Chapter 1

Whistleblowers Fighting for What’s Right

I. Introduction

Jack Gravitt was angry. He had learned from service in the U.S. Marine Corps in Vietnam the importance of following the chain of command. In June 1983, his efforts at following the chain of command with his employer, the General Electric Co.’s Aircraft Engine Business Group in Cincinnati, Ohio, cost him his job.

When Gravitt came to see us in the summer of 1984, he related a pervasive scheme by his co-employees and supervisors to mischarge time. Instead of properly recording hours charged to the job, employees were provided a list of job numbers to use when filling out their time cards. Supervisors then reviewed the time cards and made further changes, which shifted the cost of work or idle time from where it should have been charged to other jobs. Often, the recipients of the mischarged time were contracts with the U.S. government concerning the engines for the B-1 bomber. The changes, for the most part, were crudely made: the new job numbers were written over the original job numbers with a darker-colored pen.

Gravitt had refused to participate in this scheme. When he complained to his superiors, he learned that they were participants in the scheme, and he was warned to “get with the program.” Instead, Gravitt reduced his observations to an eight-page, single-spaced typed letter. He presented the letter to the top corporate office of the Aircraft Engine Business Group. General Electric discharged Gravitt the very next day. Despite the success of General Electric in capturing the lion’s share of new engine and replacement part contracts during the largest peacetime buildup of the U.S. defense arsenal, Gravitt was not reinstated.

Gravitt was not a member of a union and did not have a contract of employment with General Electric. Under the Ohio employment-at-will doctrine as it then existed, there were no public policy exceptions that would have provided Gravitt with any remedy for the

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reliatory treatment he experienced. The lawyer Gravitt consulted, the author of this book, had to advise Gravitt that he had no legal remedy.

The lawyers were now angry. Surely, among the hundreds of state and federal statutes in existence, there must be some way to redress such a fraud on the taxpayer and to protect an employee whose conscience led him to object to such illegal activities. After some effort, as well as assistance from a Cincinnati environmental lawyer, D. David Altman, and a California lawyer and longtime student of the False Claims Act (FCA), John R. Phillips, the qui tam provisions of the FCA were found. This statute, buried in the banking sections of the United States Code, appeared to provide the forum for correcting Gravitt’s concerns.

When Gravitt’s qui tam complaint was filed on October 26, 1984, in the U.S. District Court for the Southern District of Ohio, it caused quite a stir. The Office of the Attorney General in Washington, D.C., was puzzled and called Gravitt’s lawyer to find out why it had been served with a copy of the suit. Counsel for General Electric told the media he had never heard of such a cause of action and that it seemed like bounty hunting. Despite intense lobbying from the defendant, the U.S. Department of Justice (DOJ) quickly decided to pursue the case. The DOJ obtained a stay of the civil discovery begun by Gravitt and opened a criminal investigation into the charges.

In its investigation, the DOJ learned that some personnel of the U.S. Air Force may have been aware of the time voucher alterations, but only as a result of the internal company complaints initiated by Gravitt. As the DOJ proceeded with its criminal investigation, it continued to block Gravitt and his counsel from conducting civil discovery. The DOJ undertook no civil discovery itself. Having stayed Gravitt’s discovery and deposition requests, the DOJ did not take a single deposition or statement under oath and served no document requests or interrogatories on General Electric.

In the summer of 1985, Chief Judge Carl B. Rubin of the U.S. District Court for the Southern District of Ohio refused to provide the DOJ with any further stay of discovery. He set the case for trial on his November 1985 docket. At this point, the DOJ ceased its criminal investigation, and its lawyers in Washington, D.C., negotiated a settlement agreement with General Electric. The “negotiation” consisted of General Electric proposing and the U.S. government accepting an offer to settle the case for $234,000. This number was calculated based on a $2,000 civil penalty for each of 117 “public vouchers” submitted by General Electric to the U.S. government for payment during the period 1981 to 1983. These vouchers were thought to include charges for work done in the General Electric machine shop division where Gravitt had worked.
After accepting General Electric’s offer, the DOJ notified Gravitt that the case was settled. The DOJ refused to provide Gravitt with any backup information to support the settlement until it was ordered by the court to do so. Lawyers for the DOJ warned Gravitt that if he resisted the settlement in any way, the DOJ would make sure that he would not receive the statutorily mandated “bounty” for bringing the case. In addition, Gravitt was threatened with paying the DOJ’s legal expenses if he opposed the settlement.

The DOJ’s threats and lack of civil discovery were brought to Judge Rubin’s attention in November 1985. The court promptly scheduled a hearing to determine if the DOJ and the defendant could settle the case. With respect to qui tam actions, the FCA then provided that “[t]he action may be dismissed only if the Court and the Attorney General give written consent to the dismissal and their reasons for consenting.” However, the DOJ and General Electric argued that they could settle the dispute without the approval of the court and without the knowledge of the relator.

The DOJ and General Electric filed a written dismissal of Gravitt’s action just minutes before Judge Rubin began the hearing on whether the case could be settled. At the hearing, General Electric urged Gravitt to go to Congress and get the law changed if he was not satisfied with the DOJ relegating his position of relator to the sidelines. After the hearing, Judge Rubin set aside both the dismissal entry and the settlement. He urged the parties to seek an immediate appeal to the U.S. Court of Appeals for the Sixth Circuit. Although all of the parties appealed, the Sixth Circuit refused to accept the certified appeal and returned the matter to Judge Rubin for further proceedings.

Thus, in February 1986, Judge Rubin appointed a U.S. magistrate to serve as a special master to hold hearings, determine whether the $234,000 settlement should be accepted, and determine whether the action should be dismissed. Gravitt was granted status as an intervenor and permitted to conduct very limited discovery into the merits of the settlement. Gravitt deposed the DOJ attorney who negotiated the settlement, a Defense Contract Audit Agency official, and the Federal Bureau of Investigation special agent responsible for investigating Gravitt’s allegations. Gravitt was thwarted in his attempt to depose one of General Electric’s managers who had participated in the fraud when the deponent asserted his Fifth Amendment privilege against self-incrimination in response to virtually every question. The DOJ refused Gravitt’s request to grant the deponent any immunity from prosecution, even though the DOJ claimed that the criminal investigation had ceased.

Meanwhile, in autumn 1985 and early 1986, both Gravitt and his counsel, the author of this book, were subpoenaed to appear and testify before panels of the U.S. Senate and House of Representatives. At that time, Congress was considering amendments to the FCA in light of mounting evidence of massive, widespread defense contract cheating.

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12. Id. (Doc. 28) (Tr. Nov. 26, 1985).
16. Id.
testimony regarding the *qui tam* action was the only evidence Congress heard by an individual who faced the hurdles of the 1943 version of the False Claims Act Amendments, who had a *qui tam* action pending, or who had ever filed a *qui tam* action.

As a result of testimony by Gravitt and others, including John Phillips, then an attorney with the nonprofit Center for Law in the Public Interest, Congress amended the FCA. President Reagan signed the False Claims Act Amendments into law in October 1986. General Electric’s wish that Gravitt go to Congress and get the law changed was granted.

Back in Cincinnati, the special master in the *Gravitt* case issued an opinion in August 1987. Although no hearings had been held, the magistrate approved the settlement between the DOJ and General Electric and ordered that the case be dismissed. Once again, Gravitt objected. After a two-day hearing in May 1988, Judge Rubin overruled the magistrate’s opinion and found that the DOJ’s proposed $234,000 settlement was inadequate. The case was restored to Judge Rubin’s trial docket. By then, however, the DOJ had ceased work on the case. Gravitt, through his counsel, conducted all further discovery and analysis of the thousands of misvouched time cards. The *Gravitt* case straddled both sides of the 1986 Amendments to the FCA. At various times, all three branches of the federal government were enmeshed in the debate over the issues raised.

In February 1989, on the eve of a trial, a settlement was reached between the DOJ, General Electric, Gravitt, and three other whistleblowers for a total of $3.5 million. Gravitt and the other whistleblowers shared an award to the relators of $770,000. The multimillion-dollar recovery in the case was the first major *qui tam* recovery under the FCA in nearly 50 years.

But the impact of Jack Gravitt’s testimony did not end. Two decades later the principal Senate sponsor of the False Claims Act Amendments used Mr. Gravitt’s story to remind Supreme Court nominee Judge Samuel Alito of the importance of the *qui tam* provisions

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18. The DOJ has attempted to rewrite history concerning the *Gravitt* settlement. On July 18, 1989, the Office of Legal Counsel released an opinion in which it attempted to portray the court and relator as interfering with the settlement process. It stated that, in the *Gravitt* case, the court refused to accept the initial settlement offer made by the DOJ and that in the end, the DOJ succeeded in settling for that same figure. The original settlement figure, however, was $235,000; the final settlement exceeded several million dollars. Further, the article neglects to mention that the court found the government’s original settlement figure inadequate in light of the 1986 Amendments for increased penalties, a lesser burden of proof, and no requirement for proof of specific intent. *Gravitt*, 680 F. Supp. at 1165.

The article also claims that General Electric could be faulted only for having an inaccurate accounting system that resulted in net undercharges to the government and claims that the DOJ was well aware of the situation at General Electric. Thus, the Office of Legal Counsel would have the reader believe that in this case General Electric’s fraud on the government actually saved the taxpayers money. However, the court opinion that the Office of Legal Counsel cites notes that the DOJ made no effort to conduct discovery in this case. *Gravitt*, 680 F. Supp. at 1164. Conversely, the relator conducted extensive discovery that showed there had been substantial overcharges, not undercharges, against the United States. Thus, the Office of Legal Counsel’s assertion that the government was well aware of the situation at General Electric when in fact it did not investigate this situation suggests that the government took the “ostrich” approach to the Gravitt case. For the inaccurate memorandum, see *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. Off. Legal Counsel 249 (1989).
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of the FCA.\textsuperscript{19} The amount of taxpayer dollars recovered since Mr. Gravitt’s testimony is staggering.

The 1989 Gravitt settlement was soon to be overshadowed by subsequent enormous recoveries against other government contractors as a result of \textit{qui tam} actions. Total recoveries as of fiscal year 2019 now exceed $62 billion.\textsuperscript{20} In fiscal year 2019, the government recovered over $3 billion under the FCA; $2.1 billion of the recoveries were the result of \textit{qui tam} actions.\textsuperscript{21} The following recoveries have been achieved thus far under the FCA:

- $150.8 million against National Health Labs in 1993;\textsuperscript{22}
- $112 million against Teledyne in 1993;\textsuperscript{23}
- $150 million against United Technologies in 1994;\textsuperscript{24}
- $325 million against SmithKline Beecham in 1998;\textsuperscript{25}
- $62.5 million against Boeing in 2000;\textsuperscript{26}
- $385 million against Fresenius Medical Care of North America in 2000;\textsuperscript{27}
- $170 million against Beverly Enterprises in 2000;\textsuperscript{28}
- $432 million from several oil companies in 2001;\textsuperscript{29}
- $875 million against TAP Pharmaceutical Products in 2001;\textsuperscript{30}

19. GRASSLEY: We held a lot of hearings on [the FCA]. It came that there wasn’t enough being done by the Justice Department to take care of it. We saw the Justice Department making a lot of global settlements.

But there are people in the Justice Department, the professional people in the Justice Department, doesn’t want some citizen looking over their head and doing their job for them when they aren’t doing it.

GRASSLEY: And a district judge in the mid ’80s, or maybe it was the late ’80s, in, I think, a General Electric case someplace in Ohio—when the Justice Department was trying to cut back the award that the relator was going to get, said to this Justice Department guy, “Don’t you get it? You wouldn’t even have a case if it wasn’t for this whistleblower coming forward to make their statement and to make their case.”

Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, Before the Committee on the Judiciary, United States Senate, 109th Cong. 277 (2006) (statement of Sen. Grassley) (emphasis added).


21. Id.


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- $745 million in 2000 and another $631 million in 2003 against HCA; 31
- $400 million against Abbott Laboratories in 2003; 32
- $266 million against AstraZeneca Pharmaceuticals in 2003; 33
- $257 million against Bayer Corporation in 2003; 34
- $152 million against Pfizer/Warner-Lambert in 2004; 35
- $292 million against Schering-Plough in 2004; 36
- $567 million against Serono in 2005; 37
- $265 million against St. Barnabas Hospitals in 2006; 38
- $255 million against Schering-Plough in 2006; 39
- $163 million against Medco Health Solutions in 2006; 40
- $470 million against Tenet Health Care in 2006; 41
- $49.5 million against Omnicare in 2006; 42
- $328 million against Bristol-Myers Squibb in 2007; 43
- $190 million against Aventis in 2007; 44
- $130 million against Purdue Pharma in 2007; 45
- $375 million against Cephalon in 2007; 46

32. Id.
37. Id.
38. Id.
39. Id.
• $650 million against Merck in 2008;\textsuperscript{47}
• $2.4 billion against Pfizer in 2009;\textsuperscript{48}
• $600 million against Allergan in 2010;\textsuperscript{49}
• $520 million against AstraZeneca in 2010;\textsuperscript{50}
• $422 million against Novartis in 2010;\textsuperscript{51}
• $600 million against GlaxoSmithKline in 2010;\textsuperscript{52}
• $3 billion against GlaxoSmithKline in 2012;\textsuperscript{53}
• $1.5 billion against Abbott Laboratories in 2012;\textsuperscript{54}
• $1 billion against Bank of America in 2012;\textsuperscript{55}
• $762 million against Amgen in 2013;\textsuperscript{56}
• $500 million against Ranbaxy in 2013;\textsuperscript{57}
• $16.65 billion against Bank of America in 2014;\textsuperscript{58}
• $2 billion against Johnson & Johnson in 2014;\textsuperscript{59}


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- $350 million against DaVita in 2014;\textsuperscript{60}
- $450 million against DaVita in 2015;\textsuperscript{61}
- $784.6 million from Wyeth and Pfizer in 2016;\textsuperscript{62}
- $1.2 billion against Wells Fargo in 2016;\textsuperscript{63}
- $465 million against Mylan and Mylan Specialty in 2017;\textsuperscript{64}
- $350 million against Shire Pharmaceuticals in 2017;\textsuperscript{65}
- $280 million against Celegne Corporation in 2017;\textsuperscript{66}
- $66 million against Toyobo in 2018;\textsuperscript{67}
- $5 million against Lance Armstrong in 2018;\textsuperscript{68}
- $3.5 million against Allegra in 2018;\textsuperscript{69}
- $1.4 billion against Reckitt Benckiser Group in 2019 to resolve criminal and civil liability for the marketing of the opioid addiction treatment drug Suboxone to physicians for uses that were unsafe, ineffective, and medically unnecessary;\textsuperscript{70} and
- $112.5 million against Duke University to resolve allegations that it violated the FCA by submitting applications and progress reports to the National Institutes of Health and the Environmental Protection Agency that contained falsified research on federal grants.\textsuperscript{71}

\textsuperscript{61} Id.
\textsuperscript{71} Id.
It is now accurate to say that the revised FCA has resulted in more than $62 billion being recovered for the taxpayers. These staggering numbers are even more significant when one considers that, in 1985, the year prior to the passage of the FCA Amendments, the entire DOJ managed to recover only $27 million for civil fraud.72

In fiscal year 2012, the federal government recovered $4.9 billion in settlements and judgments in FCA cases.73 Among the notable victories in 2012 was the first-ever settlement under the Securities and Exchange Commission whistleblower program and a major award under the Internal Revenue Service whistleblower program.74

In fiscal year 2013, the DOJ recovered $3.8 billion in settlements and judgments from FCA cases.75 It was the second-largest annual recovery under the Act, behind the recovery of 2012, and marked the fourth consecutive year with a total recovery in excess of $3 billion.76 Of the 2013 recoveries, $2.6 billion related to health care fraud, and procurement fraud (primarily in the defense contract context) accounted for another $890 million.77 Qui tam lawsuits accounted for $2.9 billion of the 2013 recoveries.

For fiscal year 2014, the DOJ recovered $5.69 billion.78 According to the DOJ, it was the first time that recoveries exceeded more than $5 billion in a single year.79 In 2014, the DOJ recovered $3.1 billion from banks and other financial institutions and $2.3 billion from those who defrauded federal health care programs.80 Additional recoveries included settlements with Hewlett-Packard; Boeing; Kellogg, Brown & Root; CA Inc.; and BNP Paribas.81 Qui tam recoveries totaled nearly $3 billion, and whistleblowers received $435 million.82 For the second year in a row, the total number of qui tam actions filed exceeded 700.83 By August 2014, total recoveries under the FCA since 2009 had exceeded $22.7 billion.84

Overall recoveries under the FCA for fiscal year 2015 were down a bit, totaling more than $3.5 billion.85 Significant recoveries included Novartis ($390 million for kickbacks paid to specialty pharmacies and others in return for them recommending certain drugs it

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74. Id.
76. Id.
77. Id.
79. Id.
80. Id. at 1.
81. Id. at 4.
82. Id. at 2.
84. Id. at 1.
manufactured), $256 million for bill padding, bundling, and medically unnecessary laboratory testing, 457 hospitals in 43 states (more than $250 million in settlements relating to cardiac devices wrongfully implanted in Medicare patients), First Tennessee Bank ($212.5 million for underwriting mortgages insured by the U.S. Department of Housing and Urban Development that did not meet federal requirements), Warner-Chilcott ($125 million for paying kickbacks to physicians in return for their prescribing its drugs), and Adventist Health System ($115 million for kickbacks and miscoded claims).

Recoveries from other defendants included VMware, Inc. and Carahsoft Technology Corporation ($75.5 million for concealing commercial pricing practices that resulted in overcharges for their products and services), Bioscrip and Accredo Health Group ($75 million for kickbacks and drug switching), Tuomey Healthcare ($72.4 million for fraudulent billing), AstraZeneca and Cephalon ($26.7 million and $4.3 million, respectively, for underpaying rebates owed to the Medicaid Drug Rebate Program), Extendicare ($32.3 million, the largest failure-of-care settlement with a skilled nursing home in DOJ history), PharMerica ($31.5 million for dispensing Schedule II drugs without a valid prescription and improperly dispensing drugs), UPS ($25 million for submitting false claims in connection with its delivery of Next Day Air overnight packages), Citizens Medical Center ($21.8 million for paying physicians for referrals), and the Medical Center of Central Georgia ($20 million for overbilling Medicare). Of the recoveries, $1.9 billion came from within the health care industry and $1.1 billion was recovered in connection with other government contracts.

In fiscal year 2015, 638 qui tam suits were filed, and the DOJ recovered $2.8 billion from these suits and from earlier-filed suits that were either settled or resulted in a judgment in the year. There are some key takeaways from the 2015 statistics. First, $1.149 billion was recovered in declined qui tam actions. This was the most ever recovered in declined cases and eclipsed the total recoveries ($1.006 billion) in declined cases from 1987 until 2014. Second, 2015 marked the first time that relators’ shares of recoveries in declined FCA cases exceeded the relators’ shares of recoveries in intervened qui tam cases. The 2015 relator share award in nonintervened cases also was more than the $202,530,697 relators’ share awards combined for the years 1987 through 2014. Third, the 638 qui tam actions filed in 2015 was the lowest number since 2010, when 576 qui tam actions were filed. What is clear from such statistics is that relators’ counsel are more likely to pursue FCA actions despite the government’s nonintervention. This increased motivation to pursue nonintervened cases is illustrated by a settlement and judgment in two FCA cases in 2015.


87. Id.


89. Id. at 2.


91. Id. at 1–2. For the controversy over the accuracy of the DOJ statistics, see Chapter 21, Section II.D (Use of Inaccurate Statistics to Attack Qui Tam Provisions).

92. Civil Div., U.S. Dep’t of Justice, FRAUD STATISTICS, at 1. Total relators’ share awards in declined cases were $334,642,108 compared to $262,968,424 in intervened cases.

93. Id.
Major events in nonintervened cases occurred in 2015. A settlement with a large dialysis treatment center, DaVita HealthCare Partners, illustrates the strengthened role that relators play in today's modern-era FCA actions. In 2007, DaVita was sued by two whistleblowers who alleged that DaVita defrauded the government by using only a portion of a bottle of medication, throwing out the remainder, and charging the government for the entire bottle.94 This scheme was alleged to have taken place between 2003 and 2010. The government declined to intervene, opting to let the relators prosecute the action on their own, which they did over an eight-year period. With the case nearing trial, DaVita opted to settle the case in April 2015 for $450 million, plus a reserve fund of $45 million to cover fees.95 This was the highest recovery ever in a nonintervened case for about two months.96 This was not DaVita's first encounter with the FCA; the company settled a case in 2012 for $55 million focusing on double-billing the government, and a case in October 2014 for $389 million focusing on illegal kickbacks.97

In June 2015, the largest judgment ever in a nonintervened case was entered by U.S. District Judge Rodney Gilstrap in the Eastern District of Texas against Trinity Industries and Trinity Highway Products, Inc.98 In that case, after a six-day jury trial, a unanimous jury returned a verdict of $175 million, which was then trebled by the court for an award of $525 million.99 The court further determined that the defendant should be assessed a civil penalty of $8,250 for each of the 16,771 false certifications it made, for a total penalty of $138,360,750.100 The relator was given a maximum 30 percent relator's share ($199,008,225), and the relator's counsel was awarded a little more than $19,000,000 in attorneys' fees, costs, and expenses.101 The total judgment against the defendant was $683 million. According to a company filing with the Securities and Exchange Commission, if the defendant wished to appeal the judgment, it had to post a bond for the full amount of the judgment, plus 20 percent, which equated to $796 million. This case was appealed to the Fifth Circuit. On March 21, 2016, Trinity filed its appellate brief, in which it alleged that the jury verdict should be reversed because the Federal Highway Administration had issued a memorandum on June 17, 2014, confirming that the Trinity ET-Plus guardrails had been continually eligible for federal reimbursement since September 2, 2005.102 On September 29, 2017, the Fifth Circuit reversed the district court’s decision.103 Plaintiff-relator filed a

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97. Id.
98. Final Judgment, Doc. 713 (June 9, 2015). Trinity was the manufacturer of guardrails that were placed throughout the United States. The allegations against Trinity were that it violated the FCA by falsely certifying to the United States that guardrail end terminals, known as “ET-Plus,” did not have improper modifications.
99. Id. at 2.
100. Id.
101. Id.
petition for certiorari, arguing the Fifth Circuit’s interpretation of materiality was erroneous.\textsuperscript{104} That petition was denied on January 7, 2019.\textsuperscript{105}

In fiscal year 2016, the DOJ recovered $4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government.\textsuperscript{106} In the health care industry, the largest recoveries were from Wyeth and Pfizer for knowingly reporting false and fraudulent prices for Protonix Oral and Protonix IV ($784.6 million) and Tenet Healthcare ($244.2 million) for kickbacks.\textsuperscript{107} In the housing and mortgage industry, the largest recoveries were from Wells Fargo and Freedom Mortgage ($1.2 billion and $113 million, respectively) for originating and endorsing residential mortgages as eligible for federal insurance when they did not meet the requirements.\textsuperscript{108} In addition, BP Exploration and Production paid $82.6 million to settle a case involving an oil well explosion and oil spill in the Gulf of Mexico.\textsuperscript{109}

For 2017, recoveries in government-initiated FCA cases totaled $265.5 million.\textsuperscript{110} Total recoveries in nonintervened \textit{qui tam} actions totaled $898 million.\textsuperscript{111} Total recovery under the FCA for the year was $3.7 billion.\textsuperscript{112}

In 2018, FCA settlements and judgments were more than $2.8 billion.\textsuperscript{113} Of that amount, $2.5 billion involved the health care industry.\textsuperscript{114} It was the ninth consecutive year that civil health care fraud cases exceeded $2 billion.\textsuperscript{115} Among the largest recoveries was the AmerisourceBergen Corporation and some of its subsidiaries that paid $625 million for trying to circumvent important safeguards aimed at preserving the integrity of the nation’s drug supply and for profiting from repackaging certain drugs supplied to cancer patients, and $210 million from DaVita to settle allegations that it provided inaccurate information that caused Medicare Advantage Organizations to receive inflated Medicare payments. A total of 645 \textit{qui tam} actions were filed in 2018 equating to an average of 12 new cases each week.\textsuperscript{116}

In 2019, total FCA recoveries exceeded $3 billion.\textsuperscript{117} Of the recovery, $2.6 billion came from the health care industry.\textsuperscript{118} Recoveries from health care–related cases brought directly

\begin{itemize}
\item \textsuperscript{104} United States \textit{ex rel.} Harman v. Trinity Indus., No. 17-1149 (5th Cir. Sept. 29, 2017), \textit{cert. denied} (Jan. 7, 2019).
\item \textsuperscript{105} United States \textit{ex rel.} Harman v. Trinity Indus., 139 S. Ct. 784 (Jan. 7, 2019).
\item \textsuperscript{107} Id.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{118} Id.
\end{itemize}
by the DOJ increased from $568 million in 2018 to $695 million in 2019. The 2019 recoveries in such cases were the second-highest amount recovered in 30 years. Qui tam actions returned $2.1 billion of the year’s total recovery. In 2019, 633 qui tam actions were filed. The government paid $265 million to those who initiated qui tam actions. Of all new FCA matters brought in 2019, 81 percent were qui tam actions. A total of $272 million was recovered in nonintervened health care–related cases.

The FCA has easily become the U.S. government’s chief weapon against fraud. With the lures of treble damages, whistleblower protections, statutory civil penalties, guaranteed minimum bounties, attorneys’ fees, a lessened burden of proof, and an opportunity for virtually any citizen to act as a quasi–assistant attorney general, there have been many pioneers traveling the same path blazed by Jack Gravitt. Since the 1986 amendment to the FCA, total FCA recoveries exceed $62 billion, making the False Claims Act America’s primary vehicle to recoup losses suffered by the government through contractor fraud.

The FCA is unique in a variety of other ways. It is the only statute that requires the civil complaint to be filed under seal. Thus, the defendant is not notified that it has become the target of a civil suit and, often, an undercover criminal investigation.

As demonstrated by the Gravitt history, the interplay between the relator and the DOJ may often be less than delicate. Additionally, defense counsel has scrutinized the provisions of the Act, searching for weaknesses and raising numerous procedural arguments that have produced hundreds of published decisions.

As of this writing, the author has spent more than 36 years litigating scores of cases brought under the FCA that have generated more than 100 published judicial decisions. In addition to providing testimony and assistance to both houses of Congress in amending the Act in 1985, 1986, and 2008 and arguing the statute before the U.S. Supreme Court, the author has been involved in qui tam actions that produced record recoveries, both in cases where the U.S. government did prosecute the civil action and in cases where it did not. What follows is in large part based on that experience.

II. What It Means to Be a Whistleblower

Being a whistleblower is usually a very difficult experience. In all but a few cases, such as those in which an FCA case or other legal action is ultimately successful and financially remunerative, being a whistleblower may bring little but comfort to a troubled conscience. In all cases, whistleblowers risk (and are usually successful in) losing their jobs, careers, families, and friends.

For every Chet Walsh—who lived in fear for many years but ultimately was able to retire comfortably as a result of his FCA recovery—there are hundreds if not thousands of

120. Id.
121. Id.
122. Id.
123. Id.
124. Id.
125. Id. That amount represents the third-highest annual recovery in nonintervened cases in 30 years.
127. See Chapter 1, Section IV.B.1 (The Department of Justice’s Attacks on Chet Walsh).
unsung heroes who have battled unscrupulous government contractors whose only reward was knowing that their consciences were clear because they did what was right, not what was expedient. Those brave individuals who are willing to take risks and “blow the whistle” on wrongdoing are few and far between. Our society emphasizes protection of individual rights and liberties, but when it comes to taking a strong stand against wrongdoing, most citizens are reluctant to take forceful action and instead wait for someone else to take a leadership role.

What causes a few to refuse to ignore wrongdoing and most others to look in the other direction? Is it merely circumstances? Is it the result of differences in moral, ethical, or religious principles? Do certain life experiences trigger whistleblower conduct? Is it the desire to leave a permanent mark on society, lasting far longer and having a broader impact than a single individual’s words or deeds? Or is it a combination of many, many factors that vary from one individual to another? While sociologists and psychologists continue to study the motivational factors involved in being a whistleblower, one certainty exists: becoming a whistleblower changes an individual’s life course, sometimes permanently.

As a result, before embarking on an FCA action, whether as attorney or client, it is important to know what it means to be a whistleblower. The whistleblower needs to understand that the events occurring and emotional reactions taking place are similar to those experienced by others who challenge the status quo. A whistleblower needs to understand that litigation is risky and time-consuming, and that doing what is right does not necessarily mean that the outcome of the struggle will be perfect.

The information in this book can help to explain procedures involved in an FCA case. Whistleblowers, their families, and counsel would also be wise to read some of the articles or books that have been written on the topic of whistleblowing. Even a local public library with a modest collection should have a few books or pertinent magazine articles. Likewise, movies such as *Silkwood*, about a whistleblower who opposed her employer’s cover-ups of safety problems at a uranium processing plant in Oklahoma, and *The Insider*, about a whistleblower who attempted to expose his tobacco industry employer’s malpractice, portray many of the problems faced by “ordinary” people who take on the challenges and responsibilities of being a whistleblower. Another resource is other whistleblowers, those who have also pursued FCA cases as *qui tam* plaintiffs. Finally, nonprofit organizations, such as Taxpayers Against Fraud, that have as part of their purpose assistance to whistleblowers may also be able to provide some emotional or other support.

### III. Is a *Qui Tam* Suit a Whistleblower’s Only Choice?

Before filing a *qui tam* action, many individuals first pursue other causes of action, such as the many antiretalatory administrative remedies found in dozens of federal statutes. Depending on state law in their own jurisdictions, other clients seek remedies under public policy, promissory estoppel, common-law fraud claims, or local whistleblower statutes. Some whistleblowers may be advised not to pursue the whistleblower aspects of their cases but instead to pursue more traditional remedies such as state and federal age, race, or sex discrimination laws.128

In many instances, however, a *qui tam* suit is the only real solution a whistleblower has in order to obtain both some personal relief and compensation, as well as to force the government and the public to take notice of the wrongdoing. In the event that a potential

128. For more discussion of these options, see James B. Helmer, Jr. & Ann Lugbill, Representing the Terminated Employee in Ohio (2d ed. 1997).
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*qui tam* relator has already initiated legal proceedings under other remedies, an FCA action is not precluded if handled properly.129 Usually only an attorney familiar with the FCA can advise as to whether prior legal proceedings preclude later going forward on a *qui tam* basis under the Act.

**IV. Sooner or Later, You Will Fight with Your Government**

The overwhelming irony of FCA *qui tam* litigation is that, sooner or later, you will fight with your government. This is the same government on whose behalf you have sued—the same government that stands to recover a minimum of 70 percent of any proceeds of the action. You may fight over the extent to which the relator will participate as a party in actions in which the DOJ intervenes. You may fight over what would be an appropriate settlement of the case. You may (and probably will) fight over the appropriate relator’s share and the extent of the relator’s contribution to the ultimate recovery. A fight over the relator’s contribution to the results obtained may occur even in an action where the DOJ declines to intervene and the recovery results entirely from the relator’s efforts. The relator needs to remember that just because the relator is on the government’s side does not mean that the government is on the relator’s side.

The first fight likely to occur is over the appropriateness of the relator’s active participation in the lawsuit. By definition, this fight will occur only in cases in which the DOJ intervenes.130 In such cases, the dispute can arise in two contexts: (1) when the DOJ seeks settlement or dismissal of the action,131 or (2) when the DOJ seeks to restrict or eliminate the relator’s participation in the prosecution of the action.132

**A. Jack Gravitt’s Successful Battle for All *Qui Tam* Relators**

Prior to 1986, the role of a *qui tam* relator in FCA cases was ill-defined. Fortunately, the ground rules that govern such disputes have been clarified by the 1986 Amendments to the FCA.133 Prior to the Amendments, the statute did not clearly define any role for the relator after intervention by the DOJ.134 Thus, in *Gravitt*, the DOJ intervened only to try to settle

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129. In this regard, caution is necessary. Some courts have found that a state lawsuit by a whistleblower acts as a “public disclosure” that can bar an FCA suit. Now, a state lawsuit is not a public disclosure unless the federal government is party to it. United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 330–31 (6th Cir. 1998). See Chapter 5, Section VII (Public Disclosure Jurisprudence).


131. 31 U.S.C. §§ 3730(c)(2)(A)–(B). See Chapter 19, Sections IX (The Relator’s Challenges to Settlement) and XI (The Government’s Challenges to Settlement); and Chapter 4, Section V.C (Terminating the Litigation).


133. With special thanks to the fortitude of whistleblower Jack Gravitt.

134. Prior to the 1986 Amendments, the statute provided merely that once the government proceeds with the action, the action is conducted only by the government. See former 31 U.S.C. § 3730(b)(4) (1982).
the case, despite the relator’s objections and despite the fact that the DOJ had conducted no
discovery, deposed no witnesses, and successfully stayed discovery served by the relators.\textsuperscript{135}

When relator Gravitt expressed reservations about the settlement, the DOJ refused to
provide any supporting information regarding the settlement, threatened to deny Gravitt the
relator’s share to which he was entitled by statute, threatened to impose the costs incurred
by the DOJ in obtaining approval of the settlement, and threatened to have Gravitt’s counsel
sanctioned if these threats were made known to Chief Judge Rubin.\textsuperscript{136}

After Gravitt’s counsel made these threats known to Judge Rubin, the DOJ made good
on its threat to attempt to deny Gravitt any statutory share by arguing that he was not a
proper relator.\textsuperscript{137} Only after seeking and being granted intervenor status was relator Gravitt
able to conduct limited discovery into the merits of the proposed settlement and ultimately
persuade the court to set aside the settlement as inadequate.\textsuperscript{138}

While litigating the issue of the relator’s right to participate in the proceedings to deter-
mine the adequacy of the settlement proposed by General Electric and the DOJ, Gravitt and
his counsel were subpoenaed to testify before a subcommittee of the U.S. Senate and House
of Representatives concerning their experience in trying to surmount the hurdles posed by
the 1943 Amendments to the FCA.\textsuperscript{139} An account of the DOJ’s threats became part of the
testimony and Congressional Record describing the hurdles that a \textit{qui tam} relator faced
under the then-current law.\textsuperscript{140} When Representative Daniel Glickman (D-Kan.) demanded an
explanation of these threats, the DOJ backpedaled, claiming that the remarks in issue were
intended only as pointing out “litigation risks.”\textsuperscript{141}

Thereafter, Congress amended the FCA to reduce, if not eliminate, the difficulties
that Gravitt experienced in being heard before court approval of any such dismissal or
settlement.\textsuperscript{142}

\section*{B. The Department of Justice’s Efforts to Deprive Relators
of Part of Their Relator’s Share}

Even when the relator and the DOJ agree on the amount of the settlement, the relator may
encounter disagreement with the DOJ on the amount of his or her share of the recovery. The
disagreement will probably occur whether the DOJ intervenes in the action or not. Through

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\item[\textsuperscript{139}] \textit{False Claims Reform Act: Hearing on S. 1562 Before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. on the Judiciary}, 99th Cong., 1st Sess. 49–61 (Sept. 17, 1985).
\item[\textsuperscript{140}] \textit{False Claims Act Amendments: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee}, 99th Cong., 2d Sess. 353–54, 389 (Feb. 5–6, 1986).
\item[\textsuperscript{142}] 31 U.S.C. §§ 3730(c)(2)(A)–(B). \textit{See Appendix 3.G.}
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fiscal year 2019, relator share awards for all cases in which the DOJ intervened averaged only 15.4 percent. The average for all nonintervened cases was just 25.6 percent.

Although there does not have to be a fight over the relator’s share in every case, the larger the recovery, the more likely it is that government counsel will seek to override Congress’s mandate that relators receive 15 to 30 percent of the government’s FCA recovery. Consider the following examples.

1. The Department of Justice’s Attacks on Chet Walsh

A good example of the lengths the DOJ will go to to attack the relator in order to reduce the relator’s share, even where the government’s recovery is the result of information obtained only from the relator, is found in the Walsh case.

Relator Chester L. Walsh was manager of overseas aircraft operations for General Electric. He worked on-site in Israel on General Electric’s F110 aircraft programs with the Israeli Air Force. This venture was funded by the U.S. government under the Foreign Military Sales Program. During the course of his duties, Walsh discovered fraudulent schemes that he believed resulted in federal funds being shifted from government-approved projects to unapproved projects.

Isolated in Israel, Walsh began to collect information on the fraudulent schemes. Walsh collected and preserved thousands of documents evidencing the fraud. He also tape-recorded conversations with Israeli Air Force officials and General Electric employees in an effort to obtain admissions about the fraud. Later, when transferred to Switzerland, Walsh concealed in his household furnishings the documents that illustrated the fraud and succeeded in smuggling those documents out of Israel.

Thereafter, Walsh brought a *qui tam* action under the FCA and cooperated fully with the government in its investigation. He met with government investigators and representatives on numerous occasions, wore a wire for the Federal Bureau of Investigation (FBI), tape-recorded conversations with colleagues and friends at General Electric, and spent several weeks assisting the FBI in transcribing the tapes of those conversations. Walsh risked his lengthy career at General Electric by pursuing the collection of information about the fraud. Prior to collecting any “bounty” in the case, he was forced to retire as part of the settlement agreement ultimately reached.

Throughout the government’s investigation, Walsh and *qui tam* counsel Mary Louise Cohen worked closely with Special Agent Stephen P. Kosky II of the FBI. Through such cooperative efforts, the government extracted a settlement of $59.5 million from General Electric on the civil claims, a guilty plea to a four-count criminal indictment, a $10 million fine,

143. See Chapter 1, Section IV.F (Department of Justice Statistics Demonstrate That Relator Shares Recovered Are Not What Congress Intended) (chart). See Chapter 21, Section II.D (Use of Inaccurate Statistics to Attack *Qui Tam* Provisions).

144. *Id.* See Chapter 1, Section IV.F (Department of Justice Statistics Demonstrate That Relator Shares Recovered Are Not What Congress Intended) (text and chart).


146. Walsh later learned that $6 million of the funds were in fact stolen by former Israeli Air Force General Rami Dotan and General Electric official Herbert Steindler, who deposited the money in their private Swiss bank accounts. 808 F. Supp. at 582. Both Dotan and Steindler ended up as long-term guests of their respective countries’ incarceration facilities.

147. 808 F. Supp. at 582–83.

and recovery of $6,158,301 in funds misappropriated by General Electric and Israeli Air Force General Rami Dotan.

Special Agent Kosky described Walsh’s contribution to the extraordinary results as follows:

The Government knew absolutely nothing that had gone amiss at General Electric. General Electric had taken substantial measures to cover it up for a space of two years. I have no reason to believe that anyone within General Electric would have ever told us besides Mr. Walsh. Mr. Walsh brought us the only information that we had. We built on it through our own efforts and the fruits of the criminal and civil cases that were settled last summer are a direct result of what Mr. Walsh brought us and would have come from no other source to my knowledge to this day.149

Despite Kosky’s testimony,150 the DOJ launched an assault against Walsh. In an attempt to decrease Walsh’s share, the DOJ argued that he had actively participated in and planned some of the fraud and that he delayed reporting the fraud to increase the damages.151 The DOJ’s attempt to decrease Walsh’s relator share is particularly disturbing because it did not arise from any conflict between awarding an appropriate relator’s share and the government recovering all of its damages. The government’s own expert witness testified that, even if the court awarded Walsh the statutory maximum of 25 percent of the total recovery, the government would have recovered every penny it lost and, in addition, would have recovered over $18 million to compensate it for the costs of its investigation.152

Ultimately, the court awarded Walsh 22.5 percent of the proceeds of the civil settlement.153 In doing so, the court remarked on the DOJ’s mysterious pattern of behavior in these cases in which it views relators as adversaries rather than allies.154 Judge Carl B. Rubin of the U.S. District Court for the Southern District of Ohio commented:

Chester Walsh, as an individual, is of very little importance in this action. . . . It is instead the very concept of “whistleblowers” that appears to be in issue. The pattern of behavior in these cases by the Department of Justice always has been a mystery. The use of a qui tam plaintiff is nothing new. The Internal Revenue Service has for decades offered a monetary reward to anyone who provides infor-

149. Walsh, 808 F. Supp. at 582 (citing Kosky Deposition at 88–89). This is the only portion of Special Agent Kosky’s deposition that is in the public record. When Walsh’s counsel attempted to depose Kosky in the litigation for the relator’s share issue, the DOJ resisted such attempts on the basis of prosecutorial privilege. In response, the relator’s counsel suggested, and the court agreed, to take Kosky’s deposition in camera, with only the DOJ counsel present. Id. at 581. Most of that testimony remains sealed.

150. On May 16, 1994, Special Agent Kosky was honored with the FBI Director’s Award for Excellence in Investigation for his efforts in the Walsh case. This annual award goes to a single agent and is the top such award given to an FBI agent.

151. The DOJ’s onslaught against Walsh is a good example of the ironically shifting alliances that sometimes occur in qui tam litigation. Until General Electric pled guilty and $69.5 million in settlement proceeds and fines were recovered, the DOJ was allied with Walsh against General Electric. Thereafter, the DOJ became allied with General Electric against Walsh, as General Electric lobbied the DOJ extensively to encourage the DOJ to make the very arguments against Walsh that the DOJ ultimately made. United States ex rel. Walsh v. General Elec. Co., 808 F. Supp. 580, 583 (S.D. Ohio 1992). General Electric continued its fight against Walsh’s counsel. United States ex rel. Taxpayers Against Fraud and Walsh v. General Elec. Co., 41 F.3d 1032 (6th Cir. 1994).

152. Walsh, 808 F. Supp. at 582.

153. Id. at 584. The DOJ appealed this amount. The parties settled the relator’s share amount at 19.2 percent during the appeal.

154. Id. at 583–84.
information regarding tax evasion. It is a standard practice of law enforcement agencies to pay confidential informants. It is customary in entrapment cases for a jury to be advised that “criminal activity is such that stealth, stratagems, and undercover agents are necessary weapons in the arsenal of the police officer.” *Sorrells v. United States*, 287 U.S. 435 (1932). No one likes “snitches,” but they can be valuable. In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals as adversaries rather than allies. This is not the first case where this Court has noted the antagonism of the Justice Department to a whistleblower. The reason continues to be unknown, but the attitude is clear.\(^\text{155}\) Walsh performed a service to the United States. Whistleblowers in general perform a service to the United States. It is at least naive to believe that an appeal to patriotism alone will cause disclosures of fraud. The U.S. Congress has determined that whistleblowing should be encouraged by monetary rewards. This case is a classic example. Fraud on the United States (and an important ally—Israel) was disclosed by Walsh. The money was returned in full, and even if the relator had been awarded the maximum under the statute, the United States would still have recovered a net profit.\(^\text{156}\)

2. **The Department of Justice’s Efforts to Belittle Alfred Pedicone’s Heroic Efforts and Deny Him the Recovery He Earned**

Similar difficulty may be encountered with the DOJ in cases where the government declines to intervene and prosecute the claims. In most nonintervened cases, the relator and the DOJ have reached agreement absent court intervention on the appropriate amount to award the relator.\(^\text{157}\) Because the government has left the relator to go it alone in these cases, with any monetary recovery by the United States being achieved with little or no expense or risk to the sovereign, the DOJ should reach agreement near the high end of the range.\(^\text{158}\) However, the most recent statistics from the DOJ show that the average relator’s share in nonintervened cases is 24 percent, below the statutory minimum for an award.\(^\text{159}\)

In one well-known nonintervened case, the DOJ and the relator were unable to agree on an appropriate award.\(^\text{160}\) The *Pedicone* case\(^\text{161}\) demonstrates how the DOJ will denigrate the relator’s contribution to the recovery and attempt to diminish the relator’s share even in cases where the recovery is solely the result of the relator’s efforts.\(^\text{162}\) The DOJ approach in

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\(^{155}\) Id. In referring to other cases where the DOJ’s antagonism toward whistleblowers was apparent, the court was probably referring to United States *ex rel. Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988).


\(^{158}\) Id.

\(^{159}\) See Chapter 1, Section IV.F (Department of Justice Statistics Demonstrate That Relator Shares Recovered Are Not What Congress Intended) (text and chart).

\(^{160}\) Helmer, *How Great Is Thy Bounty*, at 750–51.


\(^{162}\) In *Pedicone*, the DOJ filed neither a notification of intervention nor a declination of intervention. The court held that the DOJ’s failure to act was tantamount to a declination of prosecution for the purpose of allocation of the relator’s share. 807 F. Supp. at 1351–53.
Pedicone is best summarized by President John F. Kennedy’s observation that “victory has 100 fathers and defeat is an orphan.”\footnote{J.F. Kennedy News Conference April 21, 1961, PUB. PAPERS (1962), 312.}

Alfred J. Pedicone was an accountant employed by Mazak Corp., a Japanese-owned company with a large facility in Florence, Kentucky. During his employment, Pedicone discovered that Mazak was defrauding the U.S. government by importing Japanese-made machine tools, replacing the Japanese labels with “Made in the U.S.A.” labels, and selling these highly sophisticated machines to the government in violation of the Buy American Act\footnote{41 U.S.C. §§ 10a–d.} and the FCA.

Pedicone reported these violations to his superiors at Mazak to no avail. He was grilled by his employer’s lawyers on several occasions. Pedicone then reported these violations to the U.S. government repeatedly, beginning in March 1988. The government did nothing to stop the fraud or to protect Pedicone. Pedicone became a pariah on the job and was fired soon after his whistleblowing began. After two years of government inaction, Pedicone filed a *qui tam* action under the FCA in June 1990. The case remained under seal until August 1991, when it was unsealed without the DOJ intervening or filing a notice of declination.

Thereafter, Pedicone prosecuted the action as relator. Not only did the government not assist Pedicone, but also the DOJ refused to make the results of the Defense Criminal Investigative Service auditor’s investigation into Pedicone’s allegation available to Pedicone and his counsel. The DOJ warned Pedicone’s counsel not to contact the auditor for any reason. Consequently, Pedicone and his counsel conducted discovery from scratch, notwithstanding the government’s prior investigation, in which Pedicone and his counsel had voluntarily assisted the government.

The relator and his counsel participated in or took 31 depositions; several of them were conducted with Japanese translators because Mazak executives, whose English seemed to be fine for other purposes, refused to be questioned except in Japanese. One deposition was taken in the U.S. magistrate’s courtroom as a result of discovery abuse by the defendant. The relator and his counsel reviewed 150,000 documents, some of them in Japanese; retained experts; and tracked down, interviewed, traveled to, and deposed witnesses in California, Indiana, Kentucy, Massachusetts, New York, Ohio, Tennessee, Texas, and Washington, D.C. The relator incurred the entire burden of this discovery because the DOJ refused to make any of the results of its investigation available to the relator and even instructed the relator’s counsel that he could not contact government auditors familiar with the corporation’s activities.\footnote{Helmer, *How Great Is Thy Bounty*, at 750.}

But the government did more than just fail to cooperate. In many instances, it made the relator’s efforts to acquire discovery more difficult by insisting on overly restrictive protective orders, delaying document production for months, destroying relevant documents, and producing unprepared government employees for depositions—unrepresented by counsel—to be cross-examined by the defendant.\footnote{Id. at 750–51.}

Despite such conduct, Pedicone successfully negotiated what was at the time a record settlement in a nonintervened *qui tam* case of $2.39 million plus substantial attorneys’ fees, costs, and whistleblower retaliation charges.\footnote{Id. at 751.}

As for an appropriate award, the DOJ argued that the relator should recover only 27 percent of the settlement because the case was settled before trial.\footnote{Id.} The trial court,
however, rejected that argument and instead awarded the full 30 percent permitted by the statute. Judge Beckwith stated:

This Court does not find any support for the Government’s position that the *qui tam* Plaintiff’s share should differ depending upon whether the case is settled or tried. In fact, the language of the statute makes no distinction in providing for a 25 to 30% share whether or not the matter is resolved without a trial. The Court finds that the *qui tam* Plaintiff has pursued the action at considerable personal and professional expense to himself. An award of 30% of the settlement would encourage other potential whistleblowers to take risks similar to those taken by the *qui tam* Plaintiff in this matter to expose fraud against the United States. In exercising her discretion to award the high end of the nonintervened scale to relator Pedicone, Judge Beckwith was impressed with Pedicone’s dogged pursuit of an important matter not vigorously pursued by the government and by the personal sacrifices that Pedicone made, which included losing his job and home. The court also correctly noted that Congress intended to encourage whistleblowers to conduct themselves in the fashion that Pedicone had and that, by awarding the maximum permitted by the statute, she would be doing so.

In *Pedicone*, as in *Walsh*, the court rejected the DOJ’s attempts to diminish the relator’s share. Nevertheless, the DOJ succeeded in putting Pedicone to the necessity and expense of an extensive post-settlement briefing and a mini-trial on the relator’s share issue.

### 3. The Department of Justice’s Attempts to Minimize the Relator’s Share in One of the Largest Health Care Fraud Recoveries Ever

On March 22, 1996, the U.S. Attorney’s Office for the Eastern District of Pennsylvania expressed extreme appreciation for the efforts of three relators, Robert Merena, Charles Robinson, and Glenn Grossenbacher, for their hundreds of hours of assistance in what was then the most successful *qui tam* case to that date in the history of the United States. Two years later, the DOJ asked the trial court to refuse any award to these same relators. In *United States ex rel. Merena v. SmithKline Beecham Corp.*, a total recovery of $333,976,266 (after interest) was obtained for a variety of Medicare and Medicaid instances of fraud. Relator Merena brought a *qui tam* action on November 12, 1993, in the U.S. District Court for the Eastern District of Pennsylvania. Shortly thereafter, in 1993, Grossenbacher filed a similar case under seal in the U.S. District Court for the Western District of Pennsylvania.

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169. *Id.*


173. The Sixth Circuit has held that such attorneys’ fees are not recoverable by the relator from either the United States or the defendant. *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032 (6th Cir. 1994). See the discussion of the *Taxpayers* case in Chapter 1, Section IV.B.1 (The Department of Justice’s Attacks on Chet Walsh) and Chapter 17, Section V.D.2.i (Litigation of the Relator’s Share).


175. *Id.*
Texas, and in 1995, Dr. Charles Robinson joined the Grossenbacher complaint. A third qui tam action was filed in the U.S. District Court for the Northern District of California by Kevin Spear in February 1995. The Grossenbacher-Robinson and Spear cases were transferred to the Eastern District of Pennsylvania for consolidation with the Merena case.

The DOJ obtained several extensions of time to elect whether to intervene. During the extensions, the relators and their counsel provided substantial assistance to the investigation. The United States reached a settlement in principle by February 1996, and $325 million was placed in escrow and started to earn interest.

The U.S. government formally intervened in the cases on September 27, 1996, and the action was dismissed with prejudice on February 24, 1997. Three days later, all of the settlement funds and interest—a total of $333,976,266.40—were immediately disbursed to the United States. The government agreed to pay relator Spear 15 percent of $13,297,829, which is the sum the government attributed to a claim called the “CBC Indices” claim.

No money was paid, however, to relators Merena, Grossenbacher, and Robinson. Instead, the DOJ proceeded to raise a number of arguments with the purpose of eliminating or greatly reducing the relators’ share of the recovery. Some of these arguments were at odds with positions taken by the U.S. Attorney’s Office in Pennsylvania and the government investigators.

After holding a seven-day evidentiary hearing, the trial court rejected nearly all of the DOJ’s arguments, specifically finding that the DOJ was trying to take “far more credit for the overall success of the proceedings than is rightly due” and finding at least one government argument “frivolous.” The court also questioned the government’s strategy of taking all that the relators had, settling the case, intervening in the case, dismissing the case with prejudice, and then, in an effort to deprive the relators of their statutory reward, moving to dismiss the relators’ already-dismissed cases.

The trial court specifically dealt with one argument that relators have heard often from DOJ lawyers when attempting to negotiate an appropriate relator’s share where a large recovery has been obtained: large recoveries require a small percentage relator’s share. Judge VanArtsdalen replied:

There is nothing in the statute to suggest that the amount of the total recovery is, or should be, an appropriate consideration in determining the percentage range or in calculating the total qui tam award. Had Congress intended the amount of the award to be a relevant factor in establishing the percentage of the recovery, it could have simply enumerated this as a relevant factor to be considered, or Congress could have directed a sliding scale of percentages, depending on the dollar amount of the recovery.

Judge VanArtsdalen found that a qui tam share of 17 percent, or $52,049,126 of all the funds received by the federal government, was proper. But the government pressed its case to the Third Circuit, arguing on appeal that the vast majority of the $333,976,266.40 recov-

176. Id. at 450.
177. Id. at 436 (government’s argument that relator’s cases should be dismissed for failure to plead fraud with particularity raised by United States after case had already been settled and dismissed with prejudice).
178. When the government intervened, it filed no amended complaint. Id. at 424.
180. Some funds were recovered for various state losses under Medicaid programs. Accordingly, the court deducted $14,507,107 in making the relators’ share calculation.
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ery involved allegations that were publicly disclosed before any of the relators filed suit, and thus should not have been included in the baseline damages figure from which the 17 percent share came.181 The Third Circuit only partially agreed, finding that the district court should have first determined whether any of the relators were “original sources” of the publicly disclosed allegations before deciding a relator’s share percentage.182

On remand, Judge VanArtsdalen easily found that the relators were, in fact, “original sources” of all the allegations in their complaints.183 However, constrained by restrictive Third Circuit views on the FCA public disclosure provisions, the court found that the relators’ share of most of the recovery amount was limited to between 0 and 10 percent.184 The government, as it had before, argued vigorously to limit or eliminate the relators’ share—asserting, for example, that “Mr. Merena helped very little and merely provided basically clerical assistance that the Government could have obtained without him.”185 But the court again rejected the government’s strategy: “In view of the many public accolades previously given [Merena] by the same Government officials responsible for the prosecution of the case, I have trouble accepting or even rationalizing the Government’s present position other than attributing it to an overzealous attempt to lower the amount of the award rightfully due.”186

In the end, the court very easily found that the maximum 10 percent share was appropriate:

It would be difficult to conceive of any case, wherein the recovery under the statute is limited to the ten per cent maximum, that would be more deserving of the maximum award. . . . [Merena’s] assistance was substantial, the information he provided was significant and he played an important role in bringing the qui tam action and in advancing the case to litigation and settlement.187

The relators were eventually awarded approximately $37,109,886.20, down slightly from the original award of $52,049,126, which stands as one of the largest relator recoveries to date. Hopefully, the DOJ will reflect on the trial court’s words:

. . . an Act of Congress provides for substantial awards in order that persons who acquire first-hand knowledge of false claims being presented to the Government will come forth and file meritorious qui tam complaints. The success of this legislation in continuing to achieve its goals can only be assured by unstintingly providing the qui tam awards dictated by Congress, irrespective of the size of the awards.188

182. Id. at 107–08.
184. Id. at 368. Approximately $65 million of the recovery was admittedly based on allegations from relator Merena that were not publicly disclosed. This amount was thus not subject to the 0–10 percent restriction. Id. at 371. See Chapter 16, Sections III.A (Legislative History of the “Public Disclosure” Limitation on a Relator’s Share) and III.B (Cases That Apply the “Public Disclosure” Limitations on a Relator’s Share).
187. Id. Although the court was limited to awarding a relator’s share only to Merena because his case was brought first, this fact did not affect the ultimate amount of the award.
4. The Department of Justice’s Attempts to Reduce the Relator’s Share Despite the Fact That the Relator’s Counsel Had Essentially Assumed the Role of Government Attorneys in Litigating the Case

Relator James Alderson was the chief financial officer at North Valley Hospital in Whitefish, Montana, when Quorum Health Group, Inc. became the management company of the hospital. 189 After assuming control, Quorum notified Alderson of its policy concerning cost report preparation, which required the simultaneous preparation of two inconsistent cost reports. 190 Alderson refused to comply with Quorum’s policy, which would result in submitting fraudulent bills to the U.S. government. He was fired four days later on September 9, 1990. 191

In 1992, Alderson filed his FCA action pro se. However, the government refused to issue a decision on whether to intervene in Alderson’s case until more than six years later, in 1998. Meanwhile, Alderson pursued the case on his own and assisted the government with its investigation into the claims.

In 1995, Alderson engaged Phillips & Cohen to litigate his case. In mid-1997, after five years of extensions, the government informed Alderson’s counsel that it intended to decline intervention but invited his counsel to a meeting with government attorneys so that Alderson’s attorneys would have an opportunity to dissuade the government from their decision. Following this meeting, the government agreed to intervene on the condition that Alderson’s counsel agreed to assume primary responsibility for prosecution of the litigation.

Mr. Alderson and Quorum ultimately settled the claims for $85.7 million. Interestingly, the government had previously valued these same claims at only $10 million. The relator and the DOJ could not reach agreement on the relator’s share. The court then held a two-day hearing for the purposes of determining the relator’s share. The government asserted several arguments for a reduced relator’s share.

First, the government asserted that, because the defendants had already reimbursed Alderson’s counsel for hourly attorneys’ fees and costs, any consideration of his counsel’s efforts in determining the relator’s share would amount to “double consideration of the same effort for two separate recoveries.” 192 The court found this argument unavailing and noted that even the DOJ’s own guidelines state that the contribution of relator’s counsel should be considered when determining the relator’s share. 193

Second, the government asserted that the size of the recovery supported a reduced relator’s share. In rejecting this argument, the court noted that “the statutory language and the legislative history are markedly silent on [this issue].” 194 The court further noted that the size of the recovery is largely irrelevant in determining the relator’s share. The court concluded by stating: “With respect to the FCA relator’s share, the conspicuous absence of an explicit cap or a mechanism to taper the available percentage argues forcefully against the Government’s position that the size of the recovery is a factor warranting consideration.” 195

Third, the government argued that $5 million of the $85.7 million settlement amount was excluded from the amount to which the relator’s share applied because it was not

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190. Id.
191. Id.
192. Id. at 1334.
193. See Chapter 16, Section IX (Department of Justice Relator’s Share Guidelines).
195. Id.
“proceeds of the case or settlement of the claim” but was consideration for the release of certain “administrative recoupment claims” putatively unrelated to Alderson’s fraud claims.¹⁹⁶ The court rejected this argument, noting foremost that the settlement agreement itself did not support the government’s position and further found that the government’s effort to exclude the $5 million was untimely at best.

The court also criticized the DOJ Relator’s Share Guidelines¹⁹⁷ because they “fail to establish a coherent theory under which to determine the relator’s share” and “contradict one another.”¹⁹⁸

The court ultimately awarded Alderson $20,585,698.99, or 24 percent of $85.7 million. In doing so, the court recognized that Alderson’s counsel had “assumed a responsibility essentially equivalent to that of the DOJ attorneys” and recognized the “substantial personal, financial, and professional” cost Alderson had paid to litigate the case.¹⁹⁹ The DOJ did not appeal this decision and paid the relator his share in November 2001.

In another case that spanned three years, proceeded to trial, and resulted in a jury verdict in favor of the relators, and in which the government declined to intervene, a different court refused to increase the relator’s share from the minimum of 25 percent to the maximum of 30 percent.²⁰⁰ Despite the fact that the case involved complicated accounting fraud and the relators litigated the entire case on their own, with no assistance from the government, the court found that the relators did not merit the top award of 30 percent.²⁰¹ The court found that the jury award of $31 million was exceedingly large and that the amount of the award, coupled with the fact that the relators were awarded additional damages and injunctive relief for their retaliation claims, sufficiently compensated the relators.²⁰²

Of course, the court missed that the point of the relator’s share is not to compensate the whistleblower but rather to incentivize him or her to both sound the alarm and also pursue the case when the government fails to do so. Successful relators, particularly those who actually try a case, are rare; they should be treated like lighthouses whose beams both guide and protect others.

The government was denied leave to submit a statement of interest in an FCA case that proceeded to trial and resulted in a jury verdict for the relator that was just shy of $350 million.²⁰³ The court, noting the government’s nine-month deliberation as to whether to intervene and its eventual intervention declination, found the government’s claimed enlivened interest in the development of federal law was more motivated by the large amount of the jury verdict, not an inadequately protected interest of the United States.²⁰⁴ While the district

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¹⁹⁶. Id. at 1339.
¹⁹⁷. See Appendix 13.A and Chapter 16, Section IX (Department of Justice Relator’s Share Guidelines).
¹⁹⁸. Alderson, 171 F. Supp. 2d at 1334.
²⁰¹. Id.
²⁰². Id.
²⁰⁴. Id. at *1.
court vacated the verdict finding the FCA materiality standard enunciated in Escobar was not met, on appeal, the Eleventh Circuit reversed, finding that the false claims were material, reinstating the $85,137,095 damages verdict attributable to the Medicare claims, and remanding to the district court to enter judgment after trebling damages and entering civil penalties.205

5. The Department of Justice Ignores Its Promises to Relator David Magee

In 2004, David Magee, a GS-13 computer scientist, was working in his dream job. He was the technical lead for U.S. Department of Defense (DOD) supercomputers at the Navy Oceanographic Office Major Shared Resource Center (MSRC) at the Stennis Space Center in Mississippi. The MSRC provides supercomputing services to DOD researchers. Magee’s duties included monitoring contractors, hardware, and software in connection with the operation of these world-class supercomputers. Magee’s office was in the same suite of offices as the director and deputy director of the MSRC.

In February 2004, the U.S. General Services Administration (GSA) published on behalf of the MSRC a request for proposal on a $3.2 billion task order to establish the National Center for Critical Information Processing and Storage (NCCIPS). The NCCIPS was designed to provide disaster recovery, continuity of operations, and data storage services for other federal agencies. As the lead computer scientist for the MSRC, Magee should have been involved in the design and planning of such a major project. However, he first learned of NCCIPS when the GSA request for proposal was issued. In the months before this solicitation was issued, Magee had noticed a number of unusual closed-door meetings between the MSRC director or deputy director and a select group of potential bidders on what was described as “the big project.”

In April 2004, the NCCIPS task order was awarded to this same group of contractors. The prime contractor was Science Applications International Corp. (SAIC), which teamed with two subcontractors: Lockheed Martin Space Operations (LMSO) and Applied Enterprise Solutions (AES), a new company with virtually no employees headed by the former director of the New Orleans Navy Space and Naval Warfare Systems Command (SPAWAR) IT and a personal friend of the MSRC director and deputy director.

Magee investigated the unusual circumstances surrounding the award of this major contract. In July 2004, Magee called the GSA fraud, waste, and abuse hotline to report fraudulent bidding information in connection with this contract. He followed this with e-mails to the GSA, the Navy Oceanographic Equal Employment Opportunity Office, the Navy Oceanographic Human Resources Office, and the DOD Inspector General, forwarding a number of documents and a timeline that supported his allegation of fraudulent bid rigging and conflict of interest.

Within a month, a Defense Criminal Investigation Service (DCIS) special agent from the DOD was assigned to investigate the allegations of bid rigging and conflicts of interest. That special agent later provided sworn testimony that the DCIS investigation into the alleged bid rigging or collusion in the NCCIPS contract award originated with facts and allegations reported by Magee.

Magee also reported these violations of the Procurement Integrity Act206 to the Navy Oceanographic Commander, the High Performance Computing Modernization Program in Washington, D.C., members of Congress, and the congressional Office of Special Counsel. The investigation continued for more than a year and a half. In that time, Magee suffered

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retaliation by the MSRC director. He was transferred out of the supercomputing office. Then, in August 2005, as a result of damage to the Gulf Coast by Hurricane Katrina, Magee was told that the DCIS investigation was indefinitely suspended. In early 2006, Magee tried to revive the investigation, contacting members of Congress, the DCIS, and the DOJ. Nothing was done.

With nowhere else to turn, Magee retained counsel to bring an FCA action. In June and August of 2006, an initial FCA complaint and amended complaint were filed under seal. After filing the initial complaint, Magee resigned his government job, sold his home, and moved his family from Mississippi to Texas. In 2009, after a three-year DOJ investigation, the United States intervened in Magee’s FCA case against all the defendants except the Lockheed Martin subcontractor, which Magee and his counsel were allowed to pursue on behalf of the United States.

Over the next two years, discovery proceeded as Congress had envisioned it for FCA cases—the relator, his counsel, and the government attorneys shared the work in a public-private partnership. More than 1 million pages of documents were produced in discovery by the defendants. Magee’s counsel devoted thousands of hours to analyzing these documents and creating a database for the use of the DOJ attorneys. Magee’s counsel assisted the DOJ in preparing government witnesses for depositions and trial and took the lead in many of the more than 55 depositions taken across the country, including depositions in Washington, D.C.; Atlanta, Georgia; Gulfport, Mississippi; Slidell and New Orleans, Louisiana; Huntsville, Alabama; Green Bay, Wisconsin; Cincinnati, Ohio; and San Diego, California. The relator and his counsel shared in the costs of government experts and hired experts in metadata analysis as well as experts in preparing demonstrative exhibits for trial. Magee’s counsel also supported the DOJ attorneys assigned to this case by sharing in legal research and motion practice.

At a court-ordered mediation in December 2010, Lockheed Martin offered $3 million to settle the nonintervened claims against it. The intervened defendants made no serious offer of settlement. The relator and his counsel were inclined to reject the Lockheed offer as insufficient, but the DOJ lawyers strongly urged Magee and his counsel to accept the offer in an effort to streamline the intervened case. As incentive for Magee and his counsel to acquiesce, the DOJ lead trial lawyer and her reviewer offered (1) a recommendation by the DOJ lead attorney and her reviewer that Magee receive a 28 percent relator’s share of the Lockheed offer and (2) a recommendation by the DOJ lead attorney and her reviewer of a 22 to 23 percent relator’s share of all remaining recoveries from the intervened defendants, provided that the relator and his counsel continued to provide the same level of assistance to the DOJ in prosecution of the case against the intervened defendants. Magee and his counsel agreed to this proposal and settled with Lockheed for $3 million. As agreed, the DOJ paid Magee a 28 percent relator’s share of the proceeds received by the United States from Lockheed on the recommendation of the DOJ lead trial attorney and her reviewer.

207. Magee was represented by the author’s law firm, Helmer, Martins, Rice & Popham Co., LPA, led by Paul B. Martins, and the Hawaii law firm of Galihet DeRobertis Ono, with local Gulfport, Mississippi, counsel from Owen, Galloway & Myers.
In reliance on this agreement, Magee’s attorneys and staff devoted virtually all of their time over the next year to prosecuting the case against the intervened defendants with the DOJ attorneys. Magee’s counsel made numerous trips to Washington, D.C., at the request of DOJ lawyers, for trial preparation; drafted jury instructions; researched, drafted, and argued against defense summary judgment motions before the district court; researched and drafted detailed memoranda on damages theories; took and defended depositions of experts; researched, drafted, and filed Daubert motions; synched deposition videos with transcripts for use at trial; prepared trial examinations; researched, drafted, and filed in limine motions; and prepared evidence for use at trial, including an analysis of multiple phone logs establishing extensive contact between the MSRC director and deputy with the intervened defendants SAIC and AES (while, in contrast, no such contacts existed with any of the other potential bidders). In short, Magee and his counsel abided by the agreement and did more than everything asked of them by the DOJ attorneys. All told, Magee’s counsel expended more than 16,386 professional hours on the case and advanced more than $566,000 in costs.

The case was set for trial in August 2011. In mid-2011, SAIC finally requested a settlement meeting in Washington, D.C. Magee’s counsel participated in the settlement discussions. At that time, DOJ attorneys were willing to settle the case for $10 million. The relator’s counsel urged the DOJ to value the case at a higher level. Fortunately, SAIC never offered $10 million.

At a July 2011 final pretrial conference with the district court, just weeks before the start of an anticipated month-long trial, the defendants finally settled, paying out a collective amount of $27.26 million, $4.584 million of which was in reimbursement for costs advanced by Magee’s counsel and in statutory attorneys’ fees. That left the United States with $22.67 million—more than double what the DOJ was willing to take several months earlier.

Satisfied with the performance and support provided by Magee and his counsel, the DOJ lead trial attorney and her reviewer recommended that Magee receive a 23 percent relator share of the $22 million, or approximately $5.2 million, in accord with the December 2010 agreement. At this point, for the first time, Magee and his counsel were told that senior DOJ managers in the Civil Division of the Commercial Litigation Branch refused to honor the agreed recommendation. The articulated reason for this betrayal of trust, after all the work was done and the money was received by the DOJ, was an unrelated and soon-to-be-reversed April 2011 Texas district court summary judgment decision finding that an auditor with the Mineral Management Service of the U.S. Department of the Interior could not bring an FCA action for matters he was required to investigate and report on in the course of his duties. All other courts, including an en banc Tenth Circuit Court of Appeals, had decided that former and even current government employees could serve as relators.

Despite the 2010 agreement reached between Magee and the United States, the hundreds of thousands of dollars in costs and professional time advanced by Magee and his counsel in reliance on that December 2010 agreement, and Magee’s forbearance in accepting what he and his counsel viewed as an inadequate Lockheed settlement in reliance on that agreement, the DOJ refused to honor the recommendations of its lead trial lawyer and her reviewer for the sole purpose of diminishing or eliminating a relator’s share of a settlement that was more than twice what the DOJ had been willing to accept several months earlier. This betrayal of trust was compounded by the fact that the unrelated Texas district court decision specifically

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213. See Chapter 1, Section IV.C (The Department of Justice’s Attempts to Bar Government Employee Relators).
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did not address the standing of someone like Magee, a former government employee computer scientist who undisputedly had no job duty to investigate or report fraud.\textsuperscript{214}

Magee and his counsel prepared a motion to have the court set the relator’s share percentage. In the interim, the DOJ offered to pay Magee a relator’s share of 17.6 percent ($4 million) to settle the dispute.

Magee had had enough.

Having lost his job and home in a seven-year fight and obtaining almost $25 million for the government, Magee could not bring himself to now fight against that very same government. He and his family were tired and disillusioned with the government’s conduct. Magee did not want to engage in another battle that could last many more years in the federal courts. Thus, the DOJ succeeded in this unprincipled tactic to reduce the relator’s share from 23 to 17.6 percent.

C. The Department of Justice’s Attempts to Bar Government Employee Relators

The reality of an eventual conflict between the relator and the DOJ is particularly apparent in cases involving current and former government employee relators. The DOJ has consistently taken the position that government employees are not entitled to maintain \textit{qui tam} actions under the FCA.\textsuperscript{215} Although the DOJ has not succeeded in persuading the courts or Congress of the merits of this position, it has succeeded in raising additional hurdles that the government employee relator must overcome.

From the FCA’s enactment in 1863 until the first significant amendments in 1943, government employees, as well as everyone else with knowledge of fraud practiced against the government, had the right to bring a \textit{qui tam} action. The 1943 Amendments effectively precluded government employees from bringing \textit{qui tam} actions by barring any \textit{qui tam} actions based on information that was already known to the government when the suit was filed.\textsuperscript{216} The 1986 Amendments eliminated the “prior governmental knowledge” jurisdictional bar and granted any person the right to maintain a \textit{qui tam} action, with four specific exceptions:

1. No former or present member of the armed forces may maintain an action against another member of the armed forces arising out of such person’s service in the armed forces;\textsuperscript{217}

2. no one may maintain an action against a member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on information already known to the government;\textsuperscript{218}

\textsuperscript{214} Little, 2011 U.S. Dist. LEXIS 41566, at *7 n.9 (“Occasionally, a government worker who is not directly responsible for a matter will collaterally discover an irregularity. If it is not pursued by her superiors, she might conceivably be allowed to bring a claim in which she could share, but that is not this case.”). That, of course, was the case with Magee.

\textsuperscript{215} See United States \textit{ex rel.} Marcus v. Hess, 317 U.S. 537, 546 (1943); Holmes, 318 F.3d at 1213 (en banc) (referring to the 1990 government proposal of two bills to the House Judiciary Committee that government employees not be allowed to serve as relators; neither bill became law). For a discussion of the applicable law, see Chapter 3, Section V.C. (Limitations for Government Employees).


\textsuperscript{217} 31 U.S.C. § 3730(e)(1).

\textsuperscript{218} Id. § 3730(e)(2)(A).
3. no one may bring a *qui tam* action based on allegations or transactions that are already the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party; and

4. no one except an “original source” (i.e., someone with firsthand knowledge) of the information on which the action is based may bring a *qui tam* action based on 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. An action by a nonoriginal source based on public disclosure can proceed only if the government opposes a motion to dismiss it.

The dispute between the government employee relator and the DOJ can come at any time in the proceedings. In past actions, the DOJ has sought dismissal of an action with prejudice to the government employee relator, but without prejudice to the DOJ. In other cases, the DOJ has declined intervention and later filed amicus curiae briefs urging dismissal of the relator’s claims or a bar to the relator’s recovery.

In 1943, the U.S. Supreme Court, in its landmark decision in *United States ex rel. Marcus v. Hess*, rejected the government’s invitation to prohibit government employees from serving as FCA *qui tam* relators.

Neither the language of the statute nor its history lends support to the contention made by respondents and the government. “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. The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellow, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer.

In *United States ex rel. Hagood v. Sonoma County Water Agency*, the DOJ engaged in what might be perceived as kicking the relator while he was down by appearing in the court of appeals as amicus curiae to oppose the relator’s appeal from dismissal of his *qui tam* action on other grounds. The Sixth Circuit, in *United States ex rel. Burns v. A.D. Roe Co.*, noted that at the time of its 1999 decision, no court had accepted the argument that government employees per se can never be relators in a *qui tam* action. The *Burns* court further commented on the argument that government employees cannot be relators. The
The court stated that the rationale behind this argument is that government employees “publicly disclose” to themselves as private individuals information acquired as government employees.\textsuperscript{230} The Burns court noted that this “dual status of Government employees” requires the assumption that government employees lead schizophrenic lives and can publicly disclose information to themselves.\textsuperscript{231}

The Tenth Circuit, in a lengthy en banc decision in \textit{United States ex rel. Holmes v. Consumer Insurance Group},\textsuperscript{232} ruled unequivocally that government employees have the same right to serve as a relator as any other person.\textsuperscript{233} First, the en banc Tenth Circuit reversed an earlier decision of one of its panels that disqualified government employees from serving as relators if they were part of an ongoing government investigation into the \textit{qui tam} allegations.\textsuperscript{234} Second, the en banc Tenth Circuit addressed and rejected all the government's arguments that would prohibit a government employee from serving as a relator. \textit{Holmes} rejected the government's argument that a government employee is prohibited from serving as a relator under the “public disclosure” jurisdictional bar of Section 3730(e)(4), for which the employee cannot be an “original source.”\textsuperscript{235} In fact, the Tenth Circuit characterized some of the government’s arguments in this area as “perplexing” and “disingenuous.”\textsuperscript{236}

The court also analyzed and rejected the government’s argument that a federal employee who obtains information about fraud in the scope of his or her employment and who is required to report fraud is not a “person” entitled to be a \textit{qui tam} FCA relator under Section 3730(b)(1).\textsuperscript{237} The court examined the history of the FCA's \textit{qui tam} provisions and found that, from its inception in 1863 (with the exception of 1943 through 1986), Congress envisioned government employees serving as \textit{qui tam} relators.\textsuperscript{238}

Finally, the \textit{Holmes} court addressed the government’s various public policy arguments concerning why federal employees should not be allowed to serve as \textit{qui tam} relators.\textsuperscript{239} While noting that the government’s arguments that government employees have a duty to report fraud and are prohibited by federal regulations from using a public office for private gain may be appealing, the en banc court stated that the immutable fact remains that “nothing in the FCA expressly precluded federal employees from filing \textit{qui tam} suits.”\textsuperscript{240} In fact, the court discussed the 1943 provision that precluded FCA jurisdiction if the action was based on information in the possession of the United States or any of its employees. However, it correctly found that this provision was eliminated in the 1986 Amendments to the Act.\textsuperscript{241} The court then continued: “Post-1986 congressional activity suggests that Congress

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\textsuperscript{230} Id.
\textsuperscript{231} Id. (citing United States \textit{ex rel.} LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990)).
\textsuperscript{232} 318 F.3d 1199 (10th Cir. 2003) (en banc).
\textsuperscript{233} Id. at 1204 (“The fact that an employee learns of fraud in the course of his or her employment and has a duty to report fraud does not bar the government employee's FCA action.”).
\textsuperscript{234} Id. at 1215.
\textsuperscript{235} Id. at 1202–08.
\textsuperscript{236} Holmes, 318 F.3d at 1205–08.
\textsuperscript{237} United States \textit{ex rel.} Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1204–05, 1208–11 (10th Cir. 2003) (en banc) (“Thus, while it reasonably might be debated whether the word “person” includes or excludes certain types of entities (e.g., corporations), there can be no doubt that it unambiguously encompasses all individual human beings, including Holmes.” Id. at 1208–09).
\textsuperscript{238} Id. at 1211–12.
\textsuperscript{239} Id. at 1212.
\textsuperscript{240} Id.
\textsuperscript{241} Id. \textit{See also} United States \textit{ex rel.} Williams v. NEC Corp., 931 F.2d 1493, 1501 (11th Cir. 1991) (rejecting the government’s argument that the 1943 government knowledge bar was never repealed by the 1986 Amendments to the FCA).
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views the FCA as allowing federal employees to file *qui tam* actions.\footnote{242} Quoting and agreeing with the Eleventh Circuit Court of Appeals, the en banc Tenth Circuit stated:

> We recognize that the concerns articulated by the United States may be legitimate ones, and that the application of the False Claims Act since its 1986 amendment may have revealed difficulties in the administration of *qui tam* suits, particularly those brought by government employees. . . . Notwithstanding this recognition, however, we are charged only with interpreting the statute before us and not with amending it to eliminate administrative difficulties.\footnote{243}

The en banc Tenth Circuit concluded its decision by stating that, “[a]lthough there may be sound public policy reasons for limiting government employees’ ability to file *qui tam* actions, that is Congress’ prerogative, not ours.”\footnote{244}

Since 1986, Congress has amended the FCA no fewer than four times—in 1988, 2009, and twice in 2010. On each occasion, the government had the opportunity to petition Congress to add provisions (like it unsuccessfully did in 1990) to restrict or prohibit federal employees from serving as *qui tam* relators. Congress never seriously considered enacting such a limitation on the broad language of Section 3730(b)(1) that any “person” may bring such an action.

Despite this long line of district and appellate court decisions, in 2011 a Southern District of Texas court, in *Little v. Shell Exploration & Production Co.*,\footnote{245} dismissed two government auditor relators, reasoning that, “[b]ecause they are not the original source of the information, government workers have no standing to sue as individuals when they have been paid to find and report the accounting questions that they now describe as a fraud.”\footnote{246} In reaching its conclusion, the district court adopted the very same government arguments that the Eleventh Circuit rejected in *United States ex rel. Williams v. NEC Corp.*\footnote{247} and the en banc Tenth Circuit rejected in *Holmes*.\footnote{248} In fact, the district court brushed aside as “purile [sic]” the Tenth Circuit’s analysis that the plain statutory language that a “person” may bring a *qui tam* action includes government employees.\footnote{249} Instead, the district court in *Little* assigned special significance to the title of the heading of 31 U.S.C. § 3730(b)(1), “Actions by Private Persons,”\footnote{250} despite the holding of the Tenth Circuit in *Holmes*, as well as the U.S. Supreme Court, that the title of a statutory provision “cannot limit the plain meaning of the text” and can only be considered “when [it] sheds light on some ambiguous

\footnotesize{242. United States *ex rel.* Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1213 (10th Cir. 2003) (en banc) (referring to congressional rejection of two bills submitted by the government in 1990 to prohibit federal employees from serving as *qui tam* relators).


244. *Holmes*, 318 F.3d at 1214.


246. *Id.* at *1.

247. 931 F.2d 1493 (11th Cir. 1991).


250. *Id.* at *8.
The Fifth Circuit Court of Appeals reversed the district court and joined the Tenth and Eleventh Circuits.

It should be noted that even the district court in *Little* did not extend its prohibition to all government employees, stating that “[o]ccasionally a government worker who is not directly responsible for a matter will collaterally discover an irregularity. If it is not pursued by her superiors, she might conceivably be allowed to bring a claim in which she could share, but that is not this case.” The court of appeals again reversed the district court because that court disregarded the mandate of the Fifth Circuit and erred in granting summary judgment on the public disclosure based on a broad, conclusory, and unsupported application of the original source provision. The Fifth Circuit found none of the four categories of disclosures the district court deemed “public” were, in fact, public disclosures.

The first category involved public debate. In short, the court found the fact that Shell participated in a regulatory process in which it legally sought to try to change the rules in its favor concerning the deduction of gathering and transportation costs of moving oil, the public should have been on notice that Shell intended to act unlawfully with respect to the regulations, which the Minerals Management Service (MMS, the responsible agency of the U.S. Department of Interior) refused to change. The Fifth Circuit found that such attempt to change the law is not an allegation or transaction of fraud.

The second category of disclosures involved two administrative decisions. Those decisions were not public disclosures because they concerned factually different fraudulent schemes.

The third category of disclosures involved three federal cases. The Fifth Circuit found those cases too factually and legally dissimilar to constitute public disclosures.

The fourth category of disclosures involved government investigations. Those disclosures were not “public” and hence could not form the basis for a public disclosure.

Worth noting is the fact that the Fifth Circuit exercised its rarely invoked “extraordinary” power of reassigning the case to another judge due to the trial court judge’s refusal to follow the Fifth Circuit mandate and the long delays, repeated errors, and cursory reasoning of the judge in his various opinions. The court specifically pointed to the fact that the case had been pending for more than eight years and had not progressed past the public disclosure challenge, and that it had taken the judge more than a year to render his last summary judgment decision.


255. *Id.* at 966–67.

256. *Id.* at 967.

257. *Id.* at 968–71.

258. *Id.* at 971.


260. *Id.* at 973–74.

261. *Id.* at 974.

262. *Id.*

263. *Id.* at 974–76.

264. *Id.* at 959, 965, 976.
1. The Department of Justice’s “Dual Status” “Public Disclosure” Argument

The DOJ’s argument against government employee relators begins with a strained application of the jurisdictional bar against suits based on a “public disclosure” of the allegations or transactions at issue.265 The DOJ argues that a government employee possesses a “dual status” as a government employee and as a private person, and that as soon as a government employee uses information obtained through his or her employment for purposes outside the scope of his or her employment, he or she publicly discloses such information to him- or herself as a private individual.266 Although two district courts have accepted the dual status argument, both decisions were overturned on appeal.267 Likewise, the Ninth Circuit rejected this argument when raised by the DOJ appearing as amicus curiae on a relator’s appeal from dismissal on other grounds.268

Failing to persuade on the dual status argument, the DOJ argues that qui tam actions are barred by Section 3730(e)(4)(A) because the information on which they are based has been “publicly disclosed” in a government investigation.269 This argument has been rejected as well by the Eleventh Circuit.270

2. Misapplication of the “Original Source” Rule

Where there is no “public disclosure” within the meaning of Section 3730(e)(4)(A), the inquiry about whether government employees may bring qui tam actions should end.271 However, in United States ex rel. LeBlanc v. Raytheon Co.,272 the First Circuit interpreted the “original source” exception to the jurisdictional bar against suits based on public disclosure to preclude a government employee’s qui tam action, even though no actual public disclosure occurred. With very little discussion, LeBlanc essentially held that government employees may maintain a suit only where there is no public disclosure and the relator is an original source of the information on which the suit is based. LeBlanc is an aberration.

In Williams, the Eleventh Circuit expressly rejected LeBlanc’s application of the original source exception to the public disclosure jurisdictional bar to defeat jurisdiction that already existed (i.e., because there had been no public disclosure). Williams noted that such an application conflicts with the generally accepted interpretation of Section 3730(e)(4)(A) that “the Court must determine whether (1) there has been a public disclosure within the meaning of the statute; (2) if so, whether the relator ‘based’ his suit on the public disclosure; and (3) if so, whether the relator is ‘an original source of the information.’”273 The Ninth Circuit joined in

266. United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1499 (11th Cir. 1991).
267. United States ex rel. LeBlanc v. Raytheon Co., 729 F. Supp. 170, 175 (D. Mass. 1990), aff’d, 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, 499 U.S. 921 (1991); Williams, 931 F.2d at 1499–1501. See also United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990) (rejecting government’s dual status public disclosure argument); United States ex rel. Holmes v. Consumer Ins. Grp., 318 F.3d 1199, 1210 (10th Cir. 2003) (en banc) (“we find no support for this argument in principles of agency law, which control the relationship between a federal employee, such as Holmes, and the government. For example, it is apparent that Holmes, in filing her complaint in this matter, was not acting within the scope of her employment and was therefore not acting ‘as the government’ since she was not employed to file suit under the FCA and there is no indication that the preparation or filing of her suit occurred substantially within the time and space limits imposed on her employment by the government.”).
269. See Williams, 931 F.2d at 1500.
270. Id.
271. United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1499–1501 (11th Cir. 1991); Holmes, 318 F.3d at 1208.
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this reasoning in Hagood, observing that the “original source” phrase in Section 3730(e)(4)(B) “comes into play only if an exception is sought to the bar of [Section 3730(e)(4)(A)]. As the bar of [Section 3730(e)(4)(A)] does not apply, there is no need to invoke the exception.”\textsuperscript{274} The Tenth Circuit also rejected this argument en banc, finding that there is no “public disclosure” by virtue of the relator being a federal employee and, consequently, there can be no statutory inquiry as to whether the relator is an “original source” of the public disclosure.\textsuperscript{275}

The DOJ also argues that suits by government employee relators should be barred because the 1986 Amendments to the FCA did not expressly repeal the bar against government employee relators created by the 1943 Amendments.\textsuperscript{276} The courts have rejected this argument as well.\textsuperscript{277} In doing so, the courts have noted that the structure of the statute as amended in 1986 makes clear a congressional intent to afford the right to bring \textit{qui tam} actions to all persons, with specific, limited exceptions.\textsuperscript{278} Because government employees are not specifically excepted, the courts have refused the DOJ’s requests for the creation of an additional exception beyond those enumerated by the statute.

3. Public Policy Considerations Regarding Government Employee Relators

The DOJ’s attempts to preclude \textit{qui tam} actions by government employees on public policy grounds have also been rejected.\textsuperscript{279} The DOJ argues that premature \textit{qui tam} actions by government employees will prejudice any ongoing investigation by disclosing information to the defendant and that permitting government employees to bring \textit{qui tam} actions creates a race to the courthouse. It is inherently wrong, the DOJ contends, to reward government employees for reporting fraud when it is already their duty to do so.\textsuperscript{280}

As the \textit{Williams} court points out, the safeguards contained in the FCA that permit the government to move for an extension of the seal period to protect the integrity of an ongoing investigation and the provisions that empower the government to intervene and prosecute the action or to dismiss it after affording the relator the opportunity to be heard “go a long way toward alleviating many of the Government’s concerns.”\textsuperscript{281}

The DOJ’s unyielding stance against government employee relators is troubling because it departs from the public-private enforcement partnership envisioned by the FCA. The DOJ attempts to explain this departure by arguing that government employee relators betray their duty to report fraud to their employer by using information obtained during the course of their government employment to maintain a \textit{qui tam} action for personal gain.\textsuperscript{282} This argument breaks down in cases like \textit{Hagood} and \textit{Williams}, where government employee relators reported the fraud to their superiors and brought \textit{qui tam} actions only after the government

\begin{itemize}
  \item \textsuperscript{274} United States \textit{ex rel}. Hagood v. Sonoma Cty. Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991).
  \item \textsuperscript{276} See United States \textit{ex rel}. Williams v. NEC Corp., 931 F.2d 1493, 1501–03 (11th Cir. 1991).
  \item \textsuperscript{277} \textit{Id}. See also Holmes, 318 F.3d at 1214; \textit{LeBlanc}, 913 F.2d at 19; Erickson \textit{ex rel}. United States v. American Inst. of Biological Sci., 716 F. Supp. 908, 917–18 (E.D. Va. 1989).
  \item \textsuperscript{278} Holmes, 318 F.3d at 1209, 1211–13; \textit{Williams}, 931 F.2d at 1502–03; Erickson, 716 F. Supp. at 912–15.
  \item \textsuperscript{279} United States \textit{ex rel}. Marcus v. Hess, 317 U.S. 537, 546–47 (1943); \textit{Holmes}, 318 F.3d at 1211–14; \textit{Williams}, 931 F.2d at 1503–04.
  \item \textsuperscript{280} \textit{Williams}, 931 F.2d at 1503–04.
  \item \textsuperscript{281} United States \textit{ex rel}. Williams v. NEC Corp., 931 F.2d 1493, 1503 n.16 (11th Cir. 1991).
  \item \textsuperscript{282} See, e.g., \textit{Williams}, 931 F.2d at 1503.
failed to act. In these circumstances, there is no escaping the unseemly appearance that the
government has not prosecuted the fraud and, by opposing government employee relators' *qui tam* actions, seeks to prevent others from doing so.

The DOJ tried to evade this appearance in *Williams* by arguing that the government did not ignore Williams's reports but was conducting an “active ongoing investigation.” Sometimes government investigations may be ongoing but may not be very active. The *Pedicone* case discussed earlier is illustrative, although it involved a private relator. Pedicone first reported the fraud to the government in March 1988, and the government did nothing to stop the fraud or collect damages. Pedicone filed a *qui tam* action in June 1990 that remained unsealed until August 1991; the government did not intervene. Pedicone recovered $2.39 million for the false claims involved. Even after the case was settled, the government still had an “ongoing investigation.” Likewise, in the *Magee* case, also discussed earlier, the relator made numerous internal reports of the fraud over a two-year period and only filed his *qui tam* action when he was told that the government's investigation was indefinitely suspended. In sum, the existence and extent of limitations on government employees serving as relators remain unclear. Unless a case is pending in the First Circuit, or in a jurisdiction adhering to *LeBlanc*'s application of the original source exception to bar jurisdiction, there should be no bar to *qui tam* actions maintained by government employee relators. If the *LeBlanc* rule applies, it must be shown that the relator is an “original source” of the information on which the suit is based. *LeBlanc* itself suggests that this can be accomplished by showing that the relator's official duties as a government employee did not include uncovering the fraud.

The DOJ's efforts to graft a government employee exclusion onto the FCA's *qui tam* provisions have been largely unsuccessful to date. Recent decisions greatly favor the view that the statutory language conferring on “a person” the right to bring a *qui tam* action includes government employees. Thus, the case law is developing in accordance with the express language of the statute.

4. **Government Efforts to Block Relators from Providing Assistance in the Investigation of Their Claims**

Congress wanted to empower relators to help the government in its fight against “large, profitable corporations [that] are . . . able to devote many times the manpower and resources available to the Government” by greatly expanding the role of relators. The amendments to the FCA were intended to “allow and encourage assistance from the private citizenry because “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.” Congressman Howard Berman (D-Cal.) said:

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284. *Williams*, 931 F.2d at 1496 n.7.


288. Regarding government employees as *qui tam* relators, see Chapter 3, Section V.C (Limitations for Government Employees); Chapter 5, Section IX.D (Federal Employees as Relators); and Chapter 21, Section II.C (Government Employee Restrictions).


The law makes clear that this person, the qui tam plaintiff, will be a party to the action with all the rights and responsibilities that a party receives under the Federal Rules of Civil Procedure.

The law we vote on today is intended to encourage a *working partnership between both the Government and the qui tam plaintiff*. The public will be well served by having more legal resources brought to bear against those who defraud the Government.\(^{291}\)

The drafters of the FCA Amendments also made clear that a second purpose for relators' substantial role in the prosecution of the case was to “keep pressure on the Government to pursue the case in a diligent fashion.”\(^{292}\)

Thus, Congress made clear that relators were expected to be involved in the case, in part, in order to monitor the government's investigative progress.\(^{293}\) The amendment “provides *qui tam* plaintiffs with a more *direct role* not only in keeping abreast of the Government's efforts and protecting his [sic] financial stake, but also acting as a *check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason.*”\(^{294}\)

The DOJ has adopted what it calls an unwritten “policy” under which relators and their lawyers are denied access to information regarding the progress of the investigation of the relator's complaint, including documents obtained from defendants, unless and until they sign a contract precluding them from amending the complaint to add allegations regarding information contained in those documents. This supposed “policy” is plainly intended to prevent judges from determining the extent to which relators should share in the proceeds of the whole investigation launched by their allegations. Of course, there is substantial basis to doubt that the DOJ's actions are in any real sense a “policy,” but this is cold comfort to those adversely affected by these ad hoc decisions.

The DOJ has advanced various explanations for its conduct. In one instance, it has taken the position that, where a relator learns of “False Claims Act violations which exceed the relator's knowledge about fraud,” then “the relator is not the original source of the information.”\(^{295}\) But this rationale is plainly specious because there is no original source inquiry unless there has been public disclosure of information by specified means, and disclosure to the relator in the course of the lawsuit is not one of these. In other cases, the DOJ has simply asserted that it will be “beneficial to both parties” for relators to waive their statutory rights, with no explanation.\(^{296}\)

The obvious reason for this position is that, because the DOJ has had mixed results in its attempts to convince courts to deny relators the fruits of their information, it has chosen to

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\(^{292}\) Id.

\(^{293}\) Two courts have observed that “providing the relator a right to recover, a role in the action when the government intervenes . . . and a right to object to dismissal or settlement by the government . . . also serve[s] the additional purpose of giving the relator the incentive to ‘act as a check that the government does not neglect evidence, cause undue delay, or drop the false claim case without legitimate reason.’” United States *ex rel.* Roby v. Boeing Co., 995 F. Supp. 790, 796 (S.D. Ohio 1998), aff’d on other grounds, 302 F.3d 637 (6th Cir. 2002), cert. denied, 539 U.S. 969 (2003) (quoting United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 964 n.8 (9th Cir. 1993)) (internal citations omitted).


\(^{295}\) Correspondence in Sealed Case No. 1 (Dec. 19, 2001).

\(^{296}\) Correspondence in Sealed Case No. 2 (Sept. 9, 2002).
leverage them at the outset in order to keep the courts from reaching the question.\textsuperscript{297} The DOJ has stated in writing various purported reasons for this “policy,” but it boils down to an exercise of raw power, as demonstrated by this statement in a recent under-seal filing by DOJ lawyers:

> Even if the Relators’\textsuperscript{sic} construe such an agreement as the Relators giving up rights, it is the Relators who should be willing to do so if Relators' genuine focus is pursuing the original case they filed. It is Department of Justice practice to enter into such agreements in those cases it deems appropriate.\textsuperscript{298}

The DOJ also has asserted that there is no “partnership” between it and relators unless and until it intervenes in a lawsuit.\textsuperscript{299}

The result of the DOJ’s position is that, where relators choose to follow the FCA rather than ad hoc departmental “policy,” its investigation will drag out even more than is already the case.\textsuperscript{300} The DOJ has gone so far as to suggest that where relators refuse to go along, it will consult with the defendants regarding the merits of the case\textsuperscript{301} rather than allow the relators to provide the assistance that Congress intended.

The DOJ has obviously decided that it is willing to sacrifice investigation into the merits of individual cases, compromise financial recoveries against perpetrators of fraud, and

\textsuperscript{297} E.g., United States ex rel. Barajas v. United States, 258 F.3d 1004 (9th Cir. 2001) (relator entitled to share in value of alternate remedies pursued by United States):

> In this case, the purpose of the statutory scheme is clear. The FCA is designed to help fight fraud against the government by encouraging private individuals to come forward with information about fraud that might otherwise remain hidden. The encouragement is provided by giving these individuals a relator’s share of any recovery obtained using the relator’s information in an FCA action, or an equivalent share of a recovery obtained using that same information to procure an “alternative remedy.”

\textit{Id.} at 1012.

\textsuperscript{298} United States Reply to Relators’ Response to the United States Application for One Hundred and Eighty Day Extension of Time to Consider Election to Intervene, United States ex rel. [Under Seal] v. [Under Seal], Case No. [Under Seal] at 10 n.11.

\textsuperscript{299} Id.

\textsuperscript{300} The Act requires the United States to show “good cause” to extend the seal of the case beyond 60 days. 31 U.S.C. § 3730(b)(3). “The ‘good cause’ requirement of the statute is . . . a substantive one, which the government can only satisfy by stating a convincing rationale for continuing the seal.” United States ex rel. Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1190 (N.D. Cal. 1997). “The legislative history of the False Claims Amendments Act makes abundantly clear that Congress did not intend that the government should be allowed to prolong the period in which the file is sealed indefinitely.” \textit{Id.}

The Senate Report that accompanied the 1986 Amendments states:

> The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow government coordination, review and decision. Consequently, “good cause” would not be established merely upon a showing that the government was overburdened and had not had a chance to address the complaint.


\textsuperscript{301} Correspondence in Sealed Case No. 2 (Sept. 9, 2002).
ignore the intent of Congress in order to leverage relators into playing by its rules rather than those intended by Congress. Whether these efforts will succeed remains to be seen.

D. The Department of Justice’s Misuse ofProsecutorial Discretion to Eliminate Politically Unpopular Qui Tam Cases

Historically, the DOJ has never been especially fond of qui tam actions. While the DOJ did officially support the 1986 Amendments to the Act (which included many adjustments sought by the DOJ, such as increased fines, treble damages, and a preponderance of the evidence proof standard), the DOJ opposed the expansion of rights for relators. Congress eventually enacted such provisions anyway. As we have seen, that expansion was in large part due to the shabby treatment of relator Jack Gravitt by the DOJ set out earlier in this chapter.302

One of the items that concerned Congress was the DOJ’s efforts to settle Gravitt’s qui tam case for a token amount, without court review or participation by the whistleblower who initiated the suit. Congress was well aware of the DOJ’s spotty performance in policing fraud by the nation’s contractors. Lack of resources, being overmatched by government contractor legal and lobbying teams, and, in some rare cases, even complicity between the prosecutors and the wrongdoers are all discussed in the legislative history.

Accordingly, the amended FCA contains numerous provisions that carve out a protected role for the relator—regardless of whether the government intervenes in the case—so that the relator can serve as not only the trip wire that initiates the suit or the financier who underwrites it but also the watchdog who ensures that the case is vigorously prosecuted.

As an illustration of such a role, consider that, when the government does elect to proceed with a qui tam action, it can dismiss the action, even over the relator’s objections, if the relator is provided with the opportunity for a hearing.303 However, the government may not settle an action in which it has intervened over the relator’s objections unless the court determines, after a hearing, that such a settlement is “fair, adequate, and reasonable under all circumstances.”304 In contrast, if the government elects not to proceed with the action, the relator has the right to conduct the action, subject to later government intervention upon a showing of good cause.

Note that when the government elects not to proceed, there is no limitation in the language of the current statute that prevents the relator from dismissing the case or settling the case. This is in contrast to the limitations on the government dismissing or settling the case over the relator’s objection, found in Section 3730(c)(2)(A) and (B), and to the previous version of the statute, which prohibited any qui tam action from being dismissed without the written consent of the U.S. Attorney General and the court.305

302. See Chapter 1, Section IV.A (Jack Gravitt’s Successful Battle for All Qui Tam Relators).


In addition, even if the government does proceed with the case, it may not dismiss the case over the relator's objections without providing for a court hearing and may not settle the case over the relator's objections without a hearing and a court determination that the settlement is fair, adequate, and reasonable under the circumstances. But what rights does a relator have if the government ignores Congress's mandate and neither proceeds with the action nor makes an election not to proceed? Not many, according to the U.S. Court of Appeals for the District of Columbia.

In *Swift v. United States*, a former DOJ attorney, concerned over $6,000 in time sheets and leave slips of three other DOJ employees, brought a qui tam action against those employees. Without first taking over the action, the DOJ instead moved to dismiss the case, presenting the somewhat unseemly picture of the DOJ being on both sides of the lawsuit. The DOJ argued that it had a valid governmental purpose related to the dismissal in that if the case went forward, even if only pursued by the relator, the DOJ would have to expend some resources in monitoring a case in which the potential monetary recovery was minimal. The trial court agreed and dismissed the action.

On appeal, the relator argued that only if the DOJ formally intervened could it move to dismiss the case. Although the D.C. Circuit agreed with the trial court that diversion of government resources from more significant cases was rationally related to a valid purpose, it affirmed the decision and disposed of the appeal in a much more forceful and bright-line manner. The court determined that the government had an unfettered right to dismiss the action because the DOJ has prosecutorial discretion to determine which cases should go forward in the name of the United States. As to the requirement that the objecting relator be provided with a hearing upon request, the court found such a hearing not to be for its benefit but rather “simply to give the relator a formal opportunity to convince the government not to end the case.”

It is difficult to criticize the outcome of the case based on the underwhelming facts presented by the relator. Furthermore, the D.C. Circuit's decision does track the exact language of Section 3730(c)(2)(A). However, the court gives short shrift to the language of Section 3730(c)(1), which requires the government to proceed with the action before any of the limitations of paragraph (c)(2) apply. In circular fashion, the court stated that it did not see this as a problem because it found that paragraph (c)(2) was independent of paragraph (c)(1), despite the fact that (c)(1) explicitly provides that a relator is “subject to the limitations” of paragraph (c)(2).

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306. Recall that the DOJ followed a similar strategy in United States *ex rel. Pedicone v. Mazak Corp.*, 807 F. Supp. 1350, 1353 (S.D. Ohio 1992), discussed in Chapter 1, Section IV.B.2 (The Department of Justice’s Efforts to Belittle Alfred Pedicone’s Heroic Efforts and Deny Him the Recovery He Earned).


308. While $6,000 in false time sheets may be below the DOJ’s nuisance value standard, $15,643 in railroad unemployment benefits apparently is not. In *United States v. Johnson*, No. 1:12cv136 (S.D. Ohio filed Feb. 15, 2012), the United States pursued a treble damages FCA case against a former railroad employee who collected $15,643 in unemployment benefits.


310. *Id.* at 251.

311. *Id.* at 251–52.
So, according to the *Swift* court, the DOJ has three options: (1) intervene and proceed with the action, which includes dismissing the case over the relator’s objection after a hearing in which the trial court plays the role of a potted plant; (2) do not intervene, allowing the relator to proceed with the action subject to the government’s right to later intervene upon a showing of good cause; or (3) do neither of these and at any time for any reason decide (in its unfettered discretion) to unilaterally dismiss the case.

It is extremely doubtful that Congress intended for the courts to abdicate their explicit review function in these cases as the *Swift* court determined.

Congress did not provide the DOJ with the third option. Instead, the statute clearly requires the DOJ to make a choice—proceed with the case or let the relator do so. In reaching an understandable result of eliminating a lackluster suit, the *Swift* court has provided the DOJ with an avenue to circumvent the congressional plan to encourage more whistleblower suits and whistleblower participation in those suits. Indeed, the DOJ has taken the position that, even after declining to intervene and after a relator has expended substantial resources in pursuing a *qui tam* action, the DOJ can move to dismiss the case. In *United States ex rel. Ridenour v. Kaiser-Hill Co.*[^112], the DOJ elected not to proceed with a *qui tam* action and the relators did so. In contrast to the small amount at stake in the *Swift* case, *Ridenour* concerned a $7 billion unbid contract between the U.S. Department of Energy and a private contractor hired to clean up, protect, and close the nuclear weapons component manufacturing facility at Rocky Flats, Colorado. Eight months after deciding not to intervene and proceed with the *qui tam* case, the DOJ moved to dismiss the action before the contractor answered the suit.

The DOJ argued that the continuation of the *qui tam* suit put at risk classified nuclear secret documents and that defending the lawsuit could jeopardize the contractor’s ability to close the facility by December 15, 2006, thus extending the health risks to nearby citizens and vastly expanding the funds necessary to complete the job.

The *Ridenour* court did not find that the DOJ had unfettered discretion to dismiss a *qui tam* suit, nor did it read the statute as providing no role for the court itself other than as a sounding board between the relators and the DOJ, as the *Swift* court had. Rather, the *Ridenour* court, after several days of testimony, applied the two-prong test established by the Ninth Circuit in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*[^113] that the government has the burden of demonstrating a legitimate governmentally related interest for the dismissal and that, if such burden is met, the relator may still defeat the motion to dismiss by proving that the dismissal is fraudulent, arbitrary and capricious, illegal, or the product of undue influence by the defendants. Based on an extensive record and findings by his magistrate judge, the trial court concluded that the action should be dismissed.[^114]

The Tenth Circuit affirmed the use of the two-prong Ninth Circuit test from *Sequoia Orange Co.*[^115] The court also determined that the government was not required to intervene before moving to dismiss a *qui tam* action because the FCA did not specifically so state, as

[^112]: 174 F. Supp. 2d 1147 (D. Colo. 2001), aff’d, 397 F.3d 925 (10th Cir. 2005).


[^115]: United States ex rel. Ridenour v. Kaiser-Hill Co., 174 F. Supp. 2d 1147 (D. Colo. 2001), aff’d, 397 F.3d 925 (10th Cir. 2005); see *Sequoia Orange Co.*, 151 F.3d at 1145.
well as to avoid any argument that the FCA, if requiring the government to first intervene, violated the U.S. Constitution’s provision that the executive branch is entrusted to take care that the laws be faithfully executed.316

A Third Circuit district court concluded that dismissal of an FCA case was warranted when the relator’s counsel failed to serve the U.S. Attorney with a copy of the complaint and disclosure statement until five years after the case had been filed under seal, despite repeated requests from the USAO to properly serve the United States.317 The court, while setting forth the Swift and Sequoia tests for dismissal of qui tam actions, did not attempt to predict which test the Third Circuit would adopt because it found dismissal of the action was warranted under both tests.318

A Fourth Circuit district court faced with a dismissal motion filed by the United States against an FCA relator who sought a hearing on the dismissal motion and limited discovery granted such discovery so the relator would have a legitimate and effective opportunity to convince the government to not end the case.319 Both the government and defendant argued the FCA does not require the relator to conduct such discovery.320 The court disagreed, finding the relator should be able to review evidence relied upon by the government in declining to intervene so he could evaluate whether there was improper decision making such as bad faith, abuse of discretion, fraud, arbitrary or capricious decision making, or other illegal activity.321 However, the relator was not permitted to depose a designee of either the U.S. Department of Veteran Affairs or the North Carolina State Approving Agency.322

Several motions have been filed by either a state or the United States seeking to dismiss pending qui tam actions with most granted.323 Delaware sought dismissal of an action brought under the Delaware and federal FCAs.324 Delaware sought dismissal because the remote potential for recovery does not warrant the expenditure of scarce government resources.325

318. Id. at *5–6. The District of Columbia Circuit in Swift found that the government has unfettered discretion to dismiss a qui tam action. The Ninth and Tenth Circuits, on the other hand, employ the Sequoia test, which requires the government to identify a valid government purpose for dismissal that is rationally related to accomplishing that purpose.
320. Id. at 3.
321. Id.
322. Id.
325. Id. at 1.
In so moving, Delaware argued the allegations brought by the relator were factually incorrect and legally insufficient. Additionally, the State pointed out the numerous other matters the relator brought against the FCA defendants and others that were frivolous and all of which stemmed from his loss in a child custody dispute with his ex-wife. All told, the relator had filed 11 separate actions against the defendant. The court granted the motion.

The government also moved to dismiss a pending case that involved 16 different defendants that was brought by a non-insider of such defendants. The government moved to dismiss due to the expense and resources needed to monitor the case, the absence of any reasonable likelihood of significant monetary recovery, and the relator’s actions since the declination of the cases, which indicate he is not an appropriate advocate of the government’s interests. Thus far, no decision has been rendered on the motion.

The government also moved to dismiss an FCA case pending in a Fifth Circuit district court that alleged the defendant made false claims and reverse false claims primarily predicated on violations of the Emergency Medical Treatment and Labor Act (EMTALA). Dismissal was sought because the claims threatened to interfere with agency policies and enforcement processes for EMTALA violations and would impose unnecessary costs and burdens on the government, and due to a lack of merit of the claims. In granting the motion to dismiss, the trial court reiterated the Fifth Circuit’s position that the government is given unilateral and un fettered power to dismiss pending qui tam actions. Turning to the Sequoia Orange standard, the court found the stated reasons for dismissal, interfering with HHS’s EMTALA enforcement efforts and conserving government resources, would meet the test under that standard.

Ninth Circuit district court litigation costs represent a valid government interest for purposes of Section 3730(c)(2)(A). The relator argued the government did not fully investigate his allegations; however, the court rejected his argument that the FCA requires a full investigation. The government’s investigation was sufficient because it met with the relator and his counsel two times; obtained and reviewed e-mails, notes, and other documents provided by the defendants, DOE, and relator; toured the Idaho National Laboratory; met with the defendants’ personnel involved in the project; and discussed the allegations raised by the relator with various DOE personnel. The court also refused to allow the relator to conduct discovery to determine if the government adequately investigated the case.

Relators unsuccessfully argued the government waived its right to dismiss their pending FCA case when they did not intervene and that the government’s motion to dismiss must be

326. Id. at 3.
327. Id. at 7–8.
328. Chang, Order (Doc. 56) (May 14, 2018).
330. Id. at 4–5.
332. Id. at 1–2.
334. Id. at *8–9.
336. Id. at *6.
337. Id.
338. Id.
supported by a valid government purpose and a rational relation between the dismissal and accomplishment of that purpose.\textsuperscript{339} The relators had filed their third \textit{qui tam} case against the defendants and their second case in the District of Minnesota.\textsuperscript{340} The relators alleged the defendants conspired to cover up and conceal the causes of the Interstate 35W bridge so they could obtain $250 million in federal disaster relief, grants, and other stimulus funding.\textsuperscript{341} Of specific concern to the relators was the use of foreign materials and labor used in the reconstruction of the bridge in violation of the Buy American Act.\textsuperscript{342} Noting the Eighth Circuit has not squarely confronted whether the \textit{Swift} or \textit{Sequoia Orange} cases apply, it surmised the Eighth Circuit would probably favor the \textit{Swift} approach that vests the government with an unfettered right to dismiss.\textsuperscript{343} Even were the more constrained \textit{Sequoia Orange} test applied, the government’s reason for seeking dismissal, causing a great burden and expense for the United States, with no resulting recovery, satisfied that test.\textsuperscript{344} Additionally, the court found relators were not entitled to an evidentiary hearing under 31 U.S.C. § 3730(c)(2)(A).\textsuperscript{345}

A Third Circuit district court dismissed an FCA action brought by a limited liability corporation that had brought multiple \textit{qui tam} actions in eight judicial districts.\textsuperscript{346} After investigating the case for 18 months, it declined to intervene and moved to dismiss, contending the allegations lack merit and it would be too costly to continue to monitor, investigate, and prosecute the action.\textsuperscript{347} The court found the \textit{Sequoia} test was more appropriate because it requires a rational relationship test that is more aligned with the right to a hearing and some justification for seeking dismissal.\textsuperscript{348} Such a showing was made by the government.\textsuperscript{349}

In an FCA case brought by the same relator in \textit{Harris, United States ex rel. CIMZNHCA, LLC v. UCB, Inc.}, the court refused to dismiss the complaint pursuant to the government’s dismissal motion.\textsuperscript{350} Like the court in \textit{Harris}, the court in \textit{CIMZNHCA} found the \textit{Sequoia} test more suited to the FCA.\textsuperscript{351} The government cited to the \textit{Harris} case in support of applying the rational relationship test.\textsuperscript{352} The government did not meet that standard because it admitted it collectively investigated the 11 \textit{qui tam} cases filed by the relator, only reviewed the complaint and disclosure statement in the case, did not review any additional materials attached to the complaint, did not review any additional materials from the relator, and did not undertake a cost-benefit analysis.\textsuperscript{353} The court found it “curious at best” that the

\begin{itemize}
  \item \textsuperscript{340} Davis, 2019 WL 608848, at *1.
  \item \textsuperscript{341} Id.
  \item \textsuperscript{342} Id.
  \item \textsuperscript{343} Id. at *5.
  \item \textsuperscript{344} Id. at *7.
  \item \textsuperscript{345} Id.
  \item \textsuperscript{346} United States \textit{ex el.} Harris v. EMD Serono, Inc., No. 16-5594, 2019 WL 1468934, at *1 (E.D. Pa. Apr. 3, 2019).
  \item \textsuperscript{347} Id. at *2.
  \item \textsuperscript{348} Id. at *3–4.
  \item \textsuperscript{349} Id. at *4–5.
  \item \textsuperscript{350} United States \textit{ex rel.} CIMZNHCA, LLC, No. 17-cv-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019).
  \item \textsuperscript{351} Id. at *3.
  \item \textsuperscript{352} Id.
  \item \textsuperscript{353} Id. The government’s motion to dismiss was similarly denied for failing to investigate fully relator’s claims in \textit{United States v. Acad. Mortg. Corp.}, No. 16-CV-02120-EMC, 2018 U.S. Dist. LEXIS 109489, at *11 (N.D. Cal. June 29, 2018).
\end{itemize}
government declined to pursue the claims given its admission that such allegations assert a classic violation of the Anti-Kickback Statute (AKS) that conflicts with important policy and enforcement prerogatives of the government’s health care programs.\textsuperscript{354} The court disagreed with government’s counsel that the disapproval of a professional relator was a valid government purpose for seeking to dismiss a case.\textsuperscript{355} But the Court of Appeals for the Seventh Circuit reversed the trial court and refused to follow the \textit{Sequoia Orange} test.\textsuperscript{356}

Likewise, a Ninth Circuit district court determined the government failed to meet the rational relationship test because its investigation was confined to the relator’s original complaint, not the amended complaint, interviewing the relator, and only looking at misconduct at the particular branch the relator worked at and not high-level malfeasance or fraud from senior executives.\textsuperscript{357} The government also turned down relator’s counsel’s offer to provide more information.\textsuperscript{358} The government’s primary reason for failing to conduct a fuller investigation was the difficulty in working with the relator who refused to file the amended complaint under seal without letting the government first review that complaint.\textsuperscript{359}

The Department of Justice determined it was time to summarize this area of dispute to clarify its views.

\section*{E. The Department of Justice Sometimes Seeks Dismissal of Nonintervened Qui Tam Cases}

When a relator files an FCA case under seal, it is delivered to the Attorney General, who then initiates an investigation of the alleged misconduct.\textsuperscript{360} At the conclusion of that sealed investigation, the government has three options: (1) intervene and assume primary responsibility for the prosecution of the case;\textsuperscript{361} (2) decline to intervene, in which case the relator shall have the right to prosecute the case on behalf of the United States;\textsuperscript{362} or (3) dismiss the case pursuant to Section 3730(c)(2)(A) of the Act.\textsuperscript{363} Approximately 20 percent of cases are prosecuted by the United States in intervention.\textsuperscript{364} The remaining 80 percent of FCA cases proceed as declined actions prosecuted (or dismissed) by the relator.\textsuperscript{365} A very small number of cases are dismissed by the United States.\textsuperscript{366} While this dismissal power has been used sparingly by the DOJ to date, concerns over the strain on limited government resources and protecting against adverse decisions have led the DOJ to set guidelines for the exercise of Section 3730(c)(2)(A) dismissal to rein in “frivolous whistleblower litigation.”\textsuperscript{367} Since FCA cases are...

\textsuperscript{354} CIMZNHCA, 2019 WL 1598109, at *4.
\textsuperscript{355} Id.
\textsuperscript{356} United States \textit{ex rel.} CIMZNCH, LLC v. UCB, Inc., 970 F.3d 835 (7th Cir. 2020).
\textsuperscript{357} \textit{Acad. Mortg. Corp.,} 2018 U.S. Dist. LEXIS 109489, at *1.
\textsuperscript{358} Id.
\textsuperscript{359} Id. at *2.
\textsuperscript{360} 31 U.S.C. § 3730(a).
\textsuperscript{363} 31 U.S.C. § 3730(c)(2)(A).
\textsuperscript{364} Id.
\textsuperscript{366} Id. (in the 30 years between 1986 and 2016, the DOJ moved to dismiss about 45 cases pursuant to 31 U.S.C. § 3730(c)(2)(A)).
\textsuperscript{367} Id.
brought “on behalf of the United States,” courts afford great deference to the government in the exercise of its dismissal decision.368

On January 10, 2018, Michael D. Granston, the Director of the DOJ Commercial Litigation Branch, Fraud Section,369 issued a memorandum to government attorneys detailing the following seven factors that should be considered in the exercise of Section 3730(c)(2)(A) dismissal authority.370

1. Curbing Meritless Qui Tam Actions. Those cases that are either factually incorrect or based upon an inherently defective legal theory should be dismissed under Section 3730(c)(2)(A). Such cases are rare because the government typically investigates a qui tam action only to the point where it concludes that declination is warranted. This may not result in a determination that no fraud occurred. If the government is concerned that a case may lack merit but allows the relator to further develop the case, it will likely advise the relator that dismissal will be considered in the future if the relator is unable to develop additional support by a specified date.371

2. Preventing Parasitic or Opportunistic Qui Tam Actions. Consistent with the legislative history of the FCA amendments, the government should consider dismissing qui tam actions that duplicate an existing government investigation and add no useful information to the investigation.372

3. Preventing Interference with Agency Policies and Programs. Dismissal should be considered where the relevant agency determines that a qui tam action threatens to interfere with an agency’s policies or the administration of its programs and recommends dismissal of the action to avoid these adverse effects.373

4. Controlling Litigation Brought on Behalf of the United States. This amorphous factor is designed to address the possibility of dismissing a qui tam action if it is “necessary to protect the Department’s litigation prerogatives.”374 This factor may come into play where the government seeks to dismiss some claims or defendants from a qui tam action in order to avoid interference in with the government’s ability to litigate the remaining intervened claims. This factor may also be used “to avoid the risk of unfavorable precedent” or to eliminate “a declined claim that was serving as an obstacle to settlement of the government’s intervened claims.”375 In tempering its use, the Granston Memo explains that this factor has been used in the past where “the government’s briefs make clear that the government had determined that the claims lacked substantial merit.”376

5. Safeguarding Classified Information and National Security Interests. This factor applies where the qui tam litigation, usually involving work performed on a classified contract, poses a risk of disclosure of national security information.377

368. There are two differing standards of review for evaluating a government dismissal decision. Under United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998), the United States must identify a “valid government purpose” that is rationally related to the dismissal decision. But in Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003), the United States enjoys the “unfettered right” to dismissal of the action.

369. Since the issuance of this Memo, Mr. Granston was promoted to Deputy Assistant Attorney General, Civil Division.


372. Id.

373. Id.

374. Id. at 5

375. Id.

376. Id. at n.3.

377. Id. at 6.
6. Preserving Government Resources. This cost-benefit analysis applies “when the government’s expected costs are likely to exceed any expected gain.” Such “costs” include not only the costs of monitoring the litigation and responding to discovery request but also “the opportunity cost of expending resources on other matters with a higher and/or more certain recovery.” In a March 1, 2019, speech to the Federal Bar Association, Mr. Granston cautioned that “Defendants should be on notice that pursing undue or excessive discovery will not constitute a successful strategy for getting the government to exercise its dismissal authority.” The cost-benefit analysis focuses on the likelihood that the relator can prove the allegations brought on behalf of the government.

7. Addressing Egregious Procedural Errors. This factor has been applied where the relator’s action, or inaction, frustrates “the government’s efforts to conduct a proper investigation” such as failing to serve the *qui tam* complaint and the statement of material facts upon the Attorney General.

The Granston Memo specifies that these seven factors are not an exhaustive list of reasons for the exercise of Section 3730(c)(2)(A) dismissal. Additionally, a *qui tam* action may be dismissed under alternative grounds such as the first-to-file bar, the public disclosure bar, the tax bar, the bar on pro se relators, or Federal Rule of Civil Procedure 9(b).

The Third Circuit has noted that the Granston Memo urges Justice Department lawyers to consider dismissal of *qui tam* cases whenever the government decides not to intervene in the case.

While a Section 3730(c)(2)(A) dismissal may usually be asserted at the time of the intervention decision, the Granston Memo emphasizes that it may be asserted at a later stage, “particularly when there has been significant intervening change in the law or evidentiary record.” However, the Granston Memo correctly notes that a court may be “less receptive” to a Section 3730(c)(2)(A) motion to dismiss “at a later stage when doing so undercuts a claimed desire to avoid or reduce costs associated with discovery or safeguard information in discovery.”

In the two years since the issuance of the Granston Memo, the DOJ has dismissed between 45 and 50 *qui tam* actions. While this equals the total amount of Section 3730(c)(2)(A), dismissals for the previous 30 years, it still constitutes just 4 percent of the 1,100 *qui tam* actions filed over that period. The silver lining in the DOJ’s exercise of dismissal authority under Section 3730(c)(2)(A) is that it should eliminate the usual defense argument that a declined case lacks merit. Now, a meritless case will be dismissed, not declined.

378. *Id.*
379. *Id.* at n.4.
382. *Id.*
384. *Id.* at 8.
385. *Id.*
In 2018 and 2019, the federal government, at an unprecedented rate, filed numerous motions to dismiss relator complaints. For the most part, all motions to dismiss were granted except for two.

In United States ex rel. CIMZNHCA, LLC v. UCB, Inc., the relator was a limited liability holding company of an entity doing business as the National Health Care Analysis Group (NHCA) that is a professional relator with 11 pending qui tam actions throughout the United States. While the Seventh Circuit has yet to adopt either the Sequoia or Swift approach in assessing a government’s dismissal motion, the district court opted to follow the Sequoia test and conduct a limited review of the government’s rationale for seeking dismissal. The government collectively investigated the 11 qui tam actions filed by the relator and his disclosure statement, complaint, and the materials attached to the complaint before the court. It did not review any additional materials from the relator nor conduct a cost-benefit analysis or assess the costs it would expend on the case versus the potential recovery if the case moved forward. The government’s minimal investigation was not sufficient to support the motion to dismiss. The court also found the government’s claim that there was a rational relationship between its policy interest in the enforcement prerogatives of its health care programs and the dismissal to be “curious” because the relator’s complaint alleged AKS violations. The government’s reason for dismissal was also deemed pretextual and was based on animosity toward the professional relator, which the government unsuccessfully argued could be a valid reason for seeking to dismiss the complaint. The Court of Appeals for the Seventh Circuit reversed the trial court and refused to apply the Sequoia test.

A Ninth Circuit district court likewise scrutinized the government’s proffered reasons for seeking dismissal of a relator’s complaint. The relator alleged the defendant falsely certified

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389. Id. at *8.
390. Id. at *9–10.
391. Id. at *10.
392. Id.
393. Id. at *10–11.
394. Id. at *10–12.
395. United States ex rel. CIMZNHCA, LLC v. UCB, Inc., 970 F.3d 835 (7th Cir. 2020).
loans for government insurance. The government performed only a limited investigation of the original complaint, and there was no showing any investigation was undertaken on the amended complaint. The relator alleged the scope of the government’s investigation consisted of interviewing the relator and reviewing documents produced by her that pertained only to misconduct at the particular branch she worked at when employed by the defendant but did not encompass any high-level malfeasance or fraud of the company’s senior executives.

The relator’s amended complaint alleged nationwide fraud by the defendant covering a six-year span; however, the government failed to offer any evidence that it investigated that complaint. The relator also submitted evidence that the defendant had received over $157 million in Federal Housing Administration insurance claims from 2011 to 2017 and provided data that showed the loans originated by the defendant were more likely to be seriously delinquent and result in claims. While the court would not wade into the precise contours of what a “full investigation” might be, it found the government could have conducted further investigation before moving to dismiss. The government argued its failure to conduct an additional investigation was because the relator was difficult to work with and failed to file the amended complaint under seal. That argument was rejected. The government also unsuccessfully argued it was moving to dismiss to conserve resources. The government also filed a subsequent motion to stay the proceedings while the Solicitor General decides whether he will approve an appeal of the motion to dismiss ruling. That motion was denied. The Ninth Circuit determined that an order denying the government’s motion to dismiss is not an immediately appealable collateral order.

F. Department of Justice Statistics Demonstrate That Relator Shares Recovered Are Not What Congress Intended

For several years the DOJ has issued “fraud statistics” concerning FCA filings and recoveries. Later in this volume we deal with the inaccuracies in the DOJ’s counting methods. Although the DOJ provides information on a yearly basis on the relator shares awarded by intervened cases, nonintervened cases, and total cases, the statistics do not break out the relator share percentage. Such percentages, however, can be obtained by simple division of the amount of share divided by the amount of the settlement/judgment for the three categories. Such division provides the following results:

397. Id. at *1–2.
398. Id. at *2.
399. Id. at *3.
400. Id. at *5–6.
401. Id. at *6.
402. Id.
403. Id.
404. Id. at *8–9.
406. Id.
409. See Chapter 21, Section II.D (Use of Inaccurate Statistics to Attack Qui Tam Provisions).
410. Remember that the statistics are kept not by calendar year but rather by the government’s fiscal year, which covers the time period from October 1 of the previous year through September 30 of the next year.
## RELATOR SHARE PERCENTAGE RECOVERIES

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Whistleblowers Fighting for What’s Right

The relator share percentages contemplated by Congress and set forth in the 1986 Amendments are 15 to 25 percent in intervened cases and 25 to 30 percent in nonintervened cases.

The 30-year averages are startling. In intervened cases, the average relator share of 16.0 percent for all such cases for 30 years is near the floor set by Congress. For nonintervened cases, the average of 24.0 percent is actually below the minimum in the 1986 Amendments.

The FCA has two provisions that would permit a relator share below 15 percent. First, in Section 3730(d)(3), the trial court is given discretion to award a relator share an “appropriate” sum—which could be zero and will be zero if the relator is convicted of criminal conduct arising from his violation of the FCA—if the relator is determined to have “planned and initiated the violation.” This “super rogue” clause was added in 1988 for “an extreme case where the qui tam plaintiff is a principal architect of a scheme to defraud the government” and to “delay any criticism the FCA [would] encourage principal wrongdoers to file false claims actions solely motivated by the desire to profit from their own wrongdoing.”

But the super rogue clause is so rarely used that there have been only two reported cases in which a relator was determined to be a planner and initiator. Accordingly, the super rogue clause cannot explain the low actual relator share percentages over the past 30 years.

The second way that Congress provided for a share to fall below the minimum is found in Section 3730(d)(1). In an intervened case only, if the action is determined to be based primarily on enumerated public disclosures, “the court may award such a sum as it finds appropriate, but no more than 10 percent of the proceeds.” This clause has also appeared only rarely in published decisions, and there appear to be only two incidences where it actually impacted a relator share award. With such limited case law development of the two congressional exceptions to the percentages set out for awards, it seems unlikely that those two exceptions have had a major impact on the nearly 8,000 cases covered by the DOJ’s “fraud statistics.”

A more likely explanation for 29 years of low relator share percentages is the practice of the DOJ in negotiating as small a relator share percentage as it can. The relator has few options but to accept any offer made. The relator has probably just spent years awaiting a resolution of the qui tam case, and often he or she has been without employment due to

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413. See Chapter 2, Section VI.H (The 1988 Amendments to the False Claims Act: Super Rogues); Chapter 16, Section IV (A Relator Criminally Convicted for Conduct Arising from a Violation of the False Claims Act Is Not Entitled to a Reward); and Chapter 16, Section V (Relator’s Share Where the Relator “Planned and Initiated” the Fraud).
retaliation. The relator’s savings have disappeared along with health insurance; his or her family is stressed; and friends, many of whom were co-employees at the targeted defendant corporation, have deserted him or her. The relator’s patience with lawyers, the legal system, and the very government he or she sought to protect has reached its limits.

A relator who wishes to challenge the DOJ’s offer can, of course, seek to have the court set the relator share. But few do so.\(^{421}\)

While most judges will treat a relator who has succeeded in a \textit{qui tam} case far more generously than will the DOJ, all judges have other matters demanding their attention. As the successful relator awaits a day in court, he or she has none of the proceeds of the funds recovered; rather, the funds reside in the U.S. Treasury. Nor is the relator entitled to any interest while the relator share dispute winds its way through the courts. The relator’s lawyers cannot recover legal fees for the relator share fight. And even if the relator eventually obtains a more favorable award from the court than what the government offered, the DOJ has the right to appeal any such decision. The government is not required to post an appeal bond or pay interest. The relator may have a piece of paper that says he or she gets a better award, but he or she still does not have any money. Courts of appeals can and have taken years to determine appeals. Courts of appeals can—and have—reversed and lowered trial court determinations of relator shares. So, the relator continues to be at risk, without funds, with no hope of interest, and with unpaid counsel.

It is not a very attractive option.

The DOJ, of course, knows all of this. Its lawyers are paid whether they are working on a relator share court fight or a fight with a cheating government contractor. The DOJ has no incentive to speed matters up or to increase its offer while the whistleblower continues to twist in the wind. It is not a surprise that most relators take whatever is offered.

The playing field can be made more level if, as one court did,\(^{422}\) the court orders the maximum relator share to be escrowed into an interest-bearing account while the matter is decided. The court can then determine the appropriate amount of the earned interest to pay the relator and the government after it makes the determination of the appropriate share.

Over the years, the relator share amount has varied from 50 percent absolute (1863) to 10 percent (1944) to a range of 0 to 30 percent (1986). Congress considered staying at 10 percent but ultimately rejected that amount. The share is intended to incentivize whistleblowers. The DOJ should be enforcing congressional policies while not operating to thwart them. After 32 years and over 11,000 \textit{qui tam} cases, the DOJ’s own statistics show relator share payouts near or below the statutory minimums. Such statistics demonstrate that congressional policy is not being followed.

\(^{421}\) See Chapter 1, Section IV.B.5 (The Department of Justice Ignores Its Promises to Relator David Magee).