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Qui Tam: Blowing the Whistle for Uncle Sam

Anna Mae Walsh Burke*

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* Principal of Anna Mae Walsh Burke, P.A., Fort Lauderdale, Florida. B.A., Manhattanville College, 1960; M.S., Fordham University, 1962; Ph.D., Nova University, 1965; Ed.S. 1978; J.D. 1987. Practices in the area of Commercial Litigation with emphasis on *qui tam* actions.

I. INTRODUCTION

Qui tam, or standing in the shoes of the king, is an old occupation but never before has it been so profitable. A *qui tam* suit is one brought by a person who prosecutes a suit for the king as well as for himself.¹

Federal *qui tam* suits are brought under the False Claims Act ("FCA"),² which provides penalties for one who knowingly presents a false claim to the government, and also offers incentives to whistleblowers who expose the false claims. In the ten years since the passage of the 1986 Amendments to the FCA, both the number of cases and the size of the awards have skyrocketed. Even the Internet responds with thousands of "hits" when search words such as "*qui tam*" and "whistleblower" are entered. The reason for the increasing interest in *qui tam* litigation becomes obvious with a quick calculation. Using the penalty of \$10,000 for each fraudulent act, one determines that 100 proven transgressions yields a penalty of \$1,000,000. In addition, treble damages are awarded except under certain conditions, stated in the statute, in which cooperation by the defendant reduces the penalties to only double the damages as well as reasonable costs and attorney fees.

At the end of 1995, the government reported the following information:³

Qui Tam filings by Fiscal Year:

FY 87	33 cases
FY 88	60 cases
FY 89	95 cases
FY 90	82 cases
FY 91	90 cases
FY 92	119 cases
FY 93	131 cases
FY 94	221 cases
FY 95	274 cases

Qui Tam Recoveries (approximately):

FY 88	\$2 million
FY 89	\$32 million

1. WILLIAM BLACKSTONE, COMMENTARIES III *160.

2. 31 U.S.C. §§ 3729-3733 (1994).

3. Arent Fox (visited Jan. 1, 1997) <<http://www.arentfox.com/features/quitam/quitam.stat.html>>.

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FY 90 \$40 million
 FY 91 \$36 million
 FY 92 \$124 million
 FY 93 \$193 million
 FY 94 \$379 million
 FY 95 \$243 million

Total fraud recovery from fiscal year 1987 through fiscal year 1995 totaled \$3,342,390,684,⁴ of which approximately one-third was from *qui tam* actions. The lure of *qui tam* actions appears to be irresistible.

II. BRIEF HISTORY OF *QUI TAM*

The concept of *qui tam* can be traced to at least the thirteenth century where the process allowed one to gain access to the royal courts.⁵ Although there were several laws dating back to 1790 in the United States authorizing suits by private informers who would share in a percentage of the government's recovery,⁶ the FCA first became a viable and profitable action under Abraham Lincoln.⁷ Rampant fraud was being committed against the government during the Civil War. In 1861, for example, Grant testified about the inoperable rifles he found when he took over command in Cairo, Illinois,⁸ and further testimony was given in the debates preceding the passing of the act regarding spoiled food and the fact that the same horses were sold over and over again to the government. This fraud increased both the cost of the war and the suffering of the Union soldiers, as well as seriously hampered the war effort. The government needed public help to stop these actions since many government officials were apparently involved in perpetrating the fraud.⁹ At that time, the damages assessed against the *qui tam* defendant were taxed at twice the damage suffered by the government

4. Arent Fox (visited Feb. 4, 1997) <<http://www.arentfox.com/features/quitam/quitam.stat.html>>.

5. BLACKSTONE, *supra* note 1, at *160.

6. *See, e.g.*, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102; Act of July 5, 1790, ch. 25, §1, 1 Stat. 129; Act of July 20, 1790, ch. 29, § 4, 1 Stat. 131; 133, Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38.

7. 31 Act of March 2, 1863, ch. 67, 12 Stat. 696.

8. Phillips & Cohen (visited Sept. 20, 1996) <<http://www.whistleblowers.com>>.

9. *See* CONG. GLOBE, 37th Cong., 3d Sess. 952-58 (1863) (quoted in 67 NW. U. L. REV. 446, 453 n. 82).

plus a \$2,000 penalty per incident with the relator getting fifty percent of the recovery.¹⁰

Although fondly known as the Lincoln Law, the FCA remained fairly inactive until the 1930s and 1940s when individuals began to use information obtained from public records as the basis for *qui tam* actions. These parasitic suits did not bring new information to the government but relied on information the government already had as the basis for the recovery claimed by the relator. The high point of these actions, or low point depending on your point of view, was the case of *United States ex rel. Marcus v. Hess*¹¹ where the relator obtained all his information from the public record and alleged false claims presented by a contractor. Although the question of the relator's share in that case went to the Supreme Court, the law was clear that there was no restraint on the relator's source of information. Specifically, the relator was not required to be an original source of information, and Marcus got his statutory percentage of the recovery. Congress changed the law to eliminate these parasitic cases, but the amended statute had a chilling effect on further cases. The costs of pursuing discovery in *qui tam* cases was high, and few attorneys were willing to risk representation of a *qui tam* plaintiff under that form of the law. The Senate Report for the 1986 amendments restates the Senate version of the 1943 amendments "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."¹² But inexplicably these terms failed to make the final version of the Amendment. Even though these restrictive terms were not in the 1943 act, courts interpreted the Act in the light of the Senate Report. In *United States ex rel. State of Wisconsin v. Dean*,¹³ the State of Wisconsin was denied the right to maintain its position as relator in a matter of Medicaid fraud because it had already told its tale to the United States government as part of its reporting process. In the mid-1980s, the country once more found itself facing rampant fraud and was in need of assistance from its citizenry so that it was necessary to amend the relevant statutes. Congress did not feel that *Dean* represented its true attitude toward *qui tam* suits.

10. 31 Act of March 2, 1863, ch. 67, 12 Stat. 696.

11. 317 U.S. 537 (1943).

12. S. REP. NO. 345, at 12, 99th Cong., 2d Sess. (1986). Inexplicably this clause was eliminated from the final 1943 amendments.

13. 729 F.2d 1100 (7th Cir. 1984).

In order to encourage *qui tam* suits, the 1986 amended statute allows persons who are the original source of the government's information to bring suit even though some of the information may have been available in the public record. If there has been previous public disclosure, anyone who is not an original source is proscribed from bringing suit and the case will be dismissed for lack of subject matter jurisdiction. As the court in *Wang ex rel. United States v. FMC Corp.*¹⁴ stated: "*Qui tam* suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot."¹⁵ The court goes on to state:

Anyone who helped to report the allegation to either the [G]overnment or the media would have "indirectly" helped to publicly disclose it. If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it.¹⁶

The Amendments of 1986¹⁷ provided more opportunity for the whistleblower to obtain a recovery and yet presented certain restrictions which provided the government some degree of protection from parasitic suits. The 1986 amendments were "aimed at correcting restrictive interpretations of the act's . . . *qui tam* . . . provisions."¹⁸ As the court later said in *United States ex rel. Dick v. Long Island Lighting Co.*,¹⁹ "[o]ne must have been a source to the entity that first publicly disclosed the information on which a suit is based."²⁰ As the court stated in *Wang*, "[t]he history of the False Claims Act and the legislative history of its most recent amendment make clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based."²¹

14. 975 F.2d 1412 (9th Cir. 1992).

15. *Id.* at 1419.

16. *Id.*

17. 31 U.S.C. §§ 3729–3733.

18. Act of October 27, 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (100 Stat. 3153) 5266, 5269 (to be codified at 31 U.S.C. §§ 3729–3733).

19. 912 F.2d 13 (2d Cir. 1990).

20. *Id.* at 17.

21. *Wang*, 975 F.2d at 1418.

The 1994 Amendments excluded suits which relate to the Internal Revenue Code of 1986 replacing the reference in the 1986 Amendments to the Internal Revenue Code of 1954. An interesting discussion of the history of the early years of the FCA appears in a number of places,²² as well as on an increasing number of web sites.²³

III. THE STATUTES

The FCA is codified at 31 U.S.C. §§ 3729–3733.²⁴ Because of its nature in controlling discovery and investigation of the case, 31 U.S.C. § 3733 will not be included in this paper.

22. *Qui Tam Suits Under the Federal False Claims Act: Tool for the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446 (1972); JOHN T. BOESE, CIVIL FALSE CLAIMS AND Qui TAM ACTIONS (1993) (updated 1995, 1997); JAMES B. HELMER, JR. ET AL., FALSE CLAIMS ACT (1994).

23. See, e.g., Taxpayers Against Fraud, The False Claims Act Legal Center (visited Feb. 2, 1997) <<http://www.taf.org>>; Whistleblowers' Web Site, About Phillips & Cohen (visited Sept. 2, 1997) <<http://www.whistleblowers.com>>.

24. These specific sections provide:

§ 3729 False Claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false and fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished 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;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **KNOWING AND KNOWINGLY DEFINED.**—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

(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,

and no proof of specific intent to defraud is required.

(c) **CLAIM DEFINED.**—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 if 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.

(d) **EXEMPTION FROM DISCLOSURE.**—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **EXCLUSION.**—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) **RESPONSIBILITIES OF THE ATTORNEY GENERAL.**—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **ACTIONS BY PRIVATE PERSONS.**—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Govern-

ment may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

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

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

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

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

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted *in camera*. The court may extend the 60-day period upon a further showing *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.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

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

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to

the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

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

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

(f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief nec-

IV. THE FORM OF THE LITIGATION

Presently, *qui tam* actions may entitle whistleblowers to receive part of the damages and penalties awarded to the government by filing suit on

essary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

§ 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) 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.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

§ 3733. Civil investigative demands (The text of this section is not included in this paper).

31 U.S.C. §§ 3729–3733 (footnotes omitted).

behalf of the government²⁵ and may also receive damages and penalties for themselves if they have been damaged by the blowing of the whistle.²⁶ For the remainder of this paper, the *qui tam* plaintiff shall be designated as “he” although it is equally probable that the party be a female as a male. If the government chooses not to intervene, the litigation may be pursued directly by the whistleblower in which case he will get a larger percentage of the government damages.²⁷

The process of the suit is statutorily controlled.²⁸ The relator must first inform the government of the information he has obtained concerning the fraudulent actions of the defendant. He must be an “original source” of this information²⁹ if the information has already been placed in the public record.³⁰ The statute is very specific about what constitutes public disclosure.³¹ The concept of original source is the key factor in commencing a *qui tam* suit if enough of the information has been publicly disclosed. The issue of whether a government employee can bring a suit has also been litigated.

The relator files the suit under seal on behalf of the government and himself. The complaint remains under seal for a period of sixty days while the government investigates the case and determines whether it will intervene.³² The government may ask the court to extend this period of time, but it has to present a well-founded argument for this extension.³³ If the government decides not to intervene initially, it may only intervene at a later date upon the showing of good cause to the court.³⁴ If the government chooses to initially intervene, it will carry the case forward itself, “and shall not be bound by an act of the person bringing the action.”³⁵ If the government intervenes, the relator will receive between 15% and 25% of the recovery as determined by statute.³⁶ If the government does not choose to intervene, the relator may continue the case on his own and receive between 25% and 30% of the recovery.³⁷ Pursuant to statute, the government is not

25. *Id.* § 3730(c)(3).

26. *Id.* § 3730(d)(1)–(2).

27. *Id.*

28. *Id.* §§ 3730, 3733.

29. 31 U.S.C. § 3730(e)(4)(A).

30. *Id.* § 3730(2) 4A, 4B.

31. *Id.* § 3730(d)(1).

32. *Id.* § 3730(b)(2).

33. *Id.* § 3730(b)(3).

34. 31 U.S.C. § 3730(c)(3).

35. *Id.* § 3730(c)(1).

36. *Id.* § 3730(d)(1).

37. *Id.* § 3730(d)(2).

responsible for the relator's costs of the suit whether or not it intervenes. The government also cannot simply step back into the case and intervene at any time and at its own choosing. If the government desires to intervene in the case at a later date, it must present a very compelling case to the court to permit such intervention.³⁸ Once the case is initiated, whether or not the government has intervened, the relator may not generally dismiss the case or enter into a settlement with the defendant without the government's agreement. However, the court may approve the settlement agreement or the dismissal if it is shown that the relator has carried out the case in good faith³⁹ and that the settlement is fair or the dismissal legally sufficient. In general, however, once the complaint is filed it may only be dismissed by the consent of the court and the attorney general.⁴⁰ In *United States v. Griswald*,⁴¹ the relator, called the prosecutor at the time, B.I. Dowell, objected when the government tried to accept a token amount of money and a piece of land in satisfaction of a much larger judgment.⁴² It was held that if a settlement is reached which is approved by the parties and the court, the government cannot accept a lesser settlement for the relator's share. The relator's share is vested when the judgment is entered.

In a recent case of first impression, the court in *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*,⁴³ considered the conditions upon which the relator was entitled to a hearing if the government moved to dismiss the suit whether or not the government had intervened. The court said that if the finding can be made that the government's decision to dismiss is rationally related to a legitimate governmental purpose and that dismissal is not arbitrary, fraudulent, or illegal, the inquiry is at an end.⁴⁴ The court then applied this standard to the facts of the case to determine if the government had presented a "facially satisfactory" basis for dismissal or whether Sequoia had shown a "substantial and particularized need" by "challenging the legitimacy of the asserted Governmental interest," or by "pointing to facts that indicated the claimed interest is pretextual," or "that dismissal is fraudulent," or if it appears that dismissal does not rationally

38. *Id.* § 3730 (c)(3).

39. 31 U.S.C. § 3730 (c)(2)(A)-(B).

40. *See, e.g., United States ex rel. Pedicone v. Mazak Corp.*, 807 F. Supp. 1350 (S.D. Ohio 1992).

41. 24 F. 361 (D. Or. 1885).

42. *Id.* at 366.

43. 912 F. Supp. 1325 (E.D. Cal. 1995).

44. *Id.* at 1338.

advance the asserted interest.⁴⁵ In the end, the court found that Sequoia had made a “colorable claim” and ordered a hearing at which the government would have to demonstrate a valid governmental interest. Then the relator would have to present evidence that dismissal is arbitrary, fraudulent, or illegal.⁴⁶

Along with the complaint, the relator provides the government with a disclosure document which is not filed and is maintained under seal. This disclosure document is generally kept from the defendant and may be considered to be work product. In the disclosure document, the relator presents all of the information he has so that the government can understand the nature of the claim. It is not necessary that the relator know “everything” about the evidence at this initial stage but enough information must be presented so that the government can carry out its own investigation. Mere allegations without some underlying evidence will not meet the pleading criteria. In *Mikes v. Strauss*⁴⁷ the court stated:

[T]he Court never expected plaintiff to be able to detail every aspect of defendants’ alleged fraudulent scheme prior to conducting any discovery. Instead, the primary concern of the Court was to prevent plaintiff from conducting a fishing expedition through the intricacies of defendants’ business in the hopes of uncovering some unlawful conduct on which to base the instant action.⁴⁸

As may be expected, *qui tam* cases are expensive and lengthy to litigate. If they survive motions to dismiss, summary judgment, and judgment on the pleadings, they may settle rather than be litigated.

V. JURISDICTION

The jurisdiction of the courts to hear a *qui tam* case is determined by statute.⁴⁹ Several states have passed their own *qui tam* legislation including California and Florida. The federal court has jurisdiction if state claims involve false claims which were perpetrated on the federal government. Since the defendant is often a corporation which transacts business in many locations, the relator often has the option of choosing a location convenient

45. *Id.* at 1346.

46. *Id.* at 1347.

47. 889 F. Supp. 746 (S.D.N.Y. 1995).

48. *Id.* at 751.

49. 31 U.S.C. § 3732.

for him or his attorney. Subject matter jurisdiction will be discussed under the topic "Relator".

VI. STATUTE OF LIMITATIONS

The statute of limitations is either six years from the date on which the violations of 31 U.S.C. § 3729 is committed, or

three 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 ten years after the date on which the violation is committed, whichever occurs last as imposed by 31 U.S.C. § 3731(b)(1).⁵⁰

VII. CONSTITUTIONALITY

A standard defense posed by a number of defendants in *qui tam* actions is an attack on the constitutionality of the FCA. This defense has failed in a number of different courts but for different reasons.

A. Standing

The question of standing of the relator is but one aspect of the unconstitutionality argument. In a claim filed under 31 U.S.C. § 3729, it is the United States government which has suffered injury, not the relator, although the relator may have separate claims under section 3730(h). As the Court held in *Gladstone, Realtors v. Village of Bellwood*,⁵¹ to have standing under Article III of the Constitution, the plaintiff must show an actual or threatened injury that can be redressed by the judgment requested. In *Schlesinger v. Reservists Committee to Stop the War*,⁵² the Court found that the injury must be concrete.⁵³ If the government chooses to intervene, the question of standing is overcome but if the government does not choose to intervene then the standing of the relator is not so clear. There is a substantial body of case law which holds that individuals cannot bring an action against the executive branch without a showing of injury on the part of the

50. *Id.* § 3731(b).

51. 441 U.S. 91, 99–100 (1979).

52. 418 U.S. 208 (1974).

53. *Id.* at 209.

plaintiff.⁵⁴ As the Court stated in *Warth v. Seldin*,⁵⁵ unless the plaintiff has an “interest” because he suffered an injury, he might not pursue the litigation vigorously.⁵⁶ Faced with an impressive history of cases, the courts involved have sought to deny the motion to dismiss for lack of standing but for apparently conflicting reasons. The Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,⁵⁷ held that there was a historical basis for finding standing.⁵⁸ The court in *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*⁵⁹ found standing for the relator based on a history of courts finding standing for the relator.⁶⁰ Although this appears to be circular reasoning, it is apparent that the *Hughes* court wanted to find standing. In addition, *Hughes* found that the statutory bounty gave the relator a personal stake and thus created injury in fact.⁶¹ The court also recognized standing since the relator was usually an employee who had suffered possible termination or other job harassment because of the suit. The relator normally suffers personal injuries since the relator may lose his job or be prosecuted and therefore the action creates an injury in fact for the relator.⁶² Alternatively, the court in *United States ex rel. Burch v. Piqua Engineering*⁶³ did not find the historical basis postulated by the other courts, but did find there were potential ramifications to the employment status of the relators.⁶⁴ In *United States ex rel. Truong v. Northrop Corp.*,⁶⁵ the court dismissed the theories of the other two courts, stating that since most of the cases which formed the historical basis occurred before the modern theory of “standing,” the historical basis for standing was not viable. It also viewed any ramifications as to employment as “speculating harm.” It found the basis for standing lay in the injury to the United States government in whose

54. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984); *Valley Forge Christian College v. American United for Separation of Church and State*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

55. 422 U.S. 490 (1975).

56. *Id.* at 498–99.

57. 454 U.S. 464 (1982).

58. *Id.* at 488–89 n.24.

59. 714 F. Supp. 1084 (C.D. Cal. 1989).

60. *Id.* at 1096.

61. *Id.* at 1098.

62. *Id.* at 1099.

63. 803 F. Supp. 115 (S.D. Ohio 1992).

64. *Id.* at 119.

65. 728 F. Supp. 615 (C.D. Cal. 1989).

name the suit had been brought.⁶⁶ This was a simple and direct conclusion to a problem that had been troubling the courts.

A related issue is whether the claim is made against the United States if the false claim was actually made against a state which receives funding from the federal government for a particular project. The court in *United States v. Azzarelli Construction Co.*⁶⁷ held that since the federal highway program gave a set amount of money to the state and did not deal directly with contractors, unlike, for example, open-ended money disbursement programs such as Medicare, the federal government did not suffer any injuries from the alleged bid-rigging and a *qui tam* action could not be brought.⁶⁸ Responding to *Azzarelli*, Congress, in passing the 1986 Amendments, enacted 31 U.S.C. § 3729(c), which includes in the definition of a “claim” requests for funds made to a grantee or recipient of federal funds so long as the United States government has provided any of the money which is requested from the grantee. As the court in *Wilkins ex rel. United States v. Ohio*⁶⁹ noted, “[t]he definition makes no distinction between money provided as a fixed sum and money provided under an open-ended program, but rather is broad enough to include any request for money which was originally obtained from the United States government.”⁷⁰ A relator, therefore, may have standing based on government’s funding of state projects even though the false claims were submitted to the state rather than directly to the federal government.

B. Separation of Powers

The *Truong* court also addressed the issue of dismissal of the action based on Northrop’s claim that the FCA violated the doctrine of separation of powers by unconstitutionally undermining the authority of the executive branch but the court rejected this claim.⁷¹ The court looked to the case of *Morrison v. Olson*⁷² which addressed a similar issue regarding a separation of powers challenge to the independent counsel provisions of the Ethics in Government Act of 1978.⁷³ That act created a “Special Division” of the

66. *Id.*

67. 647 F.2d 757 (7th Cir. 1981).

68. *Id.* at 761.

69. 885 F. Supp. 1055 (S.D. Ohio 1995).

70. *Id.* at 1062–63.

71. 728 F. Supp. at 620–21.

72. 487 U.S. 654 (1988), *remanded and aff’d*, 857 F.2d 801 (D.C. Cir. 1988).

73. *Id.* at 659.

Federal Court of Appeals for the District of Columbia which was empowered to appoint an independent counsel and define his prosecutorial jurisdiction.⁷⁴ Paralleling the *Morrison* Court's reasoning, the *Truong* court analyzed various phases of the litigation, more specifically Phase One: Initiating the Suit;⁷⁵ Phase Two: Conducting the Litigation;⁷⁶ and Phase Three: Terminating the Litigation,⁷⁷ and stated that:

In sum, the False Claims Act grants the executive branch greater litigative control than that provided for in the Ethics in Government Act of 1978, which the Supreme Court validated in *Morrison v. Olson*. Accordingly, defendant's constitutional challenge based on the separation of powers doctrine will not lie.⁷⁸

C. *The Appointments Clause*

In *Truong*, the defendant also raised a constitutional challenge based on a violation of the Appointments Clause, by allowing government litigation to be conducted by individuals who are not appointed in one of the ways enunciated in the Appointments Clause and thus are not "officers" of the United States.⁷⁹ The *Truong* court looked to distinguish the case in point from the holding of the Court in *Buckley v. Valeo*⁸⁰ which held that "[s]uch functions may be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]."⁸¹ The *Truong* court agreed that the "relators" were not "officers" within the meaning of the Appointments Clause,⁸² further stating that "[t]hey enjoy limited powers, have no formal duties, hold no established office, have no prescribed tenure, and receive no federal emoluments. As such, they are more appropriately classified as 'agents' for Appointments Clause purposes."⁸³ The *Truong*

74. *Id.* at 661.

75. *Truong*, 728 F. Supp. at 621.

76. *Id.*

77. *Id.* at 622.

78. *Id.*

79. *Id.* at 622-23.

80. 424 U.S. 1 (1976).

81. *Id.* at 140 (alteration in original).

82. *Truong*, 728 F. Supp. at 623.

83. *Id.* See also *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890) (stating that the "position is without tenure, duration, continuing emolument, or continuous duties, and he acts only occasionally and temporarily. Therefore, he is not an 'officer,' within the meaning of the clause of the [C]onstitution referred to.").

court distinguished the *Buckley* case on the basis that the *Buckley* court was concerned that Congress, through its appointments, was encroaching impermissibly on executive branch functions⁸⁴ and “[t]he Supreme Court . . . struck down what it regarded as congressional attempts to enlarge the legislative authority at the expense of that of the Executive Branch.”⁸⁵ But in a *qui tam* suit, the relator is a private person, in no way linked to Congress or the judicial branch.⁸⁶ The court pointed out that “[l]ower courts have, moreover, limited the potential reach of *Buckley*, finding the case inapplicable to private parties.”⁸⁷ The *Truong* court then found that “as long as private participation is not a subterfuge for Congressional control, the executive branch’s Article II responsibility to execute the laws faithfully is not threatened. Accordingly, defendant’s challenge based on the Appointments Clause cannot survive here.”⁸⁸

D. Double Jeopardy

The Fifth Amendment provides that “nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb.”⁸⁹ In a case under the FCA, a civil *qui tam* case is stayed pending the criminal trial of the defendant and, not only is the matter *res judicata* if the party is found guilty, but the defendant is also considered to have been found guilty for purposes of the civil trial if he has plead *nolo contendere*, and the civil trial proceeds only to determine damages.⁹⁰ The issue of double jeopardy arose in *United States v. Halper*.⁹¹ Halper had already been convicted and sentenced to two years imprisonment and fined \$5,000 for submitting sixty-five false claims for Medicare reimbursement. These claims had been submitted for \$12 rather than the correct \$3, resulting in a government loss of \$585. The government sought a penalty of \$2,000 per claim (the statutory penalty at that time) or \$130,000. The Supreme Court ruled in the face of such a large fine and small loss, that a defendant who had already been punished in a criminal case could only receive a second civil sanction if that could be

84. *Truong*, 728 F. Supp. at 623.

85. *Id.*

86. *Id.*

87. *Id.* at 623. See, e.g., *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 624 (D. Md. 1987); see also *NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801, 816 (N.D. Ill. 1988).

88. *Truong*, 728 F. Supp. at 624.

89. U.S. CONST. amend. V.

90. *United States v. Nardone*, 782 F. Supp. 996 (M.D. Pa. 1990).

91. 490 U.S. 435 (1989).

characterized as remedial.⁹² The Court also presented standards to use in determining if that sanction was remedial, which included other costs experienced by the government.⁹³ The holding in *Halper*, however, applies only to a case in which the defendant has already been tried in a criminal case and received some punishment.

E. *Unjust and Unusual Punishment*

Another issue is the question of the amount of fines imposed by the statute which may be said to infringe on the defendant's constitutional rights under the Eighth Amendment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁹⁴ This argument can only be made after the case has been tried, the damages suffered by the government determined, and the penalties assessed. This will have to be determined on a case-by-case basis. As stated above, the *Halper* case is only applicable when there has been a related criminal case.

VIII. THE RELATOR

The relator qualifies solely by being the provider of the information which forms the basis of the *qui tam* suit. It is the relator who brings the information to the government either prior to the suit or by the actual filing of the suit itself. If the information has been the subject of public disclosure and the relator is not the primary provider of information, the court will not have subject matter jurisdiction over the matter.

The FCA⁹⁵ provides that:

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.⁹⁶

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the infor-

92. *Id.* at 450–51.

93. *Id.* at 451.

94. U.S. CONST. amend. VIII.

95. 31 U.S.C. § 3730(e).

96. *Id.* § 3730(e)(4)(A) (emphasis added).

mation 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.⁹⁷

In *Wang ex rel. United States v. FMC Corp.*,⁹⁸ the court held that if there “has been no ‘public disclosure’ within the meaning of section 3730(e)(4)(A), there is no need for a *qui tam* plaintiff to show that he is the ‘original source’ of the information.”⁹⁹ As the court stated in *United States ex rel. Hagood v. Sonoma County Water Agency*,¹⁰⁰ the *qui tam* plaintiff need prove his status as an “original source” under section 3730(e)(4)(B) “only if an exception is sought to the bar of 4(A).”¹⁰¹

The *Stinson* cases are an example of different rulings coming down on basically the same set of facts. During discovery in an unrelated action, which was not a false claims case, *Stinson, Lyons, Gerlin & Bustamante, P.A.*, a law firm, became aware of alleged fraud being perpetrated by a number of insurance companies. The firm then filed a series of *qui tam* suits against a number of insurance companies with itself as the relator in each case. The question arose whether the information which was revealed by the defendant to the plaintiff during depositions in the discovery phase of the litigation had been “publically disclosed” so that the law firm was proscribed from bringing a *qui tam* suit based on it unless the firm could show that it was an original source. In *United States ex rel. Stinson v. Prudential Insurance Co.*,¹⁰² the court found that information revealed in a “hearing” or deposition taken in discovery was thereby placed into the public domain.¹⁰³ The court in *United States ex rel. Stinson v. Blue Cross Blue Shield of Georgia, Inc.*¹⁰⁴ found that information obtained in a deposition was not based on a public disclosure.¹⁰⁵ The two cases are an interesting compari-

97. *Id.* § 3730(e)(4)(B).

98. 975 F.2d 1412 (9th Cir. 1992).

99. *Id.* at 1416.

100. 929 F.2d 1416 (9th Cir. 1991), *aff'd*, 81 F.3d 1465 (9th Cir. 1996).

101. *See also* *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991) (stating that “the district court in *Raytheon* determined that the government employee cannot qualify for the ‘original source’ exception to the jurisdictional bar of section 3730(e)(4)(A). The court here implied that because the government employee is required, as a condition of employment, to uncover and report fraud, two of the requirements for the ‘original source’ exception were not met . . .”).

102. 944 F.2d 1149 (3d Cir. 1991).

103. *Id.* at 1160.

104. 755 F. Supp. 1040 (S.D. Ga. 1990).

105. *Id.* at 1050.

son. In both cases there was the same relator and information obtained in approximately the same manner but a very different ruling. In *United States ex rel. Springfield Terminal Railway Co. v. Quinn*,¹⁰⁶ the court took a middle ground between the two previously cited *Stinson* cases, stating that the danger of parasitic suits is minimized when discovery is not filed and therefore is not put into the public record.¹⁰⁷ The court stated that *qui tam* actions are barred only when enough information exists in the public domain to expose the fraud transaction or the allegation of fraud.¹⁰⁸

The court in *United States ex rel. Neher v. NEC Corp.*¹⁰⁹ analyzed the case law relating to whether the *qui tam* action survives the death of the relator.¹¹⁰ The court quoting several cases¹¹¹ stated, and the parties agreed, that the survival of the action depended on whether it was remedial in nature or penal and that it could be remedial for one plaintiff and penal for another. It is clear that actions under the FCA are remedial to the government and that the death of the relator has no effect on the government's claim. The court went on to find, however, that

a *qui tam* relator suffers substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm. First, a *qui tam* relator can suffer severe emotional strain due to the discovery of his unwilling involvement in fraudulent activity. Moreover, the actual or potential ramifications on the relator's employment can be substantial . . . Finally, the relator can suffer substantial financial burdens as a result of the time and expense involved in bringing a *qui tam* action. We thus believe that the FCA's *qui tam* provisions are intended to redress wrongs suffered by individual relators such as Williams, rather than the general public.¹¹²

The court continued:

106. 14 F.3d 645 (D.C. Cir. 1994).

107. *Id.* at 657.

108. *Id.* at 647.

109. 11 F.3d 136 (11th Cir. 1993).

110. *Id.* at 137.

111. *See, e.g., Ex Parte Schreiber*, 110 U.S. 76, 80 (1884); *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 876 (11th Cir. 1986); *In re Wood*, 643 F.2d 188, 190-191 (5th Cir. 1980); *James v. Home Constr. Co. of Mobile*, 621 F.2d 727, 729 (5th Cir. 1980); *Murphy v. Household Fin. Corp.*, 560 F.2d 206, 209 (6th Cir. 1977).

112. *Neher*, 11 F.3d at 138.

The recovery of a *qui tam* relator is intended to remedy the harm he suffered in several ways: by distancing the relator from the fraud and rewarding him for his involvement in the government's fight against unlawful activity; by compensating the relator for any harm he suffered with respect to his employment; and by compensating the relator for the substantial time and expense involved in bringing a *qui tam* action.¹¹³

The court went on to hold that "a relator's *qui tam* action survives his death."¹¹⁴

IX. DISCOVERY FROM THE GOVERNMENT

Although the relator is acting on behalf of the government, there are many barriers erected between the government and the relator if the government does not intervene in the case. For example, the relator might believe that obtaining documents from the government to prove the claim for the government would be simple, as the government certainly wants to have the claim proven so that it can get its share of the damages and penalties. It certainly might be considered to be the least the government can do since it did not intervene and all the costs of the action are being born by the relator. In fact, the relator and his attorney may find that obtaining documents from the government is more difficult than obtaining them from the defendants. For example, the government has a set of elaborate procedures known as Touhy regulations, which have been derived from *United States ex rel. Touhy v. Ragen*,¹¹⁵ by which the government will furnish information and grant access to government employees in connection with litigation. In many instances, it may be more difficult for the relator to obtain discovery materials from the government than from the defendant.

The relator does not have to provide the information to the government before filing his claim, although generally this is done. In such a case, the government has certain statutory protection if it has already been investigating the claim. The government has sixty days to intervene but it may get an extension if it has a good basis, which may be the continuation of its investigation. During this period, the complaint is under seal. The government may choose to intervene and carry out the case according to its own deci-

113. *Id.*

114. *Id.* at 139.

115. 340 U.S. 462 (1951).

sions. If the relator has not been an original source, in the event that there has been public disclosure, the relator will not be able to carry on the case because there will be an absence of subject matter jurisdiction. If the relator provides valuable information to the government as a direct and original source, he will then share in the recovery and penalties.

[T]he United States as against the defendants has the right to adopt as its own what was from the first claimed in its name, unprejudiced by any thing the relator may have done or omitted to do; but as respects the relator the United States must reward him out of the proceeds if he has really contributed original information in bringing the suit. It is when the United States fails to adopt or prosecute the suit, and the relator carries it on, that the defendants may raise an issue with the relator as to the merit of his activity in bringing it, and on this collateral issue may defeat it utterly.¹¹⁶

X. THE CLAIM

A. *What Constitutes a Claim?*

While the definition of "claim" lies within the statute itself¹¹⁷ and 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 if 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[.],¹¹⁸

there still has been considerable litigation regarding the nature of a claim. The elements of a claim under 31 U.S.C. § 3729 were outlined by the court in *Wilkins ex rel. United States v. Ohio*.¹¹⁹

116. *United States v. Pittman*, 151 F.2d 851, 853 (5th Cir. 1945).

117. 31 U.S.C. § 3729(c).

118. *Id.*

119. 885 F. Supp. 1055 (S.D. Ohio 1995).

[1] The elements of a claim under § 3729(a)(1) are: (1) that the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) that the claim was false or fraudulent; (3) that the defendant knew that the claim was false or fraudulent; and (4) that the United States suffered damages as a result.

[2] The elements of a claim under 3729(a)(2) are: (1) that the defendant made, used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved; (2) the record or statement and the claims were false or fraudulent; (3) the defendant knew that the record or statement and the claim were false or fraudulent; and (4) the United States suffered damages as a result.

[3] The elements of a claim under § 3729(a)(3) are: (1) that the defendant knowingly conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States; (2) that one or more of the conspirators performed any act to effect the object of the conspiracy; and (3) that the United States suffered damages as a result of the false or fraudulent claim.

[4] A claim under § 3729(a)(7) requires proof: (1) that the defendant made, used, or caused to be used a record or statement to conceal, avoid, or decrease an obligation to the United States; (2) that the statement or record was false; (3) that the defendant knew that the statement or record was false; and (4) that the United States suffered damages as a result.

[5] The knowledge element of the above claims is defined in 31 U.S.C. § 3729(b). Under that section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

- (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,
- and no proof of specific intent to defraud is required.¹²⁰

These formulations are most useful in the preparation of a complaint.

120. *Wilkins*, 885 F. Supp. at 1059 (quoting *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1258–59 (S.D. Fla. 1989)).

B. *The Reverse Claim*

Among the 1986 amendments, Congress made provisions for what has been termed the “reverse” claim, in which the defendant allegedly has reduced a payment owed to the government through some fraudulent means, rather than submitting a fraudulent claim for payment to the government.¹²¹ This addition to the list of causes of action has greatly increased the range of *qui tam* cases filed since 1986.

In *Wilkins*, the court considered the situation in which the defendant omits certain information from records so as to reduce the payments owed to the government.¹²² The court concluded that for there to be a “reverse false claim,” the government has to be made aware of the false statement, misrepresentation, or misleading omission in some fashion, *i.e.*, there has to be a “claim.”¹²³

C. *False Claims or Fraud: The Element of Intent*

The amendment created by 31 U.S.C. § 3729(b) which removes the requirement of proof of intent to defraud has made the *qui tam* cases substantially easier to prosecute. The courts, however, have drawn a line with regard to the minimal degree of knowledge that the defendant must have had of the alleged fraudulent action.¹²⁴ Yet the courts are clear that

[m]ere negligence or innocent mistake is insufficient to satisfy the above standards for knowledge. Rather, defendant must act at least with “deliberate ignorance” or “reckless disregard” of the truth or falsity of the information.

Although plaintiff must prove that the defendant acted with knowledge as that term is defined in §3729(b), plaintiff is not required to prove that the defendant acted with the intent to deceive. The gist of the violation is not an intent to deceive but the knowing presentation of a claim, record or statement that is either “fraudulent” or “false” and the requisite intent is the knowing presentation of what is “known to be false” or “a lie.”¹²⁵

121. 31 U.S.C. § 3729(7).

122. 885 F. Supp. at 1064.

123. *Id.*

124. *See, e.g.*, *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); *Wilkins*, 885 F. Supp at 1059.

125. *Wilkins*, 885 F. Supp. at 1059; *see also Wang*, 975 F. 2d at 1420; *Hagood*, 929 F.2d at 1421.

*United States ex rel. Stevens v. McGinnis, Inc.*¹²⁶ stands for the proposition that an omission of information from records which are required to be maintained may constitute a false statement or record under the FCA, but the defendant must have knowingly submitted the false claim. As the court stated in *Hagood*:

Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence. The statutory definition of “knowingly” requires at least “deliberate ignorance” or “reckless disregard.” To take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregarding.¹²⁷

Although one may believe that the essence of the *qui tam* action is fraud in fact, the legislature, in referencing a “false claim” rather than fraud, has effectively removed the requirement of proving intent.

D. Must Claims Under the FCA Be Plead with Specificity?

The standard for pleading fraud under the FCA is not Rule 9(b) of the *Federal Rules of Civil Procedure* but a substantially modified version of rule 9(b) based on exceptions which have been identified by several courts. *Durham v. Business Management Associates*¹²⁸ held that rule (9)(b) must be read consistently with rule 8 and, thus, must not abrogate the concept of notice pleading. As the court in *Colonial Penn Insurance v. Value Rent-A-Car, Inc.*¹²⁹ stated: “In *Durham*, the Eleventh Circuit stated that “[a]llegations of date, time or place satisfy the rule 9(b) requirement that the circumstances of the alleged fraud must be pleaded with particularity, *but alternative means are also available to satisfy the rule.*”¹³⁰ “The Eleventh Circuit approves this alternative means”¹³¹ The purpose of requiring that fraud be plead with specificity under rule 9(b) is: 1) to put defendants on notice as to the conduct complained of so that they have sufficient information to formulate a defense; 2) to protect the defendants from

126. No. C-1-93-442, 1994 WL 799421, *4-8 (S.D. Ohio Oct. 26, 1994).

127. *Hagood*, 929 F.2d at 1421; *see also* *Mikes v. Strauss*, 889 F. Supp. 746, 751 (S.D. N.Y. 1995).

128. 847 F.2d 1505 (11th Cir. 1988).

129. 814 F. Supp. 1084 (S.D. Fla. 1992).

130. *Id.* at 1092 (quoting *Durham v. Business Management Assocs.*, 847 F.2d 1505, 1512 (11th Cir. 1988)).

131. *Id.* at 1092.

frivolous suits; 3) to eliminate fraud actions in which all of the facts are learned through discovery after the complaint is filed; and 4) to protect a defendant from harm to its goodwill or reputation.¹³² The *Stinson* court has emphasized that these conditions can be met in other ways.¹³³ The FCA has other safeguards against multiplicity of suits. If there has been public disclosure, the relator must have “‘direct and independent knowledge,’ that is, be an ‘original source,’ of the allegations under section 3730(e)(4)(B)”¹³⁴ in order to apply the exception to rule 9(b).¹³⁵

The courts have found that the imposition of a strict enforcement of rule 9(b) would frustrate the purpose of the FCA, therefore courts allow an exception to the stringent rule so that the *qui tam* plaintiff can plead information which he knows exists but which may only be available to him now through discovery.¹³⁶ The requirement of pleading fraud with particularity under Rule 9(b) of the *Federal Rules of Civil Procedure* makes it difficult for many persons to bring a *qui tam* suit and frustrates the legislative intent of the statute.

Furthermore, pleadings cannot generally be based on information and belief unless the factual information is “‘peculiarly within the defendant’s knowledge or control.”¹³⁷ In such a case, allegations made on information and belief are acceptable if the complaint adduces “‘specific facts supporting a strong inference of fraud.”¹³⁸ Where, however, this factual information is peculiarly within the defendant’s knowledge or control, rule 9(b)’s requirement is relaxed somewhat.¹³⁹ “‘In such a case, pleading on information and belief is acceptable.”¹⁴⁰

The court in *United States v. Napco International, Inc.*¹⁴¹ followed the court in *Bennett v. Berg*¹⁴² which held that “[i]n determining the sufficiency of the pleading, the Court has considered ‘such matters as the time, place and contents of false representations, as well as the identity of the person making

132. *United States ex rel. Stinson v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1055, 1056–57 (S.D. Ga. 1990).

133. *Id.* at 1057.

134. *Cooper v. Blue Cross and Blue Shield of Fla.*, 19 F.3d 562, 567 (11th Cir. 1994).

135. *Id.* at 568.

136. *United States ex rel. La Valley v. First Nat’l Bank of Boston*, 707 F. Supp. 1351, 1355 (D. Mass. 1988).

137. *Stinson*, 755 F. Supp. at 1052.

138. *Id.*

139. *See, e.g., Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990).

140. *Stinson*, 755 F. Supp. at 1052.

141. 835 F. Supp. 493 (D. Minn. 1993).

142. 685 F.2d 1053 (8th Cir. 1982).

the misrepresentation and what was obtained or given up thereby.”¹⁴³ The Court in *Leisure Founders, Inc. v. CUC International, Inc.*¹⁴⁴ stated:

We are not persuaded by Defendants’ argument that the allegations of fraud fail to comport with the requirements of Fed. R. Civ. P. 9(b) because they fail to allege fraud with the requisite degree of particularity. Nor are we convinced that Rule 9(b) bars Plaintiff from pleading allegations based on “information or belief,” where the subject matter is “peculiarly within the adverse parties’ knowledge.”¹⁴⁵

Rule 9(b) requires that “the circumstances constituting fraud . . . shall be stated with particularity,” and is to be read together with rule 8.¹⁴⁶ A plaintiff must allege fraud with sufficient particularity to permit “the person charged with fraud . . . [to] have a reasonable opportunity to answer the complaint and adequate information to frame a response.”¹⁴⁷ The court in *Merrill Lynch v. Del Valle*¹⁴⁸ stated that the allegations must be accompanied by “some delineation of the underlying acts and transactions which are asserted to constitute fraud.”¹⁴⁹

However, pleading on “information and belief” must be done with great caution. As the court stated in *Stinson*,

[i]n the usual case, “[t]o pass muster under rule 9(b), the complaint must allege the time, place, speaker, and sometimes even the content of the alleged misrepresentation.” “Thus, pleadings generally cannot be based on information and belief.” Where, however, this factual information is peculiarly within the defendant’s knowledge or control, rule 9(b)’s requirement is relaxed somewhat. In such a case, pleading on information and belief is acceptable, but on one condition: the “complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed

143. *Napco*, 835 F. Supp. at 495 (quoting *Bennett*, 685 F.2d at 1062).

144. 833 F. Supp. 1562 (S.D. Fla. 1993).

145. *Id.* at 1574 (quoting *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972)). *See also In re Union Carbide Corp. Consumer Prods. Bus. Sec. Litig.*, 666 F. Supp. 547, 559 (S.D.N.Y. 1987).

146. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 959 (D.C. Cir. 1985).

147. *In re United States Oil and Gas Litig.*, No. 83-1702-A1-CIV., 1988 U.S. Dist. LEXIS 2217, at *4 (S.D. Fla. Feb. 8, 1988).

148. 528 F. Supp. 147 (S.D. Fla. 1981).

149. *Id.* at 149 (quoting *duPont v. Wyly*, 61 F.R.D. 615, 630 (D. Del. 1973)). *See, e.g., Leisure Founders*, 833 F. Supp. at 1574.

pleading standard.” (“[E]ven under a nonrestrictive application of the rule, pleaders must allege that the necessary information lies within the defendant’s control, and then allegations must be accompanied by a statement of facts upon which the allegations are based.”) Bald or otherwise conclusory allegations will not suffice. The “supporting facts on which the belief is founded must be set forth in the complaint.” And the complainant must be able to connect the allegations of fraud to the defendant.¹⁵⁰

In *United States ex rel. Robinson v. Northrop Corp.*,¹⁵¹ the court reaffirmed that “pleadings cannot generally be based on information and belief unless the factual information is ‘peculiarly within the defendant’s knowledge or control.’”¹⁵² In general, *qui tam* plaintiffs must meet the who, what, when, and where pleading requirement for fraud.¹⁵³

[I]t is not enough for plaintiffs to allege that “a Northrop engineer” or “Northrop employees” or “superiors” committed fraudulent acts. The identification of the employee, or at least a more specific description of the person, is within plaintiffs’ knowledge, and such information must be provided in the complaint.¹⁵⁴

Most of the allegations . . . repetitively refer to unnamed persons at unspecified times, even though the specifics are presumably known to the plaintiffs. Defendant complains that it has 35,000 employees and cannot reasonably respond in those circumstances. We agree.¹⁵⁵

The question of “when” is another matter which must be met. The court in *NCR Credit Corp. v. Repron Electronics, Inc.*¹⁵⁶ dismissed a fraud complaint where the plaintiff made “mere conclusory” allegations, rather than alleging a specific date, time, name, or quoting specific misstatements.¹⁵⁷

In contrast, in *United States v. Napco International, Inc.*,¹⁵⁸ the government survived a motion to dismiss because it detailed each purchase

150. *Stinson*, 755 F. Supp. at 1052 (citations omitted).

151. 149 F.R.D. 142 (N.D. Ill. 1993).

152. *Id.* at 145 (citation omitted).

153. *Id.*

154. *Id.*

155. *Id.* at 146.

156. 155 F.R.D. 690 (M.D. Fla. 1994).

157. *Id.* at 693.

158. 835 F. Supp. 493 (D. Minn. 1993).

agreement, including the date of each invoice, the invoice number, the invoice amount, the country from which the materials were obtained, and the dollar amount spent on each procurement. This is possible when the government intervenes in the case, but rarely can the *qui tam* plaintiff offer such detail in the initial complaint, since he may have already left the employ of the *qui tam* defendant and is rarely able to take the required documents with him. They must, however, give reasonable delineation of the specifics of the false claims so that exact proof may be obtained through discovery. Discovery cannot be a complete fishing expedition, nor can the case be created in whole after the complaint is filed on the basis that the *qui tam* plaintiff has a “idea” that something may be occurring.

E. *Standard of Proof*

The standard of proof in a *qui tam* suit is by a preponderance of the evidence.¹⁵⁹ There are a number of “but for” *qui tam* cases in which the government (or the relator) must show by a preponderance of the evidence that the government would not have taken a certain action “but for” the false claim presented by the defendant. In *United States v. First National Bank of Cicero*,¹⁶⁰ the government had to show that it would not have guaranteed a Small Business Administration loan but for the actions of the defendants. The reliance of the government on the false claim must be shown if damages in addition to penalties are to be awarded.¹⁶¹

In *United States v. Farina*,¹⁶² it was determined that submitting a bid based on false information is not a violation of the FCA, although it may have been fraud.¹⁶³ It does become a violation, however, if the bidder wins the bid and tenders a bill or false claim to the government for the work.

The court in *Outlet Communications, Inc. v. King World Productions, Inc.*¹⁶⁴ also addressed this problem.

The court may consider only the pleadings, that is the complaint and answer, in deciding a Rule 12(c) motion for judgment on the pleadings. “[T]he fact allegations of the complaint are to be taken as true, but those of the answer are taken as true only where and to the extent that they have not been denied or do not conflict with

159. *See, e.g.*, *Brooks v. United States*, 64 F.3d 251, 255 (7th Cir. 1995).

160. 957 F.2d 1362 (7th Cir. 1992).

161. *See, e.g.*, *United States v. Hill*, 676 F. Supp. 1158 (N.D. Fla. 1987).

162. 153 F. Supp. 819 (D.N.J. 1957).

163. *Id.* at 821–22.

164. 685 F. Supp. 1570 (M.D. Fla. 1988).

those of the complaint.” In order to prevail, a motion for judgment on the pleadings “must be based on the undisputed facts appearing in all the pleadings.”

Furthermore, the court is obliged to scrutinize the complaint, construed in plaintiff’s favor, and to allow it to stand “if plaintiff might recover under any state of facts which could be proved in support of the claim.”¹⁶⁵

“[T]he Court is confined to a review of the pleadings, must accept the pleaded facts as true, and must resolve any factual issues in a manner favorable to the non moving party.”¹⁶⁶ The *Colonial Penn* court went on to state that “a claim is subject to dismissal under Rule 12(b)(6) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”¹⁶⁷

The court in *Swerdloff v. Miami National Bank*¹⁶⁸ stated:

The posture of the case requires us to consider whether plaintiffs could prove *any* set of facts which would permit recovery under the Act. We make no suggestion as to whether such facts can be proven in this case. We merely hold that in our view of the law sufficient facts might possibly be shown under the cause of action here alleged to permit recovery and defendant was not entitled to judgment as a matter of law at the pleading stage of the proceeding.¹⁶⁹

The court in *Outlet Communications, Inc. v. King World Productions, Inc.* continued: “In essence, the court must examine the pleadings to determine whether any set of facts would permit plaintiff to recover as a matter of law.”¹⁷⁰

165. *Id.* at 1572 (citations omitted).

166. *Colonial Penn Ins. Co. v. Value Rent-A-Car, Inc.*, 814 F. Supp. 1084, 1090 (S.D. Fla. 1992). *See also* *Quinones v. Durkes*, 638 F. Supp. 856, 858 (S.D. Fla. 1986).

167. *Colonial Penn*, 814 F. Supp. at 1090.

168. 584 F.2d 54 (5th Cir. 1978).

169. *Id.* at 60.

170. *Outlet Communications*, 685 F. Supp. at 1572; *see also* *International Union of Dist. 50 v. Bowman Transp., Inc.*, 421 F.2d 934, 935 (5th Cir. 1970) (per curiam); *Security Life & Accident Ins. Co. v. United States*, 357 F.2d 145, 150 (5th Cir. 1966).

The Court held in *Conley v. Gibson*¹⁷¹ that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁷² The NCR court went on to say:

The ‘reasonable delineation of the underlying acts and transactions’ test should only be applied in those cases where due to the nature of the litigation, such as securities fraud, it is impossible for the litigant to have access to the detailed knowledge necessary to otherwise meet the requirement of Rule 9(b). In such case, the strict requirement of Rule 9(b) is relaxed so that substantial justice can be done.¹⁷³

The court in *Wilkins* repeats the statement of the Sixth Circuit, in *Michaels Building Co. v. Ameritrust Co., N.A.*,¹⁷⁴ that “the purpose undergirding the particularity requirement of Rule 9(b) is to provide a defendant fair notice of the substance of a plaintiff’s claim in order that the defendant may prepare a responsive pleading.”¹⁷⁵ The court in *Wilkins* evaluated the plaintiff’s position in determining that “[t]his is not a case in which a plaintiff completely unfamiliar with ODOD or OCS had brought a *qui tam* action This gives greater weight to plaintiff’s representation that records and documents relevant to his claims will be found in the defendants’ possession.”¹⁷⁶ The court in *Wilkins* also found that because the plaintiff did not have equal access to the documents he sought, it was an appropriate case to apply the exception to rule 9(b).¹⁷⁷ “The purpose of harmonizing Rule 8 ‘notice pleading’ requiring only a ‘short and plain statement’ with the particularity requirement of Rule 9(b) is to allow that all pleadings be construed as to do ‘substantial justice’ as required under Rule 8(f).”¹⁷⁸

171. 355 U.S. 41 (1957). See also *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055, 1058 (S.D. Ohio 1995); *NCR Credit Corp. v. Repron Elecs., Inc.*, 155 F.R.D. 690, 692 (M.D. Fla. 1994).

172. *Id.* at 45–46.

173. *NCR Credit Corp.*, 155 F.R.D. at 692.

174. 848 F.2d 674 (6th Cir. 1988).

175. *Wilkins*, 885 F. Supp. at 1060.

176. *Id.* at 1061.

177. *Id.*

178. *NCR Credit Corp.*, 155 F.R.D. at 692.

If the defendant has been convicted in a criminal case on the same facts, it is collaterally estopped from contesting issues in the *qui tam* case, however, the government still has to prove damages.¹⁷⁹

F. Discovery

The Court in *Retail Clerks International Ass'n v. Schermerhorn*¹⁸⁰ found that "the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged."¹⁸¹ As the court in *Mikes v. Strauss*¹⁸² states: "The court never expected the plaintiff to be able to detail every aspect of defendants' alleged fraudulent scheme prior to conducting any discovery."¹⁸³ In *Wang ex rel. United States v. FMC Corp.*,¹⁸⁴ the court expected the plaintiff to conduct discovery to identify the evidence of the alleged fraud. The court in *United States ex rel. LeBlanc v. Raytheon Co.*¹⁸⁵ found that evidence publicly disclosed for the first time during the discovery phase of a *qui tam* suit is not barred from use in that same suit by section 3730(e)(4)(A). However, if it were barred, *qui tam* plaintiffs would have little choice but to waive their right to discovery for fear of disclosing information that would bar the claims for which they might wish discovery in the first place.

As previously discussed, there are several cases relating to the law firm of Stinson Lyons which discovered rampant cheating among insurance companies while it was conducting discovery against Provident Fire and Life Insurance Company. The law firm brought *qui tam* suits both against Prudential Insurance Co. and against Blue Cross Blue Shield of Georgia, but these courts had different holdings. In *United States ex rel. Stinson v. Blue Cross of Georgia*,¹⁸⁶ the court dismissed the complaint stating:

To prevail in this suit, Stinson Lyons necessarily would have to engage in massive discovery to begin to substantiate its allegations. It is precisely this conduct that Rule 9(b) is designed to pre-

179. See, e.g., *United States v. Nardone*, 782 F. Supp. 996 (M.D. Pa. 1990).

180. 373 U.S. 746 (1963), *aff'd*, 375 U.S. 96 (1963).

181. *Id.* at 753 n.6. See also *Wheeldin v. Wheeldin*, 373 U.S. 647, 648 (1963) (regarding inferring fact from allegations of complaint); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723 (E.D. Cal. 1993).

182. 889 F. Supp. 746, 752 (S.D.N.Y. 1995).

183. *Id.* at 757.

184. 975 F.2d 1412 (9th Cir. 1992).

185. 913 F.2d 17 (1st Cir. 1990).

186. 755 F. Supp. 1040 (S.D. Ga. 1990).

vent There is nothing in the complaint that suggests that *all* of the facts needed to support this sanction do not need to be produced in discovery In short, Stinson Lyons still has alleged no facts that support an inference that BC-GA defrauded anybody.¹⁸⁷

G. Conspiracy

While 31 U.S.C. § 3729(a)(3) provides for a false claims action based on conspiracy, this has rarely been plead successfully. In part, this is based on the fact that most defendants are corporations rather than individuals. A corporation cannot conspire with itself, its agents, or employees.¹⁸⁸

XI. RETALIATION

A claim under section 3730(h) requires proof that: 1) the plaintiff engaged in lawful protected activity in furtherance of a FCA action; 2) the plaintiff is an original source; and 3) the plaintiff suffered the harm described in the statute because of these actions.¹⁸⁹

The “whistleblower” provision of the FCA prevents the harassment, retaliation, or threatening of employees who assist in or bring *qui tam* actions. In particular, the statute provides:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by is or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.¹⁹⁰

187. *Id.* at 1057.

188. *See, e.g.,* Leisure Founders, Inc. v. CUC Int’l Inc., 833 F. Supp. 1562, 1575 (S.D. Fla. 1993); Colonial Penn Ins. Co. v. Value Rent-A-Car, Inc., 814 F. Supp. 1084, 1096 (S.D. Fla. 1992); Baker v. McDonald’s Corp., 686 F. Supp. 1474 (S.D. Fla. 1987), *aff’d*, 865 F.2d 1272 (11th Cir. 1988).

189. 31 U.S.C. § 3730.

190. *Id.*

Several district courts have held that section 3730(h) protects internal whistleblowers.¹⁹¹ “To sustain an action under section 3730(h), plaintiff must prove that: 1) she engaged in conduct protected under the statute; 2) defendants were aware of her conduct; and 3) she was terminated in retaliation for her conduct.”¹⁹² One element of protected conduct is “investigation.”¹⁹³ As the court indicated in *Robertson v. Bell Helicopter Textron, Inc.*,¹⁹⁴ the *qui tam* plaintiff’s conduct must be conduct protected under the statute, such as investigating alleged fraud in an effort to bring or help the government to bring an action under the FCA. The *Robertson* court relied in part on the legislative history of the act stating, “[t]he legislative history makes clear that a ‘whistleblower must show the employer had knowledge the employee engaged in protected activity.’”¹⁹⁵

The court in *Neal v. Honeywell, Inc.*¹⁹⁶ explained that the actual filing of a *qui tam* suit should not be a prerequisite to protection, and stated that “we hold that the whistleblower protection provision of the False Claims Act forbids discrimination against an employee who has made an intracorporate complaint about fraud against the Government.”¹⁹⁷ Indeed, in *Pogue v. United States Department of Labor*,¹⁹⁸ the court held that the internal whistleblower was protected even if no lawsuit was ever filed by the government or by another *qui tam* informant.¹⁹⁹ In *Aiello*, the court held that “[t]he *qui tam* statute prohibits ‘any . . . manner [of] discrimination.’”²⁰⁰

191. See, e.g., *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir. 1994), cert. denied, 115 S. Ct. 1110 (1995); *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 269 (N.D. Ill. 1993), aff’d, 33 F.3d 860 (7th Cir. 1994); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723 (E.D. Cal. 1993).

192. *Mikes v. Strauss*, 889 F. Supp. 746, 752 (S.D.N.Y. 1995). See also *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994).

193. 31 U.S.C. § 3730(h).

194. 32 F.3d at 951.

195. S. Rep. No. 345 at 35 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5300. See *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994) (restating Senate Report No. 345).

196. 826 F. Supp. 266 (N.D. Ill. 1993).

197. *Id.* at 273. See *Aiello*, 836 F. Supp. at 724 (discussing *Neal v. Honeywell, Inc.*, 826 F. Supp. 266 (N.C. Ill. 1993)). See also *Mikes v. Strauss*, 889 F. Supp. 746 (S.D.N.Y. 1995); *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055 (S.D. Ohio 1995).

198. 940 F.2d 1287 (9th Cir. 1991).

199. *Id.* at 1290.

200. *Aiello*, 836 F. Supp. at 726 (citation omitted) (emphasis added).

The court in *Aiello*²⁰¹ also found that the relator was protected even if the relator was terminated by a later employer because of the influence of the *qui tam* defendant on the terminating employer.

The right of a government employee to be a relator has been challenged in a number of cases. In *Wilkins*,²⁰² the defendant claimed that the plaintiff was acting on behalf of the state because he was required by his job to investigate irregularities in the use of federal funds.²⁰³ The *Wilkins* court found that “[a]n employee can be acting on his own behalf in investigating matters in furtherance of a *qui tam* action even though he or she would also be conducting those same investigations on behalf of the employer.”²⁰⁴ The court notes “that section 3730(h) applies to employees who engage in lawful acts on behalf of the employee or others.”²⁰⁵ In *United States ex rel. LeBlanc v. Raytheon Co.*,²⁰⁶ the court found that a government employee could bring an action under the FCA based upon information obtained while acting as an employee. But *Raytheon* also held that a government employee could not qualify as an original source.²⁰⁷ The Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*²⁰⁸ rejected the holding of the First Circuit in *Raytheon* stating that the court improperly relied on an “original source” consideration where there had been no public disclosure.²⁰⁹ The *Raytheon* court also made a number of public policy arguments against the employee getting a share of the recovery when he was paid to work for the government²¹⁰ which were rejected by both the *Williams*²¹¹ and *Wilkins* courts.²¹²

The *Williams* court dismissed the dubious logic of the concept that a government employee held a dual status, so by telling himself the information, he was, in fact, publicly disclosing it.²¹³ That court also pointed out that the statute in section 3730(e)(4)(A) enumerates the circumstances in which information is considered to be publicly disclosed. The statute is very

201. *Id.* at 724–25.

202. 885 F. Supp. 1055 (S.D. Ohio 1995).

203. *Id.* at 1065.

204. *Id.* at 1066.

205. *Id.* (emphasis added) (citing 31 U.S.C. § 3730(h)).

206. 913 F.2d 17 (1st Cir. 1990).

207. *Id.* at 20.

208. 931 F.2d 1493 (11th Cir. 1991).

209. *Id.* at 1500 n.13. See also *id.* at 1500–01.

210. *Raytheon*, 913 F.2d at 20.

211. *Williams*, 932 F.2d at 1500.

212. *Wilkins*, 885 F. Supp. at 1066.

213. *Williams*, 932 F.2d at 1499.

specific about the methods of “public disclosure” and does not imply that these are the only examples of public disclosure. Therefore, a government employee telling the information to himself does not amount to public disclosure. In addition, Congress has barred certain actions by specific government employees and, by being so specific, has indicated that other government employees can bring such actions if they are not specifically excluded by the Act and if they meet the other criteria of the Act.²¹⁴

In order that a relator qualify under a section 3730(h) claim, the defendant must know that the plaintiff is engaging in protected activity.²¹⁵ If the employee is engaging in assigned job activities while investigating and gathering information relating to the false claim, it may not be apparent to the employer that such protected activity is taking place.²¹⁶ It is not necessary that the *qui tam* action be brought by the protected individual²¹⁷ nor is it necessary that the plaintiff threaten to file such a suit.²¹⁸ Often the plaintiff has not heard of *qui tam* causes of action until he goes to an attorney after being fired because he blew the whistle. It is necessary that the employee make it known to the employer that he objects to the defrauding of the government and that he requests the employer to either change its activities or engage in one of the other activities which are protected under the statute. “[The] employee must supply sufficient facts from which a reasonable jury could conclude that the employee was discharged because of activities which gave the employer reason to believe that the employee was contemplating a *qui tam* action against it.”²¹⁹ “Internal whistle-blowing” is sufficient to evoke the protection of the statute.²²⁰

XII. RIGHT TO AMEND COMPLAINT

The plaintiff has a right to amend his complaint at least once to eliminate any deficiencies found by the court. With regard to the right to amend the complaint, the Eleventh Circuit held, in *Cooper v. Blue Cross and Blue*

214. *Id.* See also *id.* at 1503.

215. *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994).

216. *Wilkins*, 885 F. Supp. at 1066.

217. See *Mikes v. Strauss*, 889 F. Supp. 746, 752 (S.D.N.Y. 1995); *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F. Supp. 583, 595 (N.D. Cal. 1994); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723–24 (E.D. Cal. 1993).

218. *Mikes*, 889 F. Supp. at 753 (alteration in original).

219. *Id.*

220. 31 U.S.C. § 3730(h).

Shield of Florida, Inc.,²²¹ that “Cooper is entitled to one chance to amend the complaint and bring it into compliance with the rule.”²²² The court in *Griggs v. Hinds Junior College*²²³ held:

The Federal [R]ules of Civil Procedure provide that ‘leave [to amend the complaint] shall be freely given when justice so requires.’ Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim We think the refusal to grant leave was not a valid exercise of the district court’s discretion, rather it was ‘merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.’²²⁴

The court in *Lockett v. General Finance Loan Co.*²²⁵ held: “that it was an abuse of discretion not to grant Lockett’s motion to amend the complaint”²²⁶ In *Hildebrand v. Honeywell, Inc.*²²⁷ the court stated that “if the basis of the district court’s dismissal of plaintiff’s complaint was their failure to prosecute, we find that the court’s ruling was an abuse of discretion.”²²⁸ The *Hildebrand* court continued:

Moreover, Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be freely given when justice so requires. Permission should be denied only if it appears to a certainty that plaintiffs cannot state a claim showing they are entitled to relief or defendant will be unduly prejudiced.²²⁹

XIII. THE FILED RATE DOCTRINE

There are a number of cases which are categorized by the nature of the defendant. Utility companies, such as electric and telephone companies, which are undoubtedly “deep pockets,” are controlled by the laws of their

221. 19 F.3d 562 (11th Cir. 1994).

222. *Id.* at 568–69.

223. 563 F.2d 179 (5th Cir. 1977).

224. *Id.* at 179–80 (citations omitted) (alterations in original).

225. 623 F.2d 1128 (5th Cir. 1980).

226. *Id.* at 1132.

227. 622 F.2d 179 (5th Cir. 1980).

228. *Id.* at 181.

229. *Id.* at 182. *See also Griggs*, 563 F.2d at 180.

states, generally through a public service commission. The commission regulates the rates which the utility can charge for its services, these rates being known as the "filed rates." The "filed rate doctrine" essentially states that the court does not have the power to change a rate for a utility charge that has been set by the public service commission or equivalent body of a state. Only the public service commission can make that change and the change will be reflected in later rates.

In the *en banc* opinion of *Taffet v. Southern Co.*²³⁰ the court stated that "the filed rate doctrine recognizes that where a legislature has established a scheme for utility rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme."²³¹ In addition, the *Tuffet* court pointed out that "federal courts have applied the filed rate doctrine in a variety of contexts to bar recovery by those who claim injury by virtue of having paid a filed rate."²³² In *Wegoland Ltd. v. NYNEX Corp.*,²³³ the court held that "[t]he filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable"²³⁴ and also held that the filed rate doctrine bars Federal RICO and associated causes of action based upon an alleged scheme by NYNEX to obtain inflated rates.²³⁵ Judge Brandeis's ruling in *Keogh v. Chicago & Northwestern*²³⁶ is quoted by the *Wegoland* court.²³⁷

[T]he legal rights between a regulated industry and its customers with respect to rates are controlled by and limited to the rates filed with and approved by the appropriate regulatory agency, and that any attempt to reassess the reasonableness of rates would require the judiciary to "reconstitut[e] the whole rate structure" of the industry.²³⁸

The *Wegoland* court found that the filed rate doctrine is still applicable even when there are allegations of fraud upon the regulatory agency itself.²³⁹

230. 967 F.2d 1483 (11th Cir. 1992).

231. *Id.* at 1490.

232. *Id.* at 1488.

233. 27 F.3d 17 (2d Cir. 1994).

234. *Id.* at 18.

235. *Id.*

236. 260 U.S. 156 (1922).

237. *Wegoland*, 27 F.3d at 19.

238. *Id.* (quoting *Keogh*, 260 U.S. at 163).

239. *Wegoland*, 27 F.3d at 22.

In *Sun City Taxpayers' Ass'n v. Citizens Utilities Co.*,²⁴⁰ the plaintiffs claimed that the water and sewer utility perpetrated a complex accounting fraud that misrepresented to the Association the actual operating costs and resulted in a large sum of money being paid to the utility.²⁴¹ The Second Circuit once more applied the filed rate doctrine as it had in *Wegoland*,²⁴² holding that: "(1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set utility rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime."²⁴³

The basis for these decisions is identified by the court in *Sun City*²⁴⁴ and is discussed again by the court in *Wegoland*:

If courts were licensed to enter this process under the guise of ferreting out fraud in the rate-making process, they would unduly subvert the regulating agencies' authority and thereby undermine the stability of the system. For only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids.²⁴⁵

While *Wegoland* involved RICO claims, the filed rate doctrine has been applied in other actions.²⁴⁶

The filed rate doctrine is essentially based on public policy. If the court were to determine that a rate had been set based on false information and then determine what the rate should have been in order to evaluate damages, it would be second guessing the Association. Besides having the court override the Association which set the rate, a factor which is clearly against public policy pursuant to *Wegoland* and *Sun City*, it would also permit the

240. 45 F.3d 58 (2d Cir. 1995).

241. *Id.* at 61.

242. *Wegoland*, 27 F.3d at 21.

243. *Sun City*, 45 F.3d at 62. *See also* H.J. Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 490 (8th Cir. 1992).

244. *Sun City*, 45 F.3d at 62.

245. *Wegoland*, 27 F.3d at 21.

246. *See, e.g.*, Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417 (1986) (antitrust); Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 584-85 (1981) (breach of contract); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n, 341 U.S. 246, 251-53 (1951) (fraud).

party who brought the suit to get relief, while the parties who were equally effected but were not involved in the suit do not get relief.

In *United States ex rel. John Murray v. Bellsouth Telecommunications, Inc.*,²⁴⁷ the argument that under the FCA there are two possible penalties assessed against the defendant, triple damages and a fine for each transgression. The penalty for each transgression remains even if the government has suffered no damages and therefore there is no need to assess damages for the assessment of the fine. On the basis of the filed rate doctrine, there can be no damages as the rate charged is never "wrong" even if it is set because of alleged fraudulent representations. In addition, in a false claims suit, only the government and the relator can bring such a suit so there is no inequality with relation to other rate payers. The court in *Murray* concluded that:

The FCA also provides for a penalty of between \$5,000 and \$10,000 for each violation of the act. The penalty is mandatory. The Court has been unable to find any legislative history or cases regarding how a court should determine the exact amount of the penalty to be imposed for each violation. The Court notes that "[the] range in the amount of forfeitures apparently represents congressional intent to allow discretion in assessing forfeitures." The Court concludes that as long as any civil penalty imposed upon the Defendant is not based upon any consideration of the actual damages suffered by the Government, then the filed rate doctrine does not bar the Plaintiff's claim for civil penalties under §3729(a).²⁴⁸

Although this was only a district court ruling, the argument may prevail in other cases against publicly regulated defendants and permit *qui tam* actions against publically regulated corporations.

XIV. DAMAGES

The FCA provides double or triple recovery for damages suffered by the United States. The size of the recovery is not only determined by the damage suffered by the government, but by the manner in which that damage is measured and the actual number of claims submitted to the government by the defendant or through an intermediary. There is no standard for measuring damages stated in the statute itself, and often the manner selected by the

247. No. 94-6059 (S.D. Fla. filed January 19, 1994).

248. No. 94-6059, at 6 (S.D. Fla. July 30, 1996) (order denying in part and granting in part defendant's motion to dismiss) (citations omitted).

plaintiff depends on the nature of the false claim. The theory of damages is a complex one, and an analysis of government damages according to different theories is a prudent exercise for the *qui tam* litigator.

As a key case, we must look once more to *United States ex rel. Marcus v. Hess*²⁴⁹ where the court established a simple “out of pocket” measure. How much would the government have paid “but for” the fraudulent actions of the defendants? The difference between that amount and what they did pay is the measure of the government damages according to the *Hess* Court.²⁵⁰ This method does not include the government’s costs related to investigation of the matter, including costs of delays for substandard products.

In *United States v. Bornstein*,²⁵¹ the Court applied the “benefit of the bargain” approach to calculating damages. “The Government’s actual damages are equal to the difference between the market value of the [item] it received and retained and the market value that the [item] would have had if they had been of specified quality.”²⁵² The *Bornstein* Court cited *United States v. Ben Grunstein & Sons Co.*,²⁵³ as a basis for its choice of the benefit of the bargain approach. *Grunstein* identified the measure of damages as “the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received.”²⁵⁴

While the Supreme Court in *Bornstein* used a benefit of the bargain theory of damages, it did not overturn the “out of pocket” measure applied by the *Marcus* Court, which appears to lead the practitioner to believe that the Court will consider any reasonable method of calculating damages which will fairly reimburse the government for its losses and expenses without creating a windfall situation.

Under the FCA, controlling Supreme Court and lower court precedents hold “that the Government need not show actual damages in order to prove a violation of the False Claims Act.”²⁵⁵ In *Marcus*, electrical contractors submitted fraudulent bills to the government for work on numerous projects.

249. 317 U.S. 537 (1943).

250. *Id.* at 552.

251. 423 U.S. 303 (1976).

252. *Id.* at 316 n.13.

253. 137 F. Supp. 197, 205 (D.N.J. 1956).

254. *Id.* at 205.

255. *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1127 (E.D. Pa. 1991); *see also Rex Trailer Co., Inc. v. United States*, 350 U.S. 148 (1956); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States v. Rohleder*, 157 F.2d 126 (3d Cir. 1946).

In some instances, the government discovered that the fraud was committed before payment was made, however, the Supreme Court stated that “[t]he District Court held that failure to show actual damage in these instances would not preclude recovery under the [FCA],”²⁵⁶ and the Supreme Court went on to affirm the district court.²⁵⁷ The Court in *Rex Trailer* reaffirmed the holding in *Marcus* that “there is no requirement, statutory or judicial, that specific damages be shown”²⁵⁸ The Third Circuit Court of Appeals declared this rule in *Rohleder* when it stated that the FCA “permits recovery . . . thereunder without actual damage being proven.”²⁵⁹ These holdings are all affirmed by the court in *United States v. Kensington Hospital*.²⁶⁰

The question of consequential damages does not appear to be clear at the present time since the present relevant cases involve the particular facts of the cases in question.

Even if there are no damages, the FCA provides for penalties per incident and the question arises as to the method for counting the number of incidents. For example, in *Bornstein*, the question arose as to the actual number of claims submitted and was confused by the fact that the subcontractor had only submitted three false bills to the contractor whereas the contractor had submitted thirty-five claims to the government. The *Bornstein* Court held that the subcontractor would only be held to three claims since the statute “penalizes a person for his own acts, not for the acts of someone else.”²⁶¹ Again the question as to the calculation of the number of claims will have to be taken on a case-by-case basis.

The additional question of the amount of the penalty, whether \$5,000 or \$10,000, or a number in between, has not been answered by the courts and the statute does not provide guidelines. It will be up to each court to assess the exact amount of consequential damages based on the individual facts of each case.

256. *Rex Trailer Co.*, 350 U.S. at 153 n.5.

257. *Marcus*, 317 U.S. at 552–53 (1943).

258. *Rex Trailer Co.*, 350 U.S. at 152.

259. *Rohleder*, 157 F.2d at 129.

260. *Kensington Hosp.*, 760 F. Supp. at 1128.

261. *Bornstein*, 423 U.S. at 312.

XV. TYPES OF RECENT CASES

While it appears that a number of different types of cases could be brought against *qui tam* defendants, the cases that bring in the major recovery for plaintiffs fall into certain specific categories:

- A) Medicare Fraud²⁶²
- B) Defense Contractor Fraud²⁶³
- C) Environmental Law Compliance²⁶⁴
- D) Bid rigging with actual false claim²⁶⁵
- E) Agricultural Supplements²⁶⁶
- F) Overcharging and/or product substitution and/or falsifying services performed²⁶⁷

It appears that in every instance where the United States pays a bill, is paid, or where it gives money to a state from which other claims are paid, that there is the potential for a *qui tam* suit.

XVI. CONCLUSION

The dramatic increase in the number of *qui tam* cases in the past few years, the size of the awards, and the intricacies of the legal questions regarding *qui tam* indicate that *qui tam* is an area of the law that must be watched closely.

262. See e.g., *Mikes v. Strauss*, 889 F. Supp. 746 (S.D.N.Y. 1995).

263. *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992).

264. *Pickens v. Kanawha River Towing*, 916 F. Supp. 702 (S.D. Ohio 1996).

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

266. *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325 (E.D. Cal. 1995) (mem.). A reverse false claim was submitted to the government by commodity handlers who had exceeded their quotas for growing specific fruits and who were therefore subject to a fine under the Agricultural Marketing Agreement Act and who submitted false information so that they would not have the fine imposed upon them.

267. See, e.g., *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720 (E.D. Cal. 1993).