷

c. Informal Norms

In the case of the Shasta County residents, the informal norms that governed the group were civility and neighborliness in resolving the problems caused by trespassing cattle.¹²⁸ In FCA practice, there are also informal norms of behavior. For relators’ counsel, these include the expectation that relators’ counsel will bring only meritorious cases to the DOJ’s attention,¹²⁹ will warn DOJ attorneys if problems develop in the case,¹³⁰ will be trustworthy and accurate in their representations about the case,¹³¹ and will deliver on what they promise.¹³²

127. Telephone and Internet Research, *supra* note 126. See figure 1 below.

Figure 1
Common Characteristics of FCA Specialists



128. ELLICKSON, *supra* note 38, at 52–55, 280–83.

129. See WEST, *supra* note 61, at 31–49; Kreindler, *supra* note 75, at 2.

130. See WEST, *supra* note 61, at 42.

131. Kreindler, *supra* note 75, at 2.

132. *Id.*

For DOJ counsel, the expectations are that DOJ attorneys will work closely with the relator and the defendant and their respective attorneys early in the case,¹³³ that DOJ counsel will alert the relator's counsel if another relator has previously filed a qui tam action covering the same material,¹³⁴ and that DOJ counsel will warn the relator's counsel if there are problems in the relator's case¹³⁵ or if the DOJ is going to take some action detrimental to the relator.¹³⁶ For defense counsel, the expectations are that if defense counsel is brought into discussions with the DOJ regarding the defendant's liability,¹³⁷ defense counsel will be honest and thorough in her representations. For example, if the defense counsel represents that the defendant was unaware of certain applicable regulations, or was confused as to their interpretation, DOJ counsel will expect that the defense counsel has investigated the matter fully with the

133. Cf. T. Clay Mason & Larry D. Leonard, *A Government Investigator Perspective*, FALSE CLAIMS ACT & QUI TAM Q. REV., July 1997, at 10, 11–12 (explaining why and how relators' contact with the DOJ prior to filing qui tam complaints is valuable for all players); McDermott, *supra* note 79, at 22–23 (giving advice to relators to contact the DOJ prior to filing a qui tam complaint). Some U.S. Attorney's offices, for example, encourage relators to approach them as soon as they have identified a possible violation. McDermott, *supra* note 79, at 22. These discussions often are frank and extensive, and include DOJ advice to relators on procedural matters. *Id.* For an in-depth discussion of legal theory and case strength, see *United States ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323, 1327 (M.D. Fla. 2001). Some U.S. Attorney's offices have adopted a policy of seeking a lifting of the seal on the otherwise confidential information in an FCA suit to discuss it with the defendant and defense counsel as part of the DOJ's decisional process of whether and what charges to bring against a defendant. McDermott, *supra* note 79, at 25–26. This practice, which is not mandated or even suggested by the language or legislative history of the FCA, is especially remarkable because it is contrary to the DOJ's customary ways of conducting its cases and making its decisions in confidence and without consultation with private parties. See FED. R. CRIM. P. 6(e) (requiring secrecy of grand jury proceedings).

134. This is significant information to relators because once an FCA qui tam case has been filed, all others are preempted. See WEST, *supra* note 61, at 22; cf. Kreindler, *supra* note 75, at 7. Because qui tam cases are filed under seal and remain under seal for years, other prospective relators will have no way of knowing whether it is worth their time and resources to prepare a qui tam case for filing. A tip by a DOJ attorney who is aware of pending cases under seal can be invaluable to prospective relators and their counsel. See 31 U.S.C. § 3730(b)(5) (2000).

135. McDermott, *supra* note 79, at 27; Kreindler, *supra* note 75, at 10.

136. Such detrimental action could include seeking limitations on a relator's involvement, 31 U.S.C. § 3730(c)(4), moving to dismiss the relator's case, *id.* § 3730(c)(2)(A), or opposing a settlement the relator may have reached with the defendant, *id.* § 3730(c)(2)(B).

137. McDermott, *supra* note 79, at 25–26. The defendant may only be a putative defendant since some discussions between the DOJ and targets can occur before a relator has filed her qui tam action. *Id.* This situation would occur when the relator approached the DOJ prior to filing her qui tam action. *Id.*; Mason & Leonard, *supra* note 133, at 10–13.

defendants and is informed when providing the DOJ with this exculpatory explanation.¹³⁸

138. Because of the unusual level of communication between the DOJ and relators' counsel and, often, also with defense counsel, attorneys who are players in the FCA game must deal with a special dilemma. Every attorney has the ethical obligation not to represent a client if "the representation . . . will be materially limited by . . . a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002). The comments to this rule include the following: "[C]onflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." *Id.* cmt. 8. Because of the informal norms existing in FCA practice, attorneys could run afoul of this ethical obligation when following such norms.

Imagine the following scenario: As noted, a relator's counsel is expected to alert the DOJ to problems that counsel is aware of in the case. *See supra* note 130 and accompanying text. This is a reasonable expectation, since the DOJ will be devoting resources to investigating and preparing the case. If the problem is that the relator has been involved in the wrongdoing, the relator's counsel understandably may be reluctant to reveal such involvement to the DOJ. A culpable relator almost certainly would see her percentage of any recovery in the FCA case cut considerably, plus she may be indicted on criminal charges. Yet if counsel does not reveal the relator's culpability, counsel's credibility as a repeat player in future FCA encounters with the DOJ will be compromised.

A similarly difficult situation arises for defense counsel who has been given an opportunity by the DOJ to review the potential case against a defendant and explain the defendant's position to the DOJ. Assume that here, too, significant harm could befall the defendant if the DOJ learns from defense counsel the full scope of the defendant's wrongdoing. Yet again, if defense counsel is not forthcoming with the DOJ when given the opportunity to engage in candid discussions, defense counsel's credibility as a future player in other cases with the DOJ will suffer. Again, while lack of candor is a problem for counsel in any encounter with the DOJ or any other government representative, the norm of truthful pre-filing discussion and candor that prevails in FCA practice raises the stakes of a less-than-truthful policy.

In stark terms, both the relator and defense counsel face the possibility of damaging their own interests if they follow their clients' instructions *not* to reveal their clients' liability. They will be damaged because, as repeat players in the FCA regulatory games their reputations will suffer from the deceit they practice at their clients' instructions. Unlike their clients, neither counsel has anything to lose by revealing their clients' liability; they stand to lose only by not revealing such liability. The consequences for private counsel if the DOJ learns of its deceit would likely begin with the DOJ attorneys' reluctance to grant counsel access and opportunities to discuss future matters with the DOJ. This reluctance will damage counsel's ability to serve future clients and could affect counsel's future client development potential and, thus, prosperity. In addition, depending upon the degree of concealment of client culpability, the DOJ may refer counsel to the relevant bar for licensing sanctions, or even prosecute counsel for obstruction of justice, conspiracy, or complicity.

Although both relators' counsel and defense counsel will suffer some of the same consequences if the DOJ discovers that they have concealed their clients' culpability, their damage is not identical. For example, relators' counsel will suffer an additional consequence of deceit with the DOJ that defense counsel will not. Recall that the FCA provides that defendants must pay "reasonable" attorneys' fees to plaintiffs. 31 U.S.C. § 3730(d). When the DOJ trusts the relator's counsel and is willing to work hand-in-hand with the relator's counsel on FCA cases, or even to delegate the bulk of work on FCA cases to the relator's counsel, the relator's counsel is able to generate fees on such work. If the DOJ declines to deal with the relator's counsel or strives to keep interactions with the relator's counsel to a bare minimum, the relator's counsel's ability to perform fee-generating work on FCA cases will be diminished.

d. Information Exchange Within the FCA Bar

Members of a close-knit group contribute to the circulation of information about issues important to each other.¹³⁹ In the context of the FCA, such information includes court rulings, DOJ policies, interpretations of these rulings and policies, and informal developments such as the custom, practice, and personalities of players.¹⁴⁰ This communication may be through formal publications or casual conversation among the players. For example, an off-hand remark by a defense attorney to a relator's attorney, as in, "I wish you had filed that in the Fourth Circuit," communicates that the Fourth Circuit follows precedent on an issue pertinent to the case that favors the defense. One relator's attorney's comment to another relator's attorney, "That office is full of idiots," or "That's a great office to work with. See if you can get venue there," communicates volumes about which U.S. Attorney's office is more favorable to relators.

e. Power Within the FCA Bar

1. *Power Held by the DOJ*

The power held by DOJ attorneys is obvious. These attorneys decide whether the federal government will intervene in a relator's case, whether to work with the relator, the manner in which the DOJ will cooperate with the relator, whether and how to oppose the relator in the case, and what percentage of the recovery they will recommend for relator.¹⁴¹

2. *Power Held by Relators' Counsel*

Power is held by relators' counsel in five ways. First, and most obviously, relators' counsel can influence potential relators on whether to become relators in the first place, and where to file a relator's complaint. Given the risks to potential relators of becoming whistleblowers,¹⁴² willingness to become a qui tam relator may exist only after considerable education of a potential relator by counsel. Also, as noted above, relators' counsel determine in which district a

139. See ELLICKSON, *supra* note 38, at 57 (referring to "truthful negative gossip" as a way of communicating deviance by neighbors to other neighbors).

140. Such information exchange also occurs at professional meetings such as the American Bar Association's National Institute on the Civil False Claims Act.

141. See, e.g. *United States ex rel. Merena v. SmithKline Beecham Corp.*, 52 F. Supp. 2d 420, 429-30 (E.D. Pa. 1998), *rev'd*, 205 F.3d 97 (3d Cir. 2000); *United States ex rel. Alderson v. Quorum Health Group, Inc.*, 171 F. Supp. 2d 1323, 1325-35 (M.D. Fla. 2001).

142. See Bucy, *Information as a Commodity*, *supra* note 8, at 948-58.

relator should file a qui tam action (and thus, with which U.S. Attorney's office a relator will be working).¹⁴³

Second, relators' counsel can screen out nonmeritorious relators, which, given the expansive reach of the FCA and regulatory complexity of the contracting world covered by the FCA, takes considerable sophistication on the part of counsel.¹⁴⁴ Such screening saves the DOJ time and resources.

Third, relators' counsel, working together with a relator, can educate the DOJ about new and evolving frauds of which the DOJ has no knowledge. It can take considerable time, effort, and expertise on the part of relators' counsel to sift through a relator's information and present a coherent explanation of complex transactions to the DOJ. With the benefit of conversations protected by the attorney-client privilege, an experienced relator's attorney can piece together the fraud the relator has uncovered.

Fourth, relators' counsel can supplement the DOJ's resources significantly by assisting in, and even absorbing, a major portion of the work load of investigating and preparing an FCA case.¹⁴⁵

Fifth, as a co-plaintiff, a relator has statutory power under the FCA. For example, a relator may oppose the DOJ's requests for extensions of time, which the DOJ may seek when deciding whether to intervene;¹⁴⁶ the relator may oppose the DOJ's motion to unseal or partially unseal a relator's complaint so as to discuss and negotiate with the putative defendant;¹⁴⁷ and the relator may oppose the DOJ's efforts to settle or dismiss the action.¹⁴⁸ The extent to which a relator exercises her statutory power over a case can facilitate or frustrate the DOJ's chosen strategies.¹⁴⁹

143. Kreindler, *supra* note 75, at 7 (discussing how approaches to qui tam cases vary greatly from one U.S. Attorney's office to another).

144. See Bucy, *Private Justice*, *supra* note 7, at 55, 68–69.

145. Bucy, *Games and Stories*, *supra* note 6, at 670.

146. 31 U.S.C. § 3730(b)(2)–(3) (2000).

147. WEST, *supra* note 61, at 26.

148. 31 U.S.C. § 3730(c)(2)(A)–(B).

149. For example, a relator can oppose the government's request for an extension of the sealing period, 31 U.S.C. § 3730(b)(2), the government's effort to dismiss the action, *id.* at § 3730(c)(2)(A), or settle the action, *id.* § 3730(c)(2)(B). Opposing the DOJ may result in a lesser percentage of the recovery for relators at the conclusion of the case, since the DOJ might argue to the court that the relator was not cooperative. See, e.g., *United States ex rel. Coughlin v. IBM Corp.*, 992 F. Supp. 137, 142 (N.D.N.Y. 1998). In *Coughlin*, the DOJ opposed the relators' request for a 25% share of the settlement in a qui tam action in part because the relators opposed the settlement reached by the DOJ and the defendant. *Id.* The court agreed with the DOJ and awarded the relator 15% of the settlement, noting, among other things, that “[r]elators vigorously opposed the settlement of this matter.” *Id.*

3. *Power Held by FCA Defense Counsel*

The FCA defense counsel holds power within the group because of its ability to evaluate the information collected both by the DOJ and by relators, and because it informs and influences its clients. Defense counsel's influence may well begin early in FCA cases. For example, the DOJ often obtains the unsealing of a relator's complaint before it officially joins as a party.¹⁵⁰ This gives the defendant an opportunity to review and respond to allegations and evidence before the DOJ decides whether to intervene.¹⁵¹ If a defense attorney finds from this review that the defendant may have liability, the defense attorney can be of immense help to the DOJ and the relator by educating her client about the seriousness of the matter. Accustomed to general civil litigation, clients may expect to engage in delay strategies, which generally work to the defense's favor. Delaying an FCA case, however, can be catastrophic.¹⁵² Helping a client see a quick resolution of liability, especially before the DOJ joins the case as a plaintiff, can significantly reduce penalties and damages under the Act.¹⁵³

f. Sanctions Employed by the FCA Bar for Breaches of Informal Norms

The FCA bar employs sanctions to enforce its norms that are similar to the sanctions Ellickson found were being used by the residents of Shasta County. In both groups, these sanctions include informing the offender, truthful negative gossip about the offender within the community, cessation of cooperation, and referring the offender to enforcers.¹⁵⁴

1. *Inform the Offender and Allow an Opportunity to Correct*

Informing the offender and allowing an opportunity for correction is a minimal sanction appropriate for minor breaches of informal norms. Within FCA practice, minor breaches include actions such as not showing up for a scheduled meeting or failing to produce information or services when promised.

150. See WEST, *supra* note 61, at 26.

151. *Id.*

152. Penalties accrue as additional false claims are filed, thus, delay can increase the penalties. See 31 U.S.C. § 3729(a) (2000).

153. John R. Phillips, Remarks at the A.B.A. National Institute on the Civil False Claims Act and Qui Tam Enforcement, Panel on FCA Enforcement in the Post-Stevens World (Nov. 2000).

154. See *supra* notes 118–23 and accompanying text.

2. *Truthful Negative Gossip*

Truthful negative gossip, which is repeating to others within the community facts of a violator's breach of a norm, is appropriate for repeated, minor breaches of norms, and for slightly more serious breaches. In the FCA context, this would include actions such as carelessly (though not intentionally) providing incorrect or incomplete information about the case or counsel. Given the importance of reputation in the success of one's FCA practice, this is a particularly meaningful sanction.

3. *Cease Cooperation*

Cessation of cooperation is appropriate for serious breaches of conduct. In the FCA context, this would include actions such as repeated presentations of incomplete or inaccurate information and dishonoring a significant commitment.¹⁵⁵ Different players within the FCA bar have varying abilities to exercise this option. DOJ attorneys have the most discretion to invoke this sanction since the DOJ simply can cease cooperating with a relator and fall back on its traditional investigative techniques if it decides not to work with the relator. If a relator has already provided helpful information to the DOJ and the DOJ ceases to cooperate with the relator, the DOJ would lose little in exercising this sanction. The relator and relator's counsel, however, would lose a lot, as the DOJ's disassociation of a relator prevents the relator from assisting in the case and would result in a lower percentage of any recovery for the relator. Notably, relator's counsel also would lose if the DOJ ceases cooperation with the relator, because most relators' counsel negotiate with their clients for a share of the relator's percentage in addition to the statutorily awarded attorneys fees.¹⁵⁶ Disassociation of a relator and the relator's counsel from active participation in the case also obviously reduces the opportunity to perform additional hourly work, thereby reducing the attorneys' fees allowable under the FCA and payable to the relator's counsel by defendant.

155. For example, cessation of cooperation could affect the DOJ's commitment not to move for dismissal, defense counsel's commitment that he is disclosing the full extent of the defendant's fraud, or the relator's counsel's commitment that the relator will agree to a DOJ settlement of a case.

156. See, e.g., *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1036 (6th Cir. 1994) (discussing contingency fees relators' attorneys negotiate with their clients in addition to court-ordered attorneys fees and costs); BOESE, *supra* note 15, § 4.09[A][1] (discussing awards of attorneys fees under the FCA).

Realistically, the only way relators and relators' counsel can exercise a cessation of cooperation sanction is by taking the relator's case to another U.S. Attorney's office. It is harmful to a relator and her counsel to cease cooperating with the DOJ once the case has begun because doing so will reduce the percentage of any recovery awarded to the relator in the case. To the extent that the relator's information is helpful in investigating the case, which presumably it is or the DOJ would not be willing to work with the relator, the relator's cessation of cooperation could jeopardize the success of the case.

Defendants and their counsel have the least ability to exercise a disassociation option. A decision to cease cooperating with the DOJ (and/or the relator, depending on whether the DOJ has intervened in the case) simply because the DOJ or the relator has breached norms of behavior is short-sighted for a defendant. Cessation of cooperation by a defendant will simply cause more penalties and damages to accrue. Significant noncooperation even could be viewed as a criminal matter, such as obstruction of justice.¹⁵⁷

4. *Refer the Offender to Enforcers*

Referring offenders to "enforcers" is the most serious sanction. Enforcers in the context of FCA practice include disciplinary committees of the relevant bar and criminal prosecutors. The sanction of referral to criminal prosecutors could be exercised by any player against any other player. The most draconian deployment of this sanction would be referral of a player, or witness, to the DOJ Criminal Division or another group that has authority to bring criminal charges (such as a State's Attorney General's office). Presumably, exercise of this sanction would be used when the breach of norms is severe, such as destruction of subpoenaed records, submission of fraudulent records, or providing false testimony under oath.¹⁵⁸

V. CONCLUSION

This Article has applied game theory principles identified by Robert Axelrod and Robert Ellickson concerning optimal strategies for players of close-knit groups involved in iterated games to the regulatory game

157. See, e.g., 18 U.S.C. §§ 1504–1505, 1518 (2000); *id.* §§ 1512, 1516 (2000 & West Supp. 2003).

158. Such conduct may constitute obstruction of justice, see, e.g., *id.* § 1512 (2000 & West Supp. 2003), or, depending upon the specifics, a violation of dozens of criminal fraud offenses. See, e.g., *id.* § 1341 (providing the penalties for mail fraud); *id.* § 1343 (prescribing the penalties for wire fraud); *id.* § 1961(1) (defining racketeering), amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 5(b), 117 Stat. 2875.

created by the civil FCA. Axelrod's principles for iterated games suggest that to optimize success under the FCA, the DOJ should cooperate with relators who bring information of wrongdoing to the DOJ's attention. If relators or their counsel behave irresponsibly, such as by providing inaccurate information or frustrating the investigation, the DOJ should cease cooperating with the relator and should return to cooperation only if the relator's defection has not damaged the case, and the relator and her counsel return to cooperation. This is the Tit-for-Tat strategy that Axelrod found to be most effective in iterated games. To facilitate cooperation, the DOJ should embrace the press and the private FCA bar in communicating the specifics of its Tit-for-Tat strategy.

The FCA bar is a close-knit group, as defined by Robert Ellickson in his studies of game theory. A close-knit group is identified by interactions among repeat players who share common characteristics and informal norms and exchange information easily, where each player possesses power within the group and the group employs sanctions to discipline members who fail to follow the group's informal norms. Those involved in FCA practice share common characteristics: 93.5% of the FCA private bar share at least two significant professional characteristics.¹⁵⁹ There are informal norms within the FCA bar that govern the interactions among members and the sanctions for violation of these norms.

Because of the FCA's success in dealing with complex economic wrongdoing and our global economy's need for effective tools to combat such wrongdoing, expansion of the FCA's model should be considered by policy makers.¹⁶⁰ Implementing this Act, whether in an expanded form or in its current form, however, should be informed by an appreciation of how to optimize its effectiveness. This Article has attempted to use game theory principles to highlight some of the ways to use the FCA effectively.

159. See *supra* note 127 and accompanying text.

160. Bucy, *Private Justice*, *supra* note 7, at 76–80.