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Whether Government Employees Should Qualify As Relators Under the Civil False Claims Act

By Pamela H. Bucy[1]

The civil False Claims Act (FCA) creates a cause of action on the part of "any person" who believes that another has submitted false claims to the federal government.

I. Overview of the Civil False Claims Act

The False Claims Act,[2] first passed in 1863,[3] and amended several times since,[4] most dramatically in 1986,[5] grows out of a long tradition of using private parties to supplement law enforcement efforts.[6] Such actions, termed "informer" actions, were common in thirteenth century

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[2] 31 U.S.C. § 3729 et. seq. (2002).

[3] Act of March 2, 1863 at ch. 67, 12 Stat. 696-98 Incensed at shoddy equipment delivered by suppliers to the Union Army and scam artists who delivered nothing at all though were paid for it, President Abraham Lincoln sought to have the False Claims Act passed. He described those at whom the Act was aimed:

> "Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the Nation while patriotic blood is crimsoning the plains of the South."

quoted in Priscilla R. Budeiri, *The Return of Qui Tam,* WASH. LAW. 24, 26 (Sept./Oct. 1996).

[4] Rev. Stat. 3490-94 and 5438 (1875); 89 Cong. Rec. S7606 (Sept. 17, 1943); Pub. L. 99-562, 100 Stat. 3153 (1986); Pub. L. 103-272, 108 Stat. 1362 (1994).

[5] Pub. L. 99-562, 100 Stat. 3153 (1986). The 1986 Amendments are credited with revitalizing the FCA, which had fallen into disuse. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, § 1.04[H] (Aspen 2001) [hereinafter BOESE, CIVIL FALSE CLAIMS]. The 1986 Amendments increased the amount of recovery a private party who brought an FCA action (termed a "relator") could receive; guaranteed a minimum amount of recovery for the relator; relaxed the "jurisdictional bar" provisions which had prevented many relators from filing suit; clarified and relaxed the mens rea requirement; expanded the statute of limitations; clarified the burden of proof; and, added protection for whistleblowers who are retaliated against by their employers. Pamela H. Bucy, *Private Justice,* 75 S.C.L. REV. 1, 47-48 (2002) [hereinafter Bucy, *Private Justice*].

[6] Bucy, *Private Justice, supra* note 6 at 13-54; Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 909-917 (2002) [hereinafter Bucy, *Information as a Commodity*]; J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation,* 78 N.C.L.REV.539 (2000) [hereinafter Beck, *English Eradication*]; Note, *The History and Developments of Qui Tam,* 1972 WASH U. L. Q. 81 [hereinafter *History and Developments*].

England and colonial America.[7] These early actions provided for minimal, if any, oversight of "informers" and were subject to many abuses.[8] By the mid-twentieth century, they had been abolished in England[9] and fell into disuse in America.[10]

In American jurisprudence today there are a number of actions that private parties may bring alleging that a defendant has violated some federal or state law.[11] To the extent these actions supplement the efforts of law enforcement in detecting, proving and deterring lawbreaking, the private parties who bring them serve as "private attorney generals." In almost all of these actions, the private party who brings the action has been personally injured by the defendant's conduct.[12] The False Claims Act is unique among these actions because it allows a private party who has not been personally injured to bring the FCA action alleging violation of public laws by the defendant.[13]

Briefly, here is how the FCA works. A person who believes that he has information and evidence that someone else (individual or company) has filed false claims against the federal government, may file a lawsuit making such allegations.[14] This plaintiff (termed a "relator") is required to file his lawsuit under seal (not even serving it on the defendant). The relator is also required to give a copy of the lawsuit to the United States Department of Justice, along with a written report of "all material evidence and information" the relator possesses.[15] The lawsuit stays under

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[7] Bucy, *Information as a Commodity, supra* note 7 at 909-917; Beck, *English Eradication, supra* note 7 at 565-607; *History and Development, supra* note 7 at 83-91.

[8] Bucy, *Information as a Commodity, supra* note 7 at 909-917 (For example, a party that expected to be charged with a crime would locate a friendly informer who would file suit against the defendant and settle for an amount less that the defendant would have paid the government had there been a prosecution by the government. This strategy worked to defendants' advantage since prosecution by an informer precluded prosecution by the government.

Other common abuses by informers included filing suit in a venue far from where the defendant lived, bringing suit under obsolete or little known statutes or for popular conduct that constituted a technical offense, or simply extortion not to prosecute.)

[9] Common Informers Act, 14 & 15, Geo. 6, Ch. 39 (1951) (Eng.) (abolished most informers actions); 18 Eliz. C.5 § 4 (1956) (imposed sanctions against informers who brought vexatious suits).

[10] 89 Cong. Rec. S7606 (Sept. 17, 1943) *codified at* 31 U.S.C. §§ 232-35 (1976) (limited relators' ability to bring FCA actions and limited the proceeds relators could receive if they brought an action).

[11] *See, e.g.,* The Economic Communications Privacy Act, 18 U.S.C. §2520 et seq.(2000 & Supp. 2001); American Disabilities Act, 42 U.S.C. § 12188 (a)(1) (1995); The Civil Rights Act of 1964, 42 U.S.C. 1981 et seq (1994) (implied under Title VI, Guardian Assn. v. Civil Service Comm'n of the City of New York, 463 U.S. 582, 594 (1983) and Title IX, Cannon v. University of Chicago, 441 U.S. 677, 717 (1970).

[12] *Id.;* Bucy, *Private Justice, supra* note 6 at 13.

[13] The FCA provides, "A person may bring a civil action for a violation [of this Act] for the person and for the United States Government." 31 U.S.C. § 3730(b) (2002).

[14] 31 U.S.C. § 3730(b)(1)(2002).

[15] *Id*. at § 3730(b)(2).

seal, often for two years or more, to allow DOJ to fully investigate the charges made by the relator.[16] The secrecy provided by sealing the complaint not only protects a defendant's reputation if the relator's information amounts to nothing,[17] but also facilitates DOJ's further investigation of the relator's information.[18]

At the conclusion of its investigation, DOJ decides whether it will intervene in the lawsuit as an additional plaintiff. If it does, DOJ assumes "primary responsibility" for the case although the relator remains as a plaintiff and is guaranteed a participatory role.[19] In some cases, DOJ handles the entire case after intervening; in others, relators work hand-in-hand with government prosecutors. In some cases, relators and their attorneys assume the bulk of the investigative and litigative duties.[20]

If DOJ does not join the lawsuit, the relator may continue pursuing the case, litigating it alone.[21] Even if DOJ does not join a relator's case, it retains authority over the relator's lawsuit in several ways: DOJ monitors the case and may join it at any time, even for limited purposes, such as appeal;[22] DOJ may settle or dismiss a relator's suit over the relator's objections as long as the

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[16] ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER, 33 (ABA 2000) [hereinafter WEST, ADVISING THE WHISTLEBLOWER]

[17] Bucy, *Private Justice, supra* note 6 at 69-70.

[18] *Interview with John R. Phillips,* CORP. CRIME RPTR., Nov. 9, 1987 at 5-12 [hereinafter *Phillips Interview*]. Phillips, who is generally credited as the person responsible for the 1986 Amendments to the FCA, explained how the sealing provision came about:

> " The Justice Department resisted these *qui tam* provisions of the False Claims Act. If you look at the record, the Justice Department didn't want them changed at all. One argument that was advanced was, 'you are going to make our job more difficult because as soon as you file these complaints, it is public information, and we can't do our normal investigations. If we want to put a wire on somebody or do an undercover investigation, you have blown the cover instantly, so this is a bad idea." My response was to say, 'fine, we will draft a seal provision so that it is under seal until you decide to join the case. ... It is a very unusual provision in that regard. What [it] did was [to] completely negate the argument advanced by the Justice Department."

See, e.g., WEST, ADVISING THE WHISTLEBLOWER, *supra* note 17 at 33; SEN. REP.99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5281.

[19] 31 U.S.C. § 3730(b)(2)(2002).

[20] For other examples of FCA qui tam cases where the relator and relator's counsel assumed large amounts of responsibility for the preparation of the case, see United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp.2d 1323 (M.D. Fla. 2001); United States *ex rel.* Merena v. SmithKline Beecham Corp., 114 F. Supp. 2d 352 (E.D.Pa. 2000)(facts more fully discussed in *Merena*, 52 F.Supp. 2d 420 (E.D.Pa. 1998) *rev'd* 205 F.3d 97 (3rd Cir. 2000))

[21] *Id.* at § 3730(c)(3)(2002).

[22] *Id*. at § 3730(c)(3)(2002); *See, e.g.,*Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 769 (2000);. United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486, 489 (5th Cir. 2001).

relator has been given an opportunity in court to be heard; [23] DOJ may seek limitations on the relator's involvement in the case,[24] or seek alternative remedies (such as administrative sanctions) in lieu of the relator's lawsuit.[25]

If the government joins the relator's case, the relator is guaranteed at least 15% of any judgment or settlement and the court can award more -- up to 25%. If the government does not join the lawsuit, the relator is guaranteed 25% and could receive up to 30%.[26] The amount within the statutory award depends upon the relator's helpfulness to the government.[27] Because the FCA's damages and penalty provisions tend to generate exceptionally large judgments,[28] relators' percentages involve substantial sums.[29]

The case of *United States ex rel. Alderson v. Quorum Health Group,* [30] shows how the FCA works. It is typical in that it shows the steps of a FCA qui tam action. It is atypical because of the unusual contribution made by the relator to pursuing the case; in this respect, *Alderson* exemplifies the FCA working to its fullest potential.

In the1980s, Alderson was the Chief Financial Officer at North Valley Hospital in Whitefish

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[23] 31 U.S.C. § 3730(c)(2)(A) and (B)(2002). DOJ may even move for dismissal or oppose a settlement without intervening. *See, e.g.,* Juliano v. Federal Asset Disposition Asso., 736 F. Supp. 348, 350-51 (1990) (DOJ moved to dismiss relator's case after declining to intervene); United States v. Health Possibilities, P.S.C., 207 F.3d 335, 340-41 (6th Cir. 2000) (After declining to intervene, DOJ opposed the settlement reached by relator and defendant.)

[24] 31 U.S.C. § 3730(c)(2)(C)(2002).

[25] *Id*. at § 3730(c)(5).

[26] 31 U.S.C. § 3730(c)(3).

[27] The FCA has four built-in features to reward only those relators who actually supply helpful information. First, the FCA directs courts to determine what percentage, within the statutory range, of the judgment should be given to the relator based upon how helpful the relator was in "advancing the case to litigation." 31 U.S.C. § 3730(d)(1)(2002). Second, a court is directed to reduce the share of the award further if the relator "planned or initiated" the FCA violation, and to exclude the relator from receiving any portion of the award if she has been convicted of conduct constituting the FCA violation. *Id*. at § 3730(d)(3).Third, the FCA's jurisdictional bar provision prohibits a qui tam case from going forward if the information it includes is already public (unless the relator is the "original source" of the information. *Id*. at § 3730(e)(4). Lastly, the FCA provides that only the first qualifying qui tam lawsuit may proceed. *Id*. at § 3730(b)(5).

[28] For example, recent judgements in FCA qui tam cases include a $875 million settlement from TAP Pharmaceuticals, 55 HEALTHCARE FIN. MGT. 10 (2002), a $745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a $385 million settlement with National Medical Care, Inc., a $325 million settlement with SmithKline Beecham Clinical Laboratory; a $325 million settlement with National Medical Enterprises; and a $110 million settlement with National Health Laboratories. BOESE, *supra* note 6 § 1.05[A].

[29] Recent relators' awards include $95 million, $44.8 million, $28.9 million, and $18.1 million. 21 TAF Q. REV. 20-21 (Jan. 2001).

[30] 171 F. Supp.2d 1323 (M.D. Fla. 2001).

Montana. He had been so employed for six and one-half years.[31] In August, 1990, Quorum Health Group took over as the management company for the hospital. Soon thereafter a Quorum representative instructed Alderson to prepare two Medicare cost reports. Hospitals that participate in the Medicare program by treating Medicare patients must submit annual cost reports. These are lengthy, detailed reports that provide extensive information about a hospital's costs.[32] Alderson was told to prepare an "aggressive" cost report to submit to Medicare, and a "reserve" report to be used internally.[33]

Alderson refused to prepare the two inconsistent reports. He was terminated four days later.[34] Within months Alderson filed a wrongful termination suit.[35] During depositions regarding his termination, Alderson learned of additional irregularities in Quorum's cost-reporting practices. He sought documents that would shed further light on such practices and engaged a forensic accounting expert.[36] In 1992, two years after his termination by Quorum, Alderson filed a pro se FCA qui tam complaint alleging that Quorum's cost reporting practice defrauded the Medicare program. As required by the FCA, Alderson provided the federal government with a copy of his complaint and a written statement of the information and evidence he had gathered supporting the charges in his complaint.[37]

Unable to find another job after being fired from North Valley Hospital, Alderson and his family suffered financially for years after his termination. His family was forced to move from its comfortable home to a cramped apartment in another town. They used the college savings they had accumulated for their two teenage children.[38]

For nine years after he filed his pro se FCA complaint, Alderson spent thousands of hours

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[31] *Id.* at 1325.

[32] Form HCFA 2552, Cost Reports for Hospitals. Cost reports are lengthy and complex, consisting of hundreds of worksheets and requiring detailed information about the facility, its staff and operation. Providers are required to allocate various costs, including capital expenditures, medical education costs, travel, malpractice insurance premiums and payments, and every type of patient care costs to various centers, designated by whether the patient was a Medicare patient and whether the expense is properly reimbursable to the Medicare program. ROBERT FABRIKANT, PAUL E. KALB, MARK D. HOPSON & PAMELA H. BUCY, HEALTH CARE FRAUD, ENFORCEMENT AND COMPLIANCE §2.02[4] (LJSP 2003) [hereinafter FABRIKANT ET AL, HEALTH CARE FRAUD].

[33] *Id.*

[34] 171 F. Supp. 2d at 1325.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1325.

[38] Kurt Eichenwald, *He Blew the Whistle, and Health Giants Quaked,* N.Y.TIMES, Oct. 18, 1998, at Sec. 3, Page 1.

working on his FCA case,[39] retained two different law firms to represent him in the action,[40] and either by himself or with his attorneys, met often with DOJ attorneys and/or investigators, mostly in Washington D.C., and at his own expense.[41] At these meetings, Alderson explained how Quorum's reserve cost report practice defrauded the Medicare Program.[42] When DOJ attorneys expressed concern about a legal theory to support an FCA case, or what they viewed as weak evidence or minimal damage,[43] Alderson addressed their concerns.[44] The forensic accountant Alderson retained, and continued to pay, met with DOJ officials in Washington D.C. to assist Alderson in explaining the fraud to DOJ attorneys.[45]

Working with the DOJ attorneys and investigators, Alderson identified voluminous documents that government investigators should subpoena from Quorum.[46] At DOJ's request, he reviewed the documents obtained by subpoena.[47] These were extensive: eight boxes of more than 11,000 records from 197 hospitals for seven years. For one year, working alone, Alderson analyzed the records and prepared a spread sheet summary of relevant cost reserve information. He culled a set of 2,500 documents that corroborated specific reserve information and presented his summary, spreadsheet and relevant documents to DOJ.[48]

Seven years after Alderson filed his action[49] DOJ agreed to intervene in Alderson's lawsuit, but only after receiving "assurances from Alderson's counsel of their ability and willingness to commit the necessary resources to the case and to undertake the principal role in prosecuting the litigation."[50] Thereafter, Alderson's counsel:

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[39] 171 F. Supp. 2d at 1330.

[40] Approximately one year after filing his pro se qui tam complaint, Alderson retained a law firm that specialized in health care law to handle his qui tam case. 171 F. Supp. 2d at1325. In 1995, Alderson changed to a law firm that specialized in FCA qui tam cases. *Id.* at 1327. This firm represented Alderson until the case was resolved.

[41] 171 F. Supp. 2d at 1325-1329.

[42] *Id.*

[43] DOJ attorneys believed the fraud to be $10 million or less, too low to consider. *Id.* at 1325 -1331.

[44] *Id.*

[45] *Id.* at 1325.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1326.

[49] *Id.*

[50] *Id.*

- assisted in drafting DOJ's amended complaint;[51]
- retained auditors to analyze one-half of the cost reports (government auditors analyzed the other half);[52]
- handled the third-party discovery, including the preparation and service of subpoenas to 200 hospitals nationwide; performing this task required that Alderson's lawyers hire two additional associates;[53]
- "contributed substantially to the motion practice and discovery that followed the filing [of the amended complaint]";[54]
- worked with DOJ in "combined efforts" to respond to defense motions to dismiss;[55]
- directed a two-year "substantial, sustained" mediation on behalf of the plaintiffs to reach a settlement in the case.[56]

The case ultimately settled for $85.7 million. Alderson's share was $20.6.[57] The average relator's award, when the government intervenes, is 16 % of judgment recovered. [58] When awarding Alderson an unusually large award of 24 %, the Court looked to the FCA, its legislative history, DOJ Guidelines for Relator's Award,[59] Alderson's persistence,[60] expertise, the personal sacrifices he made to help the government,[61] and the significant contribution of Alderson's counsel in pursuing the case.[62] Alderson's attorneys were awarded $2.7 million in attorneys fees pursuant to the FCA's

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 1330, and n.22.

[54] *Id.* at 1329.

[55] *Id.* at 1330.

[56] Alderson also attended and participated in all of the mediation conferences, held throughout the United States. *Id.*

[57] *Id.* at 1339.

[58] *Panel: FCA Enforcement in the Post-Stevens World,* ABA NAT'L INST. ON THE CIVIL FALSE CLAIMS ACT AND QUI TAM ENFORCEMENT, Nov., 2000 (Discussion with Michael Hertz, Director, Commercial Litigation Branch, Civil Division, U.S. Dept. of Justice).

[59] 171 F. Supp. 2d at 1331-34.

[60] According to the court, "Only [Alderson's] dogged resolution, eventually supported by competent professionals and an occasionally reluctant government, resulted in the millions now available for distribution." *Id.* at 1337.

[61] *Id.* at 1337-1338.

[62] According to the court, "The record establishes that Alderson's counsel contributed significantly (in both quality and quantity) and at certain moments crucially to this case. That contribution deserves manifest and telling weight in determining the proper relator's award." *Id.* at 1335. The award of attorneys fees and costs was in

requirement that culpable defendants should pay "reasonable attorneys' fees and costs."[63]

The court that determined Alderson's share described Alderson's contribution to the case: "[t]he record graphically demonstrates Alderson's profound personal and professional commitment to success in this litigation. His commitment manifested itself in his persistent labors and those of his attorneys and accountants, all of whom contributed mightily both before and after the United States intervened."[64]

II. How the False Claims Act Contributes to Fraud Investigations

Before the FCA was revitalized with amendments in 1986 and became a factor in federal law enforcement, the only effective way to investigate what appeared to be intentional fraud[65] against the government was before a grand jury, as a criminal matter.[66] Grand jury investigations of complex economic wrongdoing are tedious and lengthy.[67] Investigators must pierce enough of the corporate veil to figure out what has taken place, who is involved, how far and deep the wrongdoing goes and since the case is being investigated as a criminal matter, whether the fraud was intentional rather than the result of mistakes, inexperience, overwork or sloppiness.

Grand jury investigations proceed step-by-slow-step. They often begin with interviews of the source who first alerted law enforcement that there may be a possible problem. Next, relevant financial records are subpoenaed. These records are analyzed to determine what documents, transactions, individuals or companies may be involved. More records are subpoenaed and analyzed.[68]

This process continues until the investigation stops turning up new information. Often, the most helpful evidence comes from slow, painstaking tasks such as charting checking and savings account deposits and withdrawals, and correlating those with significant business transactions. Generally, only after documentary investigation has revealed what is going on, or the investigation has reached an impasse, do investigators resort to questioning live witnesses. This is because there

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addition to the contingency portion of his award that Alderson agreed to pay to his attorneys. *Id*.

[63] 31 U.S.C. § 3730(d)(1)(2002).

[64] *Id*. at 1338.

[65] The FCA includes a mens rea requirement of "knowingly," which the FCA defines as "actual knowledge of the information, . . . deliberate ignorance of the truth or falsity of the information, . . . or . . . reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b)(2002). This is the same definition for mens rea used in many criminal offenses. *See, e.g.*, United States v. Jewel, 532 F.2d 697, 702-04 (9th Cir. 1976).

[66] *See, e.g.,* JAMES B. STEWART, THE PROSECUTORS 154 (1987) (regarding the value of the grand jury in conducting investigations of wrongdoing).

[67] *Id.* at 23, 222, 243-245, 248-49.

[68] *See generally,* PAUL S. DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE §§ 2.06, 4.02 (3rd ed.) [hereinafter DIAMOND, FEDERAL GRAND JURY]; SARA SUN BEALE, WILLIAM C. BRYSON, JAMES E. FELMAN, MICHAEL J. ELSTON, GRAND JURY LAW AND PRACTICE § 6.09 (2d ed.) [hereinafter BEALE et al., GRAND JURY].

are risks in questioning witnesses without a full picture of what was going on and who was involved. Throughout an investigation, investigators must guard against alerting those who may destroy or alter evidence, or threaten or tamper with witnesses.

Rarely in grand jury investigations will a knowledgeable insider offer helpful information or be willing to cooperate *until* law enforcement has established that individual's involvement in the wrongdoing. Most insiders are too fearful of the consequences of cooperating with the government to do so under any other circumstance. Thus, prosecutors secure cooperation from a knowledgeable insider only by negotiating leniency in exchange for the insider's testimony. Such negotiation is always a gamble since prosecutors may not know until it is too late that they have cut a deal with an individual who has greater culpability than those he is being asked to testify against.[69] Such mishaps are always a possibility since investigators rarely have a full understanding of the fraud at the time they must decide who to approach for cooperation. There is another danger in conscripting witnesses with a cooperation-for-leniency exchange: such individuals often are not trustworthy.[70] They tend to minimize their own involvement or that of their friends and close colleagues.[71] Corroboration is always necessary to verify their information.[72] It is also difficult for investigators to know whether they have fully uncovered the scope of the wrongdoing and wrongdoers, or the number and identity of all victims.[73]

A knowledgeable insider adds immensely to this investigation process. It is invaluable to have an insider who knows everything about the organization being investigated and who can explain the full scope of the wrongdoing, identify everyone who was involved, when they became involved, and the extent to which they were involved. A knowledgeable insider can identify which records and transactions to examine, what companies and businesses are involved in the relevant transactions, and who are the victims. With such information, investigations could proceed more quickly and thoroughly, clearing those who are not culpable and gathering available evidence against those who are.

The FCA encourages honest, non-culpable insiders to come forward and to work with investigators throughout an entire case. Because of the way it is structured (insiders can receive a significant recovery but culpable insiders receive less, or nothing) the FCA entices *honest* insiders, not the culpable individuals grand jury investigations tend to unearth. Because of their credibility advantages, these non-culpable insiders are more valuable to government investigators than are those who are cooperating only to save themselves and who become willing to cooperate only after the government has already proven much of what occurred. By tying the amount of the insider's award to the insider's helpfulness, the FCA encourages insiders to work with investigators by supplying

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[69] *Id.* at 139-140, 202-208, 220.

[70] *Cf., id.* at 214, 223, 241.

[71] *Id.* at 25-27, 158, 165, 217.

[72] *Id.* at 163.

[73] *See generally,* DIAMOND, FEDERAL GRAND JURY, *supra* note 69 at § 4.02; BEALE, ET AL. GRAND JURY, *supra* note 69 at § 6.10.

information and providing other assistance.[74]

Besides helpful, inside information of wrongdoing, qui tam relators also bring investigative and litigative talent to regulators. The FCA, both by its terms and its practice, provides significant financial inducement not only for insiders but for experienced, skilled attorneys who represent relators' cases. Under the FCA, successful relators recover attorneys fees and costs from defendants. In practice, additional compensation for relators' counsel has evolved. Relators generally negotiate with their attorneys to pay a percentage of the relator's award to counsel.[75] This total package of attorneys fees, costs and percentage of the relator's award can be quite lucrative. Enough to lure skilled counsel from other sophisticated areas of practice.

The *Lissack* case demonstrates the dual resources of insider information and legal talent that qui tam relators bring to regulators.[76] Michael R. Lissack was a highly successful investment banker at Smith Barney becoming, for example, the second youngest person to serve as a managing director in Smith Barney's history. One day, Lissack made an anonymous phone call to a United States Attorney's office that was investigating certain investment firms for various frauds. Lissack described another fraud, "yield burning," that was quite massive and about which law enforcement knew nothing.[77]

By law, the investment banks are required to price securities no higher than fair market value. They are also required to reimburse the United States Treasury for any profits they reap on their handling of municipal securities.[78] "Yield burning" occurs when investment banks price securities in excess of fair market value and retain the profits this generates, rather than passing them on to the United States Treasury in the form of lower interest payments as required.

In Lissack's initial phone call to the U.S. Attorney's Office and in multiple later conversations, all made anonymously, Lissack explained yield burning to prosecutors who were unfamiliar with the practice, and described how it was diverting millions of dollars from the Treasury.[79]

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[74] 31 U.S.C. § 3730(d)(1) (2002)(In determining what percentage, within the mandatory range, of the judgment shall be awarded to the relator, the court shall "tak[e] into account the significance of the information and the role of the person bringing the action in advancing the case to litigation."); United States *ex rel* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1332-34 (M.D. Fla. 2001) (lists DOJ's guidelines).

[75] According to the court, "The record establishes that Alderson's counsel contributed significantly (in both quality and quantity) and at certain moments crucially to this case. That contribution deserves manifest and telling weight in determining the proper relator's award." 171 F. Supp.2d 1323 at 1335 (M.D. Fla. 2001). The award of attorneys fees and costs was in addition to the contingency portion of his award that Alderson agreed to pay to his attorneys. *Id*. .

[76] Erika A. Kelton, *The False Claims Act and Wall Street: How a Qui Tam Case Reformed the Municipal Bond Market*, 19 TAF Q. REP. 35-44 (July 2000); Charles Gasparino, *Cities Have Headache Thanks to Wall Street,* WALL ST. J. Aug. 26, 1997 at A1; *Cf. Wall Street Update,* WALL ST. J., Apr. 14, 2002 at C2.

[77] *Id.* at 35.

[78] *Id.* at 36-37, 43.

[79] *Id.* at 36.

One and one-half years later, in February, 1995, when nothing had yet been done to stop yield-burning despite his telephone calls, Lissack decided to force the government to act by taking action himself. He filed a FCA qui tam lawsuit against national and regional investment banks. After seven years, this case settled for a total of $200 million with thirty investment banks paying the damages awarded.[80]

Lissack's FCA suit got the attention of the Securities Exchange Commission which initiated multiple investigations and ultimately sanctioned individuals and banks. Lissack's qui tam suit also got the attention of the Internal Revenue Service which initiated a review of the tax-exempt status of hundreds of tax-free municipal bonds. The IRS concluded it review by issuing a new Revenue Procedure to protect the Treasury from losses of any yield burning activity in the future. The IRS's new procedure placed the burden on public issuers to detect future yield-burning situations, or to re-pay any yield burning profits realized.

In addition to filing a federal FCA action, Lissack filed a qui tam action under the California False Claims Act. In this suit, Lissack alleged that the yield burning activity of one investment banker, Lazard Feres & Company, caused the Los Angeles County Metropolitan Transportation Authority (LAMTA) to incur loses of approximately $3 million. The State of California intervened in Lissack's suit and hired Lissack's qui tam team of lawyers to represent LAMTA. In 1998, Lazard settled the California action, agreeing to pay treble damages of $9 million.[81]

The *Lissack* cases show the contributions a knowledgeable insider and his counsel can make to exposing and preventing fraud: Lissack alerted regulators to a significant, systemic, complex theft that was depriving the federal government of millions of dollars and of which regulators were unaware. When regulators failed to act to stop the practice one and one-half years after Lissack told regulators about it, he rallied regulators to action by filing his own lawsuit. To prepare the case, Lissack's legal team gathered public bond transaction documents from more than 500 issuers and retained economic experts who generated evidence with multiple regression analysis on more than 1, 900 individual Treasury securities. Their analysis demonstrated how yield burning defrauded the federal government.[82] With his knowledge of investment banking and the yield burning practice, Lissack was able to anticipate and rebut defenses. Lissack and his attorneys supplied significant expertise, labor and resources to investigate and prepare the case. Lissack's whistleblowing led to fundamental changes in how municipal financing occurs which better protect federal and state treasuries from massive graft and theft.[83]

III. Whether Government Employees Qualify as Relators Under the Civil False Claims Act

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[80] Telephone Interview, March 25, 2003, with Erika A. Kelton, Phillips & Cohen, counsel for Michael Lissack.

[81] *Id.* at 42.

[82] *Id.* at 39.

[83] *Id.* at 36, 39, 42, 44.

In United States ex rel. Williams v. NEC Corp.,[84] the Eleventh Circuit held that Arthur Williams, an attorney for the United States Air Force, was not barred from filing a *qui tam* lawsuit against NEC Corp. that alleged that NEC engaged in bidrigging on bids it submitted to the government. After Williams filed his *qui tam* action, the United States filed a motion to dismiss for lack of subject matter jurisdiction, alleging "that the False Claims Act contained a jurisdictional bar against suits brought by government employees based upon information acquired in the course of their government employment."[85] The Eleventh Circuit held that the False Claim Act contains no such bar, and reversed the District Court's grant of the government's Motion to Dismiss. In reaching its conclusion, the Eleventh Circuit looked to the statutory language and legislative history, finding in neither any indication of an absolute bar against government employees as *qui tam* relators. The Court then addressed the public policy arguments offered by the United States:

> "The United States has offered several public policy reasons for finding that Congress intended to bar government employees from initiating qui tam suits based upon information acquired in the course of their government employment. The essence of the government's public policy arguments is that the False Claims Act should not allow a personal reward to government employees for the 'parasitical' use of information obtained and developed in the course of government employment. More specifically, the United States maintains that a 'parasitical' suit brought by a government employee based upon government information while a government investigation is under way will prematurely disclose the information in the possession of the government to the defendant, and thereby prejudice the government's case. In addition, the government warns of races to the courthouse in which government employees seek to file suit as private *qui tam* relators before the Attorney General can file suit on behalf of the United States. Such races, it asserts, would force the Attorney General 'to file suits based on facts that are only in a preliminary stage of investigation, with corresponding disclosure to the potential defendant of the existence of the inquiry and undermining of the government's case.' And finally, the United States asserts that government employees should not receive compensation via the False Claims Act for reporting fraud against the government when it is part of their duties as government employees to report such fraud notwithstanding the Act.
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> "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.[16] Notwithstanding this recognition, however, we are charged only with

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[84] 931 F.2d 1493 (11th Cir.1991).

[85] *Id*. at 1495.

[16]We note, however, that the first two concerns articulated by the United States describe administrative difficulties that might arise when any private qui tam plaintiff files suit prior to the completion of a government investigation into the subject of the action. In addition, we note that the False Claims Act provides that the qui tam complaint filed by a private person be filed in camera and that it remain under seal for at least 60 days without

interpreting the statute before us and not with amending it to eliminate administrative difficulties. The limits upon the judicial prerogative in interpreting statutory language were well articulated by the Supreme Court when it cautioned:

> " 'Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. The natural meaning of words cannot be displaced by reference to difficulties in administration.' Commonwealth v. Grunseit, 67 C.L.R. 58, 30 (1943). For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense."

It is interesting to note that in 1991, when Congress created *qui tam* actions against persons committing bank fraud crimes, it clearly excluded government employees as *qui tam* relators. This statute provides that a *qui tam* action may not be brought if,

> "the declaration is filed by a current or former officer or employee of the Federal or State government agency or instrumentality who discovered or gathered the information in the declaration, in whole or in part, while acting within the course of the declarant's government employment."[17]

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disclosure to the defendant, which time may be extended for good cause upon motion by the government. 31 U.S.C. § 3730(b)(2), (3). Thus, the government may, if disclosure of information concerning the qui tam complaint to the defendant would prejudice an ongoing investigation, move the court for extensions of the time during which the complaint remains under seal. See 31 U.S.C. § 3730(b)(3). Further, if the government is concerned that the private qui tam plaintiff will not satisfactorily litigate the action on behalf of the United States, the government may elect to intervene and proceed with the action itself. 31 U.S.C. § 3730(b)(2). And finally, the government may dismiss the action brought by the private qui tam plaintiff, as long as the private relator is afforded notice and opportunity for a hearing on the motion to dismiss. 31 U.S.C. § 3730(c)(2)(A). Such safeguards go a long way toward alleviating many of the government's concerns.

[17] 12 U.S.C. § 4204(a)(1).