[University of St. Thomas Law Journal](#)

Volume 10
Issue 3 *Spring 2013* Article 13

2013

Rescuing the False Claims Act's "Golden Mean": Keeping Parasitic Profits Out of the Whistleblower's Pot of Gold

Benjamin R. Kwan

Comment

Rescuing the False Claims Act's "Golden Mean": Keeping Parasitic Profits Out of the Whistleblower's Pot of Gold

Benjamin R. Kwan*

Introduction

parasite | ˈparəˌsīt
noun
An organism that lives in or on another organism (its host) and benefits by deriving nutrients at the host's expense.[1]

What follows is a prototypical exchange between attorneys who are litigating the merits of a whistleblower's claim that a healthcare company has overbilled Medicare and defrauded the government. Judging by the following remarks, could either of the lawyers be called a parasite?

Defendant's Attorney: The Plaintiff is a competitor who is using the lawsuit in an attempt to gain a competitive advantage. We will vigorously defend our client against these meritless allegations.

Plaintiff's Attorney: My clients allege that the nation's largest nursing home operator and contract physical therapy company has been submitting false Medicare and Medicaid claims for years. If my clients are successful they would stand to share in any judgment for blowing the whistle.[2]

---

* J.D., 2013, University of St. Thomas School of Law; B.S. Journalism, Northwestern University. The author would like to thank the former dean of the law school, Thomas Mengler, for his feedback and encouragement throughout the development of this Comment. The author is also indebted to his friends, family, and to Ted Haller, whose support helped make law school a fun and rewarding experience.

1. New Oxford American Dictionary (3d ed. 2011).

2. *See generally* Dan Browning, *Whistleblower Gets Green Light to Build False-Claims Case*, Star Trib., Feb. 24, 2012, http://www.startribune.com/local/140316793.html. I used the news report and the comments from opposing attorneys to synthesize the remarks representing the defendant's and plaintiff's attorneys in my example.

Whether you see a parasite at all depends. Viewed through one lens,[3] the parasite might be the nursing home operator. One of the plaintiffs alleges the operator billed Medicare and Medicaid for therapy services that were not provided to the nursing home's residents.[4] She alleges that her former employer filed more than 9,000 such claims for reimbursement while she worked at the nursing home.[5] Through another lens,[6] the parasite might be the whistleblower plaintiff. She stands to share in any potential judgment the government recovers, provided the information she came forward with about her former employer proves true.[7] Her share could soar into the hundreds of thousands of dollars, and perhaps many times that.[8] Moreover, the whistleblower's co-plaintiff is the defendant's *competitor*, which may seem fishily opportunistic.[9]

Maybe your finger points to one of these parties as the "parasite" by way of decidedly more base factors. Are you defense-oriented or a member of the plaintiffs' bar? Is your agenda more pro-business or is it focused on vindicating taxpayer rights? Do you work on an hourly-fee or contingent-fee basis? Would you characterize the allegations as healthcare fraud and abuse or fraud against the government? Have an opinion? Hold on to it for just a moment.

The False Claims Act of 1863 (FCA)[10] is a Civil War-era redoubtable machine that remains as robust as ever and is the reason the question above is even a matter for consideration. Today, the FCA enables a private individual to sound the alarm and file suit in the name of the United States when she knows of an undiscovered fraud against the government.[11] What is more, where the government declines to intervene, the whistleblower may continue to pursue the fraud as a private cause of action.[12] Since enacting an invigorating amendment to the FCA in 1986,[13] the government has

3. *Cf.* PETER B. HUTT II & ANNA R. DOLINSKY, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, PREVENTING GOVERNMENT OVERPAYMENTS TO QUI TAM PLAINTIFFS: PROPOSED AMENDMENTS TO THE FALSE CLAIMS ACT (2011) (advocating for caps on rewards for persons who blow the whistle on organizations alleged to have defrauded the government).

4. United States *ex rel.* Johnson v. Golden Gate Nat'l Senior Care, LLC, Civ. No. 08-1194, 2012 WL 465676, at *1–2 (D. Minn. Feb. 13, 2012).

5. *Id.* at *2.

6. *See, e.g.*, *What We Do*, TAXPAYERS AGAINST FRAUD EDUCATION FUND, https://www.taf.org/who-we-are/what-we-do (last visited Nov. 13, 2013) (advocating the protection of the False Claims Act against attacks by lobbyists, among others).

7. Browning, *supra* note 2.

8. *Id.*

9. *Id.*

10. 31 U.S.C. § 3729 (2006).

11. 31 U.S.C. § 3730(b) (2006).

12. *See* 31 U.S.C. § 3730(c)(3).

13. *See* False Claims Amendments Act of 1986, 31 U.S.C. § 3729.

recovered more than $35 billion in misappropriated funds.[14] Under the FCA, whistleblowers are entitled to as much as thirty percent of the government's recovery as a reward for coming forward.[15]

FCA "*qui tam*"[16] plaintiffs who become entitled to sometimes fantastical sums of money for their willingness to bring suit help frame a persistent debate. That is, whether there is too much whistleblower largesse under the FCA and whether the FCA has given rise to an unjust cottage industry. On the other hand, those whistleblowers' rewards only skim the surface of a massive affront to the American taxpayer.[17]

So who exactly is the parasite? It still depends. I admit this setup poses a bit of a trick question. And the issue of just who is the parasite (and alternatively, who is the host) is a matter that has been—and will continue to be—hotly debated throughout the life of the FCA.[18] The key here is maintaining equilibrium, perhaps evinced by equal amounts of finger-pointing on both sides of the debate. Congress moderates the balance necessary to achieve this perception of equilibrium through provisions of the FCA that create sufficient incentives for private parties to detect and pursue frauds on the one hand, while discouraging whistleblower suits where the federal government already has the ability to discover and prosecute the fraud on its own.[19] This Comment argues that one such provision of the FCA—meant to guard against suits filed by opportunistic *qui tam* plaintiffs—must be fixed, lest the political and practical future of the FCA be eviscerated *in toto*.

The Patient Protection and Affordable Care Act of 2010 (the Affordable Care Act or ACA)[20] amended the False Claims Act's so-called "public

---

14. U.S. Dep't of Justice, *Fraud Statistics – Overview*, U.S. DEP'T OF JUSTICE, *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf [hereinafter U.S. Dep't of Justice, Fraud Statistics].

15. *See* 31 U.S.C. § 3730(d)(1)–(2).

16. The shortened Latin origin of whistleblower, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, means "who as well for the king as for himself sues in this matter." A *qui tam* action is one "brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." BLACK'S LAW DICTIONARY 588 (3d Pocket ed. 2006).

17. *See Health Care Fraud, Waste, and Abuse: Serious Issues That Must Be Addressed Through Concentrated and Sustained Efforts: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Health*, 111th Cong. (2010) (testimony of Daniel R. Levinson, Inspector General, U.S. Department of Health & Human Services) (estimating that 7.8% of the $24.1 billion paid out by the Centers for Medicare & Medicaid Services in 2009 were improper payments); *see also* REBECCA S. BUSCH, HEALTHCARE FRAUD: AUDITING AND DETECTION GUIDE, 2 (2008) (describing one commentator's estimate that about $25 million per hour is stolen in healthcare in the United States).

18. *See infra* Part II (discussing the evolution of the FCA framed in terms of parasitic profits).

19. Beverly Cohen, *Kaboom! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN ST. L. REV. 77, 78 (2011).

20. Pub. L. No. 111-148, 124 Stat. 119 (2010). And as everyone knows by now, the Supreme Court upheld the Affordable Care Act in Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566

disclosure bar"[21]—and it did so in a way that undercuts the integrity of the FCA. It is best to think of the public disclosure bar as a preliminary hurdle that most *qui tam* plaintiffs must clear before proceeding with their suits. It is a handy antidote to parasitic actions, which Congress first added to the FCA in 1943 (and later fixed in 1986) after a rash of actions based on information the government already knew.[22] The jurisdictional mechanism seeks "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."[23] The public disclosure bar tells a potential whistleblower that she may not bring her suit "if substantially the same allegations or transactions as alleged in the action or claim were [already] publicly disclosed."[24] This limitation makes total sense. One may not blow the whistle (and avail herself to a substantial reward) where the whistle has already been sounded. Generally, FCA defendants gain mandatory dismissal of a whistleblower's lawsuit when a court finds that there has been a public disclosure of the whistleblower's information.[25]

The ACA throws the courthouse doors wide open to a new class of *qui tam* plaintiffs who have the ability to file claims where they did not before.[26] The ACA's FCA amendment achieved this change in large part with the addition of one word: *Federal*. That word now qualifies the list of sources of information that will foreclose a *qui tam* suit: "*Federal* criminal, civil, or administrative hearing[s] in which the Government or its agent is a party . . . or other *Federal* report[s], hearing[s], audit[s], or investigation[s] . . . ." Thus, *State* and *local* reports, hearings, audits and investiga-

---

(2012). The implication here is that the amended public disclosure language of the False Claims Act survives.

21. *See* 31 U.S.C. § 3730(e)(4).

22. *See, e.g.*, United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

23. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (emphasis added).

24. 31 U.S.C.A. § 3730(e)(4) (West 2012), which reads in full:

> (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 (2) 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.

25. *See* 31 U.S.C. § 3730(e)(4).

26. See *infra* § III for a full discussion of the likely effects of the ACA amendments.

tions are arguably no longer off-limits. One foreseeable result of this change is private, disinterested individuals mining obscure, yet publicly available, state investigation results for information upon which to base a federal FCA *qui tam* action.

This result, as observed by scholars[27] and practitioners[28] alike, is likely to yield an expansion of FCA liability. I argue this expansion is a threat to the FCA as a whole, which may create a backlash that imperils the future of the FCA's viability in the public eye. The expansion defeats the equilibrium necessary to justify a private attorney general mechanism that properly incentivizes fraud detection, and simultaneously stops racketeers, shysters, and opportunistic trolls from sussing out parasitic profits. As a result, Congress ought to rethink its narrowing of the jurisdictional bar to *qui tam* rights of action under the FCA. This will provide a means of tamping down the persistent and growing myth that whistleblower private rights of action under the FCA are a *per se* leech on the economy.[29] In short, Congress has veered from the "golden mean" and must re-balance the FCA.

Part I of this Comment examines the origin and evolution of the FCA in light of the decidedly American private attorney general model of civil litigation; Part II examines the importance of the "golden mean" and explains how the 2010 ACA amendment destroys its equilibrium; Part III makes the case for FCA equilibrium by and through an amended public disclosure bar (i.e., rescuing the "golden mean"); and Part IV supplies an idea for how to make it happen, and why it must. For our purposes, the ACA amendment presents a sort of open wound that will allow parasitic FCA actions. That should cause Congress to reverse course, lest the foes of the FCA finally get the case law examples, headlines, and talking points they need to legitimize the myth that the FCA does more harm than it does good.

I. Incentivized Private Rights of Action & the FCA

A. *A Threshold Question: Is the Private Attorney General Model of Civil Litigation Still an Appropriate Means of Stopping Fraud Against the Government?*

In 1983, three years before Congress passed the substantial amendments that shaped the FCA we know today, Professor John C. Coffee asked: "to what extent can we sensibly rely on private litigation as a mecha-

---

27. *See, e.g.*, Cohen, *supra* note 19.

28. *See, e.g.*, Robert T. Rhoad & Matthew T. Fornataro, *Whistling While They Work: Limiting Exposure in the Face of the PPACA's Invitation to Employee Whistleblower Lawsuits*, 22 Health L. 19, 19 (2010).

29. See *infra* § I-C for discussion about the current public sentiments for and against the false claims act.

nism of law enforcement?"[30] That question drives to the heart of the issue. We can only rely on private litigation as a mechanism of law enforcement to the extent we are sensible about it. This notion demands that a private attorney general only be allowed to prosecute matters in the public interest to the extent that traditional notions about laws and their utility remain intact. Such values include, for example, avoiding over-deterrence and maintaining a private attorney general statute that respects the moral hazard problem that exists when the government can be ensured frauds will be prosecuted even if it does not intervene.[31] Notwithstanding the changes advocated here, the FCA largely avoids the problems with the private attorney general model highlighted some three decades ago by Professor Coffee.

Private attorney general suits—at least in the FCA realm—may be described as privatizing the enforcement of laws against corporate wrongdoing.[32] The private attorney general model rests on the assumption that private litigation is not just for gaining compensation for victims, but also serves as a means of generating deterrence.[33] Private attorneys generally do both by multiplying the resources committed to detection and prosecution.[34] They are force multipliers. The Supreme Court relied on that idea when it first decided to recognize implied private causes of action under federal securities law.[35]

Private attorneys general increase the number of resources committed to enforcing laws because private parties are better positioned to detect violations.[36] To use the FCA as an example, the statute creates monetary incentives for private attorneys general to bring their whistle-blowing clients forward with otherwise unascertainable (by *public* attorneys general, acting without tips and inside information) details that can lead to fraud recoveries. Private attorneys general can also pick up a great deal of government slack. "[C]entralized public enforcement bureaucracies frequently suffer from 'diseconomies of scale, given multiple layers of decision and review and the temptation to adopt overly rigid norms in order to reduce administrative costs.'"[37] Furthermore, the presence of private attorneys general can serve as a political check on agency-counterparts, who may be inclined to

30. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is not Working*, 42 MD. L. REV. 215, 218 (1983).

31. *See* Dayna Bowen Matthew, *The Moral Hazard Problem with Privitization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 297 (2007) (arguing for stiffer procedural requirements and greater exercise of prosecutorial discretion by the DOJ in FCA private attorney general suits).

32. Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167, 184 (1997).

33. Coffee, *supra* note 30, at 218.

34. *Id.*

35. *Id.* (citing J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).

36. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 108 (2005).

37. *Id.*

shirk enforcement responsibilities because of political, budgetary, or even personal pressures.[38] Finally, private party litigation in the public interest is an entrepreneurial affair. Private attorneys general tend to bring innovative litigation and settlement techniques to the fore.[39]

However, those benefits can be outweighed. Harvard Law Professor Matthew Stephenson points to three areas that give pause to any supporter of private rights of action.[40] First, when too many entrepreneurial private attorneys general take up a cause, enforcement can become inefficient.[41] Beyond wasting judicial resources, the private attorneys general may frustrate the goals that a public attorney general can mediate when it comes to the economic and social impact of enforcing laws.[42] Private attorneys general can interfere with public enforcement efforts by simply getting in the way.[43] Stephenson explains that this can occur, for example, when a government agency may prefer to negotiate with a regulated firm in order to establish a workable and consistent regulatory system, rather than subject that firm to the mercy of a *qui tam* plaintiff on the other side of a civil case.[44] Finally, private enforcement of laws may undermine the valuable American principle of prosecutorial discretion.[45]

The point of this Comment is to advocate for a necessary change to the FCA that maintains the equilibrium it is capable of achieving—thus avoiding the drawbacks Stephenson highlights. In fact, some scholars say the FCA's *qui tam* provision provides an exemplar for private rights of action generally.[46] One way the FCA provides such a good example, according to Professor Fisch, is the close coordination between relator and government in avoiding duplicative proceedings and ensuring consistency in litigation.[47] Fisch also lauds the FCA as a means of avoiding the negative costs of the private attorney general model by "plac[ing] a premium on the contribution of original information"[48]—information the government would be unable to obtain otherwise.[49] I argue that something more akin to the old "public disclosure" bar is another way of making FCA *qui tam* suits a paradigm for

38. *See id.* at 109.

39. *Id.*; *but see* Matthew, *supra* note 31, at 320 (arguing that the nature of *qui tam* suits is such that relators' counsel often press legal theories "that often require aggressive interpretations of existing law"—arguments that lead to settlements which lack any meaningful judicial or legislative opportunity to change the law to provide prospective guidance).

40. Stephenson, *supra* note 36, at 115.

41. *Id.*

42. *Id.*

43. *Id.* at 117.

44. *Id.* (internal citation omitted).

45. *Id.* at 119.

46. *See* Fisch, *supra* note 32, at 183.

47. *See id.* at 197.

48. *Id.* at 196.

49. *See id.* ("[T]he relator can supplement the government's litigation effort with private resources.").

balanced private rights of action. This exemplar status is at risk given the ACA 2010 Amendment.

B. The Private Attorney General Under the False Claims Act

The arc of the FCA has traversed many a zenith and nadir. The original Act of 1863 addressed fraud against the government committed by Civil War contractors.[50] After a few sleepy generations, World War II (WWII) gave rise to the next "feeding frenzy among unscrupulous contractors"[51]—and another flurry of FCA activity (including parasitic opportunism, discussed more below). In 1986, Congress answered a call to action after the now-infamous headlines about $7,622 ten-cup coffee makers, $435 hammers, and $640 toilet seats that plagued the Reagan administration.[52] It is the 1986 Amendments to the FCA that largely provide the foundation for what we understand the FCA to be today.

Congress reinvigorated the FCA in 1986 amidst concerns about "sophisticated and widespread fraud."[53] The FCA imposes a double-dose of pain to anyone who defrauds the government.[54] Not only is such a person subject to treble damages, but she must also pay a civil penalty of not less than $5,500 and not more than $11,000 *for each false claim*.[55] The government levies the treble damages and civil penalties against anyone who knowingly presents a false claim for payment to the federal government or improperly retains an overpayment from the federal government.[56]

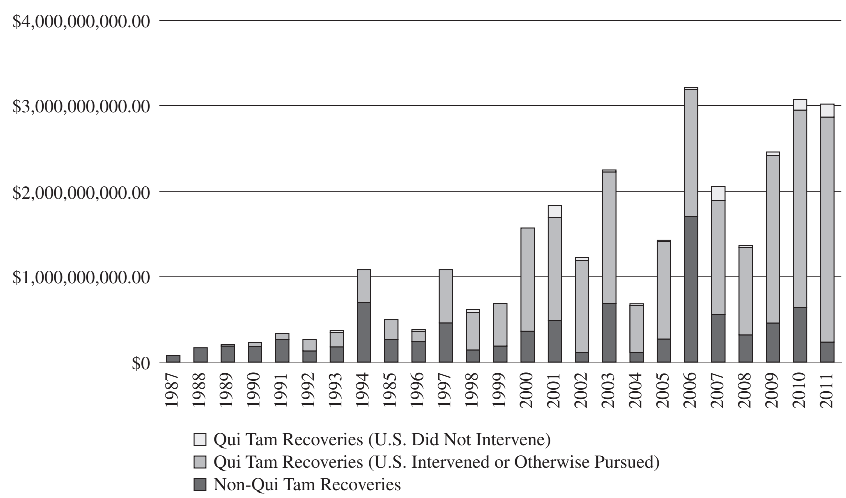
The whistleblower, or "*qui tam*," provisions of the FCA provide substantial incentives for private parties to come forward with information about fraud committed against the government.[57] These provisions also enable private parties to initiate an FCA action in the first instance before government involvement.[58] The FCA relator—or person relating the claim to the government—files her claim under seal, not to be served on the defendant until the court orders.[59] This gives the Department of Justice a minimum of sixty days to decide what it wants to do with the *qui tam* relator's information—a period of time that can be extended for good reason.[60] If the

50. Henry Scammell, Giantkillers: The Team and the law that Help Whistle-Blowers Recover America's Stolen Billions, 39 (2004).
51. *Id.* at 40.
52. *Id.* at 43.
53. Fisch, *supra* note 32, at 185 (citing S. Rep. No. 99-345, at 1-2 (1986)).
54. *See* 31 U.S.C. § 3729(a)(1)(G).
55. *See id.*
56. *See id.* § 3729(a).
57. *See id.*
58. *See id.*
59. *Id.* § 3730(b)(2).
60. *Id.* § 3730(b)(3). An internal memorandum circulated by the U.S. Attorney's Office in the Eastern District of Pennsylvania reveals that, at least in that district, the average *qui tam* FCA suit is under seal for two years. That memorandum is available at: http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf (last accessed Nov. 13, 2013).

government intervenes, it assumes primary responsibility for prosecuting the claims,[61] deciding whether the claims ought to be dismissed,[62] and negotiating settlement.[63] All the while, the *qui tam* plaintiff, or "relator," remains a party to the action, unless her involvement would interfere with the government's prosecution.[64] Ultimately, the FCA's bite lies in a relator's ability to maintain her private right of action if the Attorney General decides not to intervene in the suit.[65]

Professor William Rubenstein's description of the *qui tam* relator as one of three kinds of private attorneys general is helpful in illustrating how FCA plaintiffs fit within the broader private attorney general framework.[66] Rubenstein calls the FCA whistleblower a "substitute" attorney general.[67] The private attorney general in a *qui tam* suit is neither hired by the government nor appointed by an executive official, "[r]ather, she is a self-appointed bounty hunter, pursuing government fraud where the government has not done so."[68]

FIGURE 1: TOTAL FCA RECOVERIES—QUI TAM AND NON-QUI TAM



Since the 1986 amendments, two-thirds of the government's recoveries under the FCA have been in the area of health care fraud and abuse.[69]

61. 31 U.S.C. § 3730(c)(1).
62. *Id.* § 3730(c)(2)(A).
63. *Id.* § 3730(c)(2)(B).
64. *Id.* § 3730(c)(2)(C).
65. *See id.* § 3730(c)(3).
66. *See* William B. Rubenstein, *On What a "Private Attorney General" is—And why it Matters*, 57 VAND. L. REV. 2129, 2142 (2004) (describing the three types of private attorney general as: "substitute," "supplemental," and "simulated").
67. *Id.* at 2158.
68. *Id*. at 2144.
69. *See* U.S. Dep't of Justice, Fraud Statistics, *supra* note 14.

Defense contractors are another large target.[70] Since 1986, FCA whistleblowers who filed suit and relayed information to the government that led to settlements or judgments collected more than $3.4 billion—or roughly ten percent of the government's $30.3 billion in total FCA recoveries through the end of fiscal year 2011.[71] As *Figure 1* illustrates, government fraud recoveries shot up exponentially after the 1986 Act, commensurate with an equally astonishing number of FCA claim filings and recoveries by whistleblowers.[72]

C. *Flavors from the Field of FCA Litigation*

Before we address the "golden mean" and the need for its rescue, it is worth getting a flavor for the lawsuits, judgments, settlements, headlines, and political talking points framing the ongoing debate about the FCA and its usefulness. An interested observer will note the tension emanating from all manner of places including the halls of Congress,[73] the legal academy, and from special interest groups.[74]

Media reports document whistleblower rewards—sometimes in the millions of dollars—that can look like windfalls.[75] For example, there is a specialty pharmacy located in the Florida Keys that exists almost certainly for the sole purpose of bringing FCA suits.[76] Acting as an FCA whistleblowing plaintiff, the pharmacy has raked in millions. It is called Ven-A-Care of the Florida Keys, Inc. and is made up primarily of lawyers. The pharmacy claimed that Mylan Inc., a generic drug company, defrauded the United States and several states by falsely reporting inflated drug prices. Ven-A-Care brought suit on behalf of the United States under the whistleblower provisions of the FCA.[77] The case settled after a consolidation of claims against many other defendants in multidistrict litigation.[78] Ven-A-Care collected $8.5 million in connection with its allegations against Mylan alone.[79] Since 2000, the specialty pharmacy based in a tiny head-

---

70. *See id.* (reporting nearly $4.9 billion in Department of Defense agency-related settlement and judgments from 1987 to 2011).

71. *See id.*

72. *See id.*

73. *See, e.g.*, Fraud Enforcement and Recovery Act of 2009, 155 Cong. Rec. S4604-04, S4610 (daily ed. Apr. 23, 2009) *available at* 2009 WL 1098184, *16.

74. *Compare, e.g.*, *What We Do*, *supra* note 6 (advocating for a robust FCA and strong provisions for whistleblowers), *with, e.g.*, HUTT & DOLINSKY, *supra* note 3 (advocating for a tightened FCA with proposed measures like caps on relators' rewards).

75. *See, e.g.*, David Voreacos, *Mylan to Pay $57 Million to Settle Drug Overpricing Claims*, BLOOMBERG, Feb. 28, 2012, http://www.bloomberg.com/news/2012-02-28/mylan-to-pay-57-million-to-settle-drug-overpricing-claims-1-.html (reporting an $8.5 million dollar whistleblower share).

76. *See id.*

77. *Id.*

78. *See In re* Pharm. Industry Average Wholesale Price Litig., 491 F. Supp. 2d 20 (D. Mass. 2007).

79. Voreacos, *supra* note 75.

quarters located down a nondescript alleyway in Key West, Florida[80] has settled more than two-dozen FCA lawsuits that allowed state and federal governments to collect more than $3 billion.[81] By some accounts, Ven-A-Care's total reward-share was more than $400 million.[82]

Ven-A-Care's cottage industry only tells a sliver of the story. Many other whistleblowers have come forward on an individual basis with insider information. On December 29, 2011, the Department of Justice (DOJ) announced a $30 million settlement with GE Healthcare Inc.[83] In that case, the whistleblower alleged that a company GE Healthcare acquired in 2004, Amersham Health Inc., had violated the FCA by causing Medicare to overpay for a drug used in certain cardiac diagnostic imaging procedures.[84] Interestingly, the whistleblower was a pharmaceutical representative who sold competitor Bristol-Myers Squibb's similar drug.[85] GE Healthcare paid the relator $5.1 million out of the total settlement.[86]

In March 2012, the DOJ announced a settlement and reward for two whistleblowers who were more traditional—insiders employed by the defendant company.[87] In that case, the whistleblowers alleged both kickbacks and fraudulent claims.[88] As is typical in many FCA cases, the fraud occurred when LifeWatch Services, Inc., a Rosemont, Illinois company, billed Medicare for technologically advanced services for which patients did not qualify.[89] The difference in price between the service for which LifeWatch billed and the appropriate, less-advanced service was nearly $1,000 per claim.[90] The whistleblowers' complaints alleged that LifeWatch nonetheless submitted claims to Medicare using a false diagnostic code in order to have the claims paid.[91] In this case, the whistleblowers' share of an $18.5 million settlement was $3.4 million plus interest.[92]

---

80. Eamon Javers, *Ven-a-Care: Whistleblowing for Dollars*, CNBC (Feb. 11, 2011, 7:30 AM), http://video.cnbc.com/gallery/?video=1790801149.

81. Voreacos, *supra* note 75.

82. *Id.*

83. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, GE Healthcare Inc. Pays U.S. $30 Million to Resolve False Claims Act Allegations (Dec. 29, 2011), http://www.justice.gov/opa/pr/2011/December/11-civ-1717.html.

84. *Id.*

85. Chad Halcom, *Local Whistle-Blower Suit Ends up Costing GE $30 Million*, CRAIN'S DETROIT BUSINESS, Dec. 29, 2011, http://www.crainsdetroit.com/article/20111229/FREE/111229919/local-whistle-blower-suit-ends-up-costing-ge-30-million#.

86. Press Release, *supra* note 83.

87. *See* Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, United States Settles False Claims Act Allegations Against Illinois-Based Lifewatch Services (Mar. 23, 2012), http://www.justice.gov/opa/pr/2012/March/12-civ-369.html.

88. *Id.*

89. *Id.*

90. *See id.*

91. *Id.*

92. *Id.*

Tension over the usefulness of the FCA resonates in Congress from time to time. In 2009, Senator Jon Kyl of Arizona proposed an FCA amendment that would have capped the rewards paid to whistleblowers.[93] Senator Kyl's proposed amendments failed in quick succession. The various versions would have capped a relator's share under the *qui tam* provisions of the FCA anywhere between $5 and $50 million, or, alternatively, 300 percent of the expenses that a relator incurs in prosecuting the action.[94]

During the debate, Senator Kyl argued that whistleblower rewards "come at the expense of the Treasury" and that excessive rewards "are denying the taxpayers the benefit of the False Claims Act which was, of course, intended to benefit the Treasury and not to significantly benefit these private relators."[95] Senator Kyl, an Arizona Republican, claimed that the drafters of the 1986 Amendments never could have contemplated the billion-dollar-plus recoveries that exist today and that the relator's share of such recoveries would never have been allowed.[96] Senator Charles Grassley, a fellow Republican, (and co-sponsor of the 1986 Amendments) took up the other side of the political rhetoric.[97] Grassley pointed to the average award a relator claimed in certain instances over the years. As of 2009, in "cases where the DOJ joins the whistleblower, the average share for the whistleblower is not 25 percent or 30 percent, it is 16 percent."[98] Grassley added that, viewed as a "cost," that average was not out of line when compared to the average administrative costs of Government.[99] He concluded with a pointed barb:

> It is about recovering money, taxpayers' money. I find it ironic-I hope people are listening now because there is a conflict here between maybe people on my side of the aisle who think this is a good idea-I find it very ironic that those outside groups supporting this amendment were in staunch opposition to the idea of the Senate imposing any caps on executive compensation at companies receiving bailout funds. Now instead, they want to cap the recovery of good-faith whistleblowers to come forward with claims of fraud at companies that are ripping off American taxpayers.[100]

The interest groups help narrate the political debate that plays out in Congress and elsewhere. On the one side, for example, you will find the U.S. Chamber Institute for Legal Reform. The Chamber Institute is con-

93. *See* Proposed Amendments 986, 987, 988, and 989 to S. 386, 155 CONG. REC. S4588-02, S4589 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl).

94. *See id.*

95. Fraud Enforcement and Recovery Act of 2009, s*upra* note 73, at *16.

96. *See id.* at *15.

97. *See id.* at *25–26.

98. *Id.* at *25.

99. *Id.* at *25.

100. *Id.* at *26.

stantly trying to pare down the FCA, with special attention fixed fairly constantly on *qui tam* plaintiffs.[101] On the other side of the discussion is an organization called Taxpayers Against Fraud. Its avowed purpose is described as follows: "Our work is necessary because the False Claims Act works so well that unscrupulous special interests are always plotting new ways to weaken the law."[102]

So now you see the ebb and flow, the push and pull, the tug and slack that surrounds the FCA and the myriad questions about its success, its usefulness, and its future. It is finally the perfect time to discuss the "golden mean" and the 2010 amendments to the FCA that truly are a threat to maintaining the balance necessary to preserve the FCA as "the single most important tool U.S. taxpayers have to recover the billions of dollars stolen through fraud by U.S. government contractors every year."[103]

II. The "Golden Mean"

A. *Mediating the Tension*

The term "golden mean" finds its textual origin in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, a 1994 Court of Appeals opinion.[104] But its spirit is something Congress has striven for since 1863. Judge Wald on the D.C. Circuit penned the phrase, describing "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."[105] As the court in *Springfield* notes, "Congress has frequently altered its course in drafting and amending the *qui tam* provisions since initial passage of the FCA over a century ago."[106] One means of preventing parasitic *qui tam* suits was the public disclosure bar. Congress has veered from the golden mean with the 2010 ACA amendment to the public disclosure bar and must now return to provide the balance necessary to maintain a private right of action as powerful as the FCA.

1. *The Evolution of the Public Disclosure Bar*

The original False Claims Act of 1863 provided no means by which the courts could bar an opportunistic plaintiff from filing a *qui tam* suit

101. *See, e.g.*, Hutt & Dolinsky, *supra* note 3 (advocating, among many things, for the kind of reward caps pitched by Sen. Kyl, mandatory internal reporting through corporate compliance programs, and foreclosure of *qui tam* actions when the defendant has already disclosed its alleged wrongdoing).

102. *What We Do*, *supra* note 6.

103. *Id.*

104. *See* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

105. *Id.*

106. *Id.*

based on evidence or information the government already had.[107] To achieve a "golden mean" between proper incentives and improper opportunism, the original Act required *qui tam* plaintiffs to bear the full cost of their litigation efforts.[108] This "invitation for abuse"[109] would not be taken up, however, for decades.

Like the impetus for the original Act of 1863, wartime again ushered in the FCA's next major season. As government contracts boomed during WWII and during the decade following the New Deal, so did the number of *qui tam* suits alleging impropriety.[110] But without a means of barring whistleblower suits based on information the government already possessed, the field was ripe for opportunistic plaintiffs to file "parasitic" lawsuits.[111] Just as WWII gave rise to a "feeding frenzy among unscrupulous contractors" to defraud the government, the era also served as a heyday for opportunistic attorneys who piggy-backed on publicized government accusations and filed parasitic *qui tam* suits.[112]

The era of parasitic *qui tam* actions reached its apex in 1943 when the Supreme Court decided *United States ex rel. Marcus v. Hess*.[113] In *Marcus*, the Supreme Court allowed a *qui tam* relator to proceed with an FCA whistleblower suit using a complaint that almost certainly copied paragraphs verbatim from a publicly available criminal indictment to which the defendants had already pled no contest.[114] The Court held that this kind of opportunism could not be blocked because neither the FCA nor the legislative history barred such a suit.[115] So, even though the relator contributed no additional information to aid the government in a civil suit to recover taxpayer funds under the FCA, he was still able to share in the government's ultimate recovery.[116]

Congress responded swiftly, amid vociferous public outcry. President Roosevelt signed the 1943 Amendments to the FCA on December 21, enacting the first iteration of the public disclosure bar, which was based on government knowledge.[117] The statute reflected an ultimate compromise between the House and Senate.[118] The House bill would have killed

107. *Id.* at 649–50.
108. *Id.* at 649.
109. *Id.* (citing United States *ex rel.* LaValley v. First Nat. Bank of Boston, 707 F. Supp. 1351, 1354 (D. Mass. 1988)).
110. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).
111. *See* United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Maine, 24 F.3d 320, 324 (1st Cir. 1994).
112. SCAMMELL, *supra* note 50, at 40–41.
113. *S. Prawer & Co.*, 24 F.3d at 324–25.
114. Marcus v. Hess, 317 U.S. 537, 558 (1943) (J. Jackson, dissenting).
115. *See id.* at 546–47.
116. *See id.* at 545.
117. *See S. Prawer & Co*., 24 F.3d at 325.
118. *Id.*

whistleblower actions altogether; the Senate bill would have precluded suits that were based upon information already in the government's possession unless the whistleblower was an "original source" of the information.[119] The Senate's version largely won out, but with a deletion of the "original source" provision.[120] The final version of the first public disclosure bar precluded all *qui tam* actions "based on evidence or information the Government had when the action was brought."[121] It also reduced the whistleblower's potential reward from half to no more than ten percent where the government intervened in the action.[122] The result was forty years with very few *qui tam* actions because "courts strictly construed the jurisdictional bar."[123] The 1943 amendment contained no protection for "original source" whistleblowers who furnished evidence or information to the government in the first place.[124]

If the era pre-dating the 1943 amendment is best characterized by rampant opportunism (of which, *Marcus* was just one of many cases[125]) that frustrated the goals of the FCA, the wake of the 1943 amendment gave way to an era of FCA stagnation. In other words, neither period achieved any sort of "golden mean" of FCA fraud recovery. Between 1943 and 1986, whistleblowers only brought about 100 *qui tam* actions, most of which failed.[126] The 1986 amendment changed that.

In fact, it took $640 toilet seats[127] (that ought to have been plated with gold leaf, given the price!) to reach the "golden mean" Congress appears to have been striving for all along. After titillating media reports of government overspending induced by federal contractors, Congress took up the reins of the FCA once again and reinvigorated the statute's *qui tam* provisions—this time with arguably more adequate incentives and protections. The 1986 amendment repealed the "government knowledge" jurisdictional bar and replaced it with a provision that restricted the subject matter jurisdiction of private plaintiff suits:

> 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,

119. *Id.*

120. *Id.*

121. *Id.* (citing 31 U.S.C. § 3730(b)(4) (1982) (superseded)).

122. SCAMMELL, *supra* note 50, at 42.

123. *S. Prawer & Co.*, 24 F.3d at 325. *See also* United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1104–06 (7th Cir. 1984) (barring a *qui tam* suit brought by the State of Wisconsin because the federal government already possessed the information upon which Wisconsin based its whistleblower suit because Wisconsin had been required by law to report fraud it had uncovered before filing its complaint).

124. United States *ex rel.* D.J. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 680 (D.C. Cir. 1997).

125. *Id.*

126. SCAMMELL, *supra* note 50, at 42.

127. *See id.* at 43.

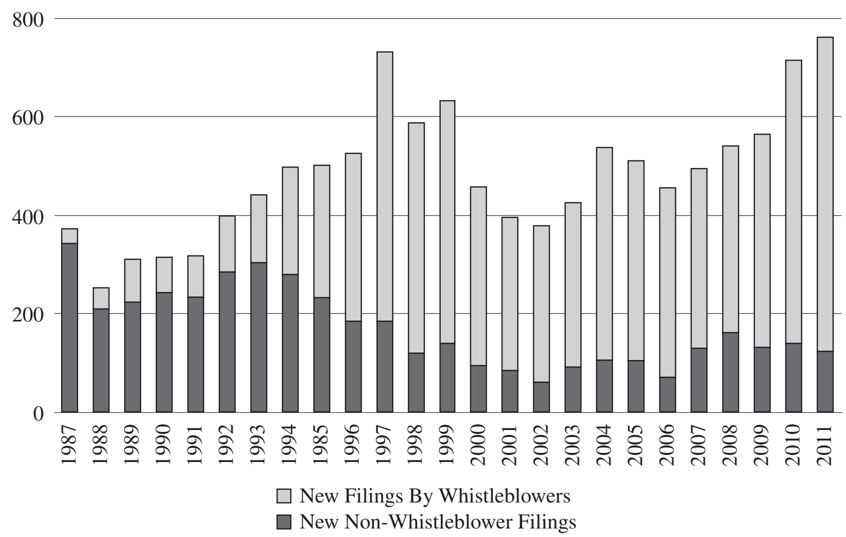
> audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[128]

An "original source" was "an individual who has direct and independent knowledge of the information . . . [who] . . . voluntarily provided the information to the Government before filing an action . . . ."[129] Congress intended for the original source rule to make certain that a whistleblower who filed suit after a public disclosure of a fraud had helpful firsthand knowledge that would assist in prosecution (direct knowledge) and that the whistleblower had discovered this information on her own (independent of the public disclosure).[130]

2. *The Life of the Public Disclosure Bar pre-ACA*

The results of the 1986 amendments to the FCA (spurred both by the relaxed jurisdictional bar as well as enhanced whistleblower rewards and the right to maintain a private right of action absent government intervention) is illustrated best by the following chart:

FIGURE 2: NEW ANNUAL FCA FILINGS—COMPARING NUMBER OF QUI TAM AND NON-QUI TAM FILINGS



During the first year after the 1986 amendment, thirty relators filed FCA suits. Just ten years later, 547 relators filed suit in federal court, and in 2011, that number reached an all-time high of 638 new *qui tam* filings.[131]

128. *D.J. Findley*, 105 F.3d at 681 (quoting 31 U.S.C. § 3730(e)(4)(A) (1994) (superseded)).
129. *Id.*
130. Cohen, *supra* note 19, at 88.
131. U.S. Dep't of Justice, Fraud Statistics, *supra* note 14.

As *Figure 2*[132] illustrates, new FCA claims brought by whistleblowers make up an increasingly greater proportion of the total number of new FCA filings each year.

In the courts, defendants used the public disclosure bar as a first line of defense, typically motioning first on the question of whether public disclosure had occurred, and second, on whether the relator was an original source.[133] While the 1986 amendment was the closest Congress had ever come to a "golden mean" between the poles of pre-1943 parasitic lawsuits and post-1943 FCA stagnation, the amendment also unearthed a new round of challenges. As Professor Beverly Cohen notes, courts provided inconsistent answers to questions about *what* constituted public disclosure and *who* was an original source.[134]

Although the language of the statute does not make clear exactly which cases Congress intended to bar, the circuits generally agreed on the basic inquiry required by the public disclosure bar.[135] First, one must ask: Have allegations made by the relator been "publicly disclosed" before the relator brought her *qui tam* action?[136] Second: If the allegations have been publicly disclosed, was the *qui tam* suit "based upon" the public disclosure?[137] And third: If so, was the relator an "original source" of the information on which the allegations were based?[138] Jurisdiction only existed if the answer to one of the first two questions was "no," or the answer to the third question was "yes."[139]

By the time the 2010 ACA amendment was passed, it may have been a ripe time for some kind of change. For example, better codifying what constitutes a public disclosure or who an original source is. But not the change ushered in by Congress, which will likely result in a new era of parasitic FCA litigation.

B. The "Golden Mean" Under Fire

With the ACA amendment to the FCA, Congress cast aside any semblance of a "golden mean" it had struggled for more than 100 years to attain. Professor Cohen predicts the change to the public disclosure bar will result in an explosion of *qui tam* false claims.[140] This anticipated surge of whistleblower suits under the FCA threatens a new era of parasitic litigation that could create a backlash strong enough to undo the FCA.

---

132. *Id.*
133. Cohen, *supra* note 19, at 88.
134. *See id.*
135. United States *ex rel.* Hays v. Hoffman, 325 F.3d 982, 987 (8th Cir. 2003).
136. Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1042 (8th Cir. 2002) (citing 31 U.S.C. § 3730(e)(4) (1986) (superseded)).
137. *Id.*
138. *Id.*
139. *Id.*
140. *See generally* Cohen, *supra* note 19.

The ACA fundamentally changed the FCA by eliminating two statutory limitations to *qui tam* jurisdiction.[141] First, the "public disclosure" provision now enumerates a smaller pool of public disclosures that will block a whistleblower's suit.[142] Second, the ACA revised the "original source" rule to eliminate the "direct knowledge" requirement, which Cohen says used to be the "most stringent requirement that relators needed to satisfy to maintain their suits."[143] Cohen argues that these changes have enormously broadened the ability of relators to commence *qui tam* lawsuits.[144] Indeed, a plain reading of the statute as amended suggests just that.

The first change is subtle, and therefore, probably best understood by seeing the "before and after" side-by-side. The original public disclosure bar, as codified after the 1986 amendment, read:

> **(4)(A)** No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> **(B)** For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.[145]

Compare that with the new language, post-ACA. Notice the subtle differences, some of which are italicized in bold:

> **(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 [*sic*] 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.

141. *Id.* at 77.
142. *Id.* at 77–78.
143. *Id.* at 78.
144. *Id.*
145. 31 U.S.C. § 3730(e)(4)(A)–(B) (2006), *amended by* 31 U.S.C. § 3730(e)(4)(A)–(B) (Supp. IV 2010).

> **(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 (2) 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.[146]

First, by adding the word "Federal" in clauses (i) and (ii) of subparagraph (A), the ACA simultaneously narrowed the scope of the public disclosure bar and broadened the scope of potential sources of information upon which a whistleblower could base her FCA suit. If one views the public disclosure bar as a hurdle *qui tam* plaintiffs must clear before proceeding, the ACA lowered that hurdle. A *qui tam* plaintiff can now conceivably clear it with *State and local* criminal, civil, and administrative proceedings under a plain reading of the amended statute. Second, *State and local* reports, hearings, audits and investigations no longer qualify as public disclosures that will bar a suit because the word "Federal" now modifies that list too. Third, the class of Federal civil, criminal, and administrative hearings that will be considered a public disclosure barring a *qui tam* suit are now limited to those in which the government or a government agent is a party.[147]

President Barack Obama signed the ACA into law on March 23, 2010, ultimately effecting these changes and, arguably destroying the "golden mean." Just seven days later, the previously open question about whether state and local sources of information could buttress an FCA *qui tam* suit would have been decided by the Supreme Court. On March 30, 2010, the Supreme Court released its 7-2 opinion on the matter in *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*.[148] In *Graham County*, the Court held that the public disclosure of allegations or transactions contained in State and local "administrative" sources (reports, audits, and investigations) would bar *qui tam* actions—just as their federal counterparts would.[149] The Court's holding applies only to FCA suits filed before March 23, 2010.

146. 31 U.S.C. § 3730(e)(4)(A)–(B) (West 2012) (as amended).

147. *See* United States *ex rel.* Beauchamp v. Academi Training Center, Inc., No. 1:11CV371, slip op. at *13 n. 36 (E.D. Va. Mar. 21, 2013) (an example of emerging jurisprudential commentary post-ACA amendments suggesting that federal suits brought by one private party against another could be the source of a *qui tam* action in that it would not trigger the public disclosure bar under the 2010 FCA amendments).

148. 130 S. Ct. 1396, 1400 (2010) *reh'g denied*, 130 S. Ct. 3351 (2010).

149. *Id.*

A second major change to the public disclosure bar is the deletion of the "direct knowledge" requirement from the "original source" rule.[150] To reiterate, the "original source" rule provides an escape hatch for relators whose *qui tam* suits are based upon information already publicly disclosed. It allows such a relator to proceed with her action because she was the "original source" of the information. Before the ACA, most courts interpreted "direct knowledge" narrowly, holding that a relator seeking to prove "direct knowledge" had to prove she did not learn of the fraud from an intermediate source.[151] This meant the escape hatch was effectively limited to "only those who had either participated in the fraud or observed it first-hand."[152] As Professor Cohen sees it, a relator may now learn of a fraud through a public disclosure, seek out independent knowledge from an intermediate, undisclosed source, and *then* take that information to the courthouse as the basis for a *qui tam* suit, so long as her independent knowledge "materially adds" to the public disclosure.[153] As Professor Cohen writes: "Kaboom!"[154] Here come the parasitic profits in the whistleblower's pot of gold.

III. Rescuing the "Golden Mean"

Why not begin with the pushback? Perhaps the "golden mean" does not need rescuing. Professor Cohen points out that the ACA amendments to the FCA came at a time when Congress "sought to increase incentives to private citizens to detect and report health care fraud that the federal government otherwise would be unlikely to discover."[155] And if we accept this view, that will certainly happen. Congress's intent appears to be a deliberate move calculated to increase whistleblower litigation.[156] But easing the path to a *qui tam* suit under the FCA is not the proper incentive to increase the number of private citizens who detect and report health care fraud (which is, admittedly, a legitimate goal). By emasculating the public disclosure bar, the ACA disrupts the "golden mean." Soon, we can expect to see parasitic suits surfacing just as they did before the 1943 amendment that gutted the FCA of its usefulness for more than four decades.[157]

A backlash aimed at the parasitic profits may follow as whistleblower suits based upon publicly-disclosed but non-Federal information result in

150. For a lengthier discussion of this change to the public disclosure bar following the ACA, see Christopher M. Alexion, Note, *Open the Door, Not the Floodgates: Controlling Qui Tam Litigation Under the False Claims Act*, 69 Wash. & Lee L. Rev. 365 (2012).

151. Cohen, *supra* note 19, at 92.

152. *Id.* at 93 n. 105 (collecting cases standing for the proposition).

153. *See id.* at 95–96.

154. *Id.*

155. *Id.* at 89.

156. *See id.* at 89 n. 83.

157. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) ("[t]he past serves as a prologue").

whistleblower windfalls that induce public ire. If the possibility of a backlash seems like a hypothesis founded on improper assumptions, one only needs to look at current sentiments about whistleblowers like Ven-A-Care, the four-man professional whistleblowing outfit discussed above. Take, for instance, a recent CNBC video segment profiling Ven-A-Care as part of a larger series on "bounty hunters."[158] During CNBC reporter Eamon Javers's story, he framed the report as a profile about a group of professional whistleblowers who targeted the pharmaceutical industry, "*costing* that industry over a billion dollars in settlements and making hundreds of millions of dollars themselves."[159] Javers concluded his profile by drawing a parallel to new securities whistleblower provisions under Section 21F of the Exchange Act added by Dodd-Frank.[160] Javers described the sentiment on Wall Street as fearful of whistleblowers in the securities realm if they are to resemble anything like Ven-A-Care.[161] According to the business reporter, a Ven-A-Care on Wall Street plays out like this: "A tiny player finds some kind of industry standard practice and makes the case that it is actually fraud and goes on a lawsuit rampage, really winning victory after victory the way Ven-A-Care did."[162]

A. *The Parasitic Suits Will Follow*

There should be no doubt that parasitic suits will surface; the doors are open, opportunistic plaintiffs will come. Because *qui tam* plaintiffs file their complaints under a sixty-day seal,[163] which may be extended for good cause seemingly indefinitely,[164] this litigation flood will appear like a desert wash: dry one second, raging with water the next. Courts deciding defendant motions to dismiss based on Section 3730(e)(4)'s public disclosure bar are currently foretelling this result. Courts are consistently deciding "public disclosure" motions using the *Graham County* holding (barring *qui tam* suits whether the publicly disclosed information was federal *or state*) for whistleblower actions filed prior to the ACA's enactment on March 23, 2010.[165] The courts agree that the ACA's amendments to the public disclo-

158. Javers, *supra* note 80.
159. *Id.* (emphasis added).
160. *Id.*
161. *See id.*
162. *Id.*
163. *See* 31 U.S.C. § 3730(b)(2).
164. *See id.* § 3730(b)(3).
165. *See, e.g.*, United States v. ITT Educ. Services, Inc., 1:07-CV-0867-TWP-MJD, 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012) (Signed into law by President Obama on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111–148, 124 Stat. 119, amended the language of 31 U.S.C. § 3730(e)(4), but Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 130 S. Ct. 1396, 176 L. Ed. 2d 225 (2010) concluded that the change is not retroactive. *See* 130 S. Ct. at 1400 n. 1. Thus, the prior version of the statute applies to the present dispute.).

sure bar and original source rules were not made retroactive.[166] But some of these decisions foreshadow the kinds of whistleblower litigation that will be permitted as soon as cases filed after March 23, 2010 come out from under seal, and plaintiffs begin to clear the new, lower public disclosure hurdle.

In *United States ex rel. Estate of Cunningham v. Millennium Laboratories of California*, the District of Massachusetts held that allegations of FCA violations already publicly disclosed in a California state defamation suit barred a *qui tam* action.[167] The court applied the pre-ACA public disclosure bar as it existed at the time Robert Cunningham, the *qui tam* relator, filed his first complaint in December 2009.[168] But the result would have been different had Cunningham waited just three months to file his *qui tam* action, after the ACA amendments. The court conceded that, "[t]he current version of the public disclosure bar *clearly limits* suits in state court from qualifying as a prior public disclosure."[169] Under the current, amended FCA language, a California state suit would not qualify as a prior, public disclosure.[170] The facts of *Millennium* give a flavor for the potential opportunism the ACA has unleashed.

The key to seeing the new, ample source of opportunism the ACA amendment creates is noting the timing of the filing of the *Millennium* suit and the circumstances leading up to it. Whistleblower Robert Cunningham worked for a Millennium Labs competitor, Calloway Laboratories, Inc.[171] Both companies provided services to physicians—i.e., Millennium provided urine drug testing.[172] Cunningham worked as a Calloway compliance officer, so he had some familiarity with the Medicare billing practices that Millennium would be accused of using to defraud the government.[173]

Cunningham (who later died and whose estate stepped into his shoes as relator) filed his *qui tam* action five days *after* Millennium had initiated its own lawsuit against Calloway in California state court.[174] Millennium sued Calloway for defamation after a series of emails between Calloway representatives and Millennium customers. To simplify, it appears the Calloway representatives were accusing Millennium of "practices that could lead to 'potential legal exposure'" for Millennium's physician-custom-

166. *See id.*

167. United States *ex rel.* Estate of Cunningham v. Millennium Labs. of Cal., 841 F. Supp. 2d 523, 529 (D. Mass. 2012), *aff'd* in relevant part 713 F.3d 662, 672 (1st Cir. 2013).

168. *Id.* at 528.

169. *Id.* at 527 (emphasis added).

170. *Id.*

171. *Id.* at 525.

172. *Id.* at 526.

173. *See* U.S. *ex rel.* Estate of Cunningham v. Millennium Labs. of Cal., 841 F. Supp. 2d 523, 525–26 (D. Mass. 2012).

174. *Id.* at 526.

ers.[175] Millennium got ahold of these e-mails and included them in the defamation suit it filed in California state court.[176]

In those emails and in its complaint, Millennium described its billing practice plainly, and argued that Calloway had misrepresented Millennium as fraudulent.[177] In doing so, Millennium also publicly disclosed all of the facts upon which Cunningham relied for his whistleblower suit five days later.[178] The court reasoned that Millennium did not likely file its state defamation suit to shield itself from whistleblower-initiated FCA liability, because ultimately, Millennium was not "insulating itself from potential liability in a lawsuit brought by the United States government."[179]

The court's reasoning in *Millenium* is exactly why the public disclosure bar worked so much better. It barred opportunistic *qui tam* suits based on information already available in a public forum. As the court in *Millennium* observed, "[i]n such a case, a relator is not necessary to 'root out [the] fraud . . . .' "[180] But now, in such a case (as the *Millennium* court conceded) a relator—either Cunningham (with somewhat close knowledge) or a disinterested third party—could conceivably bring that very same suit and clear the public disclosure bar by trolling state court dockets alone.

B. *The Parasitic Suits that Follow Will Frustrate the "Golden Mean" that Several Congresses and Countless Courts Have Striven To Achieve*

In the simplest sense, the ACA amendments frustrate the "golden mean" by making the public disclosure subsection of the FCA's whistleblower provisions inconsistent with the rest of Section 3730. The best way to understand this is to ask what Congress intended in 1986, analyze how the pre-ACA Section 3730 was structured, and determine how the provisions operated together.

The 1986 legislation sought not only to provide the government's law enforcers with more effective tools, but also to encourage any individual with knowledge of a fraud against the government to bring that information forward.[181] In the face of sophisticated and widespread fraud, Congress believed "only a coordinated effort of both the Government and the citizenry [would] decrease this wave of defrauding public funds."[182] But with the

175. *See id.* at 526.
176. *Id.*
177. *See id.*
178. *See id.* at 531 ("There is no doubt that the allegations made in the first count of the original Complaint are substantially similar to the information disclosed in the California suit complaint.").
179. United States *ex rel.* Estate of Cunningham v. Millennium Labs. of Cal., 841 F. Supp. 2d 523, 530 (D. Mass. 2012).
180. *Id.* at 530.
181. S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67.
182. *Id.*

"past as prologue," Congress knew they must strike a balance in order to avoid unleashing parasitic claims.

Both the 1943 and the 1986 amendments focused on enhancing the statute's power by making sure that *qui tam* relators provide useful information.[183] The 1986 amendment's reinvigoration was "intended as, and has been applied as, an informer statute—a means to gain information about legal transgressions that might not otherwise be known."[184] Scholars highlight the historical significance of parsing Congress's intent in this manner. "The history of informer statutes from England to America and down to *Marcus* was based on the *qui tam* relator relaying information, not repeating information already possessed. If that were the case, *qui tam* actions would not be 'informer' statutes, but 'repeater' statutes."[185]

Section 3730, outlined in pertinent part, looks for and stands for the following, as understood through the 1986 amendment's legislative history:[186]

Subsection (a) – Attorney General may bring FCA claims
Subsection (b) – Private persons may bring FCA claims
Subsection (c) – Provides an active role for private AGs
Subsection (d) – Provides monetary incentive for private AGs
Subsection (e) – Limits who can bring suit, sources of proof[187]

The inclusion of subsection (e) speaks to two things: *who* Congress anticipated would serve as a whistleblower and *what* facts those relators could fairly use as the basis for a *qui tam* suit.[188] In other words, subsection (e) sought to make sure that useful information was gleaned from *qui tam* actions and that the information did not come from a parasitic source.[189]

Read together, the legislative history and the statute suggest that Congress was striving for a "golden mean" by creating an informer's statute, not a bounty hunter—or repeater—statute. In *United States ex rel. Findley v. FPC-Boron Employees' Club*, the D.C. Circuit noted that:

> After ricocheting between the extreme permissiveness that preceded the 1943 amendments and the extreme restrictiveness that followed, Congress again sought to achieve the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic

183. A.G. Harmon, *Bounty Hunters and Whistleblowers: Constitutional Concerns for False Claims Actions After Passage of the Patient Protection and Affordable Care Act of 2010*, 2 Am. U. Lab. & Emp. L.F. 1, 9 (2011). Harmon goes on to question the constitutionality of the ACA amendments to the public disclosure bar based on Article III standing, the Article II Appointments Clause, and the Article II "Take Care" clause. *Id.* at 10.

184. *Id.* at 9.

185. *Id.*

186. *See* S. Rep., *supra* note 181, at 5288–93 (discussing the intent of Section 3730).

187. *See id.*

188. *See id.*

189. Harmon, *supra* note 183, at 9.

> plaintiffs who have no significant information to contribute on their own.[190]

Some commentators read the statute and its legislative history and argue that what Congress intended in 1986 was a "resourceful relator" statute that would clear the way for disinterested third parties to bring *qui tam* suits.[191] The ACA amendment fundamentally changed the FCA—not only making it more of a "resourceful relator" statute, but ultimately transforming the FCA into a "repeater's statute." Supporters of a lower public disclosure bar celebrate the broader pool of civil and criminal suits, government audits, reports, hearings, and investigations from which a *qui tam* suit might be culled.[192] I fear that this celebration will be met with enough frustration—after an onslaught of parasitic actions—that renewed attempts to achieve a "golden mean" will be scrapped. Instead of trying to fix this new problem, opponents of the FCA may finally get their way and use the parasitic actions as a basis for gutting the whistleblower provisions of the FCA entirely. That would mean the loss of a federal tool that, since 1986, has proved valuable as a means of recovering taxpayer dollars. In other words, there is a "golden mean," and it's worth fighting for.

The trouble with trying to rely on nearly 150 years of legislative history to pinpoint the exact balance the "golden mean" ought to achieve, however, is that there is some 150 years worth of point and counterpoint. The Third Circuit accurately summarized this problem, stating:

> 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.[193]

Thus, as other commentators have recognized,[194] focusing on social concerns and public policy—instead of relying solely on legislative intent—will be beneficial in illustrating that the "golden mean" does indeed need rescuing.

---

190. 105 F.3d 675, 680 (1st Cir. 1997).

191. *See, e.g.*, Chris S. Stewart, Note, *Resourceful Relators: The Rise of Qui Tam Suits Under the False Claims Act Based on Information Obtained in Civil Litigation*, 89 TEX. L. REV. 169, 169 (2010).

192. *See id.* at 177.

193. *See* United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991).

194. *See, e.g.*, Alexion, *supra* note 150, at 403–06 (providing an in-depth analysis of one of the other ACA amendments to the public disclosure bar, the "original source" alterations).

C. *The Post-ACA Public Disclosure Bar is Drafted in Such a Way that It Creates Conflicting—Even Contradictory—Sources of Possible "Public Disclosures"*

The ACA amendment to the FCA's public disclosure bar creates a puzzling inconsistency in the statute itself. On the one hand, it suggests the bar is meant to have a broad scope by listing "news media" (without qualification) as sources of public disclosures.[195] On the other hand, however, the statute suggests a narrow bar, with the ACA's addition of the word "Federal" to qualify this list of enumerated sources of public disclosures: Federal criminal, civil, or administrative hearings; and Federal reports, hearings, audits, or investigations.[196] I argue that Congress ought not to have written a statute that purports to have both a broad and narrow public disclosure bar. Such a statutory construction will result in parasitic actions that will leave too much room for a drastic over-correction.

The current iteration of the post-ACA public disclosure bar suggests that a whistleblower suit based upon allegations or transactions disclosed in a news media report will be barred, period. But a whistleblower suit based on allegations or transactions disclosed in a State court civil suit would not be barred. This yields incredibly inconsistent results, especially if we agree with the Supreme Court's repeated conclusion that the "statutory touchstone" of the public disclosure bar continues to be "whether the allegations of fraud have been 'public[ly] disclos[ed],' § 3730(e)(4)(A), not whether they have landed on the desk of a DOJ lawyer."[197]

A simple hypothetical might illustrate the point a little better. Say an investigative reporter in a small or medium-sized city with no U.S. Attorney's office reports on a story that reveals some element of wrongdoing at a nursing home. It is not out of the question that the fruit of the reporter's journalism yields enough information upon which anyone, including an insider at the nursing home or a disinterested third-party, could plead with particularity the allegations or transactions sufficient to make an FCA claim in federal court. Under the pre- and post-ACA public disclosure bar, that suit would be dismissed (unless the whistleblower is an original source of the information who either "voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based" before the public disclosure or is a person with "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions . . . ").[198]

---

195. *See* 31 U.S.C. § 3730(e)(4)(A)(iii).

196. *See* 31 U.S.C. § 3730(e)(4)(A)(i)–(ii).

197. Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel* Wilson, 559 U.S. 280, 300 (2010) (internal citations omitted).

198. *See* 31 U.S.C. § 3730(e)(4)(A)–(B).

Now imagine a similar scenario where the facts upon which a whistleblower suit could be pleaded are included (perhaps incidentally) as attachments to a complaint filed in State court for, say, elder abuse or some other claim that might involve Medicare billings. An opportunistic plaintiff in some large cities could literally walk that complaint down the street from State to Federal court. Once there, she could use it as the basis for a FCA whistleblower suit that would pass the new public disclosure bar. Assuming the opportunistic plaintiff had enough facts from the State complaint to plead with particularity, the door to discovery would be open, and the resulting paper trail could lead to a windfall for the parasitic whistleblower.

The inconsistency of these two hypothetical outcomes is troublesome. How much sense does it make to bar FCA suits based on disclosures in *all* news media reports, but to bar only FCA suits based on disclosures in *Federal* courts, investigations, audits, etc.? Section 3730(e)(4) is not about *what* is or is not already at the DOJ's fingertips, but rather *who* should be allowed to put information of value in the DOJ's hands as a whistleblower. Despite the recent changes to the law, the Supreme Court continues to recognize this distinction.

In *Graham County Soil and Water Conservation District v. United States ex rel. Kirk*, the Supreme Court held that Section 3730(e)'s reference to "administrative" reports, audits, and investigations encompassed disclosures made in state and local sources as well as federal sources.[199] As discussed above, the Court's holding in *Graham County* now applies only to suits filed before the ACA amendments to the public disclosure bar.[200] But the court's discussion of the breadth and purpose of the bar is still relevant, especially where nothing about the broad inclusion of "news media" as an unqualified source of public disclosure has changed following the ACA amendment.

In the *Graham County* case, Wilson, the respondent whistleblower, argued for a narrow reading of "administrative" reports, audits, and investigations.[201] Wilson wanted her FCA claim to clear the pre-ACA public disclosure bar.[202] The trouble was, the allegations upon which Wilson based her *qui tam* suit were already disclosed in a local Graham County, North Carolina audit report released five years before Wilson filed her FCA suit.[203] At issue in the Graham County case, again, was whether "administrative reports" encompassed only Federal disclosures, or also extended to state and local disclosures.

In arriving at its conclusion, the Supreme Court interpreted the purpose of Section 3730(e)(4) as a means "to strike a balance between encouraging

199. *Graham Cnty.*, 559 U.S. at 283.
200. *See supra* text accompanying note 165.
201. *See Graham Cnty.*, 559 U.S. at 283–86.
202. *See id.* at 284–85.
203. *Id.* at 284.

private persons to root out fraud and stifling parasitic lawsuits . . . ."[204] The Court's discussion of the "news media" provision of Section 3730(e)(4) highlights the inconsistency Congress has left inherent in the post-ACA public disclosure bar. Wilson argued that the purpose of Section 3730(e)(4) is to draw a line between matters the federal government is unlikely to learn about (state and local investigations) and matters readily available to the Department of Justice because of their status as "federal inquiries."[205] Wilson argued that only the former ought to clear the public disclosure bar.[206] The Court reasoned that while this proposition is not entirely implausible, the argument is sheer conjecture:

> Numerous federal investigations may be occurring at any given time, and DOJ attorneys may not reliably learn about their findings. DOJ attorneys may learn about quite a few state and local inquiries, especially when the inquiries are conducted pursuant to joint federal-state program[s] . . .[207]

Furthermore, the Court reasoned that Wilson approached the question from the wrong direction. "The statutory touchstone, once again, is whether the allegations of fraud have been 'public[ly] disclosed,' not whether they have landed on the desk of a DOJ lawyer."[208] In that sense, some state court proceedings are as publicly disclosed as news media reports. In many cases, they are arguably more prominent, and thus easier, for an opportunistic *qui tam* plaintiff to find.

Furthermore, the Supreme Court criticized Wilson for giving insufficient weight to Congress's 1986 decision to bar *qui tam* actions based on disclosures "from the news media."[209] From the naked, unqualified inclusion of "news media" disclosures, the Court interpreted a "jurisdiction-stripping category [that] forecloses the suggestion that the 1986 amendments implemented *a single-minded intent* to increase the availability of *qui tam* litigation."[210] Additionally, "since the 'news media' include a large number of local newspapers and radio stations, this category likely describes a multitude of sources that would seldom come to the attention of the Attorney General."[211]

The point is this: Congress has crafted a public disclosure bar that does not have a clear intent. Is the bar aimed broadly at foreclosing parasitic actions in order to balance the power of the *qui tam* provision generally? Or is the point to allow some parasitic actions but not others? It appears for

204. *Id.* at 295 ("How exactly § 3730(e)(4) came to strike this balance in the way it did is a matter of considerable uncertainty.").
205. *Id.* at 300.
206. *Id.*
207. *Graham Cnty.*, 559 U.S. at 299.
208. *Id.* at 300 (internal citation omitted).
209. *Id.* (internal quotation marks omitted).
210. *Id.* (emphasis added).
211. *Id.*

now that Congress has elected the latter approach. But with "[t]he past serv[ing] as prologue,"[212] this is undoubtedly a risky path to travel.

As a final note regarding the inconsistent classes of enumerated "public disclosures" under the new Section 3730(e)(4), it is important to keep in mind the momentum behind efforts to make government information more transparent. In no time at all, certain classes of government reports, audits, and investigations may be as widely available on the Internet as news media reports. These sources of state information may now provide the basis for FCA *qui tam* lawsuits. Yet they will be just as easily obtainable as "news media" reports, which will continue to be barred as sources of FCA *qui tam* suits. The Supreme Court in *Schindler Elevator Corp. v. United States ex rel. Kirk* flagged how this sort of sifting through easily (i.e., publicly) obtained information is out of line with the idea that the public disclosure bar ought to block opportunists.[213]

In *Schindler Elevator*, the Supreme Court held that a federal agency's written response to a FOIA request for records constitutes a "report" within the meaning of the FCA's public disclosure bar.[214] This holding, however, will arguably not apply to a "report" issued by a *State* agency pursuant to a state FOIA request for suits filed after the ACA amendments. Nonetheless, the Court's reasoning in *Schindler Elevator* highlights how Congress has created an inconsistent statute that lets some parasitic suits through, but not others.

In *Schindler Elevator*, the Court observed that "anyone could identify a few regulatory filing and certification requirements, submit FOIA requests until he discovers a federal contractor who is out of compliance, and potentially reap a windfall in a *qui tam* action under the FCA."[215] For that reason, the court held that an FOIA answer should count as a public disclosure and foreclose the possibility of a parasitic or opportunistic FCA action.[216] For the same reason, a suit based on a State FOIA answer should also bar an FCA suit against a contractor who is doing dual work for the state and federal governments. Both, as the Court in *Schindler Elevator* concluded, are opportunistic and ought to be discouraged.[217]

212. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

213. *See* Schindler Elevator Corp. v. United States *ex rel.* Kirk, 131 S. Ct. 1885, 1894 (2011).

214. *Id.* at 1889.

215. *Id.* at 1894.

216. *See id.*

217. *See id.*

D. *What a Backlash Might Look Like: Congress Has Already Spelled Out What a Pared-Down Whistleblower Provision Can Look Like*

Congress knows how to write a pared-down whistleblower statute. And a Congressional overreaction to the potential flood of parasitic FCA *qui tam* suits that will clear the new public disclosure bar could take a similar form—a FCA with drastically fewer incentives for whistleblowers to come forward, or perhaps none at all. For that reason, proponents of the FCA in Congress should reconsider the amended public disclosure bar before an over-correction becomes a real possibility.

Assistant United States Attorney D. Gerald Wilhelm has been prosecuting FCA litigation on behalf of the government for more than fourteen years in the District of Minnesota. From his view on the front lines of the issue, the ACA amendments to the public disclosure bar will have the practical effect of lowering the barriers to entry. This will increase the number of FCA filings, because more attorneys are now willing to devote resources to pursuing possible *qui tam* suits.[218] Wilhelm says that this increase in filings is a good thing—a position that is easily understood when you consider his front-seat observation of the billions of dollars taxpayers have recovered since the FCA's 1986 amendments. But he also recognizes the well-founded concern over parasitic filings:

> There is no experiment without risk. But we will see how this works. If we get a flood of groundless lawsuits that are pursued by people without a good claim, Congress will move on it and we'll see that they'll shut that off. But for now at least, it's an experiment—how are we finding the 'mean?' There's really no other way. . . . In terms of an overreaction, I guess I haven't seen the flood yet and so I'm not concerned, but I'm the last person in the world to say it couldn't happen and [that] the overreaction couldn't happen. I've seen it before, so it could.[219]

Among the loudest voices currently criticizing the FCA is the U.S. Chamber Institute for Legal Reform (the Chamber Institute).[220] They would most assuredly be among the loudest voices seeking to curtail the FCA if the new, lower public disclosure bar results in an onslaught of parasitic *qui tam* lawsuits. In the Chamber Institute's October 2011 report recommending various amendments to the FCA, the organization makes four proposals. First, it advocates capping monetary rewards for whistleblowers.[221] Second, the Chamber Institute favors providing incentives for employees to

218. Interview with D. Gerald Wilhelm, Assistant United States Attorney, Dist. of Minn., in Minneapolis, Minn. (May 8, 2012) (audio recording on file with the author).

219. *Id.*

220. *See, e.g.*, HUTT & DOLINSKY, *supra* note 3, at 2–3 (harshly criticizing the *qui tam* provisions of the FCA).

221. *Id.* at 8.

report internally through corporate compliance programs before being allowed to file private rights of action under the FCA.[222] Third, the Chamber Institute would foreclose *qui tam* actions in all instances where a defendant has already made a disclosure.[223] Finally, the Chamber Institute argues that the FCA should not be amended to overturn the Supreme Court's *Schindler Elevator* decision.[224]

The merits of the Chamber Institute's arguments could fill the pages of an entirely different Comment. But, suffice it to say, the arguments the Chamber Institute makes constitute the kind of reforms that could be occasioned by a flood of parasitic FCA suits. What is more, Congress, in tandem with the loud voices coming from organizations like the Chamber Institute, has its own precedent for what a more rigid whistleblower provision could look like.

Dodd-Frank's new whistleblower provision[225] represents a victory for those who had called for whistleblower bounties in the securities fraud context.[226] But, as Professor Rapp points out, the structure of the statute is a "missed opportunity" for those who hoped for something more akin to the FCA, the "'gold-standard' of whistleblower protection and bounty rewards."[227] While Dodd-Frank provides a process for seeking monetary rewards, it does not allow whistleblowers to litigate cases independently from federal action.[228] That is one notable difference between the two whistleblower provisions. Professor Rap points to a possible culprit for this emasculated rendition of a whistleblower statute:

> Perhaps because of the power of the Wall Street lobby, which regularly puts the "Military-Industrial Complex" to shame, whistleblowers under Dodd-Frank will remain spectators in most stages of the enforcement actions triggered by their revelations.[229]

This absence of a private right of action frustrates the ability of private FCA plaintiffs to carry on where perhaps DOJ is underfunded, overwhelmed, politically tarnished, or simply mistaken about the merits of a relator's claims. That is not the only precedent Dodd-Frank provides for the kind of provisions Congress is willing to make a part of new whistleblower

---

222. *Id.* at 15.

223. *Id.* at 17.

224. *Id.* at 19.

225. Dodd-Frank Act § 922, 15 U.S.C.S. § 78u-6 (Lexis Supp. 2011) (amending § 21F of the Securities Exchange Act of 1934).

226. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 76 (2012) (internal citation omitted).

227. *Id.*

228. *Id.* at 76–77.

229. *Id.* at 77.

statutes, Dodd-Frank also limits relators' recoveries to instances where the Government is able to recover more than $1 million.[230]

IV. Prescription: Amend the Public Disclosure Bar

Congress should amend 31 U.S.C. § 3730(e)(4) with language that rescues the "golden mean" and bars FCA *qui tam* lawsuits that would clear the way for parasitic profits in whistleblowers' pockets. I argue that the simplest way to do this may be to include State, local, and Federal criminal, civil, or administrative hearings in which the government or its agent is a party; and State, local, and Federal reports, hearings, audits, or investigations among the enumerated sources of public disclosures that will bar a plaintiff from taking a suit forward.

Yes, this change will make the job of disinterested third-party relators more difficult, but that result is in line with Section 3730 as a whole, which I argue is an informer's statute, rather than a repeater's statute. Further, it is still not impossible for disinterested relators to do valuable work under the FCA. With diligence that does not cross the line into harassment and predatory activity, a third-party can still uncover "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."[231] In fact, a robust original source rule could present all whistleblowers—in the "informer's statute" sense of the word—with the keys to the courthouse, public disclosures notwithstanding. Thus, I propose discussing the viability of a bright line public disclosure bar, inclusive of State, local, and Federal sources of public disclosures. To counteract harsh effects on legitimate informers who bring forth valuable information about frauds against the government, I would advocate a strong original source rule. The iteration currently in force under Section 3730 as amended post-ACA may even suffice.[232]

Conclusion

Documented frauds against the government—especially in the area of health care—provide all the staggering evidence one needs to support the continued use of the False Claims Act. More than two-thirds of the $30.3 billion in fraud recoveries since 1986 came after whistleblowers stepped forward to signal wrongdoing. To lose this powerful tool to an overcorrection because of the re-birth of an era of parasitic *qui tam* litigation would

230. *See id.* at 85 (discussing the statute and pertinent SEC regulations).

231. 31 U.S.C. § 3730(e)(4)(B) (LEXIS through July 2010 amendments).

232. For a comprehensive discussion of the caution with which the courts ought to construe the new "original source" provision, see, for example, Alexion, *supra* note 150, at 408 (arguing for an "original source" exception that 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.).

deal a significant blow to current efforts to vindicate taxpayer rights. And the work is just beginning. Waste and abuse of federal health care funds cost taxpayers billions of dollars every year. The Centers for Medicare & Medicaid Services (CMS) estimated that a staggering 7.8% of the $24.1 billion paid out in fiscal year 2009 were improper payments.[233] While not entirely fraud, the claims should not have been paid.[234]

Ultimately, Congress had the power to narrow the public disclosure bar and thereby broaden the class of potential *qui tam* suits that may be filed. But with the past as our prologue, Congress's amendment opened the door to parasitic actions that may present the kind of challenges that have led to overreactions in the past (i.e., the 1943 amendments). The best way to ensure the longevity of the FCA as a meaningful tool to use against fraud and abuse is to strive for the "golden mean." Congress can do that with a tight balance between incentivizing relators to come forward and barring opportunistic plaintiffs from drawing the ire of loud FCA detractors and a public that is resentful of whistleblower windfalls. If anything, this Comment is a cautionary tale that argues for moderation, a must-have for anything as potent and productive as the False Claims Act.

---

233. *Health Care Fraud, Waste, and Abuse: Serious Issues That Must Be Addressed Through Concentrated and Sustained Efforts: Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Health*, 111th Cong. (2010) (testimony of Daniel R. Levinson, Inspector General, U.S. Department of Health & Human Services).

234. *Id.*