COMMENT

THE 2009 "CLARIFICATIONS" TO THE FALSE CLAIMS ACT OF 1863: THE ALL-PURPOSE ANTIFRAUD STATUTE WITH THE FUN *QUI TAM* TWIST

> The extension of [a False Claims Act] cause of action to private parties in circumstances where the action was previously foreclosed is not insignificant. As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.[1]

INTRODUCTION

With the enactment of the Fraud Enforcement and Recovery Act of 2009 ("FERA") on May 20, 2009,[2] the Obama administration virtually ensured that private organizations that engage in transactions with the federal government will become more embattled than ever by whistle-blowing citizens seeking large cash bounties for infractions real or perceived, intended or inadvertent, large or miniscule. The new law was styled as a clarification of a Civil War–era statute designed to curb fraud on the government, the False Claims Act ("FCA"). Instead, it so broadened the scope of citizen enforcement through lawsuits known as *qui tam* actions[3] that these cases will likely inflate court dockets and increase the cost of the services private organizations provide, particularly in the already-expensive health care arena.

This Comment examines the latest developments in the law of private whistleblower enforcement under the provisions of the FCA. Part I of this Comment provides a brief history of the development of the FCA, its controversial *qui tam* litigation model, and its interpretation by the courts prior to enactment of the 2009 amendments. Part II analyzes some of the criticisms leveled against the FCA and its private-public enforcement mechanism and

1. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997).

2. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (to be codified in scattered sections of 18 and 31 U.S.C.).

3. A *qui tam* action is "brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." BLACK'S LAW DICTIONARY 1282 (8th ed. 2004).

discusses the risks associated with broadening the scope of the FCA to expose an ever-increasing number of parties to potential liability under the Act. Part III discusses FERA, specifically focusing on the amendments this statute makes to the FCA in the name of "clarification." Part IV considers the ramifications of these "clarifications" and argues that, rather than clarifying the law, these amendments broadly change the substance of the law, significantly increasing the types of actions the FCA can cover and the parties that can be held liable under the Act. This Comment concludes that the ever-broadening scope of potential liability under the *qui tam* provisions of the FCA, and the multimillion-dollar rewards available by statute to the private parties bringing suit,[4] will serve to increase the volume of litigation under the FCA. As a result, operational and transactional costs will rise, primarily in the health care context, as new classes of potential defendants take measures to limit their liability exposure.

I. THE FALSE CLAIMS ACT PRIOR TO 2009

A. *Background of the False Claims Act*

The original False Claims Act,[5] sometimes referred to as the "Lincoln Law," was passed in March of 1863, sponsored by Senator Jacob Howard of Michigan.[6] The bill was a response to frauds perpetrated by suppliers of the Union Army during the American Civil War.[7] These frauds generally involved the provision of substandard or worthless goods in exchange for payment by the government.[8] The original Act provided for application of the *qui tam* system of enforcement in which private parties, called

4. *See* Press Release, Office of Pub. Affairs, Dep't of Justice, Four Pharmaceutical Companies Pay $124 Million for Submission of False Claims to Medicaid (Oct. 19, 2009), *available at* http://www.justice.gov/opa/pr/2009/October/09-civ-1120.html (announcing relator's share of $10,787,392); Press Release, Office of Pub. Affairs, Dep't of Justice, Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009), *available at* http://www.justice.gov/opa/pr/2009/September/09-civ-900.html (announcing relator's share, divided among six plaintiffs, of over $102 million).

5. An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863) [hereinafter Original False Claims Act].

6. CHARLES DOYLE, CONG. RESEARCH SERV., QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 5 (2009), *available at* http://www.fas.org/sgp/crs/misc/R40785.pdf. *See also* Gary W. Thompson, *A Critical Analysis of Restrictive Interpretations of the False Claims Act's Public Disclosure Bar: Reopening the Qui Tam Door*, 27 PUB. CONT. L.J. 669, 672 (1998).

7. J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 555 (2000).

8. Professor J. Randy Beck provides examples of fraud, such as supplying firearms that would not function and artillery shells filled with sawdust instead of gunpowder. *Id.*

"relators," are given the right to sue in the name of, and with the standing of, the U.S. government.[9] In the words of Senator Howard, this method of "'setting a rogue to catch a rogue' . . . is the safest and most expeditious way . . . of bringing rogues to justice."[10] Under the 1863 statute, relators were entitled to half of the damages recovered.[11] Over time, however, the *qui tam* provisions drew criticism,[12] and in 1942 the U.S. Attorney General sought to have them repealed in response to a case pending before the U.S. Supreme Court, *United States ex rel. Marcus v. Hess*.[13] Ultimately, both the House and Senate voted in favor of repeal, albeit during separate congressional terms and therefore without practical effect.[14] In the recess between those terms, the Supreme Court approved the *qui tam* model at issue in the very case that had prompted the Attorney General's repeal effort.[15] With this guidance from the Court, Congress declined to fully repeal the provisions and instead passed amendments increasing government oversight of such suits. The 1943 amendments reduced the relator's share to a maximum of 25% if the government declined to intervene and no more than 10% if the government pursued the case.[16] The amendments also included a provision barring actions in which the underlying claim was based on information already in the government's possession.[17]

In response to a wave of Department of Defense ("DOD") procurement scandals almost four decades later, Congress again made significant changes to the FCA with a series of amendments in 1986.[18] These changes included (1) an increase of the statutory damages from not more than $2000 and double the government's

9. Original False Claims Act, *supra* note 5, at 698.

10. DOYLE, *supra* note 6, at 5.

11. *Id.* at 5–6.

12. *See* United States *ex rel*. Marcus v. Hess, 317 U.S. 537, 545 (1943). In this case, the Supreme Court upheld an award of the 50% relator's share to a plaintiff despite the government's argument that the plaintiff's *qui tam* complaint was a duplication of a criminal indictment that had already been filed against the defendant. *Id.* The Court observed that even a district attorney who would have obtained all of his information from his official position could file a *qui tam* complaint on that information in a separate action. *Id.* at 546. The Court rejected the Department of Justice's strenuous criticism of the *qui tam* provisions as injurious to the war effort and "against the public interest." *Id.* at 546–47.

13. DOYLE, *supra* note 6, at 6.

14. *Id.* at 6–7.

15. *Hess*, 317 U.S. at 547–48.

16. Act of Dec. 23, 1943, ch. 377, Pub. L. No. 78-213, 57 Stat. 608, 609 (codified at 31 U.S.C. 232(C) (1946)).

17. *Id*.

18. False Claims Amendment Acts of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified as amended in scattered sections of 31 U.S.C. (2006)). *See also* Beck, *supra* note 7, at 561 (describing DOD scandals and fraud in the early 1980s as the impetus for the amendments).

actual damages to between $5000 and $10,000 per claim plus treble damages, (2) an explicit statement imposing liability for "reckless disregard of the truth or falsity" of the defendant's statements rather than only upon a showing of actual intent to defraud, (3) an increase of the relator's "bounty" to between 15% and 25% if the government intervenes and 25% to 30% if the government does not intervene, and (4) an expansion of the statute of limitations.[19] Although the Department of Justice ("DOJ") was unenthusiastic about expanding incentives for *qui tam* litigation,[20] its position likely did not concern a Congress that viewed the DOJ's enforcement of the FCA as ineffective at best and collusive at worst.[21] The 1986 amendments were broad in scope, with significant implications for existing and future litigation of FCA cases. The courts were soon called upon to issue interpretive decisions applying the new, amended language. The most notable court opinions tended to interpret the amendments so as to narrow their scope whenever possible.

B. Judicial Decisions Limiting the Post-1986 False Claims Act

1. Limitations on Retroactivity: Hughes Aircraft Co. v. United States *ex rel.* Schumer

One of the first significant decisions limiting the FCA was *Hughes Aircraft Co. v. United States ex rel. Schumer*,[22] in which the Supreme Court considered whether the FCA's *qui tam* provisions could retroactively apply to conduct that occurred prior to passage of the 1986 amendments.[23] The Court overruled the Court of Appeals for the Ninth Circuit, which had allowed retroactive application of the amendments.[24]

The relator in *Hughes* was a former employee of Hughes

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19. False Claims Amendment Acts of 1986 § 2 (explaining that a court will evaluate defendants' cooperation and the extent of fraud to determine appropriate civil penalties, and that a court will assess a fair relator's bounty by evaluating the extent of the relator's contribution to the litigation and the size of recovery of government funds); *see also* DOYLE, *supra* note 6, at 7–8 (comparing the 1986 amendments to the prior statute).

20. *See* Beck, *supra* note 7, at 562 n.103. The DOJ thought the changes were unnecessary but acquiesced because it favored other proposed changes that would also be included in the amendments. *Id.*

21. *Id.* at 563–65. Professor Beck explains that some members of Congress believed that the DOJ was "'on the side of the defense contractors'" for political reasons, and that the *qui tam* model of enforcement was necessary "as a corrective measure for the Justice Department's unwillingness to enforce the law." *Id.* at 564. Other supporters held the more benign view that the DOJ lacked the resources to investigate and prosecute fraud and the *qui tam* model would help supplement government resources. *Id.* at 564–65.

22. 520 U.S. 939 (1997).

23. *Id.* at 941.

24. *Id.* at 952.

Aircraft Company, which had subcontracted with Northrop Corporation in 1981 to design and develop a radar system for the B-2 bomber aircraft.[25] Shortly thereafter, Hughes received another subcontract from McDonnell-Douglas Corporation to design and develop a radar system for the F-15 fighter aircraft.[26] The Northrop agreement was based on a "cost-plus" pricing system that allowed Hughes to bill Northrop for the costs of the project plus a reasonable profit.[27] The McDonnell-Douglas agreement, on the other hand, was based on a fixed-price agreement whereby Hughes would bill a fixed amount regardless of its actual costs.[28] The relator, Schumer, brought suit against Hughes alleging that the company fraudulently mischarged Northrop under the cost-plus agreement for development costs incurred during the McDonnell-Douglas project, resulting in a $50 million overcharge to Northrop and, consequently, to the United States.[29] The allegedly fraudulent actions occurred between 1982 and 1984, and the suit would have been barred under the pre-1986 FCA because it was based on information already in the possession of the government. However, the suit would not be barred under the 1986 amendments, which allowed suits based on information held by the government so long as the information had not been "publicly disclosed."[30]

The Court discussed two primary issues in its analysis of the case. First was the retroactivity of the 1986 amendments. Schumer argued that the 1986 amendments permitted his claim and also asserted that the statute did not truly have a retroactive effect and thus should not come under the Court's presumption against retroactivity.[31] The latter contention was based on two premises: (1) that false claims had been prohibited under the Act since its creation; and (2) that the amendments had not created any new cause of action, removed a bar to litigation where one previously existed, or altered a defendant's exposure to liability.[32] The Court readily dispensed with both arguments.[33]

The second issue the Court discussed revolved around the unique characteristics of the *qui tam* model of enforcement.[34] Specifically, the Court noted that "[t]he extension of an FCA cause of action to private parties in circumstances where the action was

25. *Id.* at 942–43.
26. *Id.* at 942.
27. *Id.*
28. *Id.*
29. *Id.* at 943.
30. *Id.* at 945–46.
31. *Id.* at 946.
32. *Id.* at 947–48.
33. *Id.* (explaining briefly that Schumer's first "argument was made, and rejected" in an earlier case, and that as to his second contention, "[a]gain, respondent is mistaken").
34. *Id.* at 949.

previously foreclosed is not insignificant."[35] The Court also observed that private plaintiffs are more likely to pursue actions based only on technical violations of law, when the actual damages to the government may be minimal.[36]

One scholar commented on the DOJ's treatment of this case and the Court's "understated account of the DOJ's inactivity in the face of DOD findings that exonerated" Hughes[37] In fact, the DOD's findings indicated that not only had Hughes behaved properly, the company had actually *reduced* the costs incurred by the government.[38] Nevertheless, the DOJ declined to exercise its prerogative to have the suit dismissed and instead allowed Schumer, the private *qui tam* plaintiff, to proceed independently against Hughes.[39] With a simple, unadorned statement in a footnote, the Court merely noted that the DOJ did not "move to dismiss the action, as it was . . . entitled to."[40] Had the Court not barred retroactive application of the *qui tam* provisions, this case would have come out very differently for Hughes, which would have been stuck with the costs of defending an action that the government should never have allowed to proceed. The DOJ's unwillingness to dismiss baseless FCA claims not only disadvantages defendants such as Hughes, but also on a broader scale affects companies' willingness to engage in transactions in government markets.[41]

2. The Presentment Requirement: United States *ex rel.* Totten v. Bombardier Corp.

The Court of Appeals for the District of Columbia further narrowed the post-1986 FCA in *United States ex rel. Totten v. Bombardier Corp.*[42] In this case, a relator brought suit alleging that Bombardier violated the FCA by delivering defective rail cars to Amtrak.[43] The alleged basis for liability turned on Bombardier's submission of invoices seeking payment from an Amtrak account that contained government funds.[44] After it addressed jurisdictional issues, the district court faced the threshold question of whether a relator may proceed under the FCA "against a defendant who submits a false 'claim' to a federal grantee . . . [absent] evidence that

35. *Id.*
36. *Id.*
37. William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 222 (1998).
38. *Id.*
39. *Id.*
40. *Hughes*, 520 U.S. at 943 n.2.
41. Kovacic, *supra* note 37, at 222–23.
42. 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005).
43. *Id.* at 490.
44. *Id.*

the claim was ever actually submitted to the U.S. government."[45] The district court determined that the plain language of the FCA allowed for liability under the statute for claims made to grantees of government funding, but only upon presentment of the claim to an actual agency or instrumentality of the United States.[46] The court had no difficulty finding that Amtrak was not an actual agency of the United States and therefore was not subject to the FCA.[47]

The Court of Appeals for the D.C. Circuit affirmed the decision of the district court, holding that liability under the FCA attaches only when the false claim is presented directly to an officer or employee of the government, not when the claim is presented to a grantee, like Amtrak, and paid using government funds.[48] In so holding, the court distinguished precedent that allowed liability to attach for claims made to a corporate entity entirely owned by the government, which was effectively "an 'agency and instrumentality of the United States.'"[49] This decision would be questioned and implicitly overturned in *Allison Engine Co. v. United States ex rel. Sanders*.[50]

3. Further Questions of Intent, and a Revisiting of Presentment: Allison Engine Co. v. United States *ex rel.* Sanders

The Supreme Court issued the latest interpretation of the FCA in June of 2008 in a case in which the Court discussed the presentment requirements of *Totten* along with the additional substantive question of whether, to be liable under the FCA, a defendant must intend that the government pay fraudulent claims. In *Allison Engine*, the Court considered a claim brought by former employees of a subcontractor involved in the production of naval warships.[51] The U.S. Navy contracted with two shipyards, Bath Iron Works and Ingalls Shipbuilding, to build a fleet of guided-missile destroyers.[52] The shipyards contracted with Allison Engine Company to build generator sets for the ships, and Allison Engine contracted with General Tool Company to assemble the generator sets.[53] Incorporated into the agreements of each subcontractor were requirements that each part of the ships be built to meet the Navy's standards and drawings.[54] The agreements also specified that each generator set would be accompanied by a certification stating that

45. *Id.* at 491 (quoting United States *ex rel.* Totten v. Bombardier Corp., 286 F.3d 542, 553 (D.C. Cir. 2002) (quotation marks omitted)).
46. *Id.*
47. *Id.*
48. *Id.* at 492.
49. *Id.* (quoting Rainwater v. United States, 356 U.S. 590, 591 (1958)).
50. 128 S. Ct. 2123 (2008).
51. *Id.* at 2127.
52. *Id.* at 2126.
53. *Id.* at 2126–27.
54. *Id.* at 2127.

the unit was manufactured in accordance with the Navy's standards.[55]

The relators in the case, former employees of General Tool, brought suit under the FCA, alleging that the invoices submitted by the two shipyards, Allison Engine, and other subcontractors were fraudulent because the work on the generator sets had not been completed in accordance with the Navy's standards.[56] The relators also claimed that the defendants filed false certifications stating that the generator sets had been built according to the proper specifications.[57] At trial, the relators introduced evidence showing that false statements had been presented by Allison Engine, General Tool, and others to the shipyards, but they failed to show that the shipyards had presented false claims to the Navy.[58] The district court ruled as a matter of law that no reasonable jury could find a violation of the FCA because there was no evidence that a claim had ever been presented *to the government*, and therefore there was no proof that the defendants intended the claim to be paid by the government rather than by a private party.[59] The Court of Appeals for the Sixth Circuit reversed that decision, holding that proof of intent to have the government pay the claim directly is not necessary under the FCA because intent to have a private party pay the claim *with government funds* is sufficient.[60]

The Supreme Court unanimously rejected the Sixth Circuit's holding that a relator must merely show that a claim was paid out of government funds.[61] In an opinion delivered by Justice Alito, the Court noted first that the language of the statute dictates that liability attaches when a defendant submits a false record or statement "to get" a claim paid "by the government."[62] The Court read this language as an indication that the defendant must intend for the government to pay the claim, and not merely for a third party to pay the claim using government funds.[63] A broader alternative interpretation would "expand the FCA well beyond its intended role"[64] and result in a statute whose reach was "almost boundless."[65] The Court then observed that such a broad interpretation would allow liability to attach for "any false claim

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 2127–28.
60. *Id.* at 2128.
61. *Id.* at 2126.
62. *Id.* at 2128 (quoting 31 U.S.C. § 3729(a)(2) (2006), *amended by* Pub. L. No. 111-21, § 4(a)(1), 83 Stat. 1617 (2009)) (internal quotations omitted).
63. *Id.*
64. *Id.*
65. *Id.* (quoting United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 496 (D.C. Cir. 2004) (internal quotations omitted)).

made to any college or university" receiving federal grants.[66] The Court determined that the FCA only imposed liability for false statements that were made to third parties "intending for the statement to be used by the [third party] to get the government to pay its claim."[67] Otherwise, the FCA would become "an all-purpose anti-fraud statute," a result the Court suggested was a realistic and undesirable possibility.[68]

The Court also addressed the question of presentment, recognizing that the Sixth Circuit's decision conflicted with the holding of *Totten*, which required actual presentment of a claim to an employee or agent of the government.[69] On this issue, the Court sided with the Sixth Circuit and held that liability under § 3729(a)(2) required only proof that the defendant presented a false record or statement to another party with the intent that the other party use the record or statement to receive government payment.[70]

C. *Academic Responses to the Post-1986 False Claims Act*

Not surprisingly, academics also reacted to the sweeping changes made to the FCA in 1986. Professor William Kovacic authored a number of journal articles about the effects of the provisions[71] and proposed some modifications to the FCA to reduce potential inefficiency. Among the changes he suggested were (1) further limiting the scope of possible liability under the Act; (2) adding provisions to discourage meritless suits; and (3) limiting the per-claim statutory penalty for damages in instances when there are a large number of similar individual claims, each resulting in relatively insignificant actual damages.[72] A few years later, Professor Randy Beck authored a comprehensive article on the topic of *qui tam* litigation in which he proposed a slightly more drastic solution: abolish the *qui tam* model altogether, or make changes to DOJ intervention procedures so that they would mimic the proper exercise of prosecutorial discretion.[73] This Comment further discusses the theories of both Professor Kovacic and Professor Beck in Part II, specifically their analyses of the inherent economic risks of the FCA and the *qui tam* litigation model, and the unavoidable conflicts of interest arising in a system in which private parties litigate statutory violations on behalf of the government.

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66. *Id.* (quoting *Totten*, 380 F.3d at 496).
67. *Id.* at 2130.
68. *Id.*
69. *Id.* at 2128.
70. *Id.* at 2130.
71. *See, e.g.*, Kovacic, *supra* note 37; William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799 (1996).
72. Kovacic, *supra* note 37, at 236–38.
73. *See* Beck, *supra* note 7, at 638–39.

II. THE RISK OF SCOPE: POTENTIAL FOR ABUSE UNDER THE FALSE CLAIMS ACT

Although the FCA has been lauded as an important tool for government recovery of funds and property lost to fraud,[74] the structure of the enforcement mechanism and the severity of the statutory penalties for noncompliance have led to discussion of the FCA's downsides. In many respects, the FCA leads to high transaction costs for parties who seek to do business with the government[75] and exposes organizations to a significant threat of litigation for "benign" infringements that result in little or no actual economic harm to the government.[76]

A. *Economic Costs and the Principle of Externalities*

Although proponents of the FCA are quick to point out huge financial recoveries by the government under the FCA's provisions,[77] very little discussion has focused on the potential economic costs of *qui tam* litigation, or on how those costs may outweigh the benefit of the recoveries. The effect of certain aspects of the FCA on actual and potential defendants of these suits is significant expenses for compliance and litigation. Those costs must either be returned to the public—either imposed on customers or on the government itself—or the company must determine a way to absorb the costs and remain profitable.[78] In all likelihood, the rational company will reallocate costs by adjusting pricing structures and simply pass these costs on to the eventual consumer.

There is very little empirical research examining the cost burdens borne by the targets of these actions. That may be because questioning the operation of a statute that recovers so much public money would be unpopular, or because companies are reluctant to engage in activities that might antagonize the government. One study, however, revealed the cost of FCA litigation for contractors involved in defense procurement.[79] It brought to light figures that are startling even though they are now more than a decade old. In the mid-1990s, a group of forty defense contractors agreed to participate in a study of their experiences with FCA litigation, most on the condition of confidentiality.[80] Based on their survey

74. *See* M.M. Harris, *Patriots and Profiteers: Combating False Claims by Contractors in the Iraq War and Reconstruction*, 59 ALA. L. REV. 1227, 1228 (2008).

75. Kovacic, *supra* note 37, at 232.

76. *Id.* at 225–26.

77. *See* Taxpayers Against Fraud, Top 20 False Claims Act Cases, http://www.taf.org/top20.htm (last visited May 1, 2010).

78. *See* Jonathan T. Brollier, Note, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of* Qui Tam *Actions Brought Under the False Claims Act*, 67 OHIO ST. L.J. 693, 706–07 (2006).

79. Kovacic, *supra* note 37, at 224

80. *Id.*

responses, the study found that the average out-of-pocket legal expense for responding to an FCA complaint *started* at $250,000 to $500,000 for the simplest claims.[81] These costs increased dramatically as the complexity of the cases increased. When more intricate suits were filed alleging schemes of wrongdoing, or when dispute-resolution methods such as arbitration or settlement prior to trial failed, the costs generally exceeded $1,000,000 and sometimes exceeded $10,000,000.[82] From an economic-efficiency perspective, the most troubling cases arose where the government declined to intervene in the lawsuit and the *qui tam* plaintiff proceeded with the action.[83] The survey data contained records of thirty-eight such instances.[84] The average recovery in these matters was $97,223 even though the average cost to defend the action was $1,431,660.[85] According to the most recent statistics, the government declined to intervene in over two-thirds of the cases that had been reported as of 2008.[86] In addition, the vast majority of the cases in which the government declined to intervene were ultimately dismissed, incurring costs for the parties without benefitting the public.[87]

The figures are shocking, and these costs "are not mere externalities for either the government or the taxpayer."[88] Based on other statutory provisions, the defendants in defense-procurement cases can recover up to eighty percent of their fees from the government,[89] and in cases where such recovery is not available, private entities contracting with the government will simply raise their prices to account for their increased exposure to liability. When one considers that the vast majority of *qui tam* actions are not pursued by the government, and are eventually dismissed after the private plaintiff proceeds alone,[90] the "absurd" but logical result is that private citizens, and indeed the government itself, may be losing money by allowing the private prosecution of cases in which the DOJ declines to intervene.[91]

81. *Id.* at 225.
82. *Id.*
83. *Id.* at 226.
84. *Id.*
85. *Id.*
86. DOJ, FRAUD STATISTICS 1986–2008 (2008), http://www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm. As of 2008, the DOJ intervened in 1190 out of 6199 cases and declined to intervene in 4134. 875 are still under investigation. *Id.*
87. *Id.* Of the 4134 cases in which the DOJ declined to intervene, 3348 were subsequently dismissed. *Id.*
88. Brollier, *supra* note 78, at 707.
89. *Id.*
90. *Id.*
91. *Id.*

B. Conflicts of Interest Inherent in Qui Tam *Litigation*

A second criticism leveled against the FCA is that the use of private parties to prosecute other private parties creates a private pecuniary interest in prosecutions that may be detrimental to the public interest.[92] Under this view, the lack of prosecutorial discretion exercised by a financially disinterested agent of the government leads private parties to pursue actions that may not be beneficial for the public but that can lead to enormous financial gain for the plaintiff litigants.[93] Proponents of *qui tam* enforcement argue that the public interest is served by such litigation because any successful claim results in some recovery of funds to the government; however, this recovery is not the only purpose of the FCA.[94] The draconian statutory penalties imposed, even when the government's damages are comparatively minimal, leads to the conclusion that the FCA is a punitive device.[95]

As with any punitive statute, the FCA's goal is deterrence of harmful behavior. [96] However, deterrence must also be balanced against the economic costs of enforcement and the rights of potential parties.[97] Without the limiting influence of impartial prosecutorial discretion, a potential *qui tam* plaintiff has very little to lose and a significant prospective financial bounty to gain.[98] As the Supreme Court recognized in *Hughes*, "a relator's interest and the government's do not necessarily coincide,"[99] because relators "are motivated primarily by prospects of monetary reward rather than the public good."[100] The potential for conflicts of interest is discussed further in Part IV.E, in light of changes made by the 2009 amendments to the FCA allowing private parties not only to pursue FCA claims without government guidance, but also to access the DOJ's investigative resources in order to bolster their cases.

C. Delay in Filing to Allow Damages to Accrue

Because recovery under the FCA includes statutory punitive damages calculated based on the number of individual claims against a defendant, the statute creates a perverse incentive for private parties to delay as long as possible in filing charges in order to accrue the maximum recovery.[101] This incentive is incongruent with the taxpayers' interest in early recognition and correction of

92. *See* Beck, *supra* note 7, at 608.
93. *Id.* at 610–11.
94. *Id.* at 609.
95. *See* Kovacic, *supra* note 37, at 219–20.
96. *See* Beck, *supra* note 7, at 609.
97. *Id.* at 609–10.
98. *Id.* at 610–11.
99. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 n.5 (1997).
100. *Id.* at 949.
101. Kovacic, *supra* note 71, at 1829.

fraudulent activity.[102] In a similar manner, since the *qui tam* plaintiff may not be adversely affected in any way by the fraudulent activity, this incentive can create problems for private companies even when antifraud compliance procedures are in place.[103] In this situation, a company could take good-faith steps to limit and correct the fraudulent activity if management were informed of the problems; however, if an individual employee has an incentive to increase his prospective recovery by staying quiet, he may avoid reporting the problem for as long as possible.[104] In at least one case, evidence indicated that an employee of General Electric may have delayed filing his *qui tam* claim for almost six years, resulting in accrued damages of more than $28.5 million to the government and increasing the employee's potential bounty significantly.[105] Similar problems exist in governmental departments when employees who have inspection and supervisory duties may notice improper practices by a government contractor but have an incentive to “overlook” the problem for a period of time, resulting in additional waste of government resources.[106]

D. Interference with Legitimate Management Decisions and Exposure to Anticompetitive Behavior

The threat of *qui tam* litigation under the FCA presents identifiable risks in two other areas: (1) interference with legitimate management decisions, and (2) threats and anticompetitive behavior among parties jointly participating in the fulfillment of government contracts.[107] First, the risk of litigation can impede management decisions (such as compensation, hiring and firing, and assignment of tasks) within companies that engage in frequent transactions with the government, because of the likelihood that the company may have “wavered in adhering” to a regulation and may have improperly certified compliance at some point during some transaction.[108] In these cases, the risk of creating employee animosity through unpopular management decisions is weighty, as an employee who knows of such a violation has the power to bring a staggeringly expensive lawsuit against the company. Second, threats of *qui tam* litigation can be used as leverage in the bidding process among prime contractors and subcontractors seeking government projects.[109] Based on the information sharing inherent in the cooperative process of tiered contracting, subcontractors gain

102. *Id.*
103. *See id.*
104. *See id*.
105. *Id.* at 1829–30 (describing facts of United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032 (6th Cir. 1994)).
106. *Id.* at 1830.
107. *Id.* at 1826–28.
108. *Id.* at 1826.
109. *Id.* at 1828.

extensive information about the billing practices, regulatory compliance, and subcontracting procedures of prime contractors, and frequently are positioned to encounter grounds for an FCA claim based on that information.[110] It may be more lucrative for the subcontractor to forgo the *qui tam* claim and use the potentially damaging information to extract future contracts from the prime contractor.

III. Amendments to the False Claims Act Passed Under the Fraud Enforcement and Recovery Act of 2009

In May of 2009, Congress passed the Fraud Enforcement and Recovery Act[111] in the wake of the subprime-mortgage crisis and subsequent meltdown of the American financial sector.[112] This multifaceted bill increased the government's power to prosecute fraud in the financial services industry by creating new criminal penalties for financial fraud, broadening the types of institutions subject to federal criminal statutes, and providing increased funding for the DOJ to investigate and prosecute fraud. In addition, FERA included a seemingly innocuous section titled "Clarifications to the False Claims Act to Reflect the Original Intent of the Law."[113] This provision, although labeled as a "clarification" of the FCA, actually included a number of amendments that significantly altered the scope of the FCA and overturned a body of case law in which the judiciary had consistently sought to narrow the scope of the FCA.

The primary changes under the 2009 amendments are (1) modifications intended to overturn the Supreme Court's unanimous holding in *Allison Engine* that liability attaches under the FCA only when the defendant intended that his claim be paid by the government,[114] (2) expansion of the scope of liability for "reverse false claims,"[115] (3) increased exposure to liability for alleged retaliation,[116] and (4) remarkably expanded use of the DOJ's investigatory and law enforcement powers to secure information and transfer it to private parties for use in *qui tam* actions when the

110. *Id.*

111. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (to be codified in scattered sections of 18 and 31 U.S.C.).

112. *See* President Barack H. Obama, Remarks on Signing the Fraud Enforcement and Recovery Act of 2009 and Legislation to Prevent Mortgage Foreclosures and Enhance Mortgage Credit Availability (May 20, 2009), *available at* http://www.gpoaccess.gov/presdocs/2009/DCPD-200900390.pdf (indicating that FERA was enacted to help address the ongoing recession); *see also* S. Rep. No. 111-10, at 10 (2009) (justifying passage of FERA as a "response to our current economic crisis").

113. Fraud Enforcement and Recovery Act § 4.

114. *See infra* Part IV.A.

115. *See infra* Part IV.C.

116. *See infra* Part IV.D.

government chooses not to intervene.[117] Part IV of this Comment presents a more detailed explanation of these changes and their ramifications.

IV. RAMIFICATIONS OF THE CHANGES MADE BY THE FRAUD ENFORCEMENT AND RECOVERY ACT AMENDMENTS

A. *Repudiation of the Court's Unanimous Decision in* Allison Engine

Following the *Allison Engine* decision, a noticeable shift occurred in lower court decisions that reflected the holding of the case.[118] First, lower courts relied on the decision in refusing to find liability under the FCA in the absence of evidence showing a direct link between defendants' false statements to a private party and intent that the private party would submit those false claims to the government.[119] In addition, lower courts modified their pleading requirements to require that plaintiffs make additional allegations when pleading an FCA claim in order to survive dispositive motions filed by defendants.[120] These changes made it significantly harder for plaintiffs to successfully commence claims because the additional standards required plaintiffs to plead allegations of defendants' specific intent to make a false statement or certification to the government.[121] Defendants, on the other hand, were more protected from suits that alleged little more than technical regulatory violations.[122] Against this new backdrop, Congress embarked on its "clarification" of the "intent" of the FCA, which lawmakers passed specifically to undo the Court's decision in *Allison Engine* and the D.C. Circuit's similar decision in *Totten*.[123]

The 2009 amendments contained in FERA removed from the FCA language that the Court relied on in *Allison Engine* when ruling that a party must intend for a claim to be paid by the government in order for liability to attach.[124] Before FERA, the FCA

117. *See infra* Part IV.E.

118. *See* Kevin M. Comeau, *False Certification Claims in Light of* Allison Engine *and False Claims Act Amendments Introduced in the 111th Congress*, 18 FED. CIR. B.J. 491, 505–06 (2009).

119. *Id.* at 505.

120. *Id.* at 506–07.

121. *Id.* at 506.

122. *Id.* at 504–05.

123. S. REP. No. 111-10, at 10–12 (2009) (citing the decisions in *Allison Engine* and *Totten* as threats to "[o]ne of the most successful tools for combating waste and abuse in Government spending").

124. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009) (to be codified in scattered sections of 18 and 31 U.S.C.) (eliminating the requirement that the false or fraudulent claim be paid or approved by the government).

applied to any person who:

> (1) knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment or approval; [or]
>
> (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*.[125]

Post-FERA, the statute now applies to any person who:

> (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; [or]
>
> (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . .[126]

There is no longer any requirement that the false record or statement be submitted in order to receive payment "by the government." This change is bolstered by the modification of the definition of a "claim" to include "any request or demand . . . for money or property . . . whether or not the United States has title to the money or property . . . if the money or property is to be spent or used on the government's behalf or to advance a government program or interest."[127] Moreover, this provision applies where the government has provided or will provide "any portion of the money or property."[128]

The real-world impact of these changes is staggering. The combination of new definitions serves to cover virtually any entity that receives money in any form from the federal government, and it exposes any party who deals with such an entity to potential liability under the FCA. Inclusion of a "materiality" requirement in the new language does little to constrain the law because materiality is defined so broadly that it covers any action "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[129] The truly universal reach of the new statutory language becomes apparent when one considers the total number of organizations that receive "any portion" of their money or property "to be spent or used on the government's behalf or to advance a government program," and then considers the number of everyday interactions in which a document, statement, or claim could be made to one of these organizations having "a natural tendency to influence" the payment of money or

125. 31 U.S.C. § 3729(a)(1)–(2) (2006), *amended by* Fraud Enforcement and Recovery Act § 4 (emphasis added).
126. Fraud Enforcement and Recovery Act § 4.
127. *Id.*
128. *Id.*
129. *Id.*

property.[130] By all appearances, the post-2009 FCA has become exactly what the *Allison Engine* Court feared: an all-purpose antifraud statute of panoramic scope.[131]

B. Retroactivity Provision Establishing the Effective Date of the New Language of § 3729(a)(1)(B) “as if enacted on June 7, 2008”

In amending the FCA by enacting FERA, Congress intended to completely nullify the *Allison Engine* decision, which the Senate Judiciary Committee derided for “erroneous interpretations of the law.”[132] The special retroactivity provision of the amendments makes the specific wording changes of § 3729(a)(1)(B) retroactive to two days before delivery of the Court’s decision in *Allison Engine* interpreting the prior version of the FCA.[133] The amendment also specifically applies to “all claims under the False Claims Act . . . that are pending on or after that date.”[134]

C. Increased Scope of the “Reverse False Claims” Provisions

The 2009 amendments significantly broaden the potential scope of liability under the “Reverse False Claims” provision of the FCA.[135] This provision applies when the alleged misconduct is calculated to avoid payment of an obligation *to* the government, rather than a fraudulent attempt to obtain payment *from* the government. Under the prior version, liability attached when a party “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.”[136] The amended statute increases the scope of liability through an additional provision imposing liability if a party “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”[137] The language of the amendment is sufficiently broad to cover almost any conceivable scenario in which the government can argue that a party has knowingly retained funds or property belonging to the government. Furthermore, even the potentially limiting “obligation-to-pay” language is blunted by the broad definition of “obligation” as “an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar

130. *Id*.
131. *See supra* notes 64–68 and accompanying text.
132. S. REP. No. 111-10, at 10 (2009).
133. *See* Fraud Enforcement and Recovery Act § 4 (making relevant sections of the Act retroactively effective on June 7, 2008); Allison Engine Co. v. United States *ex rel.* Sanders, 128 S. Ct. 2123 (2008) (decided on June 9, 2008).
134. Fraud Enforcement and Recovery Act § 4.
135. *Id.*
136. 31 U.S.C. § 3729(a)(7) (2006) (modified by Fraud Enforcement and Recovery Act § 4).
137. Fraud Enforcement and Recovery Act § 4.

relationship, from statute or regulation, or from the retention of any overpayment."[138] The expansion of liability under the terms of this provision opens up a new realm of litigation, especially in the area of Medicaid claims, because hospital billing systems may cause systematic overcharges and internal accounting processes may result in the retention of prepaid government funds.[139]

D. Expansion of the Anti-Retaliation Provisions to Cover Parties and Activities Not Previously Included in the Protections of the False Claims Act

As the *Hughes* Court observed, it is not insignificant to expose entirely new classes of people to liability under the FCA when no liability previously existed.[140] Under the 2009 amendments, however, antiretaliation provisions have been expanded to allow more parties than ever to allege retaliation, and to allow these parties to lodge their allegations *against* more parties than ever. In order to mitigate potential risks to a *qui tam* plaintiff that are inherent in coming forward with allegations against his company, the FCA provides a statutory basis for relators to sue their employers if they suffer adverse actions as a result of bringing a *qui tam* suit.[141] Prior to the 2009 amendments, this right extended to "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against . . . by his or her employer because of lawful acts . . . in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action."[142] The 2009 amendments modified this language and provided that "[a]ny *employee, contractor, or agent* shall be entitled to all relief necessary . . . if that employee, contractor, or agent is *discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment* because of lawful acts."[143] Not only does the new language extend protection to contractors and agents, it also conspicuously removes the requirement that retaliatory acts be committed "by [the] employer"[144] and instead requires only that the *qui tam* participant experience some negative repercussions "in the terms and conditions of employment."[145] The amended statute also broadens the language of the previous version

138. *Id.*
139. *See* Jonathan Diesenhaus & Jessica Ellsworth, *What Hospitals Need to Know About Recent Changes to False Claims Act*, AHA NEWS, June 8, 2009, at 7.
140. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997).
141. 31 U.S.C. § 3730(h) (2006) (modified by Fraud Enforcement and Recovery Act § 4).
142. *Id.*
143. Fraud Enforcement and Recovery Act § 4 (emphasis added).
144. 31 U.S.C. § 3730(h).
145. Fraud Enforcement and Recovery Act § 4.

to prohibit retaliation for any act done “in furtherance of other efforts to stop [one] or more violations of this subchapter.”[146] Under the new language, any employee, agent, or contractor of a company who participates in virtually any way to further a *qui tam* action has access to the provisions of the FCA to bring a suit for retaliation against any other person in the company, provided that the retaliatory actions had one of the listed negative effects on the conditions of employment.

E. Increase in the Prosecutorial Conflict of Interest Inherent in Qui Tam *Actions*

As discussed above, the potential tension between the private interests of the plaintiff in a *qui tam* case and the interest of the public creates the opportunity for conflict.[147] The 2009 amendments, combined with a new DOJ rule published in March of 2010, increase this potential by greatly broadening the DOJ’s authority to investigate false claims allegations, and by allowing the federal government to turn over resulting information to a private plaintiff if the government decides not to file suit or intervene.[148] The FCA allows the government to make a “civil investigative demand” (“CID”) in connection with the investigation of a false claims allegation.[149] CIDs may be issued before commencement of a formal civil action and before the government decides whether to intervene in the case.[150] Furthermore, a CID may be issued to anyone whom the government has “reason to believe”[151] might be “in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.”[152]

Prior to the passage of FERA, the authority to issue CIDs was strictly reserved to the Attorney General.[153] Under the amended FCA, however, the Attorney General may delegate this authority.[154] Less than a year after the passage of the FERA, the DOJ published a new rule allowing delegation of this authority to “branch directors, heads of offices, and United States Attorneys.”[155] Therefore, the

146. *Id.*
147. *See supra* Part II.B.
148. Redelegation of Authority of Assistant Attorney General, Civil Division, to Branch Directors, Heads of Offices and United States Attorneys in Civil Division Cases, 75 Fed. Reg. 14,070 (Mar. 24, 2010) (to be codified at 28 C.F.R. pt. 0); Fraud Enforcement and Recovery Act § 4.
149. 31 U.S.C. § 3733(a)(1) (2006) (modified by Fraud Enforcement and Recovery Act § 4).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* (stating that “the Attorney General may not delegate the authority to issue civil investigative demands under this subsection”).
154. Fraud Enforcement and Recovery Act § 4.
155. Redelegation of Authority of Assistant Attorney General, Civil Division, to Branch Directors, Heads of Offices and United States Attorneys in Civil

combined effect of the 2009 amendments and the 2010 DOJ rule is that the offices of the U.S. Attorneys in every state now have the power to issue CIDs. This drastic expansion of delegated authority will likely result in increased use of the CID in a broader range of cases.[156]

In addition, the 2009 amendments also provide that "[a]ny information obtained by the Attorney General . . . under this section may be shared with any [*qui tam*] relator if the Attorney General . . . determine[s] it is necessary as part of any false claims act investigation."[157] It is unclear under the new statutory language whether the Attorney General must first obtain consent from the party who initially provided the information. The amended § 3733(a)(1) does not expressly restrict the Attorney General's ability to share information without consent, although other provisions limit the authority of the designated custodian to release information without consent.[158] In any case, this new freedom to share information increases the potential conflict of interest inherent in the *qui tam* model. In essence, the government is free to use its CID powers to obtain information, prior to the commencement of any action and prior to deciding whether to intervene, and then may freely share the fruits of this discovery with the private plaintiff for use against the private defendant if the government chooses not to intervene in the case. The result is somewhat counterintuitive; proponents justify the *qui tam* model as conserving prosecutorial resources by inducing private citizens to bring information to the government, but in these situations the government actually expends resources to provide information to the private citizen. The amended FCA conserves the resources of the private parties by allowing them access to the law enforcement powers of the government. These powers should be reserved only for cases in which the government decides to intervene, and the information obtained by the government during the process of making the intervention decision should not be shared with the private parties who decide to continue the action independently.

CONCLUSION

While the recovery of fraudulently obtained government funds is the laudable and much-publicized goal of the amended FCA, the specter of *qui tam* litigation under the newly amended provisions of

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Division Cases, 75 Fed. Reg. 14,070 (Mar. 24, 2010) (to be codified at 28 C.F.R. pt. 0).

156. *See* Roderick L. Thomas & Mark B. Sweet, Civil Investigative Demands—A New Rule Expands Prosecutors' Power to Depose Witnesses and Issue Interrogatories in False Claims Act Investigations, (Mar. 24, 2010), http://www.wileyrein.com/publications.cfm?sp=articles&id=5976.

157. Fraud Enforcement and Recovery Act § 4.

158. *See, e.g.*, 31 U.S.C. § 3733(i)(2)(C) (2006).

the FCA presents risks for any organization that receives funding from the federal government. As the scope of potential liability for false claims infractions increases, more and more potential defendants will recognize the risks and take steps to reduce their exposure to burdensome litigation.[159] While some of these steps will undoubtedly have beneficial results, for example, identifying potentially fraudulent behavior within the organizations, implementation of these extensive systems of compliance checking also will bring increased operational costs to the defendants.[160] These operational costs, along with the staggering costs of defending *qui tam* actions that may or may not be meritorious, are not presented to the public for consideration as part of the overall financial impact of the FCA. Unfortunately, these costs are a reality of the system and must be borne by someone. Currently, the healthcare industry is the major target of FCA actions,[161] even as healthcare costs are skyrocketing and consumers are bearing more and more of these costs either directly or through insurance premiums.[162]

Although the government has a valid interest in limiting improper uses of taxpayer money and recovering when fraud has occurred, federal law should also seek to balance the interests in combating fraud against the costs imposed on consumers in the process. Private organizations targeted by *qui tam* actions have no choice but to find ways to recover or externalize their costs, and this recovery will invariably involve an increase in the prices being charged for services, either to private-sector consumers, to the government itself, or both. In determining the scope and application of statutes like the FCA, Congress should not focus only on maximizing all possible means of recovery, regardless of the ultimate costs to private parties, but rather should consider the

159. *See, e.g.*, Charles R. Ching, Harry R. Silver & Laura Laemmle-Weidenfeld, *In-House Counsel Beware: The False Claims Act Might Impact Your Business*, ACC DOCKET, Nov. 2009, at 56, 65 (noting an allegation that a company failed to establish effective compliance programs is sufficient to show "reckless disregard" for the falsity of claims to support liability under the FCA).

160. *See id.* at 65–66. The components the authors suggest for establishing an effective compliance program as a defense to FCA claims include (1) written policies and procedures, (2) a compliance officer and committee, (3) training and education for employees, (4) open communication channels with confidentiality and non-retaliation policies, (5) effective internal monitoring and auditing, (6) disciplinary guidelines for enforcing standards, and (7) a quick response to detected problems. *Id.* Such extensive measures, although undoubtedly effective and beneficial, can be very costly in both money and manpower.

161. FRAUD STATISTICS, *supra* note 86. In 2008, the DOJ opened 375 *qui tam* "new matters" of which 228 fell under the Department of Health and Human Services. *Id.* The DOD accounted for 46 new matters, and the remaining 101 were categorized as "other." *Id.*

162. Duke Helfand, *Rising Health Costs Trap Many; Millions Who Need Individual Coverage Have One Bad Choice: Pay Up or Go Without*, L.A. TIMES, Feb. 20, 2010, at A1.

guidance of the courts and scholars in limiting the scope of the statute and devising more efficient ways to protect the rights of potential defendants from excessive risk and litigation costs while still enjoying the significant power available through the extensive reach of the *qui tam* system.

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