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## Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act

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# Open the Door, Not the Floodgates: Controlling *Qui Tam* Litigation Under the False Claims Act<sup>†</sup>

Christopher M. Alexion\*

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### I. Introduction

David Siller and Chen-Chen Wang were whistleblowers. Both men became aware of ongoing fraud in the course of their employment, and both alerted the authorities. Yet because of the sharply contrasting approaches taken by different federal circuits, one of these whistleblowers was rewarded, and one went away empty-handed.<sup>1</sup>

David Siller worked for a health care products distributor in San Antonio, Texas. Siller learned that a large manufacturer was overcharging the government for its products and brought a *qui tam*<sup>2</sup> whistleblower action under the False Claims Act (FCA).<sup>3</sup> The district court dismissed Siller's claim because the allegations in Siller's suit had already come to light in a previous lawsuit against the manufacturer. On appeal, however, the Fourth Circuit reversed, finding that because Siller had independent knowledge of the fraudulent activities, and because Siller had disclosed his information to the government before filing suit, he qualified as an "original source" under the FCA and thus could recover damages.

Chen-Chen Wang was not so fortunate. Wang, a mechanical engineer for the FMC Corporation (FMC), noticed that FMC was defrauding the government on several defense contracts. Wang notified the U.S. government and filed suit under the FCA. The district court dismissed Wang's claim, and the Ninth Circuit

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1. The following scenarios are based on *U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994) (holding that "a *qui tam* plaintiff need not be a source to the entity that publicly disclosed the allegations on which the *qui tam* action is based in order to be an original source under section 3730(e)(4)(B)") and *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) (holding that "[b]ecause he had no hand in the original public disclosure of [fraud], Wang's claim . . . is blocked by the jurisdictional bar of section 3730(e)(4)(A)"). Both cases will be discussed in further detail. See *infra* text accompanying notes 126–69 (discussing one prong of a three-way circuit split).

2. The phrase "*qui tam*" is the legal shorthand for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own," and the phrase dates from at least the time of English jurist Sir William Blackstone. See *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000) (defining the term).

3. See An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, § 4, 12 Stat. 696 (1863) (current version at 31 U.S.C.A. §§ 3729–33 (West 2011)) (providing for civil actions for false claims).

affirmed the dismissal. Unlike the Fourth Circuit, the Ninth Circuit read a requirement into the FCA that when allegations of fraud have been made public, a *qui tam* plaintiff cannot recover damages unless the plaintiff was a *source* of the public disclosure. Since Wang knew of the fraud but did not file his complaint until others had publicized the corporation's fraudulent actions, the Ninth Circuit held that the FCA's "public disclosure" provision barred Wang's suit.

Siller and Wang are examples of *qui tam* relators—whistleblowing private citizens who discover that the federal government is being defrauded and then file suit under the FCA. The FCA, which dates back to the Civil War, allows relators like Siller and Wang to share in the recovery of damages from dishonest contractors.<sup>4</sup> Since the FCA's enactment, Congress and the federal courts have sought to prevent both the under-enforcement and the abuse of the statute, resulting in a tumultuous history that has swung between both extremes.<sup>5</sup>

Both Siller and Wang encountered the FCA's public disclosure bar and its original source exception. Yet because of the contrasting interpretations the Fourth and Ninth Circuits applied, Siller's and Wang's suits came to dramatically different conclusions. This Note reviews these dueling interpretations, as well as changes made to the FCA by the Patient Protection and Affordable Care Act (PPACA).<sup>6</sup> This Note argues that the courts should narrowly construe the PPACA's amendments in order to achieve the "golden mean" between valuable *qui tam* actions and parasitic, opportunistic litigation.<sup>7</sup> Specifically, under the amendments, the term *original source* should apply to a relator who has either informed the government of his allegations before such information becomes public, or, in cases where the allegations are already in the public domain, the relator has valuable information which substantially assists the government.

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4. See *infra* text accompanying notes 33–35 (discussing the background of the FCA).

5. See *infra* text accompanying notes 36–78 (noting various ways courts have handled the FCA).

6. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (providing for reforms to the U.S. health care system).

7. See *infra* text accompanying notes 218–59 (discussing the 2010 amendments).

Part II examines the history of the FCA from its inception until the crucial 1986 amendments to the statute.<sup>8</sup> Part III reviews the three-way circuit split over the proper interpretation of *original source* that developed after the 1986 amendments, as well as the PPACA amendments.<sup>9</sup> Finally, Part IV considers the amendments made by the PPACA, using empirical evidence and the legislative history of similar provisions to argue that an original source under the FCA is a relator who has disclosed his information to the government prior to any public disclosure, or who has knowledge of fraud that would substantially assist the government's case.<sup>10</sup>

## II. Background of the False Claims Act

Congress sought to address fraudulent schemes like the ones David Siller and Chen-Chen Wang encountered by enacting the False Claims Act,<sup>11</sup> a statute that allows charges to be brought against government contractors who submit false claims for payment to the federal government.<sup>12</sup> This section first explains the origin and mechanics of the FCA.<sup>13</sup> Next, this section reviews the extremes of abuse and disuse between which *qui tam* actions under the FCA have historically swung.<sup>14</sup> Finally, this section considers key amendments to the FCA enacted in 1986<sup>15</sup> and 2010.<sup>16</sup>

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8. See *infra* text accompanying notes 11–89 (discussing the FCA's history).

9. See *infra* text accompanying notes 90–217 (discussing the circuit split).

10. See *infra* text accompanying notes 218–59 (arguing for a narrow interpretation of the new definition).

11. See An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, § 4, 12 Stat. 696 (1863) (current version at 31 U.S.C.A. §§ 3729–33 (West 2011)) (providing for civil actions for false claims).

12. *Id.*

13. See *infra* text accompanying notes 17–32 (discussing how the FCA works).

14. See *infra* text accompanying notes 36–78 (noting the extremes of over-enforcement and disuse).

15. See *infra* text accompanying notes 79–203 (discussing the crucial 1986 amendments to the FCA).

16. See *infra* text accompanying notes 204–17 (discussing the 2010 amendments to the FCA).

*A. The False Claims Act*

The FCA is one of the fastest-growing areas of federal litigation and is the federal government's primary tool for catching companies who submit false claims to government agencies or programs.<sup>17</sup> The stakes are high: In 2010, the United States Department of Justice, Civil Division, reported \$3,080,446,526 in total fraud-related settlements and judgments.<sup>18</sup> These judgments, of course, do not reveal the cost to the government of *undetected* fraud. Further, the Senate Judiciary Committee, in enacting the crucial 1986 amendments to the False Claims Act, also noted the *non-monetary* harms resulting from fraud being perpetrated on the federal government:

[Fraud] erodes public confidence in the Government's ability to efficiently and effectively manage its programs. Even in the cases where there is no dollar loss—for example, where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined. A more dangerous scenerio [sic] exists where in the above example the part *is* defective and causes not only a serious threat to human life, but also to national security.<sup>19</sup>

In order to combat fraud, the FCA relies substantially<sup>20</sup> on *qui tam* actions, which allow a private citizen to bring suit on behalf of the federal government and to recover damages.<sup>21</sup> The

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17. See Joel D. Hesch, *Understanding the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the Supreme Court's Ruling in Rockwell v. United States*, 7 DEPAUL BUS. & COM. L.J. 1, 1 (2008) (noting that the FCA is "the federal government's primary anti-fraud tool for recovering ill-gotten gains from companies submitting false claims for payments to more than twenty government agencies or programs, such as Medicare and the military").

18. U.S. Dep't of Justice, *Fraud Statistics—Overview, October 1, 1987–September 30, 2010* (Jan. 10, 2011), [www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf) (last visited Jan. 26, 2012) [hereinafter *Fraud Statistics*] (on file with the Washington and Lee Law Review).

19. S. REP. NO. 99-345, at 2 (1986) (citation omitted).

20. See *id.* at 2 (noting that "the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds").

21. See 31 U.S.C.A. § 3730(d)(1) (West 2011) (providing that plaintiffs "shall . . . receive at least 15 percent but not more than 25 percent of the

FCA recognizes that the Attorney General of the United States has a responsibility to diligently investigate a violation under the statute, and that if the Attorney General finds that a person has violated or is violating the FCA, the Attorney General may prosecute the offender himself.<sup>22</sup> Nevertheless, a private citizen “may bring a civil action for a violation of [FCA] section 3729 for the person and for the United States Government.”<sup>23</sup> The action is brought in the name of the government and “may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”<sup>24</sup> The FCA also requires that a “copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.”<sup>25</sup>

The complaint must be originally filed in camera and is not disclosed to the defendant or the public for sixty days unless the court orders otherwise.<sup>26</sup> The federal government, however, may elect to intervene, and, if it does, the government must “proceed with the action within 60 days after it receives both the complaint and the material evidence and information.”<sup>27</sup> During this sixty-day period, unless the government receives an extension, it must “proceed with the action, in which case the action shall be conducted by the Government,” or “notify the court that it declines to take over the action.”<sup>28</sup> If this is the case, the private *qui tam* plaintiff “bringing the action shall have the right to conduct the action.”<sup>29</sup> At that point, only the government may

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proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action”).

22. *See id.* § 3730(a) (providing that if the Attorney General “finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person”).

23. *Id.* § 3730(b)(1).

24. *Id.*

25. *Id.* § 3730(b)(2).

26. *See id.* (providing that the complaint “shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders”).

27. *Id.*

28. *Id.* § 3730(b)(4).

29. *Id.* § 3730(b)(4)(B).

intervene or bring a related action based on those specific facts.<sup>30</sup> As the D.C. Circuit Court of Appeals noted in *United States ex rel. Stinson v. Prudential Insurance Co.*,<sup>31</sup> the *qui tam* plaintiff may proceed unless information on which the plaintiff's suit relies triggers one of the FCA's jurisdictional bars.<sup>32</sup>

### *B. The FCA's Early History: From Disuse to Abuse*

Congress originally enacted the FCA during the Civil War, allowing private citizens to bring suit on the government's behalf.<sup>33</sup> Congress wanted to use "a rogue to catch a rogue"<sup>34</sup> by inducing informers to betray their coconspirators, and the FCA's *qui tam* provisions encourage relators to come forward by allowing them to receive from 15% to 25% of the recovery or settlement.<sup>35</sup>

The FCA, however, was not heavily employed until the 1930s and 1940s, when the New Deal's increase in government spending created the opportunity for contractors to defraud the government.<sup>36</sup> Unfortunately, this renaissance of the FCA fostered parasitic litigation, with one of the most egregious

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30. See *id.* § 3730(b)(5) (providing that no person "other than the Government may intervene or bring a related action based on the facts underlying the pending action").

31. See *U.S. ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1152 (3d Cir. 1991) (noting that a claim may proceed unless "information on which the claim is based triggers one of the jurisdictional bars contained in section 3730(e)").

32. See *id.* (noting that a claim may proceed unless "information on which the claim is based triggers one of the jurisdictional bars contained in section 3730(e)").

33. Act of March 2, 1863, ch. 67, § 4, 12 Stat. 698 (1863) (current version at 31 U.S.C.A. §§ 3729–31 (West 2011)).

34. *U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679 (D.C. Cir. 1997) (citing CONG. GLOBE, 37TH CONG., 3D SESS. 955–56 (1863)). The opinion incorrectly cites pages 955–96.

35. See 31 U.S.C.A. § 3730(d)(1) (West 2011) (noting that plaintiff shall "receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim").

36. See *Findley*, 105 F.3d at 679 (noting that "increased government spending opened up numerous opportunities for unscrupulous government contractors to defraud the government").



examples being *United States ex rel. Marcus v. Hess*.<sup>37</sup> In that case, the plaintiff, Marcus, claimed that several electrical contractors had defrauded the government.<sup>38</sup> Marcus brought a *qui tam* action under the FCA,<sup>39</sup> alleging that the contractors had an informal practice of averaging their prospective bids.<sup>40</sup> A contractor chosen by the others would then submit a bid equal to that average but lower than the other contractors' bids.<sup>41</sup> Hence, the government was deceived into paying more for services than it would have paid otherwise.

Marcus won in the district court.<sup>42</sup> The Third Circuit, however—taking a strictly literal view of the FCA—reversed.<sup>43</sup> The Third Circuit emphasized that prior to Marcus's action, the defendants had already faced an indictment for defrauding the government and had pled no contest.<sup>44</sup> The Third Circuit agreed with respondents' contention that Marcus had received his information, not from independent investigation, but from the existing indictment; hence he should not have been allowed to proceed with his *qui tam* action.<sup>45</sup>

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37. See U.S. *ex rel. Marcus v. Hess*, 317 U.S. 537, 553 (1943) (holding that *qui tam* relator could proceed with his suit and reversing appellate court).

38. See *id.* at 539 (noting that plaintiff charged “respondents with defrauding the United States through the device of collusive bidding”).

39. See *id.* (“[T]he petitioner in the name of the United States and on his own behalf brought this action under [§] 5438 (18 U.S.C.A. [§§] 80, 82–86), and [§§] 3490–3493 (31 U.S.C. [§§] 231–234, 31 U.S.C.A. [§§] 231–234), of the Revised Statutes.”).

40. See *id.* n.1 (describing that the “pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant”).

41. See *id.* (“An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates.”).

42. See *id.* at 540 (noting that “verdict and judgment for \$315,000 were rendered against the defendants, of which \$203,000 was for double damages and \$112,000 was an aggregate of \$2,000 sums for 56 violations”).

43. See *id.* at 540–41 (noting that the Third Circuit construed the statute “with ‘utmost strictness’ on the premise that *qui tam* or informer actions ‘have always been regarded with disfavor’ by the courts”).

44. See *id.* at 545 (noting that before the “filing of this action these respondents were indicted for defrauding the government and on a plea of *nolo contendere* were fined \$54,000”).

45. See *id.* (noting that “the petitioner received his information not by his own investigation, but from the previous indictment” and hence the *qui tam* statute “should not under such circumstances be construed as permitting suit by the petitioner”).

The United States Supreme Court, in reversing the lower court, rejected both of these lines of reasoning. The Court found that not only did the statute apply in this instance<sup>46</sup> but the plaintiff's lack of independent knowledge of fraud did not bar his suit: "Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed."<sup>47</sup> The Court handled the statute strictly, noting that the text of the FCA was devoid of any limiting qualifications as to who may bring a private action.<sup>48</sup> The Court also pointed out that the FCA's sponsor in the Senate explicitly would have allowed even a district attorney, who would most likely gain all knowledge of a fraud from his official position, to pursue a *qui tam* action.<sup>49</sup> The Court rejected the government's policy arguments, finding that the government was relying on what Congress should have done, not what Congress did; the Court protested that its hands were tied by the statutory language.<sup>50</sup> The Court believed that, while the government's contentions had teeth, these arguments were best addressed to Congress—it was not the Court's job to change the wording of the statute.<sup>51</sup> For the Court, the fact that Congress passed this version of the FCA was clear and convincing evidence that Congress "concluded that other considerations of policy outweighed those now emphasized by the government."<sup>52</sup>

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46. *See id.* ("We conclude that these acts are covered by the statute under consideration.").

47. *Id.*

48. *See id.* at 546 ("'Suit may be brought and carried on by any person,' says the Act, and there are no words of exception or qualification such as we are asked to find.").

49. *See id.* (noting that the "sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position" could file).

50. *See id.* at 546–47 ("The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did.").

51. *See id.* at 547 ("[T]he trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.").

52. *Id.*

*Marcus* fostered a dramatic increase in “parasitic” *qui tam* litigation, in which relators simply copied indictments or congressional investigations already in the public domain.<sup>53</sup> Such suits served to diminish “the government’s ultimate recovery without contributing any new information.”<sup>54</sup>

### C. *The Pendulum Swings Again: From Abuse to Disuse*

In the wake of the *Marcus* decision, Congress took up the Supreme Court’s invitation and amended the FCA to prune back excessive lawsuits.<sup>55</sup> Thus, the FCA, as amended in 1943, barred *qui tam* suits that were “based upon evidence or information in the possession of the United States . . . at the time such suit was brought.”<sup>56</sup>

Yet this correction of the opportunistic era represented by the *Marcus* decision sent the pendulum swinging too far in the other direction.<sup>57</sup> This era is perhaps best exemplified by the Seventh Circuit’s decision in *United States ex rel. Wisconsin v. Dean*.<sup>58</sup> In *Dean*, the State of Wisconsin brought charges against Alice Dean, a medical doctor, for submitting false claims for Medicaid reimbursements, and a state court found Dean guilty.<sup>59</sup>

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53. See U.S. *ex rel.* Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 679–80 (D.C. Cir. 1997) (noting that litigation “surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations”).

54. *Id.* at 680.

55. See *id.* (noting that Congress “finally took action to prevent such piggy-back lawsuits”).

56. *Id.* (citing Act of December 23, 1943, 57 Stat. 608, recodified in 31 U.S.C. § 3730(b)(4) (1982) (superseded)).

57. See Todd J. Canni, *Who’s Making False Claims, the Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require That All Qui Tam Plaintiffs Possess Direct Knowledge*, 37 PUB. CONT. L.J. 1, 7 (2007) (“Where the original version of the FCA opened the door too wide, inviting all types of speculative suits, Congress ultimately realized that the 1943 amendments effectively shut the door on *qui tam* suits.”).

58. See U.S. *ex rel.* Wis. v. Dean, 729 F.2d 1100, 1106–07 (7th Cir. 1984) (holding that a state is not entitled to an exemption to the FCA’s requirements even when the state is under an obligation to report information to the federal government).

59. See *id.* at 1102 (“Defendant Alice R. Dean is a medical doctor who at

Subsequently, the Wisconsin Departments of Justice and Health and Social Services brought suit in federal district court against Dean under the FCA.<sup>60</sup> The State of Wisconsin's complaint alleged that Dean had submitted approximately 912 fraudulent claims for reimbursement over roughly a two-year period, and the suit sought compensatory damages, punitive damages, and costs.<sup>61</sup> The Seventh Circuit, after laying out the requirements for *qui tam* actions under the FCA, noted that relators may maintain a *qui tam* action—even though the government declines to join—unless it appears that the relator's suit is based upon evidence or information the United States (or one of its agencies) already possesses at the time the suit is brought.<sup>62</sup>

The federal government declined to join the action,<sup>63</sup> and the district court found that information about Dean's fraudulent claims was sufficiently in the government's possession; the federal government was already able to adequately investigate the case and make a decision about whether to prosecute.<sup>64</sup> Yet the district court, looking more toward the history and goals of the FCA, interpreted the FCA as allowing Wisconsin's action to proceed.<sup>65</sup> In reaching this conclusion, the district court "determined that the State of Wisconsin could maintain a *qui tam* action when the State *was the source* of 'essential information'

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one time practiced psychiatry in the Milwaukee area. In 1980, the defendant was found guilty in state court of making fraudulent claims for Medicaid reimbursements in connection with her medical practice.”).

60. *See id.* (noting that the government “filed suit in federal district court against the defendant under the False Claims Act”).

61. *See id.* (noting that the suit “alleged that the defendant submitted approximately 912 fraudulent claims for reimbursement for psychiatric services between March 1974 and February 1976” and demanded “compensatory damages on a pendent claim, \$150,000 punitive damages, and costs”).

62. *See id.* (noting that plaintiff “may maintain the action even though the government declines to join unless [it appears] that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought”).

63. *See id.* (“The United States declined to join this action.”).

64. *See id.* at 1103 (noting that the district court “held that ‘the information upon which the instant case is based was sufficiently in the possession of the United States to enable the federal government to adequately investigate the case and make a decision whether to prosecute’”).

65. *See id.* (noting that the court “interpreted the legislative history of section 232(C) and denied [Dean’s] motion to dismiss for lack of subject matter jurisdiction”).

and when the State was required to provide such information to the federal government as part of its participation in the Medicare reimbursement program.”<sup>66</sup> The district court reasoned that a contrary result would render the FCA ineffective.<sup>67</sup>

The Seventh Circuit reversed.<sup>68</sup> The court agreed that the federal government possessed adequate information as contemplated by the FCA,<sup>69</sup> and thus any justification for allowing the State’s *qui tam* action to proceed must be grounded in an exception to the FCA’s plain language.<sup>70</sup> Substantiating such an exception would require “a ‘clearly expressed legislative intention’ contrary to that language.”<sup>71</sup> The district court concluded that the legislative history of the FCA did justify such an exception, but the Seventh Circuit sharply disagreed.<sup>72</sup> The Seventh Circuit noted that the various courts which reviewed the FCA’s legislative history since the jurisdictional bar was added in 1943 all refused to find an exception.<sup>73</sup> The court also pointed out that while Congress’s immediate concern in enacting the 1943 amendment was to combat parasitic litigation, the language and effect of the 1943 amendment was, in fact, much broader.<sup>74</sup> Further, the amendment itself was

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66. *Id.* (emphasis added).

67. *See id.* (noting that a contrary result would “frustrate the purpose of Congress in protecting the United States against false claims”).

68. *See id.* (“We accepted jurisdiction and now reverse.”).

69. *See id.* at 1104 (noting that the “district court . . . properly determined that the government possessed adequate information as contemplated by section 232(C)”).

70. *See id.* (describing a need for an “exception [that would] overcome the plain language of the False Claims Act”).

71. *Id.* (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)).

72. *See id.* (noting that the district court “concluded that the legislative history of the Act was clear enough to overcome the statute’s unambiguous language” but that “[o]ur own review of the legislative history leads us to the opposite conclusion”).

73. *See id.* (finding that reviewing courts “all held that no exception exists”).

74. *See id.* (noting that while “Congress’s immediate concern in enacting the 1943 amendment was to do away with the ‘parasitical suits’ allowed by [*Marcus*], the language and effect of the 1943 amendment in fact is much broader”).

the result of a compromise between very different remedies proposed in each House of Congress. The House of Representatives passed a bill to completely abolish *qui tam* suits. The Senate, on the other hand, sought to allow *qui tam* actions if they were based either upon information not in the possession of the United States or upon information in the possession of the United States of which the *qui tam* plaintiff was the source. The compromise amendment allowed *qui tam* actions that the United States did not join to continue if the information was not in the possession of the United States at the time the action was brought, thereby incorporating *only the first part* of the original Senate proposal.<sup>75</sup>

In other words, while the 1943 amendment countered parasitic lawsuits by establishing a jurisdictional bar for cases in which the United States government already possessed the information in question, the amendment provided no exception for cases in which the *qui tam* relator was himself (or itself) the *original source* of such information. Like the Supreme Court in *Marcus*,<sup>76</sup> the *Dean* court handled the FCA very cautiously, reasoning that only rarely should a court find an exception to a statute when Congress has not explicitly provided one.<sup>77</sup> The court refused to read the Social Security Act as providing an exception to the FCA and insisted that if Wisconsin “desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption.”<sup>78</sup>

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75. *Id.* at 1104–05 (emphasis added).

76. It is interesting that in providing its holding, the Seventh Circuit in fact cited *Marcus*. See *id.* at 1106–07 (“As the Supreme Court stated in *United States ex rel. Marcus v. Hess* . . . when it refused to create the jurisdictional bar that Congress later provided by the 1943 amendment to the False Claims Act . . .”).

77. See *id.* at 1106 (“Only in the rarest instance will a court find an exception to a statute when Congress has not directly amended that statute.”) (citing *Galvan v. Hess Oil Virgin Islands Corp.*, 549 F.2d 281, 288 (3d Cir. 1977)).

78. *Id.*

*D. Striking a Balance: The 1986 Amendments*

In 1986, Congress provided such an exemption.<sup>79</sup> The 1986 amendments to the FCA included the “original source exception,” which changed the FCA to read:

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action *is an original source of the information*.<sup>80</sup>

If the 1943 amendment corrected decisions like *Marcus*, then the 1986 changes sought to remedy decisions like *Dean*.<sup>81</sup> According to the Report from the Senate Judiciary Committee, the amendments’ purpose was to strengthen the federal government’s ability to detect and combat fraud.<sup>82</sup> The Senate lamented the recent spate of fraud cases<sup>83</sup> and pointed out that such a flood of fraudulent activity necessitated modernization of the FCA.<sup>84</sup>

The 1986 amendments sought not only to equip the government with better tools but also to encourage individuals with knowledge of fraud to alert the government.<sup>85</sup> In the face of sophisticated and widespread fraud, the Committee believed that “only a coordinated effort of both the government and the citizenry [would] decrease this wave of defrauding public

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79. See 31 U.S.C.A. § 3730(e)(4)(A) (West 2011) (providing for civil actions for false claims).

80. *Id.* (emphasis added).

81. See S. REP. NO. 99-345, at 13 (1986) (referring to the “unfortunate result of the *Wisconsin v. Dean* decision”).

82. See *id.* at 1 (describing a need “to enhance the Government’s ability to recover losses sustained as a result of fraud against the Government”).

83. See *id.* at 2 (noting that “the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe”).

84. See *id.* (noting that the “growing pervasiveness of fraud” necessitated modernization of the FCA in order “to make the statute a more useful tool against fraud in modern times”).

85. See *id.* (describing the amendments’ purpose “not only to provide the Government’s law enforcers with more effective tools” but to “encourage any individual knowing of Government fraud to bring that information forward”).

funds.”<sup>86</sup> As the First Circuit noted in *United States ex rel. Findley v. FPC-Boron Employees’ Club*, the 1986 amendments sought to promote proper *qui tam* suits while discouraging opportunistic, parasitic litigation.<sup>87</sup> The amendments repealed the “government knowledge” jurisdictional bar and replaced it with a provision that allows suits involving allegations of fraud that are already public when the *qui tam* relator is an original source of the information.<sup>88</sup> Ironically, the *Findley* court noted, the 1986 amendments themselves have spawned new litigation and even circuit splits over the meanings of the amendments’ key terms, such as *original source*, *direct and independent*, and *information*.<sup>89</sup> This Note turns next to the resulting circuit split regarding the definition of *original source*.

### III. Three-Way Circuit Split and Statutory Developments

After Congress enacted the 1986 amendments to the FCA, a split developed among the United States Courts of Appeals over the proper way to interpret the original source exception to the FCA’s public disclosure bar for *qui tam* actions.<sup>90</sup> As will be discussed below, the First and Fourth Circuits took what may be termed the “permissive approach,”<sup>91</sup> while the Second and Ninth Circuits took a much more restrictive approach.<sup>92</sup> In contrast to both of these views, the D.C. and Sixth Circuits staked out a

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86. *Id.*

87. *See* U.S. *ex rel.* *Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 680 (D.C. Cir. 1997) (“After ricocheting between the . . . permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress . . . sought to achieve ‘the golden mean between adequate incentives . . . and discouragement of opportunistic plaintiffs . . .’”).

88. *See id.* at 681 (noting that the amendments “repealed the ‘government knowledge’ jurisdictional bar” and allowed an exception when “the person bringing the action is an original source of the information”).

89. *See id.* (noting that the amendments “have led to extensive litigation and to circuit splits concerning the meaning of the words ‘based upon,’ ‘public disclosure,’ ‘allegations or transactions,’ ‘original source,’ ‘direct and independent knowledge’ and ‘information’”).

90. *See* U.S. *ex rel.* *Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 22 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3454 (2010) (noting the circuit split).

91. *See infra* Part III.A (noting the permissive approach).

92. *See infra* Part III.B (discussing the restrictive view).



middle ground.<sup>93</sup> Finally, the Patient Protection and Affordable Care Act of 2010<sup>94</sup> altered the definition of *original source* under the FCA.<sup>95</sup>

#### A. Permissive Approach

In *United States ex rel. Duxbury v. Ortho Biotech Products, L.P.*,<sup>96</sup> the First Circuit considered a *qui tam* suit brought against a pharmaceutical distributor, Ortho Biotech Products, L.P. (OBP).<sup>97</sup> The *qui tam* relators alleged that OBP violated the FCA in unlawfully promoting the sale of one of its drugs.<sup>98</sup> The original complaint charged that OBP had fraudulently manipulated the drug's Average Wholesale Price<sup>99</sup> and used free samples, rebates, and education grants to falsify their books.<sup>100</sup> Plaintiffs alleged that OBP used these tactics to lower the providers' net cost.<sup>101</sup>

The district court dismissed the complaint, and the *qui tam* relators appealed.<sup>102</sup> On appeal, OBP and the government argued

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93. See *infra* Part III.C (examining the “middle ground” approach).

94. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (providing for reforms to the U.S. health care system).

95. See *infra* text accompanying notes 204–17 (discussing the new amendments to the FCA).

96. See U.S. *ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13, 21 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3454 (2010) (finding that *qui tam* relator qualified as an original source).

97. See *id.* at 16 (noting that relators “alleged that defendant-appellee Ortho Biotech Products, L.P. (‘OBP’) violated the FCA in unlawfully promoting the sale of its drug Procrit”).

98. *Id.*

99. See *id.* at 17 (discussing “allegations concerning OBP’s fraudulent reporting of the Average Wholesale Price (‘AWP’) of [its drug] Procrit, a benchmark used by the Medicare program for reimbursement purposes”).

100. See *id.* (“[The complaint] also alleged that OBP provided ‘free samples’ of Procrit as well as ‘non-public financial inducements,’ such as rebates, discounts, ‘unrestricted education grants,’ and ‘phony drug studies.’”).

101. See *id.* (noting charges that OBP “further ‘inflate[d] the AWP,’ as ‘the value of these services was kept off the book [sic], so as not [to] be reflected in the AWP’”).

102. See *id.* at 19–20 (noting that “the district court allowed OBP’s motion to dismiss with prejudice and entered judgment in OBP’s favor” and that as “no claims survived, the district court dismissed the Amended Complaint with prejudice as to the Relators.”).

that the *qui tam* action should be dismissed under the FCA's public disclosure bar; OBP contended that the statute required disclosure of the information to the government *before the information became public*.<sup>103</sup> The First Circuit disagreed with OBP.<sup>104</sup> The court rejected OBP's contention that the FCA requires an original source to provide his or her information before the public disclosure at issue; instead, the court decided to "honor the plain and unambiguous terms of the statute" and held that § 3730(e)(4)(B) only requires that a relator provide his or her information prior to the filing of the *qui tam* suit.<sup>105</sup> The First Circuit began with settled rules of statutory interpretation and considered whether the statute at issue was plain and unambiguous.<sup>106</sup> To determine this, the court looked at the language itself, as well as the immediate context and the statute as a whole.<sup>107</sup> The court noted that a literal reading of the FCA would only require relators to provide their information to the government before filing suit<sup>108</sup> and that "the plain terms of [§] 3730(e)(4)(B) begin and end the matter."<sup>109</sup> The court was not persuaded by the government's contention<sup>110</sup> that the definition of "source" in *Black's Law Dictionary* should apply, and that this

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103. *See id.* at 21 (noting the argument that "31 U.S.C. § 3730(e)(4)(B) requires a relator to provide the information to the government before the public disclosure itself, not just before the filing of the relator's suit").

104. *See id.* ("[W]e disagree, and conclude that the district court's interpretation is the correct one.").

105. *Id.* at 28.

106. *See id.* at 22 ("Although we are about to travel a well-trodden path, our first step remains the same. Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

107. *See id.* ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

108. *See id.* ("By its terms, the 'original source' exception only requires the relator to 'provide[ ] the information to the Government before filing an action under this section which is based on the information.' Section 3730(e)(4)(B) does not impose any other timing requirement.").

109. *Id.*

110. *See id.* ("The government argues that the language of § 3730(e)(4)(B), when read in context, supports its view.").

definition requires an original source under the FCA to “originate” information.<sup>111</sup>

The court refused to accept the government’s proffered definition of *original source* when the FCA already defined the term,<sup>112</sup> noting that it is only when a statute fails to define a term that a court should fall back on the ordinary meaning.<sup>113</sup> The court also refused to take into account Congress’s choice to use the term *original source* rather than engraft the definition found at § 3730(e)(4)(B) into (e)(4)(A).<sup>114</sup> The court reasoned that had Congress wanted courts to use the plain meaning, it would have done so explicitly.<sup>115</sup>

The court pointed to the structure of the FCA and defended its position against charges that it would encourage parasitic lawsuits, noting that the “first-to-file rule” *already* incentivizes whistleblowers not to delay their *qui tam* actions.<sup>116</sup> The goal of the first-to-file rule is to provide *qui tam* relators an incentive to alert the government to fraudulent activity quickly, lest another relator steal their action’s legal thunder; the court saw no reason to pile further restrictions onto *qui tam* actions.<sup>117</sup> According to the First Circuit, the Supreme Court’s decision in *Rockwell International Corp. v. United States*,<sup>118</sup> which interpreted the

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111. *See id.* (“[T]he government points to the meaning of the terms ‘original source’ itself, contending that a ‘source’ is defined as ‘[t]he originator or primary agent of an act, circumstance, or result.’ . . . Thus, a source cannot ‘originat[e]’ information that has been publicly disclosed.”).

112. *See id.* (declining to “rely upon the plain meaning of the terms ‘original source’ when the statute *defines* the term at § 3730(e)(4)(B)”).

113. *See id.* at 22–23 (“It is only ‘[w]hen a word is not defined by statute’ that we ‘construe it in accord with its ordinary or natural meaning.’”).

114. *See id.* at 23 (declining to “attribute significance to Congress’s use of the terms ‘original source’ rather than engraft the definition found at § 3730(e)(4)(B) into § 3730(e)(4)(A)”).

115. *See id.* (“Finally, had Congress intended to retain the plain meaning of ‘original source’ and require relators to provide their information prior to the public disclosure, ‘it easily could have done so.’”).

116. *See id.* at 24 (noting that the rule “*already* provides potential relators significant incentive not to sit on the sidelines”).

117. *See id.* (“It is unclear why a relator would wait for a public disclosure and risk another relator bringing suit.”).

118. *See Rockwell Intern. Corp. v. United States*, 549 U.S. 457, 476 (2007) (holding that the relator “did not have direct and independent knowledge of the information upon which his allegations were based”).

FCA's "direct and independent" knowledge requirement, undercut the government's argument<sup>119</sup> because in addressing the meaning of the FCA's direct and independent knowledge requirement, the Supreme Court also addressed the term *information*, holding that the term refers to the information behind the *relator's claim*, not the information behind the *public disclosure*.<sup>120</sup>

The First Circuit also held that the FCA's tumultuous history supported its position.<sup>121</sup> Congress had amended the FCA specifically to encourage more private *qui tam* actions, noting that such actions may be useful and lucrative even when certain allegations of fraud have already been made public.<sup>122</sup> The 1986 amendments, after all, were designed to remedy the extreme restrictiveness of the *Dean* decision.<sup>123</sup> The First Circuit rejected any reading of the FCA that would discourage productive whistleblower suits from proceeding, even if such permissiveness allowed a few parasitic *qui tam* actions to creep into the docket.<sup>124</sup> The First Circuit feared that the reading suggested by OBP and the government (as well as by the D.C. and Sixth Circuits) would

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119. See U.S. *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 24 (1st Cir. 2009) (stating that *Rockwell* "substantially undercuts the conclusion by the D.C. and Sixth Circuits that 'little incentive' is necessary for suits brought after a public disclosure").

120. See *id.* ("[T]he *Rockwell* Court . . . addressed the meaning of the term 'information' . . . [and held] that 'information' for purposes of both subparagraphs refers to the 'information underlying the allegations of the relator's action,' not the information underlying the public disclosure." (emphasis added)).

121. See *id.* at 27 (noting that "the 1986 amendments equally sought to end a regime that resulted in the 'under-enforcement' of the FCA, one that rested too much on government notice to prevent fraud").

122. See *id.* (noting that there "may arise situations when . . . the government would benefit from suits brought by relators with substantial information of government fraud even though the outlines of the fraud are in the public domain").

123. See *id.* at 26 (noting that the *Dean* court held that if relators want a special exemption to the FCA's public disclosure bar, they "should ask Congress to provide that exemption" and that "Congress obliged, and in 1986 Congress amended the FCA to 'encourage more private enforcement suits'").

124. See *id.* at 27 ("[W]e have rejected readings of the 'public disclosure' bar that 'would create a new exclusion not articulated in the text' which would discourage 'productive private enforcement.'").

jeopardize the 1986 amendments and return the courts to the government-knowledge bar of the *Dean* era.<sup>125</sup>

In *United States ex rel. Siller v. Becton Dickinson & Co.*,<sup>126</sup> the Fourth Circuit articulated a similar position, stating that a relator “having direct and independent knowledge of the information on which the allegations in the public disclosure is based” need only “provide his information to the government before instituting his *qui tam* action, as the provision unambiguously states.”<sup>127</sup> In *Siller*, the *qui tam* plaintiff alleged that a medical device distributor defrauded the government, and the plaintiff filed an action in 1991,<sup>128</sup> but not before similar charges came to light in another case.<sup>129</sup> The district court held that Siller did not qualify as an original source.<sup>130</sup> The Fourth Circuit, however, rejected this approach,<sup>131</sup> holding that such an outlook rested on a misreading of the FCA’s legislative history.<sup>132</sup> The Fourth Circuit viewed the Second Circuit’s reading of the FCA’s text and legislative history as “not merely unpersuasive,

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125. *See id.* (“[W]e rejected an interpretation . . . [that included disclosures made only to the government], as it would ‘reinstate exactly what Congress eliminated . . .’ Although the reading urged here would not return us to the ‘government notice’ regime, it [would bar] ‘productive private enforcement suits.’” (citation omitted)).

126. *See U.S. ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994) (holding that “a *qui tam* plaintiff need not be a source to the entity that publicly disclosed the allegations on which the *qui tam* action is based in order to be an original source under section 3730(e)(4)(B)”).

127. *Id.*

128. *See id.* at 1341 (“David Siller filed the instant *qui tam* suit against BD in January 1991. According to Siller, [Siller] originally learned that BD overcharged the government through his employment with SSI, not as a result of SSI’s suit against BD.”).

129. *See id.* (“In 1989, SSI filed suit against BD. . . . The thrust of [the] complaint was that BD canceled SSI’s distributorship because it feared that SSI . . . would disclose that BD was overcharging the government.”).

130. *See id.* at 1351 (noting that “Siller was not an ‘original source’ within section 3730(e)(4)’s exception to its jurisdictional bar”).

131. *See id.* (“We reject the Second Circuit’s standard, and the district court’s adoption of that standard, as imposing an additional, extra-textual requirement that was not intended by Congress.”).

132. *See id.* at 1352 (“We believe that, in truth, the Second Circuit’s conclusion that a putative plaintiff must provide his information to the disclosing entity in order to be an original source rests not upon the statutory language, but entirely upon a reading, and misreading, of the legislative history.”).

but implausible.”<sup>133</sup> The court held that the Second Circuit’s interpretation of § 3730(e)(4) of the FCA, which read the FCA as requiring the plaintiff to provide his information to the disclosing entity, is foreclosed by the definition of *original source* in subparagraph (B).<sup>134</sup>

The Fourth Circuit found the Second Circuit’s view to be not only a misreading of the FCA’s legislative history but also a misuse of this history to read ambiguity where no ambiguity existed.<sup>135</sup> The Second Circuit relied heavily on comments by Senator Grassley during the debate over the 1986 amendments, and if the enacted language had matched the proposed language at the time of Senator Grassley’s comments, the Second Circuit might have a point.<sup>136</sup> Yet the version of the amendments on which Senator Grassley commented was later changed in two significant respects.<sup>137</sup> First, the requirement that an original source under the FCA inform the media was dropped from the amendments’ final language; given that the media is specified in other parts of the final language, the fact that Congress deleted the words “the media” from the original source requirements is instructive.<sup>138</sup> Second, the amendments ultimately required only that an original source had to inform the government “before filing” an action—not before the *government* filed an action.<sup>139</sup>

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133. *Id.* at 1351.

134. *See id.* (“The Second Circuit’s interpretation . . . might at least be tenable were there not a definition of ‘original source’ in sub-paragraph (B). . . . Sub-paragraph (B) . . . sets forth [what] the Second Circuit holds it does not . . .”).

135. *See id.* at 1352 (“In fact, the Second Circuit’s decision is a classic example of the use of legislative history to create an ambiguity in the statute where none exists in order to justify use of that history as dispositive evidence of congressional intent.”).

136. *See id.* at 1353 (“If the provision . . . had been enacted as it existed at the time Senator Grassley made the comment, the comment would be some evidence of a congressional intent supporting the Second Circuit’s interpretation, although even then we would not permit [it] to override [clear] statutory language . . .”).

137. *See id.* (“In fact, however, the version of the legislation addressed by Senator Grassley was changed in two significant respects.” (footnote omitted)).

138. *See id.* (noting that “Congress deleted ‘the media’ as a party whom the original source was required to inform” and that “Congress presumably would not have deleted the media from the ‘original source’ definition . . . if it intended to require the plaintiff to provide his information to the disclosing entity”).

139. *See id.* (“Second, Congress ultimately provided that an original source

Indeed, if Congress had intended relators to be a source to the disclosing entity, Congress would not have allowed relators to provide their information after the public disclosure.<sup>140</sup> These changes in language from the amendments' proposed language to their final form suggest that, even if Congress had considered requiring relators to be a source to the disclosing entity in order to qualify as an original source, Congress ultimately chose not to codify such a requirement.<sup>141</sup> In sum, then, according to the First and Fourth Circuits, *qui tam* relators must voluntarily provide their information to the government only before filing their actions; no other timing requirements apply.

### B. Restrictive Approach

The Second Circuit also weighed in on the debate. In *United States ex rel. Dick v. Long Island Lighting Co.*,<sup>142</sup> the Second Circuit considered a *qui tam* action brought by managers of a nuclear power plant.<sup>143</sup> The managers filed an action under the FCA,<sup>144</sup> charging that the Long Island Lighting Co. (LILCO) had deceived the state's Public Service Commission about the plant's construction status, essentially cheating the government.<sup>145</sup>

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had to inform the government only 'before filing [his *qui tam*] action,' as opposed to 'prior to an action filed by the Government.'").

140. *See id.* ("It would be odd, if Congress had intended a plaintiff to be a source to the disclosing entity in order to be an 'original source,' for it to have allowed the plaintiff to provide his information after the public disclosure . . .").

141. *See id.* ("These two changes suggest that, even assuming that Congress may at one point have intended a plaintiff to be a source to the disclosing entity to be an original source, which is anything but clear, it ultimately chose not to enact such a requirement into law.").

142. *See U.S. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) (holding that "if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred").

143. *See id.* at 14 (noting an action by "mid-level managers at the Shoreham Nuclear Power Station").

144. *See id.* (noting that the managers "were aware of the construction status of Shoreham" and that "they filed a complaint against the Long Island Lighting Co. (LILCO), certain of its executives (collectively, the 'LILCO defendants'), and Stone & Webster Engineering Corp.").

145. *See id.* (discussing deception about the "construction status of Shoreham" and LILCO's allegedly obtaining "higher rates and defrauding the

However, almost sixteen months earlier, New York's Suffolk County had filed an action against LILCO for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>146</sup> and this RICO action had garnered significant publicity.<sup>147</sup>

The court noted that, while the appellants' later-filed complaint included some new factual allegations, on the whole the complaint "was fairly characterized by the district judge as a copy of [Suffolk County's] earlier complaint."<sup>148</sup> The court disagreed that relators were original sources, reasoning that in addition to voluntarily providing their information to the government before filing their actions, true original sources must also be a *source* of the initial leak.<sup>149</sup> The court based this conclusion on a close reading of the text and its legislative history.<sup>150</sup> The court also noted that the purpose of the FCA "is to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward,"<sup>151</sup> and reasoned that its interpretation harmonized with this purpose and was "most likely to bring 'wrongdoing to light' since, by barring those who come forward only *after* public disclosure of possible [FCA] violations from acting as *qui tam* plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time."<sup>152</sup>

Like the First Circuit in *Duxbury*, the Second Circuit began with the FCA's legislative history, stating that the court's role is

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United States as a ratepayer").

146. *See id.* (noting that the county "had commenced a putative class action against the LILCO defendants, alleging in its complaint violations of the Racketeer Influenced and Corrupt Organizations Act . . . leading to the rate overcharges" (citation omitted)).

147. *See id.* (noting that the action "was widely reported in the news media, especially in the Counties of Nassau and Suffolk").

148. *Id.*

149. *See id.* at 16 (finding that "there is an additional requirement that a *qui tam* plaintiff must meet in order to be considered an 'original source,' namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based").

150. *See id.* (describing a "close textual analysis combined with a review of the legislative history").

151. *Id.* at 18.

152. *Id.*



to discern congressional intent.<sup>153</sup> The court noted that two legislators—both heavily involved in the passage of the 1986 amendments—had spoken at length regarding the meaning of the term *original source*.<sup>154</sup> Representative Berman, a codrafter of the legislation, defined an original source as someone who “had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed.”<sup>155</sup> In the same vein, Senator Grassley, who introduced the legislation in the Senate, stated that the FCA barred a relator who had not been a source to the entity that disclosed the allegations.<sup>156</sup>

The Second Circuit noted that if § 3730(e)(4)(B) contained the exclusive requirements that a *qui tam* plaintiff must satisfy to be an original source, Senator Grassley’s and Representative Berman’s statements would make little sense.<sup>157</sup> However, if subsection (4)(A) is construed to hold an additional requirement that a relator must meet to be considered an original source, namely, that the relator must have been a source to the entity that first leaked or disclosed the allegations of fraud, the legislative history is more coherent.<sup>158</sup> In short, the Second Circuit found that, for cases in which allegations of fraud are in the public domain, and the *qui tam* plaintiff is not a source of such information, then the plaintiff’s suit is barred.<sup>159</sup>

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153. *See id.* at 17 (noting that “our fundamental task in interpreting a statute is ‘to give effect to the intent of Congress’” and that “we look to the legislative history for evidence of Congress’s intent” (citing *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940))).

154. *See id.* (“Two legislators who appear to have been the most involved with the Act’s development and passage spoke at length regarding the meaning of ‘original source.’”).

155. *Id.* (citing 132 CONG. REC. H9389 (daily ed. Oct. 7, 1986)).

156. *See id.* (noting that a relator would be barred “who had not been an original source to the entity that disclosed the allegations” from bringing a *qui tam* claim based on publicly disclosed information”).

157. *See id.* (noting that if (4)(B) “contained the exclusive requirements that a *qui tam* plaintiff must satisfy to be an ‘original source,’ these legislators’ statements would be somewhat inexplicable”).

158. *See id.* (noting that legislative history makes “much [more] sense if [paragraph] (4)(A) contains an additional requirement . . . namely, that to be considered an ‘original source,’ one must have been a source to the entity that first publicly disclosed the information on which a suit is based”).

159. *See id.* at 18 (“In sum, for the reasons stated hereinabove, we believe

The Ninth Circuit cited *Dick* and articulated the same approach in *Wang v. FMC Corp.*<sup>160</sup> *Wang* is very similar to *Dick*; both cases come to the same conclusion. The plaintiff in *Wang* was fired from his job at the FMC Corporation, a defense contractor, and later filed several claims.<sup>161</sup> Among these claims was a *qui tam* action alleging that the corporation had defrauded the government.<sup>162</sup> The Ninth Circuit, like the Second Circuit, relied on legislative history and found that the FCA extends *qui tam* jurisdiction only to those who had participated in the public disclosure of the allegations in the first place.<sup>163</sup> The court also considered public policy, noting that the paradigmatic *qui tam* plaintiff is the “whistleblowing insider.”<sup>164</sup> *Qui tam* suits are meant to encourage those with inside information to blow the whistle on fraudulent practices, and “[i]n such a scheme, there is little point in rewarding a second toot.”<sup>165</sup> Since *Wang*, like *Dick*, was not a true original source, *Wang* was forced to withdraw from the action.<sup>166</sup>

To put it another way, if a plaintiff simply *republishes* charges that are already in the public domain, the Second and Ninth Circuits barred such a relator from bringing a *qui tam* action.<sup>167</sup> The court made its point forcibly: “A ‘whistleblower’

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that if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred.”).

160. See *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) (holding that “[b]ecause he had no hand in the original public disclosure of [fraud], Wang’s claim . . . is blocked by the jurisdictional bar of section 3730(e)(4)(A)”).

161. See *id.* at 1415 (“Wang was fired from his job at FMC on December 11, 1986. He filed this action a year later, on December 10, 1987. In addition to his False Claims Act claim, Wang joined a number of state law claims, including a wrongful termination claim.”).

162. See *id.* (noting Wang’s allegation that “FMC defrauded the Government in four separate projects”).

163. See *id.* at 1418 (relying on the “history of the False Claims Act and the legislative history of its most recent amendment make clear that *qui tam* jurisdiction was meant to extend only to those who had played a part in publicly disclosing the allegations and information on which their suits were based”).

164. *Id.* at 1419.

165. *Id.*

166. *Id.* at 1418.

167. See *id.* at 1419 (finding that such relator “cannot bring a *qui tam* suit, even if he had ‘direct and independent knowledge’ of the fraud”).

sounds the alarm; he does not echo it.”<sup>168</sup> Public policy also dictates that plaintiffs should be incentivized to reveal fraud; the government’s goal is to reward those who bring wrongdoing to light, and any bounty that results from such action should go to those relators.<sup>169</sup>

### C. Middle-Ground Approach

In contrast to the view of the First and Fourth Circuits—which allowed *qui tam* plaintiffs to proceed as long as they voluntarily provided their information to the government before filing their actions—and the view of the Second and Ninth Circuits—which barred *qui tam* suits in which the plaintiff was not the source of any public disclosure—the D.C. and Sixth Circuits carved out a third option.<sup>170</sup>

In *United States ex rel. Findley v. FPC-Boron Employees’ Club*,<sup>171</sup> the *qui tam* relator alleged that government employees’ clubs, which earned revenue from vending services, kept money owed to the government.<sup>172</sup> The district court, however, found that the same fraudulent practice of government employees’ clubs retaining vending machine income was widely known at the time the action was brought, and the court dismissed the case in

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168. *Id.*

169. *See id.* at 1420 (“While Wang was silent, some other conscientious or enterprising person bravely brought the transmission problems to the attention of the media and the Army. If there is to be a bounty for disclosing those troubles, it should go to one who in fact helped to bring them to light.”).

170. *See U.S. ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 691 (D.C. Cir. 1997) (holding that “[r]elator Findley cannot qualify as an ‘original source’ because he had no knowledge of any of the essential elements of the publicly disclosed fraudulent transactions prior to their public disclosure”); *U.S. ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997) (holding that “the relator must provide the government with the information prior to any public disclosure”).

171. *See Findley*, 105 F.3d at 691 (holding that “[r]elator Findley cannot qualify as an ‘original source’ because he had no knowledge of any of the essential elements of the publicly disclosed fraudulent transactions prior to their public disclosure”).

172. *See id.* at 678 (discussing allegations that “government employees’ clubs that earn revenue from vending services on federal property [were] violating the False Claims Act... by retaining monies owed to the government”).

reliance on the FCA's jurisdictional bar.<sup>173</sup> The D.C. Circuit, using the language, structure, history, and purpose of the FCA, concluded that the FCA's public disclosure bar should only allow suits in which the relator played a role in making new discoveries; since Findley was not such a relator, the court held that his suit was barred.<sup>174</sup>

The court agreed with the Fourth Circuit's rejection of the strict approach articulated by the Second Circuit and the Sixth Circuit.<sup>175</sup> To qualify as an original source, a relator must simply have provided information to the government before filing the suit.<sup>176</sup> The court added that "the statute only contemplates an 'original source' being a 'source' to the government."<sup>177</sup> A person who provided information to the government should be able to bring his suit; it should not matter that the relator's information was subsequently uncovered by, for example, the news media.<sup>178</sup>

Yet the D.C. Circuit differed from the Fourth Circuit in one key respect, finding that a true original source must, essentially, outrace the public disclosure.<sup>179</sup> The court conceded that subparagraph (B), considered in isolation, seems to imply that an original source need only have direct and independent knowledge; the court, however insisted that subparagraphs (A) and (B) must be read in conjunction.<sup>180</sup> The court found it significant that

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173. *See id.* ("[T]he practice of government employees' clubs retaining vending machine income was widely known at the time this action was brought and dismissed the case in reliance on the Act's jurisdictional bar against *qui tam* suits that are 'based upon the public disclosure of allegations or transactions . . . .").

174. *See id.* ("[T]he public disclosure bar . . . limits *qui tam* jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously unaware.")

175. *See id.* at 690 ("[T]here is no additional requirement that the 'original source' be responsible for providing the information to the entity that publicly disclosed the allegations of fraud.")

176. *See id.* (noting that relator must have "voluntarily provided the information to the government" before filing a *qui tam* suit").

177. *Id.*

178. *See id.* ("A person who provided information to the government that subsequently was uncovered by a reporter and printed in the newspaper, would still be able to maintain a *qui tam* action.")

179. *See id.* (noting that relator "must provide the government with the information prior to any public disclosure")

180. *See id.* ("Standing on its own, subparagraph (B) suggests that an 'original source' need only have direct and independent knowledge of the

Congress chose to use the term *original source* rather than incorporate subparagraph (B)'s description into subparagraph (A); the court reasoned that this choice reflected a requirement that an original source provide the information to the government before the information becomes public.<sup>181</sup> "Once the information has been publicly disclosed," the D.C. Circuit reasoned, "there is little need for the incentive provided by a *qui tam* action."<sup>182</sup> In Findley's case, the relator conceded that he did not know about the public disclosures of fraud but rather learned of the practices of the FPC-Boron Employees' Club at a later date.<sup>183</sup> Because the fraudulent schemes that Findley observed were made public before Findley even knew of them, the court found that Findley could not qualify as an original source.<sup>184</sup>

The *qui tam* relator in *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*<sup>185</sup> was an employee of South Central Bell, a BellSouth subsidiary, who became concerned that her employer was defrauding the government by falsifying repair information for telephone lines used by BellSouth's government customers.<sup>186</sup> McKenzie did not sit passively by; she complained

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allegations in the *qui tam* complaint. The two subparagraphs must be read together, however, in order to divine Congress' real intent.").

181. *See id.* at 691 ("[T]he only reading of the statute that accounts for . . . Congress' decision to use the term 'original source' rather than simply incorporating subparagraph (B)'s description . . . is one that requires an original source to provide the information to the government prior to any public disclosure.").

182. *Id.*

183. *See id.* ("[Relator] stated that he was unaware of the public disclosures that we relied on in determining that the jurisdictional bar has been triggered and that he learned of the practices of the FPC-Boron Employees' Club [at a later date].").

184. *See id.* (finding that because the "employees' groups' questionable transactions were publicly disclosed . . . before Findley even became aware of the practices, he cannot qualify as an original source who is exposing essential elements of a fraudulent transaction that have not previously been publicly disclosed").

185. *See U.S. ex rel. McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997) (holding that "the relator must provide the government with the information prior to any public disclosure").

186. *See id.* at 937 (noting that "McKenzie was an employee of BellSouth's subsidiary, South Central Bell, from December 1966 until March 1992," and that according to McKenzie's complaint, "South Central Bell, to avoid having to make refunds to the United States and other customers, falsified trouble reports").

to her supervisors about these practices in 1984 and continued to complain until she left the company.<sup>187</sup> After bringing her concerns to light, McKenzie felt harassed and claimed that the company threatened to dismiss her.<sup>188</sup> After McKenzie suffered two emotional breakdowns, a company psychiatrist placed McKenzie on leave, prompting McKenzie to bring suit.<sup>189</sup> The district court, however, dismissed the complaint for lack of jurisdiction.<sup>190</sup>

The Sixth Circuit reviewed the dismissal with an eye toward whether the FCA, particularly the 1986 amendments, justified jurisdiction over McKenzie's suit.<sup>191</sup> The district court, noting that McKenzie's allegations were based upon public disclosures, found that she would need to qualify as an original source in order to proceed.<sup>192</sup> After reviewing the approaches of other circuits, including the position offered by the D.C. Circuit in *Findley*, the court noted that a plaintiff cannot "be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain."<sup>193</sup> The court then adopted the approach of the D.C. Circuit and concluded that to be an original source, a relator must bring fraud to the government's attention before knowledge of the fraud has been publicly disclosed.<sup>194</sup>

The Sixth Circuit reached its conclusion by examining congressional purpose, as well as the plain meaning of the

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187. *See id.* (noting that McKenzie "began complaining to her supervisors at South Central Bell about these practices in 1984 and continued to complain until she left her position on disability status").

188. *See id.* (noting that relator claimed to have been "threatened with discharge").

189. *See id.* (noting that "a company psychiatrist placed McKenzie on permanent disability leave" and that McKenzie "filed suit under the FCA").

190. *See id.* (noting that the district court "dismissed McKenzie's complaint for lack of subject matter jurisdiction under the FCA").

191. *See id.* at 938 (noting that the court examined "whether the 1986 amendments [to the FCA] extend jurisdiction to include McKenzie's suit").

192. *See id.* at 941 (noting that the court "determined that McKenzie's allegations were based upon public disclosures" and so she "must have been an 'original source' for the district court to have jurisdiction over her action").

193. *Id.* at 942.

194. *See id.* ("[T]o be an original source, a relator must inform the government of the alleged fraud before the information has been publicly disclosed.").

FCA.<sup>195</sup> The court considered the FCA's history prior to the 1986 amendments and noted the two extremes of *Marcus* and *Dean* to which judicial interpretations of the FCA had swung.<sup>196</sup> The Sixth Circuit believed its interpretation of the phrase *original source* was consistent with the FCA's purpose and more likely than other views to expose new allegations of fraud because, by barring relators who file after a public disclosure, the Sixth Circuit's view would discourage potential relators from keeping quiet.<sup>197</sup> The court also reasoned that its approach furthered another goal of the FCA—preventing parasitic *qui tam* actions.<sup>198</sup> The Sixth Circuit, like the D.C. Circuit, wanted to reward the true whistleblower, not the plaintiff who watches others make allegations of fraud and then attempts to cash in on the information.<sup>199</sup> To reward such a plaintiff, said the court, would fly in the face of the FCA's purpose.<sup>200</sup>

Applying this analysis to McKenzie's case, the court refused to find that McKenzie was an original source; her complaint was filed three years after identical allegations became public.<sup>201</sup> McKenzie was “not a ‘true whistleblower’ and [could not] benefit

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195. *See id.* (“We reach this conclusion based on Congress’s purpose in amending the Act and the plain meaning of the Act.”).

196. *See id.* (“[J]urisdiction under the FCA had experienced two extremes: The original statute which allowed suits to proceed even though they had been copied from federal indictments, and the 1943 amendments to the Act, which precluded all suits in which the government already had knowledge of the fraud . . .”).

197. *See id.* at 943 (“The interpretation . . . adopted by this Court today is consistent with this goal and ‘is most likely to bring “wrongdoing to light” since, by barring those who come forward only after public disclosure . . . it discourages persons with relevant information from remaining silent . . .”).

198. *See id.* (“At the same time, this approach furthers Congress’s second goal in amending the FCA: ‘[T]o prevent “parasitic” *qui tam* actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures of government fraud.”).

199. *See id.* (“Anyone who alerts the government and is a ‘true whistleblower’ deserves any reward that may be obtained by pursuing a *qui tam* action under the FCA. However, the individual who sits on the sidelines . . . should not be able to participate in any award.”).

200. *See id.* (“This would be contrary to the purpose of the statute.”).

201. *See id.* (“[I]t is clear that McKenzie is not an ‘original source.’ Her complaint was filed three years after *Falsetti* and well after the allegations in *Dorris* were made public. She was not the first to inform the government of the alleged fraud.”).

as if she were one.”<sup>202</sup> Thus, the approach of the D.C. and Sixth Circuits, while not so restrictive as to require *qui tam* relators to be the *source* of any public disclosure, still required relators to inform the government before filing their actions and before the allegations became publicly disclosed.<sup>203</sup>

#### *D. The Patient Protection and Affordable Care Act*

In 2010, President Obama signed into law the Patient Protection and Affordable Care Act (PPACA).<sup>204</sup> While the PPACA’s health care provisions garnered much attention, the PPACA, in a much less publicized section, also altered the definition of *original source* under the FCA. The new definition, in context, reads as follows:

(4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual *who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily*

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202. *Id.*

203. See U.S. *ex rel.* Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 691 (D.C. Cir. 1997) (holding that “[r]elator Findley cannot qualify as an ‘original source’ because he had no knowledge of any of the essential elements of the publicly disclosed fraudulent transactions prior to their public disclosure”); U.S. *ex rel.* McKenzie v. BellSouth Telecomms., Inc., 123 F.3d 935, 943 (6th Cir. 1997) (holding that “the relator must provide the government with the information prior to any public disclosure”).

204. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (providing for reforms to the U.S. health care system).



*provided the information to the Government before filing an action under this section.*<sup>205</sup>

The PPACA, then, changed the definition of the term *original source* to a relator who meets either prong of a dichotomy: (1) The relator has voluntarily disclosed his or her information to the government “prior to a public disclosure”; or (2) The relator has independent knowledge that “materially adds to the publicly disclosed allegations.”<sup>206</sup>

Unfortunately, no legislative history for this portion of the PPACA is available, leaving courts to wonder as to Congress’s intent in changing the *original source* definition. Further, due to the recent passage of the Act, courts have had little time to consider the nuances of the new definition. The approximately eleven federal *qui tam* cases decided since the adoption of the Act either address different aspects of the changes<sup>207</sup> or expressly decline to apply the changes because the PPACA made no mention of retroactivity.<sup>208</sup>

The developments described above leave the courts with questions about how to interpret the new amendments to the FCA in light of how they have previously construed the statute. Unfortunately, the paucity of legislative history for the 2010 amendments makes this task difficult. Though the 2010 amendments contain ambiguities, it is clear that the new

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205. *Id.* at 901–02 (emphasis added) (codified as amended at 31 U.S.C.A. § 3730 (West 2011)).

206. *Id.*

207. *See, e.g.*, *United States v. Smith & Nephew, Inc.*, 749 F. Supp. 2d 773, 781 (W.D. Tenn. 2010) (noting “changes effected by the 2010 amendments to the FCA” relating to the “criminal, civil, or administrative hearing” element of the statute).

208. *See, e.g.*, *Gonzalez v. Planned Parenthood of Los Angeles*, 392 F. App’x. 524, 526 (9th Cir. 2010) (finding that the parties “briefed these developments after argument, and they agree that the PPACA’s statutory amendments should not be applied retroactively to this case”); *U.S. ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, 739 F. Supp. 2d 396, 402 n.56 (S.D.N.Y. 2010) (noting that the Supreme Court held that “these amendments do not apply retroactively to cases pending at the time of the amendments”); *U.S. ex rel. Dekort v. Integrated Coast Guard Sys.*, 705 F. Supp. 2d 519, 553 n.13 (N.D. Tex. 2010) (“Given that the legislation makes no mention of retroactivity, this Court . . . will ‘use the present tense in discussing the statute as it existed at the time the case was argued.’”); *U.S. Dept. of Transp. ex rel. Arnold v. CMC Eng’g*, 745 F. Supp. 2d 637, 643 n.5 (W.D. Pa. 2010) (“The amendment was not made retroactive; therefore, the new statutory language will not be addressed.”).

language rejects the restrictive interpretation of the phrase *original source* adopted by the Second and Ninth Circuits. The new language makes no mention of a relator's need to be a source to a disclosing entity, confirming the D.C. Circuit's view that an original source need only be a source to the government.<sup>209</sup> Under both prongs of the new definition of *original source*, the relator must simply "voluntarily disclose[] to the Government the information on which allegations or transactions in a claim are based."<sup>210</sup> This clarification is a positive change because the Second Circuit and Ninth Circuit approach would have restricted many potentially beneficial *qui tam* suits.<sup>211</sup> A major goal of the 1986 amendments was to find a balance between the extremes of the *Marcus* and *Dean* decisions,<sup>212</sup> and the new language carefully avoids taking the restrictive approach of the Second and Ninth Circuits. In light of the three-way circuit split, if Congress had intended to give credence to this approach it could easily have defined an original source as a *source to the disclosing entity*; Congress's refusal to do so is instructive.<sup>213</sup>

It also seems clear that the "middle ground" approach articulated by the D.C. Circuit receives at least some favorable treatment: The first prong of the new definition states that an "original source" means an individual who . . . *prior to a public disclosure* under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or

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209. See U.S. *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir. 1997) ("Significantly, the statute only contemplates an 'original source' being a 'source' to the government.").

210. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 901-02 (2010) (codified as amended at 31 U.S.C.A. § 3730(e)(4)(B) (West 2011)).

211. See U.S. *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 27 (1st Cir. 2009) (noting that "there . . . may arise situations when . . . the government would benefit from suits brought by relators with substantial information of government fraud even though the outlines of the fraud are in the public domain").

212. See *Findley*, 105 F.3d at 680 ("After ricocheting between the . . . permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress . . . sought to achieve 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs . . . .").

213. See *supra* text accompanying notes 136-41.

transactions in a claim are based . . . .”<sup>214</sup> As noted previously, the D.C. Circuit in *Findley* read into the FCA a requirement that an original source provide the information to the government before the information becomes public.<sup>215</sup> “Once the information has been publicly disclosed,” the D.C. Circuit reasoned, “there is little need for the incentive provided by a *qui tam* action.”<sup>216</sup> The first prong of the new definition, in incorporating this requirement, takes a needed step in screening out parasitic litigation.

It can be argued, however, that the definition’s second prong, which adds, “or . . . who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section,”<sup>217</sup> is unclear and potentially weakens the positive step taken by the first prong. The next section will consider this ambiguity.

#### IV. Combating Fraud Under the 2010 Amendments

This Part will consider what remains unclear under the PPACA and how courts should proceed; specifically, this Part will look to the legislative history of the proposed False Claims Correction Act of 2009 for relevant indications of congressional intent.<sup>218</sup> Next, this Part will review policy concerns undergirding the FCA’s mission and consider empirical studies of both federal and state *qui tam* actions.<sup>219</sup>

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214. *Id.* (emphasis added).

215. *See Findley*, 105 F.3d at 691 (“[T]he only reading of the statute that accounts for . . . Congress’ decision to use the term ‘original source’ rather than simply incorporating subparagraph (B)’s description . . . is one that requires an original source to provide the information to the government prior to any public disclosure.”).

216. *Id.*

217. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 902 (2010) (emphasis added) (codified as amended at 31 U.S.C.A. § 3730(e)(4)(B) (West 2011)).

218. *See infra* text accompanying notes 220–43 (discussing the bill’s legislative history).

219. *See infra* text accompanying notes 244–59 (discussing empirical evidence for frivolous *qui tam* actions).

*A. Resolving Ambiguities*

While the first prong of the new definition laudably incorporates the D.C. and Sixth Circuit's requirement that relators provide their information to the government before any public disclosure occurs, the definition's second prong is unclear. The PPACA uses phrases like "independent [knowledge]" and "materially adds to" without defining these terms. Because of this lack of definition, as well as the scarcity of legislative history behind these provisions of the PPACA, it may be helpful to consider the history of the False Claims Correction Act of 2009 (H.R. 1788)<sup>220</sup> for guidance. H.R. 1788 is relevant because it represents the most recent window into the mind of Congress with regard to the FCA; from it we can discern the weight Congress places on avoiding parasitic litigation.

Though H.R. 1788 was never enacted, the House Committee on the Judiciary compiled a Report on the bill.<sup>221</sup> While the Report did not specifically address the "original source" exception, it did deal with the public disclosure bar.<sup>222</sup> H.R. 1788's supporters sought to clarify the FCA and strike the proper balance between incentivizing whistleblowers and discouraging parasitic lawsuits.<sup>223</sup> The bill would have barred only actions where all the essential elements of the *qui tam* suit stem from a disclosure that has been "made on the public record or broadly disseminated to the general public."<sup>224</sup> Further, the bill would have allowed only the government, not defendants, to invoke the FCA's public disclosure bar.<sup>225</sup>

H.R. 1788 did not specifically address the original source controversy. Nevertheless, the Committee's Report, particularly

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220. See False Claims Act Correction Act of 2009, H.R. 1788, 111th Cong. (2009) (proposing amendments to the False Claims Act).

221. See H.R. REP. NO. 111-97 (2009) (reporting on the bill and recommending passage).

222. See *id.* at 14 (discussing proposed changes to the public disclosure bar).

223. See *id.* ("This clarifying language should return the meaning of the public disclosure bar to what Congress intended in the 1986 amendments, while still preventing truly parasitic suits.").

224. *Id.*

225. See *id.* (noting that H.R. 1788 "provides that only the Government, and not a defendant, may move to dismiss an action based on the public disclosure bar").

the dissenting views, is still helpful due to its discussion of parasitic lawsuits. The views of the bill's opponents are useful because—since H.R. 1788 did not pass—these views ultimately carried the day. H.R. 1788's opponents were concerned that the bill went too far in its goal of “streamlining” *qui tam* actions, and that while the bill contained useful elements, it also harbored significant problems.<sup>226</sup> For instance, many of H.R. 1788's provisions focused on helping private *qui tam* plaintiffs without necessarily benefiting U.S. taxpayers.<sup>227</sup>

The bill's opponents noted that increased litigation under the FCA would not necessarily lead to greater recoveries.<sup>228</sup> Particularly important is the fact that the United States government has declined to intervene in approximately 80% of *qui tam* actions.<sup>229</sup> In fact, of “the \$21.5 billion in FCA recoveries since 1986, only three percent was recovered in *qui tam* cases in which the Department of Justice declined to intervene.”<sup>230</sup> To put it another way, weakening the public disclosure bar would not save the government any money but rather would only benefit opportunistic plaintiffs.<sup>231</sup>

H.R. 1788's opponents also pointed out that the increased burden on the courts and the Justice Department counterbalances plaintiffs' interests in recovery under the FCA.<sup>232</sup>

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226. *See id.* at 28 (“Although some of the provisions in this bill may be beneficial, other provisions are highly problematic.”).

227. *See id.* (noting that “the remaining sections of the bill are generally aimed at helping private *qui tam* plaintiffs and the *qui tam* plaintiffs' bar without, in some instances, obvious benefits to the United States and the taxpayers”).

228. *See id.* (“What is more, it is entirely unclear that an *increased number* of *qui tam* cases will lead to *increased recoveries* under the FCA.” (emphasis added)).

229. *See id.* (“The Federal Government investigates every *qui tam* filing and has consistently declined to intervene in about 80% of the cases filed by private plaintiffs. This selectivity is indicative of genuine discernment.”).

230. *Id.*

231. *See id.* (“[I]t is suspect that the *qui tam* provisions in this bill will increase the Federal Government's ability to recover taxpayer dollars. Rather, it is possible that these provisions will encourage private plaintiffs to file unfounded and parasitic lawsuits that benefit no one but the plaintiffs and their attorneys.”).

232. *See id.* (noting that “additional suits will add to the Justice Department's burden and detract from its ability to focus on meaningful cases” and that “the *qui tam* provisions in this bill may, in fact, be counterproductive”).

The FCA is about balance between competing interests, and simply increasing the number and availability of *qui tam* actions does not necessarily strike this balance.<sup>233</sup> Further, achieving the golden mean involves encouraging those whistleblowers with genuinely valuable information while discouraging those who have no significant information to contribute.<sup>234</sup> The idea is to reward only those who “are truly deserving—whistleblowers who bring information regarding fraud to light.”<sup>235</sup> The opponents of H.R. 1788 noted that the bill would essentially eviscerate the public disclosure bar.<sup>236</sup> The Justice Department, in particular, expressed concern that plaintiffs with no direct knowledge of fraud would seek to cash in on FCA litigation while providing no real benefit to the government.<sup>237</sup> Relators could take money away from taxpayers while *contributing essentially nothing to the government’s case*.<sup>238</sup>

The Committee Report not only shows Congress and the Justice Department’s concern with preventing parasitic litigation, but the opponents’ language is highly persuasive and can readily be applied to the ambiguities in the 2010 amendments. Based on the need to strike the golden mean between incentivizing whistleblowers and preventing parasitic claims, and in light of the recent spate of unnecessary *qui tam* actions (as evinced by

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233. *See id.* (“[The FCA] is about striking the proper balance between competing interests. The interests here are between allowing the United States to recover . . . [while] ensuring that innocent recipients . . . are not hauled into court . . . . We believe the FCA currently strikes that balance well.”).

234. *See id.* at 32 (noting a need to strike the “golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own” (citing U.S. *ex rel.* Springfield Terminal Rwy. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994))).

235. *Id.*

236. *See id.* (“Despite the fact that the public disclosure bar has worked well since the 1986 amendments were adopted, H.R. 1788 would eviscerate the bar.”).

237. *See id.* (“According to the Justice Department, the bill ‘severely restricts the circumstances where the bar would apply in a way that would reward relators with no first hand knowledge and who do not add information beyond what is in the public domain . . . .’”).

238. *See id.* (“[I]f these changes were implemented, a relator could file suit and reduce the taxpayers’ recovery even though he or she has not contributed anything new to the Government’s case. The likely effect . . . will be to kill the [public disclosure] bar.”) (footnote omitted).

the Justice Department's refusal to join 80% of the actions), courts should read the new language cautiously. The courts should view the new definition's second prong as a narrow exception to the first prong's requirements. The vague language *independent knowledge* and *materially adds to* should be understood to refer to a plaintiff's *knowledge of valuable information that substantially assists the government's case*. The new definition's first prong already does much to prevent parasitic litigation by requiring relators to file suit prior to a public disclosure; this narrow view of the second prong would apply to cases in which the government has intervened and the relator's information would substantially assist the government's case. This interpretation harmonizes with Congress's intent—as demonstrated by the opponents of H.R. 1788—to ease the burden on the Justice Department by allowing only those relators with the valuable knowledge needed to prove the government's case.<sup>239</sup> Rather than clogging the courts with *qui tam* actions that merely parrot publicly disclosed allegations, the construction proposed above will strike the proper balance by (1) requiring most relators to file suit prior to any public disclosure and (2) allowing a select group of relators to file after a public disclosure only when their information substantially assists the government and the relators have voluntarily informed the government before filing suit.

This approach would reject broader readings of the PPACA's new original source definition. Such broader readings might, for instance, interpret the second prong's requirement of knowledge that materially adds to allegations in the public domain as including *any* additional information leading to new allegations of fraud. Under such a construction, a *qui tam* relator could theoretically read about fraudulent activity in the *New York Times*, provide information to the government that technically "adds to" the allegations already made public, and share in any recovery even if the relator's information did not substantially assist the prosecution of the wrongdoer or lead to a greater recovery. In such cases, the individual *qui tam* plaintiff, not necessarily the U.S. taxpayer, wins. In contrast, the narrow construction proposed above tracks the approach of H.R. 1788's

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239. See *supra* text accompanying note 238 (placing emphasis on the government's case).

opponents by giving proper weight both to the need to promote *qui tam* actions that assist the government's case and the urgency of screening out parasitic suits. Under this construction, the first prong of the *original source* definition would coincide with the position of the D.C. and Sixth Circuits (outlined in Part III), while the second prong would provide an exception, not addressed by these Circuits, for cases in which the *qui tam* relator has substantially useful knowledge and provides such knowledge to the government before filing suit.

### B. Policy Concerns

The interpretation suggested above emphasizes the danger of parasitic *qui tam* actions, a danger for which there is increasing empirical evidence. Considering empirical evidence and social concerns, rather than focusing exclusively on legislative history, will prove beneficial; as the Third Circuit has noted, the FCA's legislative history is complex enough that one can find support for just about any interpretation of the phrase *original source*.<sup>240</sup> It is more useful, the Third Circuit also pointed out, to focus on the original source provision's overarching purpose, which is to "operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision and the restrictiveness of the post-1943 cases."<sup>241</sup> The FCA's goal has principally been to encourage the true whistleblower—the relator with firsthand knowledge who speaks up to prevent further fraud.<sup>242</sup> As Richard Oparil observed, the FCA is just as concerned with deterring parasitic claims as with fostering productive suits.<sup>243</sup>

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240. See U.S. *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) ("The bill that eventuated in the 1986 amendments underwent substantial revisions during its legislative path. This provides ample opportunity to search the legislative history and find some support somewhere for almost any construction of the many ambiguous terms in the final version.").

241. *Id.* (citation omitted).

242. See *id.* ("One theme recurring through the legislative history . . . is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the 'conspiracy of silence' among employees of corporations engaging in fraud.").

243. See Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L. REV. 525, 549 (1989) (noting that the 1986 amendments retain



Evidence of parasitic *qui tam* actions is alarming. One way to gauge this threat is to examine the rate of government intervention in *qui tam* actions. According to Department of Justice data, the Attorney General has not intervened in the majority of *qui tam* cases brought under the FCA. In fact, from 1987 to 2010, the government has declined to intervene in approximately 78% of *qui tam* actions in which investigation is complete.<sup>244</sup> While the conclusion that *qui tam* actions in which the Attorney General declines to intervene are likely to be frivolous involves an assumption, such an assumption does have support.<sup>245</sup>

Further, data about the *disposition* of *qui tam* cases supports the idea that the number of frivolous suits is high.<sup>246</sup> Just as there is reason to connect the Attorney General's refusal to intervene in the vast majority of *qui tam* actions with a high level of opportunistic litigation, it is also reasonable to believe that there is a connection between dismissals and frivolous lawsuits.<sup>247</sup> Of course, the mere discovery of frivolous suits is not dispositive, but it is "important because it indicates that *qui tam* actions result in some harm to the public—a waste of the time and money of the [United States] Attorney General's Office."<sup>248</sup> This high rate of dismissal "lends strong support to the

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the FCA's "bias against parasitic lawsuits" and that the amendments "may deter individuals or entities from bringing a[n] FCA action if the purported fraud has been highly publicized").

244. *Fraud Statistics*, *supra* note 18. As of September 30, 2010, out of a total 7,201 *qui tam* actions filed since 1987, the government has intervened in 1,327 actions and declined to intervene in 4,628 actions. The government was still investigating 1,246 actions.

245. See Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 971 (2007) ("Based on the above analysis, there is much support for the assumption that the Attorney General will intervene when a suit has merit.").

246. See *id.* ("Data on the disposition of false claims actions also indicate that the number of frivolous suits is high.").

247. See *id.* at 971–72 ("Just as it is reasonable to presume that if *qui tam* actions have merit the Attorney General will intervene, so too is it reasonable to presume that where they are frivolous the Attorney General will not intervene and they will ultimately be dismissed.").

248. *Id.* at 972.

conclusion that qui tam statutes result in many frivolous claims.”<sup>249</sup>

Professor Michael Rich also draws the conclusion that many *qui tam* actions are nonmeritorious,<sup>250</sup> pointing out that each year thousands of frivolous *qui tam* actions are filed.<sup>251</sup> Similarly, Professor Dayna Bowen Matthew notes concerns with opportunistic *qui tam* litigation.<sup>252</sup> Professor Matthew highlights the hidden costs associated with *qui tam* suits: The relator’s action is not monitored and controlled as government prosecution would be, and this can have implications for the quality of the litigation.<sup>253</sup> Attracted by the potential for monetary gain, some relators will pursue cases lacking factual support or solid legal theories; the result could be bad precedent and wasted public resources.<sup>254</sup> Unlike the government, the private *qui tam* plaintiff is not compelled to consider the larger social costs associated with *qui tam* litigation, such as the impact of imposing defense costs on target companies.<sup>255</sup>

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249. *Id.* at 975.

250. *See generally* Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out of Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233 (2007–2008) (arguing for joint and several liability for attorneys’ fees under FCA litigation and proposing that courts require certification of novel legal theories in *qui tam* litigation).

251. *See id.* at 1264–65 (“The result is that the government does not dismiss, and relators are allowed to proceed with, thousands of non-meritorious qui tam [sic] suits.”).

252. *See* Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 337 (2007) (“Overenforcement by zealous ‘private attorneys general’ has been a concern for decades. The seminal literature on joint public-private enforcement abounds with examples.”).

253. *See id.* at 297 (“Privatization means the *qui tam* relator is not being effectively subordinated to the Government’s direction or supervision. This has impact on the quality of cases pursued, the number of cases pursued, and the strength of legal theories advanced when cases are pursued.”).

254. *See id.* (“Due to the sizable potential of financial gain, some *qui tam* relators will pursue cases with poor factual support or pursue flimsy legal theories that establish bad precedent and waste public resources.”).

255. *See id.* (“[T]he relator has neither an ethical nor financial interest compelling it to consider the impact of frivolously imposing defense costs on target companies. The Government, on the other hand, is expected to exercise prosecutorial discretion that takes into account what social goods might be sacrificed [by litigation].”).

A narrow reading of the new definition's second prong, as discussed above, addresses these concerns by encouraging only select *qui tam* actions. In cases where allegations of fraud have been publicly disclosed, only relators who can substantially assist the government—not whistleblowers who remain silent until they smell a defendant's blood in the water—may join in a recovery under the FCA. The concerns presented by Professors Rich and Matthew, including increased burdens on the Justice Department, taxpayers, and defendants, would be greatly diminished.

What, then, is the upshot? The point is policy driven: *Qui tam* actions do not exist merely to reward relators for spotting fraud. Rather, the FCA's mission is to reward those relators who alert the government to false claims and fraudulent schemes that the government would not otherwise have discovered.<sup>256</sup> The social costs of *qui tam* litigation would outweigh its benefits were the government's recovery to be reduced by *qui tam* relators who did not come forward until allegations of fraud became public (unless the relator's information is extremely valuable).<sup>257</sup> The FCA's aim is to reward the kicker who kicks the game-winning field goal, not the second-stringer who runs onto the field to celebrate. To use a different metaphor, if the FCA's mission is to incentivize the right kinds of whistleblowers—those who first blow the whistle—then there is “little point in rewarding a second toot” of the whistle.<sup>258</sup> A whistleblower, after all “sounds the alarm; he does not echo it.”<sup>259</sup>

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256. See H.R. REP. NO. 111-97, at 28 (2009) (“[I]t is suspect that the *qui tam* provisions in this bill will increase the Federal Government's ability to recover taxpayer dollars. Rather, it is possible that these provisions will encourage private plaintiffs to file unfounded and parasitic lawsuits that benefit no one but the plaintiffs and their attorneys.”).

257. See *id.* at 32 (noting a need for a public disclosure bar that does not “reward relators with no first hand knowledge and who do not add information beyond what is in the public domain”).

258. *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

259. *Id.*

### V. Conclusion

The proliferation of whistleblower suits under the FCA is reminiscent of an episode of the series *Arrested Development*.<sup>260</sup> In the episode, Michael Bluth addresses the Board of the Bluth Company about honesty and whistleblowing.<sup>261</sup> Michael dumps out a box of whistles on the boardroom table, stating that he wants an honest company—“a building full of whistleblowers.”<sup>262</sup> Unfortunately for Michael, the meeting turns into an eruption of needless whistleblowing.<sup>263</sup>

The 2010 amendments to the FCA, if not construed cautiously, could lead to very similar (and much less comical) problems. Congress originally enacted the FCA to promote honesty among independent contractors, and when relators began to overenforce the FCA’s provisions, Congress stepped in to prevent such abuse.<sup>264</sup> When this correction led to underenforcement and reduced recoveries for the government, Congress enacted the 1986 amendments in an effort to strike the crucial balance between proper *qui tam* actions and opportunism.<sup>265</sup> The courts have wrestled with this golden mean ever since.<sup>266</sup> Today, when the Attorney General’s office declines to put its seal of approval on the vast majority of *qui tam* actions, and when thousands of frivolous FCA actions are filed each year,<sup>267</sup> it is important that Congress and the courts not forget that the FCA’s mission is not just to expose fraud but to save the government valuable resources. Using the approach outlined above will help strike the proper balance by requiring relators to

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260. See *Arrested Development: Whistler’s Mother* (Fox television broadcast Apr. 4, 2004).

261. See *id.* (“He’s right; we don’t need a whistleblower. We need a building full of whistleblowers.”).

262. *Id.*

263. *Id.*

264. See *supra* text accompanying notes 11–78 (detailing the FCA’s background).

265. See *supra* text accompanying notes 79–89 (describing the 1986 amendments).

266. See *supra* text accompanying notes 96–203 (discussing various judicial interpretations of the FCA’s “original source” provision).

267. See *supra* text accompanying notes 244–59 (discussing evidence for frivolous *qui tam* actions).

provide their information to the government prior to any public disclosure. Construing the second prong of the new definition as a narrow exception to the first prong will ensure that, in cases in which allegations of fraud are already public, only relators with information essential to the government's case will be able to take advantage of the FCA's provisions.