

Mutiny of the Bounty: A Moderate Change in the Incentive Structure of *Qui Tam* Actions Brought Under the False Claims Act

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This Note proposes two amendments to the False Claims Act, a federal statute that encourages whistleblowers to prosecute, on behalf of the government and themselves, actions against firms that overcharge on government contracts. The False Claims Act controversially deputizes private citizens, called “relators,” who are not themselves injured, as a means of discovering and punishing fraud. Because the current incentive structure of the False Claims Act does not encourage the Department of Justice to exercise its statutory power to dismiss unfounded qui tam actions, this Note proposes a fee-shifting procedure whereby the unsuccessful relator and the Department of Justice share in paying a prevailing defendant’s attorneys’ fees in situations in which the Department of Justice neither joined nor dismissed the ultimately unmeritorious action. The Note’s second proposed amendment advocates a graduated bounty structure that rewards zealous and forthcoming relators with a higher percentage of the government’s recovery, while granting the more languid relators a significantly lesser bounty. This change to the incentive structure rewards relators who bring suits quickly rather than those who wait idly by for additional damages against the government and taxpayers to accrue. The Note concludes that the False Claims Act is a valuable and important means of detecting, deterring, and prosecuting fraud, but argues that the adoption of its two proposed changes would encourage the interested parties in qui tam actions to behave in a way that benefits the taxpayer.

I. INTRODUCTION

The False Claims Act gives the government and citizens the right to sue people or corporations who knowingly submit a false claim for payment to the government.¹ The ability of citizens who are not directly harmed by such

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¹ False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). The False Claims Act defines the “knowing” scienter element to mean that the defendant “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[.] . . . [N]o proof of specific intent to defraud is

fraud to sue and recoup a portion of the recovery or settlement is derived from the law's *qui tam* provision.² While the historical sources of the False Claims Act, and especially its *qui tam* provision, may be traced to medieval Britain and the United States Civil War, the modern reinvigoration of the statute occurred as a result of several 1986 amendments³ passed in the wake of widespread allegations of fraud against the government associated with Department of Defense procurement.⁴ The results of these amendments have been astonishing. Before the amendments' passage, about six *qui tam* cases were brought to the Department of Justice's attention each year.⁵ Between 1986 and 2000, however, the number of *qui tam* actions brought under the False Claims Act exceeded 3326; an increase of nearly 4000%. Since their passage, relators and the government have together recovered more than \$12 billion⁶ from fraud-feasors.⁷

required." *Id.* § 3729(b). The False Claims Act does not, however, "apply to claims, records, or statements made under the Internal Revenue Code." *Id.* § 3729(e).

² *Id.* § 3730(b)-(d).

³ False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153-58 (1986) (codified as amended at 31 U.S.C. §§ 3729-3731 (2000)). While the intricacies of these amendments as well as the substantive and procedural operations of the statute will be examined at length below, the 1986 amendments increased the amount of money that the government and citizens suing as relators could recover from liable defendants, increased the amount of the recovery that the relator (and therefore her attorneys) could keep as a bounty, allowed relators who were the original source of information to go forward even if the government knew of the fraudulent incident, broadly defined the knowing element of the law, and clarified that the burden of proof standard, as in other civil cases, is proof by the preponderance of the evidence. *Id.*; see Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 45 n.260, 47 n.271 (2002) [hereinafter Bucy, *Private Justice*].

⁴ See John T. Rosenthal & Robert T. Alter, *Clear and Convincing to Whom? The False Claims Act and its Burden of Proof Standard: Why the Government Needs a Big Stick*, 75 NOTRE DAME L. REV. 1409, 1410 (2000).

⁵ Bucy, *Private Justice*, *supra* note 3, at 48. Relators are required to file the complaint and a "written disclosure of substantially all material evidence and information the person possesses" with the Department of Justice. 31 U.S.C. § 3730(b)(2) (2000). The Department of Justice has sixty days to decide whether to "intervene and proceed with the action." *Id.* The Government also has the right to dismiss the action over the objections of the relator so long as the relator is notified and provided a court hearing in which he or she may contest the dismissal. *Id.* § (c)(2)(A). Only in exceptionally rare instances, however, does the Department of Justice exercise its option to dismiss *qui tam* actions. See *infra*, notes 61-70 and accompanying text.

⁶ Taxpayers Against Fraud, *Why the False Claims Act?*, <http://www.taf.org/whytaf.htm> (last visited Apr. 6, 2006). It is appropriate to note that

[a]lthough TAF has its own address in Washington, D.C., an executive director, a staff of five, and an independent board of directors, it concedes that 95% of its

False Claims Act whistleblower stories abound in the news media. HealthSouth, a health care corporation that had engaged in a variety of criminal and fraudulent behaviors, recently agreed to pay the United States government \$325 million to settle a lawsuit that had grown out of a *qui tam* whistleblowers' suit filed in San Antonio under the False Claims Act.⁸ Northrop Grumman, a frequent flier in the False Claims Act arena, has paid, without admitting liability, \$191 million to settle three False Claims Act cases in the past two years.⁹ Meanwhile, Northrop continues to face False Claims Act litigation for a *qui tam* action, in which the Department of Justice has intervened, which was filed in 1989 and in which the government is seeking \$369 million in damages "plus millions of dollars in other potential fines and interest related to the pending case."¹⁰ Some recently unsealed internal memos from Northrop include damning quotes such as "[w]e should train the [cost-accounting managers] to violate the system," and "[w]e can't tell the truth [when we explain accounting faults]."¹¹ Invoking admitted and alleged improprieties at Halliburton and its subsidiary Kellogg Brown & Root might be clichéd given the political ramifications of the investigation of Vice President Cheney's former employer, but not to do so would be remiss. Having investigated a variety of alleged abuses associated with a fuel delivery contract, the Pentagon asked the Department of Justice to join its inquiry into Halliburton last year.¹² Including the Department of Justice allows the robust penalties and damages provisions of the False Claims Act

expenses have been incurred as legal fees to Hall & Phillips [a relator's law firm], and it was founded substantially by John R. Phillips [a named partner of Hall & Phillips]. GE [a False Claims Act defendant] portrays TAF as a Hall & Phillips front.

United States *ex rel.* Taxpayers Against Fraud v. General Elec. Co., 41 F.3d 1032, 1039 (6th Cir. 1994).

⁷ Supporters of the False Claims Act also claim that every \$1 the government spends fighting fraud in the health care arena returns, after deductions for whistleblowers' bounties, \$13 to the Federal Treasury. News Release, Taxpayers Against Fraud, Fighting Health Care Fraud Returns Nearly \$13 for Every \$1 Invested (Apr. 21, 2004) <http://www.taf.org/meyer.pdf>.

⁸ *HealthSouth Agrees to Settle Medicare Case*, WALL ST. J., Dec. 31, 2004, at A5.

⁹ Andy Pasztor & Jonathan Karp, *Northrop Papers Indicate Coverup*, WALL ST. J., Apr. 19, 2004, at A3.

¹⁰ *Id.*

¹¹ *Id.*

¹² Neil King, Jr. & Glenn R. Simpson, *Pentagon Asks Justice to Join Halliburton Probe: Move Suggests Investigators See Grounds for Penalties over Billing for Fuel in Iraq*, WALL ST. J., Mar. 11, 2004, at A1.

to be used to buttress the Pentagon's less sweeping prosecutorial powers.¹³ Whistleblower lawsuits brought under the False Claims Act have made newspaper headlines and television news leads because of the high cost that fraud exacts on the government and on taxpayers.¹⁴ The generous bounties that whistleblowers receive also contribute to the high profile of these cases.¹⁵

False Claims Act skeptics level a number of criticisms at the operations of the Act, particularly its *qui tam* terms. They argue that the Act leads to high transaction costs that (1) prevent some firms from dealing with the government;¹⁶ (2) provides overbroad interpretation of false claims, thereby drastically increasing the cost of damages arising from what appears to be a single act;¹⁷ (3) encourages a divergence of interest between the relator and the government;¹⁸ (4) fosters "an inherent conflict of interest because [it] . . . affords informers a pecuniary interest that often conflicts with public interests at stake in the litigation";¹⁹ and (5) creates overly broad liability for "[f]irms that engage in frequently repeated activities that are covered by a

¹³ *Id.*

¹⁴ See *infra*, notes 39–43 and accompanying text.

¹⁵ See *infra*, notes 53–55 and accompanying text.

¹⁶ See William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 235 (1998) [hereinafter Kovacic, *Government Procurement Markets*].

¹⁷ See Stephanie L. Trunk, Note, *Sounding the Death Toll for Health Care Providers: How the Civil False Claims Act Has a Punitive Effect and Why the Act Warrants Reform of Its Damages and Penalties Provision*, 71 GEO. WASH. L. REV. 159, 177 (2003).

¹⁸ See generally George S. Mahaffey, Jr., *Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 REV. LITIG. 629, 679 (2004).

¹⁹ J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 610–12, 625 (2000) (observing that "[w]hile it makes economic sense from the informers' standpoint to file a large number of FCA cases in hopes of a few significant payouts, this course of action produces costs for defendants and the public"). An example of this alleged divergence of interest is the perceived incentive for potential relators to allow fraud to continue in the hope of increasing the government's damages (and their own bounty) rather than reporting false claims early. William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1829–30 (1996) [hereinafter Kovacic, *Whistleblower Bounty Lawsuits*]. The Supreme Court has noted that *qui tam* relators "are motivated primarily by prospects of monetary reward rather than the public good. . . . [and they] are thus less likely than is the Government to forego an action arguably based on a mere technical noncompliance . . . that involved no harm to the public fisc." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997).

certification [because they] can commit hundreds of individual offenses if the behavior in question does not strictly conform with the representations of the certification.”²⁰

This Note seeks to reconcile the favorable deterrent, punitive, and fraud-reducing effects of the *qui tam* provisions of the False Claims Act with some of these concerns by proposing a pair of amendments to the Act. The first proposed change creates an attorneys’ fee-shifting structure whereby relators and the government are equally liable to a prevailing defendant in cases in which the Department of Justice neither intervened nor sought dismissal. The second recommended amendment creates a graduated bounty provision that would reward relators who file their actions earlier with a higher proportion of the recovery than the current statute contemplates, while lowering the relators’ portion of the recovery in cases in which they were more deliberate in the case’s prosecution. The effects of these amendments would be to diminish the likelihood that relators and their attorneys will bring baseless *qui tam* actions, to increase the chances that the government will exercise its powers to dismiss cases that seem unmeritorious, and to reward those relators who are most diligent in their prosecution of *qui tam* actions.

Section II of this Note will provide an understanding of the background and historical sources of the *qui tam* provisions of the False Claims Act. Section III will highlight the important 1986 amendments to the False Claims Act that reinvigorated the statute and initiated the modern era of *qui tam* litigation. Section IV provides a glimpse of both the criticism and support that the False Claims Act has endured and enjoyed since its 1986 renaissance. Within this section of the Note are the two proposed amendments along with anticipated criticism and responses thereto. The Note concludes in Section V that, while a number of other changes to the statutory language and judicial interpretation of the False Claims Act may be warranted, the twin proposals of this Note may go far to preserve the power of the Act while fine-tuning the considerable procedural and financial incentives that motivate relators, their lawyers, defendants, and the government.

²⁰ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1854 (questioning the False Claims Act’s application to such certification violations and concluding that “[d]eviation from the certified level of performance may impose trivial economic harm on the government, but each event in which the contractor fails to achieve complete compliance is a separately punishable offense under the False Claims Act [and therefore incurs the \$5000 to \$10,000 statutory penalty per violation.]”); see John T. Boese & Beth C. McClain, *Why Thompson is Wrong: Misuse of the False Claims Act to Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 2–3 (1999); see also Lisa Michelle Phelps, Note, *Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions*, 51 VAND. L. REV. 1003, 1022–28 (1998).

II. HISTORY OF *QUI TAM* AND THE FALSE CLAIMS ACT

Qui tam cases, wherein a citizen appears as a relator on the state's and his own behalf, are named for the Latin phrase describing such actions: "*qui tam pro domino rege quam, pro se ipso in hac parte sequitur*."²¹ Translated from the Latin, the phrase means "who as well for the king as for himself sues in this matter"²² and refers to the fact that both the relator, who brings the action, and the government, which actually is harmed, share the fruits of any penalty, damages, or settlement from the liable defendant.²³

While England used *qui tam* to enforce a variety of regulations beginning in Medieval times and continuing through the twentieth century, the Roman sources of the practice date back even earlier.²⁴ Private citizens, known as *delatores*, and who are analogous to modern relators, were rewarded with part of a convicted defendant's property because "Roman criminal law relied on a system of prosecution by private citizens."²⁵ Like provisions were used in Anglo-Saxon and Anglo-Norman England to enforce prohibitions against working on the Sabbath, the requirements of assizes on wine and food, and, following the plague in the fourteenth century, wage ceilings implemented to keep the wages of a diminished workforce affordable to Members of Parliament.²⁶ Opposition to the use of *qui tam* to encourage informers mounted in the several centuries following the Medieval period because of predatory and professional informers and their targets' agreements to secret extrajudicial settlements called "unlicensed compositions."²⁷ Parliament abolished all use of *qui tam* in 1951 following concern that some enterprising informer would resurrect an eighteenth-century prohibition on serving drink

²¹ BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).

²² *Id.*

²³ See generally, Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1818–19.

²⁴ See Beck, *supra* note 19, at 566–67.

²⁵ *Id.* at 566.

²⁶ *Id.* at 567–71. A typical *qui tam* provision from this period, enacted in a 1331 amendment to the 1328 Statute of Northampton, which barred merchants from selling wares after the conclusion of a fair, provided that "such merchant shall forfeit to our Lord the King the double Value of that which [is sold] and [the relator] shall . . . [receive] the Fourth Part of [the double damages assessed against the merchant]." *Id.* at 569 (quoting 5 Edw. 3, ch. 5 (1331) (Eng.)). This statute is unique because of its longevity. It remained on the books in Britain until 1951, when Parliament abolished all *qui tam* actions.

²⁷ *Id.* at 580. Unlicensed compositions were particularly problematic because the informer used the threat of a *qui tam* action to induce the payment of a settlement by a defendant in exchange for his promise not to pursue the claim. *Id.* This is and was an inappropriate use of *qui tam* because the sovereign, as the real party in interest, receives no part of the settlement. *Id.* at 585.

on Sundays to challenge His Majesty's 100th Anniversary of the Great Exhibition of 1851.²⁸

The United States' experience with *qui tam* has been brief in comparison to Britain's medieval *qui tam* antecedents. Unlike the British model, however, *qui tam* is an increasingly important and prominent feature of the American jurisprudential landscape. The 1986 amendments mentioned above did not create the False Claims Act, but rather added teeth to a Civil War era statute.²⁹ "During the Civil War, President Abraham Lincoln grouched that his troops found sawdust instead of gunpowder when they pried open ammunition crates at the front. The cavalry discovered it was being charged for the same horses two and three times."³⁰ The 1863 False Claims Act³¹ was passed following widespread fraud and deception on the part of military contractors who supplied the Union army with faulty weapons, animals, and food.³² "The Act was specifically designed to combat fraud and false claims by essentially 'deputizing' private citizens and . . . [t]his *qui tam* provision allowed the private citizen to collect up to fifty percent of all monies recovered in the lawsuit."³³ Indeed, one of the Act's congressional proponents, Senator Jacob Howard, favored the use of *qui tam* legislation to root out such fraudulent activities, though he acknowledged that this method required the government's enlisting a "rogue to catch a rogue."³⁴ The original text of the Act, however, permitted relators to copy criminal indictments and then come forward, prosecute the claim, and collect a bounty as if they had ferreted out the false claim themselves or furnished information valuable to such a prosecution.³⁵ This faulty portion of the Act

²⁸ *Id.* at 604–05. Prior to the passage of a Sunday Openings Act, which would have simply exempted the Great Exhibition, the Members of Parliament passed the Common Informers Act of 1951 without dissent, thereby abolishing all of Britain's *qui tam* provisions amid colorful commentaries likening informers to blackmailers and mercenaries. *Id.* at 604–08.

²⁹ See Bucy, *Private Justice*, *supra* note 3, at 43–48.

³⁰ Andy Pasztor, *WHEN THE PENTAGON WAS FOR SALE* 11 (1995).

³¹ False Claims Act, ch. 67, 12 Stat. 696–98 (1863) (codified at 31 U.S.C. §§ 3729–33). The 1863 version of the Act had a double damages provision and statutory penalty, called a forfeiture, of \$2000 per false claim. *Id.* at 698.

³² See Bucy, *Private Justice*, *supra* note 3, at 43–44.

³³ Rosenthal & Alter, *supra* note 4, at 1424.

³⁴ CONG. GLOBE, 37th Cong., 3d. Sess., 955–56 (1863).

³⁵ See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Hess*, the Court found that the *qui tam* relator was proper "even though the federal government knew all about the fraud by virtue of its own investigation and indictment of the defendants and despite the fact that the relator in the case had commenced an FCA suit after copying the government's indictment." *Id.* at 548; Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 *HAMLIN L. REV.* 373, 378 (2002).

was amended in 1943³⁶ to bar relators from bringing *qui tam* actions under the Act when the government had prior knowledge of the fraud or claim.³⁷ While this caused a rapid decline in *qui tam* filings under the False Claims Act,³⁸ the government used the Act, combined with the creation of new Inspector General offices, to try to prosecute fraud.³⁹

III. THE 1986 AMENDMENTS TO THE FALSE CLAIMS ACT

Following a variety of public scandals involving overcharging by defense contractors,⁴⁰ false claims submitted to programs such as Medicare,⁴¹ and the perception that fraud and false claims were a tremendous

These parasitic lawsuits, and perhaps “the desire of Congress to reduce any possible impediments to the war effort,” help to explain why Congress amended the False Claims Act in 1943. Rosenthal & Alter, *supra* note 4, at 1426.

³⁶ Act of Dec. 23, 1943, ch. 377, 57 Stat. 608–09.

³⁷ See *id.* at 609. These amendments also required relators to present their information and suspicions to the Department of Justice (DOJ), which then had sixty days to review the potential action and decide whether to join the action, thereby leaving the relator with no hand in the case but a 10% claim to the government’s recovery. *Id.* If the DOJ opted not to join the action, then the relator could proceed alone, but was entitled to 25% percent of his recovery. *Id.* These changes diminished relators’ recoveries from their prior level of 50%, and therefore “the *qui tam* provisions of the Act fell into disuse.” Rosenthal & Alter, *supra* note 4, at 1427.

³⁸ See Ara Lovitt, *Fight for Your Right to Litigate: Qui Tam, Article II, and the President*, 49 STAN. L. REV. 853, 857 (1997).

³⁹ See Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978).

⁴⁰ See Christopher C. Frieden, *Protecting the Government’s Interests: Qui Tam Actions Under the False Claims Act and the Government’s Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041, 1042 (1998). During the early years of the Reagan Administration, defense spending grew rapidly and “the government was again faced with the problem of widespread fraud in the defense industry . . . [and] overbilling and false claims became an increasingly serious problem.” *Id.*

⁴¹ See S. REP. NO. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5268.

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

Id. at 5267. The Senate Report, which was reported out of the Conference Committee since the Senate version of the amendments was passed, also noted that as of 1985, “45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses.” *Id.* (citing *Hearings on Federal Securities Laws and Defense*

drain on the budget,⁴² Congress passed the 1986 amendments to the False Claims Act. These changes “created the most potent decentralized monitoring system in American public law.”⁴³ More colorfully, courts have characterized the Act as being a form of governmental regulation achieved “by unleashing a posse of *ad hoc* deputies to uncover and prosecute frauds against the government.”⁴⁴

Among these innovative changes was an extension of the statute of limitations,⁴⁵ a relaxation of the scienter element,⁴⁶ a clarification that the proof burden remained, in accord with most other civil actions, at the low preponderance of the evidence standard,⁴⁷ and a prohibition on claims based on already-public disclosures, unless the relator is an “original source of the information.”⁴⁸ The Act also provides that, in addition to treble damages for

Contracting before the Subcommittee on Oversight and Investigations of the Comm. on Energy and Commerce, House of Representatives, 99th Cong. (1985).

⁴² See, e.g., *Hearings on White Collar Crime Before the S. Comm. on the Judiciary*, 99th Cong. (1985) (noting that four of the largest defense contractors had been convicted of criminal offenses). The Senate Report also contained a Department of Justice estimate that between 1% and 10% of the federal budget was lost to fraud each year at a cost in 1985 of between \$10 billion and \$100 billion. S. REP. NO. 99-345, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5268 (citing *Hearings on the Departments of State, Justice and Commerce Before the Subcomm. on the Dep'ts of State, Justice and Commerce, the Judiciary and Related Agencies of the H. Comm. on Appropriations*, 96th Cong. (1980) and reporting that known fraud cases totaled a loss of \$200 million dollars to the government, but that the estimate does not include “the cost of undetected fraud which is probably much higher because weak internal controls allow fraud to flourish”).

⁴³ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1809.

⁴⁴ *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (internal quotations omitted).

⁴⁵ 31 U.S.C. § 3731(b) (2000). A case must be filed within six years of the submission of a false claim to the government or three years from the time that the government learned or should have learned of the fraud, whichever is longer, though never more than ten years from the submission the false claim to the government. *Id.*

⁴⁶ *Id.* § 3729 (providing that “no proof of specific intent . . . is required”). The scienter requirement was changed because of Congress’ disapproval that some courts had instead demanded “the functional equivalent of a criminal standard.” S. REP. NO. 99-345, at 7 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5272 (internal citations omitted).

⁴⁷ 31 U.S.C. § 3731(c) (2000).

⁴⁸ *Id.* § 3730(e)(4)(A). This change responded to a Seventh Circuit Court of Appeals case, *United States ex rel. Wisconsin Dep't of Health and Soc. Serv. v. Dean*, 729 F.2d 1100 (7th Cir. 1984), wherein the court refused to hear the State of Wisconsin’s claim against a psychiatrist who had defrauded Medicaid because Wisconsin had a duty under Medicaid “to submit its investigatory report to the federal government.” Brooker, *supra* note 35, at 381. The court reasoned that because Wisconsin had submitted the Medicaid investigatory report, the federal government already knew about the claim and therefore Wisconsin did not have standing as a *qui tam* relator. *Dean*, 729 F.2d at 1103–04. The

actual government loss, a civil penalty of between \$5000 and \$10,000 be assessed for each false claim that a defendant submits.⁴⁹

amended version of the False Claims Act rejected this interpretation and instead, seeking to avoid the sort of parasitic suits which plagued the Act's operation during World War II while also encouraging relators like Wisconsin in *Dean*, who were the original source of the inculcating information, provided that:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a . . . 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 the original source of the information.

Id.

⁴⁹ 31 U.S.C. § 3729(a) (2000). Under the Debt Collection Improvement Act of 1996, the penalties have been increased by 10% to account for inflation. Pub. L. No. 104-134, § 31001(s)(2), 110 Stat. 1321, 1321-373; see Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47099, 47100 (Aug. 30, 1999) (discussing the method by which penalties are increased to reflect inflation). These statutory penalties are well-justified in cases of defense industry fraud, such as those which dominate the pages of the 1986 amendments' legislative history; however, their application in the context of health care fraud has met with significant and increasing criticism. Boese & McClain, *supra* note 20, at 2-3. "Since the mid-1990's, the FCA has been used in situations when health care services were in fact provided to patients, but where the defendants may have violated underlying legal requirements [like the Antikickback Statute or a variety of certifications under Medicare]. . . ." Joan H. Krause, *Health Care Providers and the Public Fisc: Paradigms of Government Harm Under the Civil False Claims Act*, 36 GA. L. REV. 121, 125-26 (2001) (concluding that recent cases "signal the government's willingness to invoke the FCA against activities that are increasingly far removed from traditional types of government procurement fraud—a controversial position in light of the fact that the majority of FCA cases are resolved through settlement rather than trial"). Under this new, broad theory of liability, "the government contends that, when the provider violates the conditions of a government program and then submits a claim [bill], the provider is falsely certifying that the conditions of the program were met and is consequently submitting a false claim." Leon Aussprung, *Fraud and Abuse*, 19 J. LEGAL MED. 1, 7 (1998). Statutory penalties of \$5000 to \$10,000 per violation make considerable sense in the context of a defense contractor falsely billing for a limited number of high-dollar items. "While treble damages will be enormous in such cases, the . . . statutory penalty will be almost negligible. Thus, the defense contractors who are treated most harshly under the FCA are those who cause the government to incur the largest amount of damages." Krause, *supra*, at 143. In the health care context, however, providers often face thousands of individual allegations of false billing practices. *Id.* at 143-44. Thus, a billing irregularity can easily be magnified into a tremendous penalty given the significant differences between providing thousands of syringes or medications and procuring a more limited number of military aircraft, for instance. See *id.* With a huge number of transactions, each one allegedly falsely billed, the statutory penalties multiply so rapidly that providers sometimes feel forced to settle a case, and cut off the growing damages, rather than attempt to win at trial, even when they may be optimistic

In 1986, Congress also delineated the proper procedure for bringing a *qui tam* action under the False Claims Act.⁵⁰ The relator is required to file his or her claim, including a “complaint and written disclosure of substantially all material evidence and information the person possesses,”⁵¹ in camera and these documents remain under seal while the Department of Justice investigates the case and decides whether to intervene, apply for an extension of time in which to make its decision, decline to intervene, settle, or dismiss the action.⁵² If the government, through the Department of Justice, decides to proceed with the relator’s action, then it assumes the “primary responsibility for prosecuting the action”⁵³ and the relator is entitled to between 15% and 25% of the government’s recovery.⁵⁴ If, however, the government does not pursue the relator’s claim, then the relator may press the action alone and garner between 25% and 30% of the proceeds or settlement.⁵⁵ The

of their prospects in court. *See id.* at 127. Krause concludes that “in the health care context, FCA liability is greater for providers who submit the largest *number* of claims, even if those claims result in relatively little financial harm to the government.” *Id.* at 144 (emphasis added). The proposed changes to the Act which this Note advocates seek to refine the economic incentive structure which the Act creates. Changes to the scope of the statute’s reach, particularly to the health care industry, are best identified and proposed by scholars who have more experience with Medicare, the Antikickback Statute, and other health regulations.

⁵⁰ 31 U.S.C. § 3730(b)-(c) (2000).

⁵¹ *Id.* (b)(2).

⁵² *Id.* (b)-(c).

⁵³ *Id.* (c)(1).

⁵⁴ *Id.* (d)(1). The relator’s recovery depends on “the extent to which the person substantially contributed to the prosecution of the action.” *Id.* The relator is also entitled to reasonable expenses, attorneys’ fees and costs. “All such expenses, fees, and costs shall be awarded against the defendant.” *Id.*

⁵⁵ *Id.* (d)(2). There are significant strategic incentives, notwithstanding the roughly 10% difference in the bounty provisions, for relators to gain the support of the Department of Justice. Bucy, *Private Justice*, *supra* note 3, at 51. The most significant reason that relators and their counsel strive to obtain DOJ collaboration is pecuniary self-interest. *Id.* at 51, n.290. Between 1986 and 2000, the total amount paid to relators when the government did join the action was \$576 million. The total amount paid to relators who proceeded alone was a paltry \$35.3 million. *Id.* The average relator recovery during this period was about \$1 million when the government joined the action, whereas the average relator without the assistance of the DOJ stood to gain only about \$18,500. *Id.* While only 2.1% of the 570 cases that the Department of Justice joined during this period were dismissed, 71.1% of the 1907 cases from which the Department of Justice abstained were dismissed. *Id.* Among the other reasons for gaining support from the Department of Justice are the Department’s ability to recommend what portion of an action’s proceeds should be accorded to a relator and the significant public prosecutorial skills and resources which the Department can bring to bear. *Id.* at 51 n.291.

government may dismiss a *qui tam* action over the relator's objections if the Department of Justice provides the relator with notice and a hearing on the government's motion to dismiss.⁵⁶ These amendments powerfully rejuvenated the spirit and power of the False Claims Act. In the decades since the amendments' passage, scholars and practitioners have continued to debate the propriety of the False Claims Act in general and its *qui tam* provisions in particular.

IV. CRITICISM AND SUPPORT OF THE FALSE CLAIMS ACT'S INCENTIVE STRUCTURE AND PROPOSED AMENDMENTS THERETO

The False Claims Act's utilization of *qui tam* to discover, sue, and recover from companies that submit false claims to the government is heralded as a triumph for taxpayers⁵⁷ and decried as an incentive for relators

It is increasingly difficult to obtain DOJ intervention in part because of the explosive growth in FCA private actions over the past decade. Relators filing sealed complaints are competing with each other to obtain DOJ intervention. The relator who has the best chance of achieving DOJ intervention is the one who presents a thorough, well documented and well-conceived report, demonstrating full knowledge of applicable billing regulations and requirements

Id. at 52.

⁵⁶ 31 U.S.C. § 3730(c)(2)(A) (2000). The government may also settle the action over the objections of the relator if a similar procedure is followed. *Id.* (c)(2)(B).

DOJ seems to have adopted a policy of seeking dismissal of a *qui tam* suit only when there is a jurisdictional flaw in the relator's suit (such as reliance on publicly available information [of which the relator is not the original source]). There is one reported instance in which DOJ sought to dismiss a *qui tam* suit on the ground that the suit lacked substantive merit or otherwise contradicted the interests of the United States.

Kovacic, *Government Procurement Markets*, *supra* note 16, at 215.

The Courts of Appeals, however, are split over the question of whether the government may object to a settlement once the Department of Justice has declined to join the action. *Compare* *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 724 (9th Cir. 1994) (holding that "while the government may not obstruct the settlement and force a *qui tam* plaintiff to continue litigation, the government nevertheless may question the settlement for good cause . . . with or without formal intervention and without proceeding with the litigation under § 3730(b)(2) or (c)(3)"), *with* *United States ex rel. Doyle v. Health Possibilities, P.S.C.*, 207 F.3d 335, 336 (6th Cir. 2000) (holding that "a *qui tam* plaintiff may not seek a voluntary dismissal of any action under the False Claims Act without the Attorney General's consent").

⁵⁷ *See* Rosenthal & Alter, *supra* note 4, at 1421. Rosenthal and Alter argue that the government's relationship with the defense industry does not mirror arm's length commercial transactions and therefore false and inflated claims are not greeted with the same disapprobation that such action would receive in the private sector. *Id.* They also

with little to lose and much to gain to plague the defense and health care industries, thereby creating an increased transactional cost of doing business with the government and therefore raising the cost of the nation's defense and health care.⁵⁸

During the 1990s, the Department of Defense, as well as other branches of the government, sought to reduce regulations on government contracts in an effort to allow market efficiency and competition to reduce costs on the government and thus the taxpayer.⁵⁹ Use of *qui tam* actions under the False Claims Act “can generate excessive litigation, elicit substantial numbers of nuisance suits, and provide tools by which firms strategically use the courts to impede efficient behavior by rivals.”⁶⁰ The result of these expenses is that private enforcement of fraud and false claims by relators increases the costs that contractors face when dealing with the government and therefore such firms raise prices or limit their dealing with the government.⁶¹

suggest that the recovery and deterrent value of the *qui tam* provisions outweigh the increased costs that defense firms must charge because of the False Claims Act and add a corollary conclusion that the False Claims Act has not worked to diminish the number of contractors willing to do business with the Department of Defense. *Id.*

⁵⁸ Kovacic, *Government Procurement Markets*, *supra* note 16, at 235 (concluding, following a survey of defense contractors, “that the current [False Claims Act] is a significant, distinctive, customer-specific risk of doing business with government agencies”). Critics of the robust new *qui tam* provisions of the False Claims Act also argue that the 1986 amendments contradict the 1990s-era efforts to bring Department of Defense procurement contracting into step with typical commercial arrangements. *Id.* at 209–11, 235–36.

⁵⁹ See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 186. Reforms of this sort were directed toward two goals: (1) allowing the government to act as a traditional commercial entity in the market, which the myriad 1980s-era regulations giving rise to civil and criminal liability had circumvented, and (2) relaxing or abrogating those regulations that increased contractors' transactional costs with the government, thereby limiting the disincentive to deal with the government that the regulatory regime had fostered. Kovacic, *Government Procurement Markets*, *supra* note 16, at 206.

⁶⁰ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1825.

⁶¹ Advocates of this position maintain that allowing the government to behave as a market participant rather than as a regulator would lower the cost of doing business and encourage greater efficiency, innovation, and competition. Because application of the False Claims Act is reserved to those firms that deal with the government, the argument goes that this unique transactional cost creates tremendous financial incentives for firms to sell only to regular business entities who do not enjoy the robust protections offered by government regulation, the False Claims Act, and its accompanying *qui tam* provisions. See generally *id.* There is, however, significant skepticism that, notwithstanding the government's purported goal of acting as a commercial market participant, institutional and systemic factors do not tend to place efficiency and the traditional operation of market forces as a priority in government acquisition endeavors. See Rosenthal & Alter,

While government contractors have a significant economic incentive to avoid oversight and enforcement actions by public regulators and private relators alike, the operation of the False Claims Act's *qui tam* provisions plays out in especially troubling ways in a number of circumstances that could, under an amended statute, instead work in the interest of taxpayers, the government, and contractors. Among the most troubling features of *qui tam* actions is the high litigation cost but low recovery rate faced by firms defending against claims that the Department of Justice opts neither to join nor to dismiss.⁶²

Although typical legal costs incurred per claim brought under the False Claims Act may be roughly \$250,000 to \$500,000, and increase in complicated cases to upwards of \$10 million,⁶³ in cases which the government does not join, the recovery costs are dwarfed by the costs of litigation on both sides.⁶⁴ In a survey of defense contractors, proponents of deregulation and *qui tam* reform found that, of thirty-eight *qui tam* claims which the government did not join, the firms' average costs in external legal fees per case were \$1,431,660, whereas the mean governmental recovery under the False Claims Act in these cases was just \$97,223.⁶⁵ While proponents of the broad use of *qui tam* provisions to limit fraud against the

supra note 4, at 1415–19. “[U]nlike a businessman motivated by profit and seeking to maximize efficiency and minimize costs, the White House [is] more worried about image and embarrassment. . . .” *Id.* at 1456. Members of Congress are “motivated by ideology, constituents [by bringing home pork in the form of lucrative government contracts to their districts], and re-election and not the ‘bottom-line’ like participants in private sector commercial markets.” *Id.* at 1449. Given that the Department of Defense’s incentive is to increase its own budget and that regulators are often subject to industry capture, “there is little motivation on the part of the services or personnel . . . to investigate issues of fraud or false claims . . .” *Id.* at 1463. Because military officers working in acquisitions and development are promoted based on the success—not the cost or efficiency—of their projects, they also lack an incentive to cost-cut and root out fraud. *Id.* at 1466. Because so many military officers, regulators, and legislators go on to find work in the very industries or businesses that they had been meant to regulate or enforce, they also lack the strong incentive that their private sector colleagues possess to deter fraud and promote efficiency. *See id.* at 1469–70. Because of the American conception of democracy as a representative institution in which the executive and legislative branches are informed by the desires of citizens at a local level, many of these incentives are not bad; however, they do belie the claim that the mechanisms of government have the proper incentive structure to encourage the government to operate its procurement agencies with an eye toward discovering, prosecuting, and recovering false claims.

⁶² Kovacic, *Government Procurement Markets*, *supra* note 16, at 225–27; *see supra* note 55 and accompanying text.

⁶³ Kovacic, *Government Procurement Markets*, *supra* note 16, at 225.

⁶⁴ *Id.* at 226.

⁶⁵ *Id.*

government would credit this as evidence of the deterrent value of the False Claims Act, reasonable minds seem more likely to find such results to be unjust.

These legal costs are not mere externalities for either the government or the taxpayer. In addition to contractors' internalizing these costs by raising prices,⁶⁶ defense industry firms that mount a successful defense against fraud claims can typically recover 80% of their legal fees from the government.⁶⁷ Applying that recovery rate to the figures above, and assuming that 71% of *qui tam* actions brought by relators who are not joined by the Department of Justice are eventually dismissed,⁶⁸ the government and taxpayers are plainly losing money in payments to firms that successfully defend against claims allegedly brought on the government's and taxpayers' behalf. This result is absurd and suggests that limiting the number of relators who proceed outside of the Department of Justice's aegis would not significantly limit the number of actual false claims prosecuted and would certainly prevent the depletion of government coffers in the defense of such claims.⁶⁹

Despite the plain financial disadvantage that these particular sorts of claims present to the government as a whole and to taxpayers generally, the Department of Justice rarely uses its ability to dismiss such actions pursuant to § 3730(c)(2)(A). There seems only to be one example of a case in which the Department of Justice sought dismissal of a *qui tam* action under the False Claims Act for a lack of substantive merit.⁷⁰ "The DOJ appears . . . to have adopted a policy of seeking dismissal of a *qui tam* suit only when there

⁶⁶ See Rosenthal & Alter, *supra* note 4, at 1416. "Critics [of the amended False Claims Act] correctly argue that the private commercial contractors will account for the increased risk of liability and increased cost of internal controls and regulatory compliance by increasing the price of the goods and services they offer in government procurement transactions." *Id.*

⁶⁷ Kovacic, *Government Procurement Markets*, *supra* note 16, at 226. One of this Note's proposed changes would provide fee-shifting in situations in which defendants prevail when relators proceeded without Department of Justice intervention. Fees would only be shifted when the DOJ permitted the unsuccessful relator to proceed. The prevailing defendants' attorneys' fees would be shared equally between the relator and the government. For a more detailed discussion of this proposed amendment, see *infra* Part IV.A.

⁶⁸ Bucy, *Private Justice*, *supra* note 3, at 52.

⁶⁹ Eliminating this class of actions could also cause additional benefits to inure to the legal system because "[n]onmeritorious private actions consume scarce judicial resources, delay adjudication of other docketed matters, and can breed disrespect for the judicial system." *Id.* at 67.

⁷⁰ United States *ex rel.* Sequoia Orange Do. v. Sunland Packing House Co., 912 F. Supp. 1325, 1352–54 (E.D. Cal. 1995). In *Sequoia Orange*, the Department of Justice sought dismissal of a relator's action because the litigation contravened the implementation of a new USDA regulation. *Id.*

is a jurisdictional flaw in the relator's suit—for example, reliance on publicly available information.”⁷¹ The Department of Justice does not currently have an incentive to utilize its § 3730(c)(2)(A) powers because “the greater FCA [False Claims Act] recoveries that an office [of the Department of Justice] can garner, the more resources and recognition within the DOJ that office obtains.”⁷²

This reluctance to dismiss on the part of the Department of Justice may also stem from the interest that the Department attorneys and offices have in garnering recoveries for the government. Though Department lawyers might not have the resources to pursue every claim or do not believe that every claim has merit, they have no incentive to limit the number of independent relator claims that move forward.⁷³ An alternative explanation for the reluctance to dismiss may come from Department investigators' “natural tendency . . . to believe that if one of the issues brought forward by a *qui tam* relator is meritorious, then all of the issues are.”⁷⁴ Still another explanation for the rare use of dismissal power is that the Department's “political capital is ill-spent irritating a Congress that believes the DOJ has been lax in prosecuting procurement fraud and likely would object to DOJ efforts to gain dismissal of *qui tam* suits on nonjurisdictional grounds.”⁷⁵ The concern that Congress would oppose the more robust use of dismissal could be thwarted by evidence that doing so actually would save the government money. Aside from saving taxpayers and the government the cost of reimbursing contractors who mount overwhelmingly successful defenses to relators' suits with which the Department of Justice does not join, “[a] willingness . . . to dismiss foolish⁷⁶ lawsuits would demonstrate the genuineness of the

⁷¹ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1818 (citation omitted).

⁷² Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI. L.J. 1021, 1034 (2004) [hereinafter Bucy, *Game Theory*].

⁷³ Bucy, *Private Justice*, *supra* note 3, at 71. “It absorbs government resources to monitor ongoing *qui tam* cases and to move for dismissal even when dismissal appears warranted. And there is always a chance, however small, that the relator will prevail and collect a judgment, of which at least seventy percent will go to the government.” *Id.* (citation omitted).

⁷⁴ W. Jay DeVecchio, *Qui Tam Actions: Some Practical Considerations*, in HEALTH CARE LAW AND LITIGATION: ACCESS TO CARE AND TECHNOLOGY 381, 398 (American Law Institute–American Bar Association Continuing Legal Education ed. 2002).

⁷⁵ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1849.

⁷⁶ The notion that none of these independent relators' suits is meritorious is invalid. However, given the fact that the government and taxpayers are the true beneficiaries of the *qui tam* and False Claims Act scheme, whereas the relator and his attorney are instruments applied to that end, the government's choice to dismiss an action reflects a

government's desire to establish stronger 'partnerships' between public purchasing agencies and their suppliers."⁷⁷ The promotion of meritorious *qui tam* actions and the deterrence of vexatious and unfounded suits can be

decision on the part of the party in interest that success is unlikely and, due to reimbursement costs to the successful defendant, continued prosecution would likely pose an expense that is far higher than could be offset by the occasionally successful recovery. There is considerable, but not unanimous, support for the position that the government is the true party in interest in False Claims Act suits. *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990) (noting that "[i]t is clearly established that although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action."); *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992) (holding that "the United States is the real party in interest in any False Claims Act suit, even where it [opts not to intervene and] permits a *qui tam* relator to pursue the action [alone] on [the government's] behalf"). *But see* *United States ex rel. Petrofsky v. Van Cott*, 588 F.2d 1327, 1329 (10th Cir. 1978) (holding that under the pre-1986 False Claims Act, the government is only a nominal party to a *qui tam* action after it declines to intervene). The opinion in the *Milam* case, wherein the relator brought suit, but was not joined by the Department of Justice, against a hospital that had used falsified studies to win grant money, provides a cogent line of reasoning justifying the holding that the government always remains the true party in interest. *Milam*, 961 F.2d at 48–50. In response to the state-run hospital's dismissal motion, which was premised on Eleventh Amendment immunity, the court reasoned that

the structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against [a finding that relators with whom the Department of Justice does not join may not sue the states under the False Claims Act.]

Id. at 49. Given the legislative history and purpose of the statute, as well as the broad power that the government wields in False Claims Act cases, it follows that the government is the party in interest in *qui tam* actions.

⁷⁷ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1849–50; *see* Bucy, *Private Justice*, *supra* note 3, at 63.

When an investigation . . . is nonmeritorious, the tangible and intangible costs to the targeted company are not only substantial, they are unnecessary. To the extent that private actions are more likely than government actions to be nonmeritorious, they are destructive for industry. The threat of nonmeritorious actions, brought by any one of thousands of possible private attorneys general, creates uncertainty in business planning and causes industry to engage in unnecessarily extensive and expensive preventative programs.

Id. Thus, the Department of Justice has been unlikely, because of the reasons discussed above, to actively seek the dismissal of actions which it does not choose to join. The proposed amendment described below reduces relators' and their counsels' financial incentive to pursue the costly and rarely successful False Claims Act class of actions in which the Department of Justice declines to join.

accomplished by creating a fee-shifting provision under which the Department of Justice and the unsuccessful relator equally bear the cost of the successful defendant's attorneys' costs when the Department permits a relator to proceed with neither government intervention nor government-sponsored dismissal.

A. *Proposed Amendment to 31 U.S.C. § 3730(d)(4)*

Because the current version of the False Claims Act can reward behavior which does not benefit the public fisc, it is appropriate to amend § 3730(d)(4) to read:

If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall award to the defendants reasonable attorneys' fees and expenses if the defendant prevails in the action. The cost of these fees and expenses shall be shared equally between the Treasury and the person bringing the action.

This proposed change differs dramatically from the current version of the Act because it makes the award of attorneys' fees to prevailing defendants mandatory in situations in which the Department of Justice permits a *qui tam* relator's action to proceed unsuccessfully, does not join, and fails to dismiss. This creates an incentive for the Department of Justice to join in truly meritorious actions while abandoning those cases that are particularly unlikely to meet with success. Rather than leave the independent relator entirely responsible for his successful opponent's attorneys' fees, this proposal would also reduce or eliminate the Department's current incentive to "wait and see" with those cases that seem unfruitful. The amendment would diminish the current "wait and see" attitude by leaving the government partially responsible for the results of its choice to neither join the action nor dismiss it.⁷⁸

Critics of this change may object that whistleblowers' incentives to bring their information forward will be diminished. This assertion is belied by the limited recoveries that independent relators historically have met.⁷⁹ Concerns that this amendment creates an implicit heightened pleading standard are of

⁷⁸ Note that this potential liability for the defendant's attorneys' fees would *not* apply when the Department of Justice intervenes in the relator's action and proceeds with the "primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1) (2000).

⁷⁹ See *supra* note 47 and accompanying text (noting small likelihood of success in such circumstances and that even when the relator does prevail, the recoveries are much smaller than in cases where the Department of Justice opts to proceed).

some moment;⁸⁰ however, relators' counsel already have a profound financial interest in "preparing a thorough, complete, and convincing written statement for the government."⁸¹ Because a relator whose action the Department of Justice declines to join already faces the (slightly) increased risk of bearing a prevailing defendant's attorneys' fees⁸² and counter-claims, a prominent relator's attorney observes that "you want to do everything possible to minimize the risk of declination."⁸³ These current strategic incentives to formulate facts and conduct an extensive investigation prior to serving the government with the relator's complaint are also statutorily prescribed by the False Claims Act's requirement that "all material evidence and information the [relator] possesses shall be served on the Government."⁸⁴ Most significantly, the circuit courts, for better or worse, uniformly require

⁸⁰ The imposition of heightened pleading by the courts in a variety of substantive areas, including civil rights and securities fraud, is increasingly recognized as inappropriate by the Supreme Court and commentators. *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) (admonishing circuit court for imposing a heightened pleading standard outside of Rule 9(b)'s narrow exceptions for fraud and mistake and noting that such a procedural change "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation"); *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513 (2002) (noting that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions"); see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998 (2003) [hereinafter Fairman, *Notice Pleading*]. The most striking reason why requiring a pleading burden that rises above Rule 8's low "notice pleading" standard is problematic is that pleading occurs well before the processes of discovery are available for parties to more clearly formulate their claims, defenses, theories of liability, and other important information. *Id.* at 993.

⁸¹ Bucy, *Private Justice*, *supra* note 3, at 51. "Such a report should [in] detail . . . explain how the defendant committed fraud. . . . It should reveal witnesses' identities and anticipated testimony, and describe what records are available to prove not just that fraud was committed [or that a false claim was submitted], but that it was committed 'knowingly.'" *Id.* at 52.

⁸² Under the current version of the False Claims Act, relators who proceed without the intervention of the Department of Justice will only be liable for the prevailing defendant's attorneys' fees and expenses if "the court finds that the [relator's] claim . . . was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4) (2000). In contrast, this Note's proposal would leave relators and the Department of Justice financially responsible for the successful defendant's fees and expenses whenever the Department neither joined nor dismissed an unsuccessful *qui tam* action.

⁸³ ROBIN WEST PAGE, ADVISING THE *QUI TAM* WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 1 (2001).

⁸⁴ 31 U.S.C. § 3730(b)(2) (2000). The requirement that relators submit not only a complaint, but also the disclosure materials, imposes the strategic incentive to plead and disclose facts that rise well above the low "notice pleading" standards set forth in Rule 8 of the Federal Rules of Civil Procedure.

that the sealed complaint comports with the Federal Rules of Civil Procedure's Rule 9(b) requirement that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity,"⁸⁵ rather than Rule 8(a)'s liberal "notice pleading" standard.⁸⁶

This modest change to § 3730 will hold the Department of Justice and relators who are perceived to be especially vexatious accountable when they prosecute and lose those *qui tam* actions which have thus far tended to be

⁸⁵ FED. R. CIV. P. 9(b). The concern that this Note's proposed change would impose a de jure heightened pleading standard fails to acknowledge the fact that "every circuit court that has addressed this issue [of whether Rule 9(b)'s requirement that averments of fraud be pleaded with particularity applies to False Claims Act actions] has concluded that the heightened pleading requirements of Rule 9(b) apply to claims brought under the FCA." United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 228 (1st Cir. 2004) (cataloguing the 6th, 11th, D.C., 4th, 9th, 3rd, 5th, and 2d Circuit Courts of Appeals' uniform adoption of Rule 9(b)'s pleading requirements in the context of the False Claims Act). The reality that courts require particularized pleading in False Claims Act complaints is, in practice, not overwhelmingly troublesome because (1) relators would be unlikely to become whistleblowers if they had only a slight suspicion of wrongdoing that required extensive additional discovery to flesh out, and (2) relators' counsel, as discussed above, has profound strategic justifications to accumulate and present the facts and information that a relator possesses at the earliest possible stage in order to curry favor with the Department of Justice. Theoretically, however, the incorporation of particularized pleading may be inappropriate for use with *qui tam* actions because the statute very clearly provides that liability attaches not only for fraudulent claims, but also for false claims, and that "no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b) (2000). Thus while it is proper and advantageous for the relator and his or her attorney to submit as many facts highlighting the false claim as possible, and that this should be done in the written disclosure and may be included in the complaint, the Rule 9(b) requirement of the Federal Rules of Civil Procedure that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity" should, in an ideal procedural world, probably not apply because the Act gives rise to a cause of action for false claims, not just fraud. Given the widespread requirement that *qui tam* relators must plead with particularity, it seems unlikely that this sort of heightened pleading will be replaced by notice pleading in the near future. However, the application of heightened pleading to the False Claims Act is symptomatic of a general "impos[ition of] a procedural burden that is contrary to the Federal Rules. . . . [and] contribute[s] to the erosion of the transsubstantive nature of the Federal Rules." Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 307 (2004) [hereinafter Fairman, *Invitation to the Rulemakers*] (surveying a host of substantive bodies of law that have been infected with Rule 9(b)'s heightened pleading standard and concluding that the Rule, having little justification and well-documented negative effects, should be abandoned).

⁸⁶ FED. R. CIV. P. 8(a) (setting forth the general pleading requirement that pleadings contain "(1) a short and plain statement of . . . the court's jurisdiction . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks").

costly, nonmeritorious, and particularly likely to call the overall validity of the False Claims Act into question.

B. Proposed Amendment to 31 U.S.C. § 3730(d) Award to Qui Tam Plaintiff

Advocates of the robust use of False Claims Act *qui tam* actions applaud the statute's generous treatment of relators by citing the resultant prowess of their attorneys,⁸⁷ quality and accuracy of "high-level, detailed, inside information about wrongdoing,"⁸⁸ and deterrent effect against future fraud.⁸⁹ False Claims Act critics, usually from the defense bar, decry whistleblowers' actions as yet another example of well-meaning government regulation and oversight gone too far.⁹⁰

The government's and the taxpayers' interest in the early identification, prosecution, retribution, and punishment of fraud against the government is ill-served by the False Claims Act's provisions that encourage relators to allow the number of claims and actual damages against the government to accumulate.⁹¹ Because successful claims brought under the *qui tam* portion of the current version of the False Claims Act entitle the relator to between 15% and 30% of the total award to the government, and because the government's damages are indexed to both the total number of false claims submitted as well as the magnitude of actual harm, potential whistleblowers

⁸⁷ See Bucy, *Private Justice*, *supra* note 3, at 58. Relators recover between 15% and 25% of judgments or settlements, depending on whether the Department of Justice proceeds with the action and the degree to which the relator's inside information was critical to the success of the suit. 31 U.S.C. § 3730(d) (2000). Professor Bucy notes that "[t]hese large fees are a significant incentive for top legal talent to undertake *qui tam* plaintiff's work. As an aside, it should be noted that the large judgments at stake are [an] incentive for defendants to hire top defense counsel, thereby evening up the sides." Bucy, *Private Justice*, *supra* note 3, at 58.

⁸⁸ Bucy, *Game Theory*, *supra* note 72, at 1026.

⁸⁹ Brooker, *supra* note 35, at 382–84 (noting rapid increase in *qui tam* filings under the False Claims Act and, citing the Chief Economist for the Senate Committee on the Budget, estimating that the cost of fraud deterred in the twenty years following the 1986 amendments to the False Claims Act will reach \$210 billion).

⁹⁰ See, e.g., Beck, *supra* note 19, at 561–65. Beck provides a thoughtful history of Britain's *qui tam* actions and cautions that "one surely should be cautious when 'transplanting' a species that has been deliberately eradicated from its native soil." *Id.* at 548.

⁹¹ Professor Kovacic is an example of a reform-minded False Claims Act scholar and practitioner who identified this statutory incentive for potential relators to allow fraudulent or irregular billing practices "to persist—thus increasing the size of the injury and the relator's potential recovery—and to gather evidence for pursuing a *qui tam* suit." Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1829.

have a profound incentive to permit damages to accrue, all the while assembling proof of the violations to support what might be an eventual *qui tam* action.⁹² Because the *qui tam* legislation within the False Claims Act is meant to deputize private citizens to come forward as champions of the government's and the taxpayers' well-being, the divergence of interest that follows from the relator bounty as currently written circumvents the purpose of the statute. Rather than encouraging either diligent monitoring within the government contracting industry or the rapid elucidation of fraudulent abuses, the bounty provisions of the False Claims Act reward relators who procrastinate.⁹³ Professor Kovacic has commented that "[i]t is unwise to tie the firefighter's reward to the total size of the blaze extinguished."⁹⁴ His proposed response to this apparent problem is to limit the relator's bounty to a "percentage of damages suffered by the government up to the time that the relator knew or should have known of the misconduct at issue."⁹⁵ This suggestion does address the problem created by the statute's unintended delaying incentive; however, its approach may be too heavy-handed.

A notable case that suggests that Kovacic's proposal may be too ambitious involved an ex-General Electric (GE) worker, Chester Walsh, who, acting as a *qui tam* relator, exposed GE's bribery of an Israeli general and the defrauding of the U.S. government.⁹⁶ While one of Walsh's superiors and the Israeli general probably began conspiring to defraud the government and GE in 1984, Walsh discovered the first false claims submitted to the

⁹² 31 U.S.C. §§ 3729(a) & 3730 (2000).

⁹³ This analysis is meant to highlight the imperfections that follow from the False Claims Act in its current form. It is not meant to criticize relators or their attorneys. The rewards that the Act affords to relators are critical given the variety of justifiable reasons that potential whistleblowers have to simply turn a blind eye to fraud. When contemplating the possibility of becoming a *qui tam* relator, employees and other potential whistleblowers face a vast array of disincentives to coming forward with their secret but valuable information. Taxpayers should be grateful for the recoveries and deterrence that whistleblowers have afforded to the public. Professor Bucy has noted that:

It is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one's employer, colleagues and friends. At a minimum, such disclosure disrupts businesses and lives. Quite possibly it leads to an employer's demise, colleagues' and friends' imprisonment or loss of employment, payment of large penalties and attorney's fees, and shame for all.

Bucy, *Private Justice*, *supra* note 3, at 61.

⁹⁴ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1845.

⁹⁵ *Id.* at 1845–46.

⁹⁶ *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1034–37 (6th Cir. 1994).

government in 1987.⁹⁷ Walsh, still working for GE in Israel, contacted a relators' law firm back in the US in 1987, but did so under an assumed name and without providing a means for the lawyers to contact him.⁹⁸ After about a year of investigation following Walsh's return to the US, his attorneys filed suit and submitted a disclosure statement to the Department of Justice in 1990.⁹⁹ The government's damages in 1987 were \$13.1 million but had grown to \$41.6 million by 1990.¹⁰⁰

False Claims Act critics decry these ballooning damages as evidence that Walsh and his lawyers let "the damage meter . . . run . . . [by] delayed filing."¹⁰¹ Walsh, his lawyers, and *qui tam* advocates counter that in 1987 Walsh was in Israel, had neither gathered much inside information nor retained counsel, and feared for his safety because of the substantial power that the Israeli general and GE wielded.¹⁰²

Relators and their attorneys, absent other considerations, have very plain incentives to delay the filing of a False Claims Act suit not only to increase the bounty award (and therefore contingency fees) but also to create a disclosure statement compelling enough to encourage the Department of Justice's support.¹⁰³ But their willingness to act as relators will also be

⁹⁷ *Id.* at 1037.

⁹⁸ *Id.* at 1043. Because Walsh was only able to leave Israel and bring the evidence that he had gathered there to the U.S. in 1989, the lawyers that he had contacted could only begin an investigation in 1989. *Id.* One of Walsh's lawyers noted that:

in '87 and '88, we had no documents, no information. We didn't even have Mr. Walsh's correct name. In July of 1989, Mr. Walsh had left Israel and brought us a box of documents and asked us—we started reviewing the documents to determine whether there was a basis to file a false claims case. By early 1990, we had concluded that there was a basis to undertake to draft a complaint and disclosure statement and to file them. It's a very complicated case. It involves foreign policy issues. It involves foreign military sales laws, which are very obscure.

And I was concerned that, because it involved a foreign state, an ally of the United States, a powerful Israeli general, unless the case was done thoroughly, completely and as accurately as was humanly possible, the case might never see the light of day, and we thought that the more compelling we could make the case the better chance there was that the case would actually some day be unsealed and be allowed to proceed.

Id. at 1043–44.

⁹⁹ *Id.* at 1038–39.

¹⁰⁰ *Id.*

¹⁰¹ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1830.

¹⁰² *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1042–44 (6th Cir. 1994).

¹⁰³ For a more extensive discussion of the importance of disclosure statements, see *supra*, notes 72–75 and accompanying text.

colored by concerns regarding employers, coworkers, family, friends, and personal safety. Kovacic's proposal seems to acknowledge the first of these incentives and ignore those nonmonetary factors which may inhibit relators' immediate disclosure of fraud.

Rather than follow Kovacic's plan, which would require the judicial determination of (1) the moment when the relator had at least constructive notice of the fraud, and (2) the value of damages at that moment,¹⁰⁴ it would be more appropriate to create positive incentives for relators to bring suit early by creating a graduated bounty system indexed to the period of time between the contractor's filing of a false claim and the relator's filing of his or her complaint.

This more nuanced change in the bounty provisions of the False Claims Act would increase the bounty for relators who file complaints that are temporally proximate to defendants' submission of false claims while lowering the bounty for relators who delay, whether because of concerns for safety or economic succor, the filing of their complaints. Such an amendment would create a heightened incentive for relators to bring fraud to the government's attention more quickly while not entirely eliminating the possibility of a bounty award for disclosing subsequent instances of fraud against the government.

To effectuate such a graduated bounty system, it is appropriate to amend § 3730(d)(1), the section defining the bounty awarded to relators whose *qui tam* actions are joined by the Department of Justice, by adding new subparagraphs § 3730(d)(1)(A), (B), and (C). The revised § 3730(d)(1) will therefore read:

¹⁰⁴ Kovacic, *Whistleblower Bounty Lawsuits*, *supra* note 19, at 1845–46. Kovacic's proposal would severely limit the amount of the relator's bounty and therefore the incentive for him to leave his job, obtain competent (and costly) relator's counsel, and become involved in the court system for an extended period of time. This is so because his bounty would only be calculated based on the damages that had occurred *until* he knew of the fraud. His decision to muster significant information regarding fraud *after* its very first discovery would depend solely on his magnanimity, not on the pecuniary bounty structure that has proved so successful in identifying fraud. If relators could garner only about 20% of the damages occurring up to the moment that they discovered the fraud, and their lawyers could only recover about a quarter of that amount from a contingency fee, the amount of fraud occurring before discovery would have to be so large (in order to justify bringing the suit) that it would be almost preposterous that the relator had not noticed it even earlier. The difficulties inherent in the identification of when a relator should have discovered fraud and the severe limiting of the resulting bounty award create the possibility that Kovacic's proposal would render the False Claims Act very feeble indeed.

(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:

(A) at least 20 percent, but not more than 30 percent, of the proceeds of the action or settlement of the claim if the action was brought within two years of the defendant's filing of the first false claim to the Government which the relator alleges in the complaint; or

(B) at least 15 percent, but not more than 20 percent, of the proceeds of the action or settlement of the claim if the action was brought within between two and four years of the defendant's filing of the first false claim to the Government which the relator alleges in the complaint; or

(C) at least 10 percent, but not more than 15 percent, of the proceeds of the action or settlement of the claim if the action was brought more than four years after the defendant's filing of the first claim to the Government which the relator alleges in the complaint,

depending upon the extent to which the person substantially contributed to the prosecution of the action.¹⁰⁵

A parallel graduated bounty structure should also be included in § 3730(d)(2), the subsection that defines relators' compensation when they proceed with their *qui tam* action without the Department of Justice's intervention. The amended § 3730(d)(2) should provide that:

“(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

¹⁰⁵ 31 U.S.C § 3730(d)(1) (2000). This change adds a two-year timeframe for the most generous 20% to 30% bounty bracket. The current version of the statute provides only a 15% to 25% bounty for relators whose suits are joined by the government, but allows relators to recover this percentage regardless of the timing of their suit (so long as it comports with the § 3731(b) statute of limitations). *Id.* The middle range on this amended bounty scale permits relators' recoveries of between 15% and 20% and requires the relator to file his or her complaint between two and four years from the defendant's submission of the first false claim which the relator alleges. Claims filed more than four years from the defendant's submission of its false claim produce the lowest level of bounty, 10% to 15%, for those relators who, for whatever reason, were not zealous in their *qui tam* filing. These changes of the bounty structure comport with the False Claims Act's statute of limitations, which prohibits actions that are brought either:

- (1) more than 6 years after the date on which the violation [occurred] . . . , 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 Government] . . . , but in no event more than 10 years after the date on which the violation is committed.

31 U.S.C. § 3731(b) (2000).

amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be¹⁰⁶:

(A) not less than 30 percent and not more than 35 percent of the proceeds of the action or settlement if the action was brought within two years of the defendant's filing of the first false claim to the Government which the relator alleges in the complaint; or

(B) not less than 20 percent and not more than 30 percent of the proceeds of the action or settlement if the action was brought between two and four years of the defendant's filing of the first false claim to the Government which the relator alleges in the complaint; or

(C) not less than 15 and not more than 25 percent of the proceeds of the action or settlement if the action was brought more than four years from the defendant's filing of the first false claim to the Government which the relator alleges in the complaint,

and shall be paid out of such proceeds.¹⁰⁷

By using a higher initial bounty award, this amendment would encourage relators and their attorneys to diligently and zealously prosecute *qui tam* actions in the name of the government and the taxpayer. It would also permit, albeit with a diminished bounty, some relators to take extra time either in the preparation of their disclosures or in their reaching the momentous decision to become a whistleblower. The flexibility of this amendment recalibrates the False Claims Act's incentive structure to promote the interests of the taxpayer while acknowledging and accommodating the practical realities that face relators and their legal counsel.

¹⁰⁶ *Id.* § 3730(d)(2).

¹⁰⁷ *Id.* While the current version of the statute confers between 25% and 30% of the action's proceeds, the amended portion will now allow between 15% and 35%, depending on the timeliness of the relator's complaint. Because the relator and his or her attorney are virtually solely responsible for the prosecution of cases which the Department of Justice declines to join, and, assuming the passage of this Note's previous change, it is important that the bounty incentives of the law be scaled higher for independent relators than those with whom the Department of Justice joins. Without this higher compensation structure, even those relators with meritorious *qui tam* actions would be loathe to proceed without the Department of Justice because this Note's previous proposal would leave them liable for half of their successful opponent's fees and expenses. See *supra* notes 69–72 and accompanying text.

V. CONCLUSION

Since Congress passed the 1986 amendments to the False Claims Act, fraud prosecution has ballooned—to the benefit of the government and the taxpayers. *Qui tam* relators, their lawyers, and the Department of Justice may in certain situations behave, as a result of the statute's incentive structure, in a way that benefits neither the government, nor the taxpayers, nor the firms with which the government contracts. The proposed amendments to the False Claims Act that this Note advocates seek neither to emasculate the Act nor to broaden its scope, but rather to ensure that relators and the Department of Justice focus their efforts in a way that benefits the country's citizens. These proposals include (1) a fee-shifting provision under which the government and the relator would be equally liable for a prevailing defendant's attorneys' fees in the discreet class of cases in which the Department of Justice opts neither to intervene nor dismiss, and (2) a graduated bounty structure that would reward relators who bring their *qui tam* actions quickly by inversely relating the size of the bounty to the length of time between the alleged fraud and the relator's filing of the action. In tandem, these amendments will maintain the powerful role that whistleblowers play in deterring, identifying, and prosecuting fraud while ensuring that the bounties which they and their attorneys receive are structured in a way that will encourage the zealous prosecution of meritorious cases, rather than the languid pursuit of baseless suits.