

2001

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Recommended Citation

Jannet M. Carmichael & Janice A. Cichowlas *The Changing Role of Pharmacy Practice - A Clinical Perspective*, 10 Annals Health L. 179 (2001).
Available at: <http://lawcommons.luc.edu/annals/vol10/iss1/7>

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The Changing Role of Pharmacy Practice— A Clinical Perspective

*Jannet M. Carmichael, Pharm.D., FCCP, BCPS**
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INTRODUCTION

The traditional system of initiating and managing pharmacotherapy, in which a relatively small number of disciplines are authorized to write prescriptions, is obsolete. The current health care system fails to ensure optimal outcomes from the use of medications, results in too many preventable medication-related problems, and perpetuates unnecessary professional turf battles between physicians and other health professionals over authority and responsibility for proper medication use. The time is now to change the rules governing what prescribing medication is, who does it, and how it is done.

This essay examines the practice of pharmacy, and how it can be improved by the legal and institutional recognition of Collaborative Drug Therapy Management (“CDTM”). The essay is premised on the notion that, to meet the challenges of the new system of health care delivery, health professionals must redesign their scope of practice and focus more on integration and collaboration among health care providers.

I. THE CURRENT PHARMACY PRACTICE ENVIRONMENT

The act of penning medication instructions on a prescription tablet belies the complexity of tasks involved with prescribing medications. Prescribing medications is more adequately de-

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scribed as a process that encompasses selecting, initiating, monitoring, continuing, modifying, and administering drug therapy.

The practice of pharmacy is integral to the process of prescribing medications. In its most rudimentary definition, the practice of pharmacy is:

the interpretation, evaluation, and implementation of Medical Orders; the dispensing of Prescription Drug Orders; participation in Drug Device selection, Drug Administration, Drug Regimen Reviews, and drug or drug-related research; provision of Patient Counseling and the provision of those acts or services necessary to provide Pharmaceutical Care in all areas of patient care including Primary Care; and the responsibility for Compounding and Labeling of Drugs and Devices, proper and safe storage of Drugs and Devices, and maintenance of proper records for them.¹

In reality, however, the practice of pharmacy is much more. It involves determining what medications the patient needs and providing them, as well as providing the necessary services throughout the course of treatment to maximize the safety and efficacy of drug therapy. Pharmacists provide patients with a "feedback mechanism as a means of facilitating continuity of care."² The relationship between pharmacist and patient is a covenantal one, with the pharmacist aware of, and committed to, the patient's interests.³ In short, the philosophy of pharmacy practice has changed: Pharmacists do not solely administer drugs but, rather, *pharmaceutical care*, a comprehensive approach to drug therapy management.

As the health care system grows in complexity, and pharmaceutical interventions become increasingly important, it is necessary to reexamine the role of pharmacists. Pharmacists, physicians, and other health professionals must necessarily work together to maximize positive patient outcomes and to reduce medication error. They can do so using the model of Collaborative Drug Therapy Management. In a system utilizing CDTM, a pharmacist with the requisite knowledge and skills may initiate and monitor patients' medication regimens, advise patients regarding their therapy, administer medications, order and/or per-

1. National Association of Boards of Pharmacy, MODEL STATE PHARMACY ACT & MODEL RULES art. I, § 104, available at <http://www.nabp.net/law/modelact/article1.asp>. (last visited Mar. 15, 2001).

2. Donald C. Brodie et al., *Societal Needs for Drugs and Drug-Related Services*, 44 AM. J. PHARMACY EDUC. 276, 277 (1980).

3. Charles D. Hepler, *The Third Wave in Pharmaceutical Education: The Clinical Movement*, 51 AM. J. PHARMACY EDUC. 369, 375 (1987).

form necessary tests, and assess progress, among other tasks.⁴ The next section describes how the current health care climate has served as a catalyst for the CDTM movement.

A. Economic Forces are Changing the Pharmacy Environment

Economic factors are driving the necessity for CDTM. Retail prescription drug sales exceeded \$121.7 billion in 1999, an 18% increase from 1998.⁵ Total health spending rose 5.6% in 1999, the sixth consecutive year of below 6% growth, while spending on prescription drugs grew by 16.9% during the same time.⁶ At this rate, prescription drugs will soon become the third, single-largest component of health care spending after hospitals and physicians, accounting for 8.2 cents on every dollar.⁷

Many factors are responsible for the increase in drug sales. First, an aging population creates a larger pool of patients in need of medications. Second, the pharmaceutical industry has produced an ever growing store of highly effective medications that can improve quality of life and extend life expectancy. Third, direct-to-consumer advertising of prescription medication has increased the demand for certain “lifestyle” drugs. In addition, many managed care plans offer coverage of prescription costs. Furthermore, with current bipartisan support of a Medicare prescription drug benefit, the trend of increasing prices for prescription drugs is not likely to reverse. Pharmacists’ workload has increased concomitantly with the increase in prescription volume, making pharmacists among the busiest professionals in the health industry.

B. Quality of Care Issues Focus the Nation’s Attention

As the volume of prescription medication use has increased, the nation’s attention has become focused on the staggering human and economic cost of medical errors. In 1995, the cost of

4. American Society of Health-System Pharmacists, *Collaborative Drug Therapy Management*, at <http://www.org/public/proad/collaborative.html> (last visited Mar. 15, 2001).

5. National Association of Chain Drug Stores, *Industry Facts-at-a-Glance: Rx Sales 1999*, at http://www.nacds.org/industry/industry_fr.html (last visited Mar. 15, 2001).

6. Health Care Financing Administration (“HCFA”), *1999 National Health Care Expenditures—Highlights*, at www.hcfa.gov/stats/nhe-oact/tables/chart.html (last visited Mar. 15, 2001).

7. *Id.*

medication-related morbidity and mortality⁸ in the United States was \$76.6 billion.⁹ The nation was stunned in 1999 when the Institute of Medicine ("IOM") issued its report, *To Err is Human: Building a Safer Health System*,¹⁰ which concluded that medical errors account for between 44,000 and 98,000 deaths annually.¹¹

A significant amount of the attention paid to medical errors focuses on the inappropriate use of medications, which annually results in billions of dollars of added health care costs.¹² Many commentators recognize that pharmacists must be enabled to assume more responsibility in the management of patients to minimize medication errors. The IOM report notes that

[b]ecause of the immense variety and complexity of medications now available, it is impossible for nurses or doctors to keep up with all of the information required for safe medication use. The pharmacist has become an essential resource in modern hospital practice.¹³

Similarly, the director of the FDA's Center for Drug Evaluation and Research believes that pharmacists are a crucial safety link in the medication-use process because they provide consumers with all-important information on the benefits and risks of their medications.¹⁴

Understanding when and how problems with medication arise is crucial to reducing the rate of medication errors. Approximately 39% of medication errors occur in the prescribing phase of medication use.¹⁵ Fifty-percent of errors occur during order transcription and drug administration, and another 11% of errors occur during dispensing.¹⁶ The single largest proximal cause of medication errors (22%) is a lack of complete knowl-

8. Morbidity and mortality can be defined as "the phenomenon of therapeutic malfunction or miscarriage – the failure of a therapeutic agent to produce the intended outcome. . . . [that] may ultimately lead to . . . mortality." Jeffrey A. Johnson & J. Lyle Bootman, *Drug-Related Morbidity and Mortality: A Cost-of-Illness Model*, 155 ARCHIVES OF INTERNAL MED. 1949 (1995).

9. *Id.* at 1952.

10. INSTITUTE OF MEDICINE, *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM*, available at <http://www.nap.edu> (last visited Mar. 15, 2001) [hereinafter *TO ERR IS HUMAN*].

11. *Id.* at 1.

12. Johnson & Bootman, *supra* note 8, at 1952.

13. *TO ERR IS HUMAN*, *supra* note 10, at 194.

14. See generally Janet Woodstock M.D., *Medical Errors*, Hearing Before the Senate Comm. on Health, Education, Labor, and Pensions, 106th Cong. (2000).

15. Lucian L. Leape et al., *Systems Analysis of Adverse Drug Events*, 274 J. AM. MED. ASS'N 35, 37 (1995).

16. *Id.*

edge about drugs during the prescribing, order transcription, and drug administration stages.¹⁷

One significant study of the anatomy of medication errors identified eight categories of drug-related problems.¹⁸ The first category of drug-related problems identified occurs when the patient has a medical condition requiring drug therapy (a drug indication), but is not receiving a drug for that indication. Males over fifty years of age who have no contraindications to aspirin but do not regularly take it, are one example. Medical literature suggests that taking aspirin daily prevents strokes and heart attacks.

The second category arises when the patient is taking the wrong drug for his or her medical condition. For example, some patients receive a particular drug therapy in the presence of an allergy to that drug. Likewise, if a patient is receiving a drug, but an equally effective but safer or less expensive drug exists, it is arguable that the wrong drug is being used.

The third category of drug-related problems occurs when the patient is taking too low of a dose of the correct medication for a given medical condition. For example, many medications are titrated to address a specific therapeutic goal. Medication to lower cholesterol or blood sugar, for example, is often started at a low dose to determine a patient's tolerance, and then increased until the desired cholesterol or blood sugar level is reached. If the patient fails to return for a follow-up visit, he or she may be taking too little of the drug, thereby increasing the risk of long-term complications.

Conversely, a fourth category of drug-related problems arises when a patient has a medical condition for which too much of the correct drug is being taken. For example, many pharmacists are involved in disease management programs where warfarin, a blood thinner, is monitored. Patients receiving more than the desired serum drug concentration of this medication are often admitted to hospitals with bleeding problems. In addition, if a patient has had a decrease in renal function, medications often accumulate to toxic levels, requiring an adjustment in the dose to prevent toxicity.

The fifth category of drug-related problems transpires when a patient has an adverse reaction to a particular drug. Many unwanted drug reactions are unavoidable, and range from minor

17. *Id.*

18. Linda M. Strand et al., 24 PHARMACOTHERAPY 1093-97 (1993).

inconveniences to life-threatening emergencies. When an adverse reaction is suspected, it is important to provide the patient appropriate information to make informed decisions about alternatives.

The sixth category of drug-related problems originates from a drug-drug, drug-food, or drug-laboratory interaction. When a patient sees multiple health care providers and takes multiple medications, there is ample opportunity for one medication to be prescribed that interferes with another. One drug added to another can dramatically change active drug levels, hindering or enhancing one or both medications.

The seventh and most common drug-related problem arises when the patient is not taking or receiving the prescribed drug for a particular medical condition. Patients may not take medications for reasons such as intolerance, apathy, inability to pay, poor memory and a variety of other medical and social reasons. Whatever the cause, it is obviously important to identify and remedy the problem, if possible.

Finally, the eighth category of drug-related problems occurs when the patient has a medical condition resulting from taking a drug without valid medical indication. Too often, medications are started without a clear monitoring plan and are continued without an understanding of the anticipated outcome of therapy.

In each of the eight categories of drug-related problems mentioned above, increased involvement by a pharmacist could have lessened the potential for medication error. This is one of the many advantages of CDTM discussed below.

II. THE BENEFITS OF CDTM

A collaborative practice maximizes a physician's training and diagnostic expertise and a pharmacist's training and expertise in drug therapy management. In its most successful examples, the pharmacist and the physician have entered into a collaborative practice agreement or protocol under which the physician diagnoses and may make an initial treatment decision, and then authorizes the pharmacist to select, monitor, modify and/or discontinue medications as necessary to achieve pre-established patient outcomes. The physician and pharmacist then share the risk and responsibility for patient outcomes.

Several studies indicate that the day-to-day practice of pharmacists in systems that recognize CDTM is in sharp contrast with the practice of pharmacists in traditional pharmacy envi-

ronments. Pharmacists practicing CDTM devote 46% of their time to distributive functions, 34% to clinical responsibilities, and 23% to administrative duties.¹⁹ Seventy-three percent of respondents reported that their pharmacists were involved in developing disease management protocols and treatment guidelines.²⁰ Pharmacists practicing in traditional pharmacy environments, such as retail drug stores, spend the majority of their time performing activities that do not require a licensed pharmacist. One study of chain drug stores indicates that 73% of pharmacy personnel staff time is spent on processing orders and prescriptions, 9% on managing inventory, 5% on pharmacy administration and 13% on other miscellaneous activities.²¹ Pharmacists in this environment are spending over two-thirds (68%) of their time on these activities.²² The survey found that pharmacists in chain drug stores spend only 31% of their time on activities that require a pharmacist, including reviewing and interpreting prescriptions, assessing patients' drug therapy, clarifying prescriptions, and counseling patients.²³ Only 1% of the pharmacist's time in this environment is spent on disease management.²⁴ When pharmacists were asked to rank the drains on their productivity, ascertaining coverage restrictions, checking identification cards, determining eligibility for insurance benefits, and providing help-desk support ranked highest. This data suggests an opportunity to transfer many technical and non-skilled activities currently performed by pharmacists to ancillary personnel.

Studies that have quantified the benefit of CDTM indicate that for every dollar invested in clinical pharmacy services, an average benefit of \$16.70 was realized.²⁵ Others demonstrate that increased levels of pharmacist staffing and some clinical

19. C.E. Reeder, *ASHP Survey of Ambulatory Care Responsibilities of Pharmacists in Integrated Health Systems—1997*, 55 AM J. HEALTH-SYSTEM PHARMACY 35-43 (1998).

20. *Id.*

21. National Association of Chain Drug Stores Education Foundation, *Pharmacy Activity Cost and Productivity Study: November 1999*, at <http://www.nacds.org/news/andersen.html> (last visited Mar. 15, 2001).

22. *Id.*

23. *Id.*

24. *Id.*

25. See also Glenn T. Schumock, *Economic Evaluations of Clinical Pharmacy Services, 1988-1995*, 16 PHARMACOTHERAPY 1188-1208 (1996) (summarizing economic assessments of clinical pharmacy services); American College of Clinical Pharmacy, *Evidence of the Value of the Pharmacist*, at <http://www.accp.com/position.html>. (last visited Mar. 15, 2001).

pharmacy services were associated with reduced hospital drug costs and, more importantly, reduced hospital mortality.²⁶

It is uncertain whether the industry will choose to free up pharmacist time for the purpose of increasing clinical activities and solving drug-related problems or to decrease the number of pharmacists altogether, thereby decreasing the cost of filling prescriptions. In part, this will be determined by the value to society of pharmacist involvement in clinical activities, and the willingness of society to pay for this service. The predominant fee-for-service system ties compensation solely to the prescription product. Consequently, although the pharmacist is uniquely positioned for the task of drug therapy management, usually with doctoral-level training, payment for pharmacist services is tied to the process of prescription filling, with little payment for any other services. Pharmacists largely support an expanded role for the profession.²⁷ However, when drug-related problems arise, overworked pharmacists have little time to solve them, and are forced to do so without the promise of monetary recompense.

III. LEGISLATIVE AND REGULATORY RESPONSES TO THE CDTM MOVEMENT

In its publication, *To Err is Human*, The Institute of Medicine reported that

[i]n 1998 alone, FDA approved 90 new drugs, 30 new molecular entities (drugs that have never been marketed in this country before), 124 new or expanded uses of already approved drugs, 344 generic drugs, 8 over-the-counter drugs, and 9 orphan drugs, or almost two actions every day of the year. Approximately 48 percent of the prescription drugs on the market today have become available only since 1990. Medications are also the most frequent medical intervention, with an average of 11 prescriptions per person in the United States.²⁸

26. Michael E. Pitterle et al., *Hospital and Pharmacy Characteristics Associated with Mortality Rates in United States Hospitals*, 14 PHARMACOTHERAPY 620, 626 (1994); see also C.A. Bond et al., *Health Care Professional Staffing, Hospital Characteristics, and Hospital Mortality Rates*, 19 PHARMACOTHERAPY 130, 134 (1999); C.A. Bond et al., *Clinical Pharmacy Services and Hospital Mortality Rates*, 19 PHARMACOTHERAPY 767-81 (1999). Two other good references here are: <http://www.aphanet.org/pharmacare/clinicalsumm.html> and <http://accp.com/position/paper6.pdf>.

27. Charles D. Hepler & Linda M. Strand, *Opportunities and Responsibilities in Pharmaceutical Care*, 47 AM. J. HOSP. PHARMACY (1990).

28. *TO ERR IS HUMAN*, *supra* note 10, at 149.

Congress has recognized that pharmacists are key participants in health care delivery and has acknowledged the underutilization of their professional services. The Omnibus Budget and Reconciliation Act of 1990 ("OBRA-90")²⁹ requires states to promulgate regulations to expand the scope and standard of pharmacy practice as a condition for receiving federal funds for Medicaid patients.³⁰ The focus of this legislation was to reduce federal health care spending by providing enhanced pharmaceutical care, with prospective and retrospective drug utilization review and patient counseling. Most states have expanded the OBRA requirements beyond merely offering consultation to patients, and require mandatory consultation for all patients.³¹

In most states, pharmacists currently do not have legal authority to perform all the functions of pharmaceutical care. Each state's pharmacy act reflects the standard of care for pharmacists from a public policy standpoint. As of December 1999, twenty-five states had authorized collaborative drug therapy management (CDTM), and eighteen additional states were pursuing legislative or regulatory changes to permit CDTM.³²

In California, the State Board of Pharmacy is responsible for examination and licensing of state pharmacists and establishes standards of competency. The California State Board of Pharmacy promotes the pharmaceutical care approach with their adaptation of the Hepler and Strand concept called The Pharmacists' Care Model.³³ *The Professional Competency in Pharmacy Statement* reflects the public policy position of the board, and states that pharmaceutical care is

29. Pub. L. No. 108-508, 104 Stat. 1388 (codified in various sections of 42 U.S.C.) (requiring pharmacists to become more active in patients' drug programs through the implementation of Drug Use Review ("DUR") programs).

30. See 42 U.S.C.A. § 1396r-8 (West, Westlaw 2000).

31. Dora A. Gonzalez, *A Prescription for Litigation: In Pursuit of the Pharmacist's "Duty to Warn" of the Adverse Effects of Prescription Drugs*, 1 J. LEGAL ADVOC. & PRAC. 53, 54 (1999).

32. AMERICAN SOCIETY OF HEALTH-SYSTEM PHARMACISTS (ASHP), COLLABORATIVE DRUG THERAPY MANAGEMENT SUPPLEMENT TO THE STATE LAWS AND REGULATIONS PACKET (1999) [hereinafter ASHP SUPPLEMENT]. The states currently authorizing CDTM by statute are Arkansas, Arizona, California, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. Melissa Madigan, National Association of Boards of Pharmacies, *Survey: States that Allow Pharmacists to Enter Into Collaborative Practice Agreements With Prescribers* (2001) (on file with authors).

33. California State Board of Pharmacy, *The Pharmacists' Care Model*, at <http://www.pharmacy.ca.gov> (implementing a comprehensive approach to pharmacy).

[t]he provision of medication-related care to patients. It is intended to achieve definite outcomes (cure of a disease, elimination or reduction of a patient's symptomatology, arresting or slowing of a disease process or preventing a disease or symptomatology) that improve a patient's quality of life.³⁴

In achieving these goals, pharmacists working in this model are the "repositories of drug therapy expertise," but are to work collaboratively with physicians, nurses, and other health care professionals.³⁵ Such statements from a state agency indicate the agency's awareness of change within the profession, which will be reflected in statutes and regulations promulgated and enforced to meet the mandate of consumer protections.

The State of Washington can serve as a model to other states, as well. In Washington, a pharmacist may initiate or modify a patient's drug therapy within designated parameters.³⁶ A Washington regulation defines the term "monitoring drug therapy" as the review of "the drug therapy regimen of patients by a pharmacist for the purpose of evaluating and rendering advice to the prescribing practitioner regarding adjustment of the regimen."³⁷ In that state, pharmacists are given "prescriptive authority" with "prior board notification of written guideline or protocol required."³⁸ This protocol requires identification of the physician and the pharmacists who are parties to the agreement, the time limitation for the agreement, the type of prescriptive decisions the pharmacist can make, and the documentation that must be maintained.

IV. RECOMMENDATIONS FOR CHANGE

Federal and state law and pharmacy tradition need to be amended before the full potential of CDTM can be realized and pharmacists can be compensated for their activities.³⁹ These changes should include expanding the role of the pharmacist so that she can access pertinent medical information in order to recommend appropriate drug therapy; monitor and evaluate the response of the patient to drug therapy; recommend

34. *Id.*

35. *Id.*

36. WASH. REV. CODE ANN. § 18.64.011 (West, Westlaw 2000).

37. WASH. ADMIN. CODE. § 246-863-100 (West, Westlaw 2000).

38. *Id.*

39. Jannet M. Carmichael et al., *Collaborative Drug Therapy Management by Pharmacists*, 17 PHARMACOTHERAPY 1050-58 (1997) (stating a pharmacist's ability to access a patient's medical records is essential for the provision of CDTM).

changes in the drug therapy plan to the physician; identify drug interactions and patient noncompliance; and communicate instructions and information to the patient about the drug. While most of these changes must occur at the state level, where health care professionals are licensed and regulated, the federal government also has an important role to play. For example, as patient safety becomes a higher priority, the Health Care Financing Administration, in its oversight of the Medicare, Medicaid, and Child Health Insurance Programs, could insist on the use of CDTM multi-disciplinary teams in their patient care standards. While many pharmacists possess all or some of the necessary training and skills to participate in CDTM, its widespread implementation has not yet occurred. The support of myriad health care professionals—both clinical and administrative—is necessary to enable pharmacists to participate successfully on multidisciplinary teams. Health care organizations and professionals should work together to set goals for CDTM. Measures should be established for team members to freely offer suggestions to other team members for improvements or corrections to possible errors. Better communication is needed across disciplines, with greater appreciation for the role of each and every health care professional on the care team.

In addition, there should be more interdisciplinary training of health care professionals. As teams of people are increasingly delivering care, training should include experience with those other team members.

The IOM study offered its own specific recommendations for improving medication errors, including the use of CDTM.⁴⁰ According to the IOM, drug-drug interaction checking software is important to reduce reliance on memory. Dosing cards (laminated cards that can be posted or carried in the pocket) could help with standard doses. Requiring physicians to enter prescriptions online could not only eliminate misinterpreting handwriting, but also field constraints would keep an order from being filled if a patient's allergy information, weight, height, etc. are not entered first. In addition, use of bar coding for patients and their medications also could be helpful, and automated dispensing could reduce errors. CDTM teams should know the responsibilities of each member and help each other by noticing errors that could cause harm to a patient. A pharmacist should

40. *Id.* at 185; *see also id.* at 182-202 (providing a complete list of recommendations).

always be available on nursing units and on rounds. Finally, patients must be kept informed and educated regarding their medications.

CONCLUSION

The IOM study *To Err is Human* points out that “[w]hether a person is sick or just trying to stay healthy, they should not have to worry about being harmed by the health system itself.”⁴¹ Medical errors are a leading cause of injury and death in this country, and they add billions of dollars to health care costs. The ever-increasing variety and complexity of drugs makes it impossible for doctors to keep up with all of the information necessary to safely prescribe medication. Including pharmacists on patient care teams can greatly improve patient outcomes. Adequate regulatory capability exists, but more attention must be paid to the expanding role of the pharmacist. State laws, such as those promulgated in the State of Washington, should be enacted to expand the role of the pharmacist. Professional organizations can promote the necessary updates in legislation and regulation to improve the quality of care to patients. Standards must be set, and training and licensing efforts must promote those standards. Through recognition and implementation of CDTM in all aspects of the health care system, these ends can be accomplished.

While the paradigm of collaborative practice is not new to health care,⁴² advocates of CDTM must remember that increased privilege brings increased responsibility. Pharmacists may find themselves confronted with many of the same issues faced by physicians.⁴³ As long as pharmacists stay abreast of the legal and ethical issues involved,⁴⁴ the advantages of CDTM outweigh the disadvantages, and CDTM can serve as the ideal vehicle for confronting the challenges posed by the omnipresence of pharmaceutical interventions in modern health care.

41. TO ERR IS HUMAN, *supra* note 10, at 5.

42. See, e.g., The Nursing and Advanced Practice Nursing Act, 225 ILL. COMP. STAT. 65/15 (allowing Advanced Practice Nurses to practice to the full extent of their education and experience as long as it is documented in a written collaborative agreement with a collaborating physician).

43. Deborah E. Boatwright, *Legal Aspects of Expanded Prescribing Authority for Pharmacists*, 55 AM. J. HEALTH-SYST. PHARM. 585-94 (1998) (mentioning financial pressures associated with managed care and malpractice liability as two such examples).

44. See *id.* at 585.

The Government, the Legislature and the Judiciary—Working Towards Remedying the Problems with the Civil False Claims Act: Where Do We Go From Here?

Raegan A. McClain*

INTRODUCTION

The civil False Claims Act (“FCA” or “Act”) imposes liability on any “person” who knowingly presents or causes to be presented a false or fraudulent claim to the United States Government.¹ For many years, the FCA has been a successful tool in combating health care fraud against the government. Since the 1986 Amendments to the FCA, the Department of Justice (“DOJ”) has recovered more than \$4 billion in civil fraud cases brought under the *qui tam*² provisions of the Act.³ In 2000 alone, the government won or negotiated over \$1.2 billion in health care fraud cases and proceedings, which resulted in the government collecting over \$717 million, and returning over \$577 million to the Medicare Trust Fund.⁴

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1. 31 U.S.C. § 3729(a)(1) (1994).

2. A *qui tam* relator is a private individual who brings a lawsuit on behalf of the government. The word *qui tam* is derived from the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*” which translates to “[w]ho sues on behalf of the King as well as for himself.” BLACK’S LAW DICTIONARY ABRIDGED 867 (6th ed. 1991).

3. Press Release, Office of Public Affairs, U.S. Dep’t of Just., *Justice Recovers Record \$1.5 Billion in Fraud Payments Highest Ever for One Year Period* (No. 641, Nov. 2, 2000), at <http://www.usdoj.gov/opa/pr/November/641.civ.htm> (last visited April 15, 2001); Press Release, Office of Public Affairs, U.S. Dep’t of Just., *Justice Department Recovers Over \$3 Billion in Whistleblowers False Claims Act Awards and Settlements* (No. 79, Feb. 24, 2000), at <http://usdoj.gov/opa/pr/2000/February/079civ.htm> (last visited Mar. 15, 2001).

4. U.S. DEP’T OF HEALTH & HUM. SERV. AND U.S. DEP’T OF JUST. HEALTH CARE FRAUD & ABUSE CONTROL PROGRAM, ANN. REP. FOR FY 2000 (Jan. 2001), available at <http://www.usdoj.gov/dag/pubdoc/hipaa00ar21.htm> (last visited Apr. 16, 2001) [hereinafter “2000 ANNUAL REPORT”]. Although the government won or negotiated over \$1.2 billion in 2000, the government did not collect this total amount in

There is no doubt that the monetary amounts recovered as a result of the FCA are impressive. However, beneath the façade of dollar signs lies an Act in turmoil. For over a century there have been conflicting opinions about the purpose and intent of the FCA. Consequently, Congress has attempted to improve the Act numerous times in an effort to rectify some of the controversial provisions. Although there have been significant executive, legislative and judicial efforts to decipher vague provisions of the FCA, there are still fundamental problems with certain provisions of the Act, as well as how the Act is enforced.

This paper examines and critiques the roles of the executive, legislative and judicial branches in influencing the development and application of the modern FCA. Part I of this paper provides a general overview of the historical development of the FCA and its current substantive provisions. Part II discusses and evaluates the government's use of the FCA to target fraud and abuse in health care, describes criticism of such use, critiques the government's response to this criticism, and suggests ways in which the government might improve its enforcement tactics. Part III examines judicial interpretations of the public disclosure jurisdictional bar of the FCA and explains how these interpretations have shaped the recent application of the qui tam provisions of the Act. Part III also attempts to reconcile the competing interpretations of the qui tam provisions with the intended purpose of the Act. Part IV summarizes and analyzes legislative attempts to modify the FCA since the 1986 Amendments in order to determine whether past proposals may provide solutions for correcting the Act's current inadequacies. Additionally, this part offers suggestions for alleviating some of the harsh provisions of the Act in order to rein in executive branch leverage over unwitting providers. Finally, the paper concludes by summarizing how executive, legislative and judicial efforts might effectively remedy the problems that continue to foster an inequitable application of the Act.

2000. *Id.* The actual collected amount of \$717 million includes collections from favorable judgments, negotiations and settlements of previous years. *Id.*

I. OVERVIEW OF THE FALSE CLAIMS ACT

A. *Historical Developments*

In order to understand the current FCA, it is necessary to understand its historical development. In 1863, President Abraham Lincoln signed into law the Informer's Act, which is today known as the False Claims Act. This law was designed to combat fraud against the Union Army by defense contractors during the Civil War.⁵ Since its enactment, the FCA has been transformed by two significant amendments—the 1943 and 1986 amendments. As a result of these amendments, the modern FCA is more broadly applied.

1. The 1863 Act⁶

Although the initial FCA contained nine sections, three sections primarily served as the origins for the modern FCA. Section 1 generally prohibited individuals in the military or naval service from submitting false claims to the government.⁷ Examples of such fraudulent acts included submitting false vouchers and false oaths, forging signatures, uttering forged papers, conspiring to defraud, stealing or embezzling, delivering false receipts for arms, and purchasing or receiving arms from soldiers.⁸ An individual committing any such crimes could be arrested and held for trial by court-martial and, if found guilty, could be pun-

5. Senator Howard said when introducing the initial Informer's Act:

This bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and the Treasury Department. The country, as we know has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil

CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (statement of Senator Howard). Some examples of fraudulent acts that were taking place during this time are as follows: "[c]ontractors would sell the same horses twice to the Army; they would sell sand instead of gun powder; and sawdust instead of muskets." 144 CONG. REC. S7675-02, S7676 (daily ed. July 8, 1998) (statement of Sen. Grassley).

6. Act of March 2, 1863, ch. 67, 12 Stat. 696. The FCA was later split into civil and criminal components. The civil provisions were reenacted as §§ 3490-3494 of the Revised Statutes. U.S. Rev. Stat. tit. 36, §§ 3490-3494 (1875). The criminal provisions were reenacted as § 5438 of the Revised Statutes. U.S. Rev. Stat. tit. 70, § 5438 (1875). Section § 5438 was repealed in 1909, Act of March 4, 1909, ch. 321, § 341, 35 Stat. 1153, and was subsequently revised and codified in 18 U.S.C. §§ 287 and 1001, Act of June 25, 1948, ch. 645, 62 Stat. 698, 749.

7. Act of March 2, 1863, ch. 67, 12 Stat. 696, § 1.

8. *Id.*

ished by fine or imprisonment and dismissed or discharged from service.⁹

Section 3 applied to individuals not in the military.¹⁰ Such individuals who committed any prohibited fraudulent act were punished by forfeiting to the government two thousand dollars per act, plus double the amount of damages sustained by the government.¹¹ An individual convicted of such crimes could also be imprisoned between one and five years, and fined between one thousand and five thousand dollars.¹²

Section 4 set out court jurisdiction and authorized private persons, who are known today as *qui tam* relators ("relators"), to file actions on behalf of the United States.¹³ Section 6 set forth the recovery amount for such *qui tam* relators. Under the 1863 Act, relators were entitled to half of the amount forfeited by the guilty defendant, as well as half the amount of the damages collected by the government.¹⁴ Originally, the statute of limitations provided that any action must be brought within six years from the date the unlawful act was committed.¹⁵

2. The 1943 Amendments

Since the 1863 Act did not place limitations on private individuals bringing a lawsuit on behalf of the United States, many individuals filed "parasitic" lawsuits—lawsuits based on information copied from another source—in the late 1930s.¹⁶ This practice was the subject of the United States Supreme Court decision in *United States ex rel. Marcus v. Hess*.¹⁷ In *Marcus*, a relator filed an action against the defendant-contractors to recover damages incurred by the government as a result of defendants' collusive bidding on electrical contracts.¹⁸ However, prior to the filing of the relator's suit, the defendants were indicted and, after entering a plea of *nolo contendere*, fined for

9. *Id.* §§ 1 & 2.

10. *Id.* § 3.

11. *Id.*

12. *Id.* § 3.

13. *Id.* § 4.

14. *Id.* § 6.

15. *Id.* § 7.

16. *Cf.* 89 CONG. REC. 10845-10846 (1943) (statement of Rep. Walter) ("Now, the country is literally covered with racketeering suits. As a matter of fact, the latest count that I had showed 250 cases, in none of which has any service been rendered to the United States.").

17. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

18. *Id.* at 539.

defrauding the government.¹⁹ The government argued that the relator should be dismissed from the lawsuit because he received the information that served as the basis for his suit from the indictment, rather than by his own investigation.²⁰ The relator denied relying on the indictment, arguing that he conducted an investigation of his own and presented the government with additional information.²¹ The Supreme Court recognized the relator's right to sue based on the language of the then-current version of the Act, which stated that a "[s]uit may be brought and carried on by *any person*."²² The court explained that the Act did not contain any words of "exception or qualification" to confine permissible relators to those who betrayed their co-conspirators.²³ In fact, based on that language, the Supreme Court stated that even the district attorney who filed the criminal suit could qualify as a relator.²⁴ After *Marcus*, there was an urgency to amend the Act to prevent individuals from filing suit in situations where the government was already in possession of the information that served as the basis of the complaint.

In response to *Marcus*, Congress in 1943 enacted the "public disclosure bar" to prevent qui tam plaintiffs from filing such "parasitic" lawsuits.²⁵ In pertinent part, the 1943 Amendments prohibited a court from having jurisdiction over suits where it appeared that the information or evidence used by the relator "[w]as based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought," unless the individual filing the lawsuit possessed and voluntarily disclosed substantial evidence

19. *Id.* at 545.

20. *Id.*

21. *Id.*

22. *Id.* at 546 (quoting Act of March 2, 1863, ch. 67, 12 Stat. 696, § 4) (emphasis added).

23. *Id.*

24. *Id.*

25. During the debates on the amendments, Representative Walter stated:

We feel that by enacting this compromise legislation the United States will be amply protected and at the same time there will not be this ever-present invitation to racketeers to examine indictments, to examine reports of the Truman committee, or if you please, for dishonest and unscrupulous investigators to turn over information to their friends or co-conspirators for the purpose of bringing suit against our citizens on information that either comes to them by reading an indictment or a bill of complaint or through testimony before some committee or which comes to them in their official capacity as a representative of the United States.

89 CONG. REC. 10847 (1943) (statement of Rep. Walter).

or information to the Attorney General which was not previously in the possession of the Department of Justice ("DOJ").²⁶

Additionally, the 1943 Amendments changed the amount awarded to relators. In cases where the government chose to pursue the lawsuit, the court was given the authority to award the relator a reasonable and fair amount of the proceeds collected, not to exceed one-tenth of the total proceeds awarded or recovered from the suit or settlement.²⁷ In cases where the government chose not to pursue the lawsuit, however, the award could range up to one-fourth of the total proceeds collected from the suit or settlement.²⁸

Opponents of the 1943 Amendments argued that the changes virtually gutted the qui tam provisions of the Act.²⁹ Under the amended Act, relators could file a lawsuit only where the government did not have any previous knowledge of the alleged fraud. Thus, a private individual who provided information of fraudulent activity to the government before filing suit was barred from subsequently bringing a FCA lawsuit as a relator because the government had knowledge of the fraud. Also, since the 1943 Amendments significantly decreased the relator's potential bounty, they weakened the lure of a large financial incentive to file suit. These criticisms were recognized and remedied by Congress when the FCA was again amended in 1986.

3. The 1986 Amendments

Some courts believed the opinion of the Court of Appeals for the Seventh Circuit in *United States ex rel. Wisconsin v. Dean*³⁰ was the impetus prompting Congress to amend the Act in 1986.³¹ In *Dean*, the State of Wisconsin, acting as a qui tam relator, brought an action against a psychiatrist for making fraudulent claims to receive Medicaid reimbursements for her

26. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, § 1 (codified as amended at 31 U.S.C. § 232 (1976)).

27. *Id.*

28. *Id.*

29. In criticizing the proposed 1943 Amendments, Representative Miller stated: "In their zeal to remedy this [parasitic] condition they have overlooked, in my judgment, and perhaps unwittingly placed limitations upon the prosecution of true informer actions which defeat the very purpose and in practical effect nullify true informer suits. . . [t]his bill deters the honest informer." 89 CONG. REC. 10847 (1943) (statement of Rep. Miller).

30. *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1101 (7th Cir. 1984).

31. See, e.g., *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1993).

services.³² Because the federal government possessed information about the fraudulent acts before the suit was brought, the Seventh Circuit considered whether the district court had proper jurisdiction.³³ In reversing the district court, the Seventh Circuit explained that the unambiguous language of the Act prohibited jurisdiction where a complaint was “based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time” such complaint was filed.³⁴ Therefore, despite the fact the State of Wisconsin was required to inform the federal government of the alleged fraudulent acts it discovered, because the United States knew about the alleged fraudulent acts when the suit was filed, the district court lacked subject matter jurisdiction.³⁵ The *Dean* opinion illustrated that the jurisdictional bar failed to reward those individuals who were responsible for informing the government of fraudulent acts. This defect was one of many addressed in the 1986 Amendments.

The 1986 Amendments, which created the modern FCA, drastically changed the Act—especially the *qui tam* provisions of the Act. The major changes included (1) clarifying the intent standard, which resulted in a reversal of restrictive court interpretations; (2) increasing the amount of damages and civil penalties that could be assessed; (3) increasing the relator’s reward; (4) changing the scope of the jurisdictional bar; (5) modifying the statute of limitations; and (6) amending the filing procedures.³⁶

One of the questions addressed in litigation prior to the 1986 Amendments was the level of intent required under the Act. Before the 1986 Amendments, the majority of courts required proof that the defendant had specific intent to defraud the government.³⁷ The 1986 Amendments defined “knowledge” of fal-

32. *Dean*, 729 F.2d at 1102.

33. *Id.*

34. *Id.* at 1103-04 (quoting 31 U.S.C. § 232(C)).

35. *Id.* at 1106-07.

36. The 1986 Amendments also created a provision that allows a company to voluntarily disclose its own misconduct in order to reduce its exposure to liability under the Act, 31 U.S.C. § 3729(a) (1994), a provision to address “reverse false claims” (i.e. when a person makes a false statement to reduce his/her liability to pay money to the government), *id.* § 3729(a)(7), a provision establishing the standard of proof by a “preponderance of the evidence,” 31 U.S.C. § 3731(c) (1994), and a provision that protects individuals from retaliation by an employer for involvement in an FCA case, 31 U.S.C. § 3730(h) (1994).

37. See, e.g., *United States v. Davis*, 809 F.2d 1509 (11th Cir. 1987); *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *United States v. Mead*, 426 F.2d 118 (9th Cir. 1970); *United States v. Ueber*, 299 F.2d 310 (6th Cir. 1962); and *United*

sity in a way that “[a]ttempts to reach what has become known as the ‘ostrich’ type situation where an individual has ‘buried his head in the sand’ and failed to make simple inquiries which would alert him that false claims are being submitted.”³⁸ Congress clarified that specific intent was not required under the Act, and that “knowingly” could be shown by proving actual knowledge, deliberate ignorance or reckless disregard of the truth or falsity of the information.³⁹

The 1986 Amendments strengthened the FCA by increasing the civil penalties from \$2,000 per violation to between \$5,000 and \$10,000 per violation.⁴⁰ Additionally, Congress increased the damages from double the damages sustained by the government as a result of the individual’s unlawful act, to triple those damages.⁴¹

One of the main goals of the 1986 Amendments was to encourage private individuals to come forward with information by increasing the potential reward amount.⁴² After the 1986 Amendments, in cases where the government chooses to intervene, the relator is entitled to at least 15% of the proceeds recovered, but could receive as much 25%.⁴³ In cases where the government does not intervene, the relator is entitled to anywhere between 25% to 30% of the proceeds.⁴⁴ Additionally, the successful relator is entitled to reasonable attorney’s fees and other costs.⁴⁵

Although the jurisdictional bar added in the 1943 Amendments solved the problem of parasitic lawsuits, it also prohibited lawsuits from being brought by individuals who were the original source of the information provided to the government.

States *ex rel.* Brensiber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942). *But see* United States v. Hughes, 585 F.2d 284 (7th Cir. 1978); United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973); Fleming v. United States, 336 F.2d 475 (10th Cir. 1964). Each of these courts found that no specific intent was required.

38. S. REP. NO. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286.

39. 31 U.S.C. § 3729(b) (1994).

40. *Id.* § 3729(a).

41. *Id.* However, double damages may still be awarded in cases where defendants meet self-reporting requirements. *Id.*

42. “The proposed legislation seeks . . . to encourage any individual knowing of Government fraud to bring that information forward. . . . S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.” S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266-67.

43. 31 U.S.C. § 3730(d)(1) (1994).

44. *Id.* § 3730(d)(2).

45. *Id.*

Thus, the 1986 Amendments also sought to correct the problem of prohibiting individuals from acting as relators in cases where the relator initially brought the information to the government's attention.⁴⁶ Therefore, a "public disclosure" provision was added to the Act, which provided that no court could have jurisdiction over a qui tam action if the information which served as the basis for the claim was publicly disclosed, unless the relator could show that s/he was the original source of such information.⁴⁷

Another change made to the Act related to the statute of limitations period. The permissible period for filing a false claim action was amended from six years after the violation occurred to either six years after the violation occurred or three years after the government should have learned of the facts underlying the claim, whichever is longer, but in no event longer than ten years from the date of the unlawful violation.⁴⁸ This change in the statute of limitations would permit the government to bring suit beyond the six-year tolling period if it did not have a concrete suspicion that the fraudulent activity in issue had occurred.

Lastly, a minor change was made in the filing procedures for qui tam actions. In addition to the requirements under the 1943 Act, which required a qui tam plaintiff to serve a copy of the complaint and all evidence in his or her possession on the United States, the 1986 Amendments required the plaintiff to file his or her complaint in camera, where it would remain under seal for at least 60 days.⁴⁹ Within this 60-day period the government may elect to intervene and proceed with the cause of action or may notify the court that it declines to intervene.⁵⁰

B. Components of the Current Act

1. The Elements

The FCA provision used most often to prosecute individuals and entities in the health care industry prohibits any person from knowingly presenting or causing to be presented a false or

46. 132 CONG. REC. 20535 (1986) (remarks of Sen. Grassley).

47. 31 U.S.C. § 3730(e)(4)(A); *see also infra* Part III.A-B for a detailed explanation of court interpretations of the "public disclosure bar."

48. *Id.* § 3731(b).

49. *Id.* § 3730(b)(2).

50. *Id.* § 3730(b)(4)(A)-(B). However, upon a showing of good cause, the government may petition the court for extensions of time in addition to the sixty-day period. *Id.* § 3730(b)(3).

fraudulent claim, record or statement for payment or approval to the United States Government.⁵¹ The Act defines “claim” as a request or demand for money or property, made to a contractor, grantee, or other recipient, if the government provides or reimburses any part of the money or property that is requested or demanded.⁵² Although specific intent to defraud need not be proven, the government bears the burden of showing that the individual in question “knowingly” committed the prohibited statutory conduct.⁵³ Courts addressing the scienter requirement have determined that the government must prove more than gross negligence in order to meet the least burdensome standard of “reckless disregard.”⁵⁴

2. Penalties and Damages

As mentioned above, the 1986 Amendments provided that individuals found liable under the FCA are subject to civil penalties of between \$5,000 and \$10,000 per claim.⁵⁵ On August 30, 1999, the Office of the Attorney General issued a final rule that increased the civil monetary penalty amount by 10%.⁵⁶ Consequently, individuals can now be assessed civil penalties of between \$5,500 and \$11,000 per claim.⁵⁷ Additionally, the defendant still can be assessed three times the amount of damages the government sustains as a result of the fraudulent action.⁵⁸ However, in cases where the individual committing the violation cooperates with the government investigation, the court may choose a more lenient punishment of two times the amount of damages the government incurs as a result of the fraudulent action.⁵⁹

51. *Id.* § 3729(a)(1).

52. *Id.* § 3729(c).

53. *Id.* § 3729(b).

54. *See, e.g.,* United States v. Krizek, 111 F.3d 934, 943 (D.C. Cir. 1997) (stating that reckless disregard is “a linear extension of gross negligence or ‘gross negligence-plus’”); Saba v. Compagnie Nationale Air France, 78 F.3d 664, 668 (D.C. Cir. 1996) (explaining that one meaning of reckless disregard is “simply a linear extension of gross negligence, a palpable failure to meet the appropriate standard of care.”).

55. 31 U.S.C. § 3729(a).

56. Civil Monetary Penalties Inflation Adjustment, 28 C.F.R. § 85.3(a)(9) (2000). Pursuant to section 5 of the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, Congress has the authority to adjust civil monetary penalties in accordance with inflation.

57. 28 C.F.R. § 85.3(a)(9).

58. 31 U.S.C. § 3729(a).

59. *Id.*

3. Qui Tam Provisions

The qui tam or whistleblower provisions of the FCA empower private citizens who are the original source of information regarding fraudulent wrongdoings to bring an action, on behalf of the government, against the individual or entity committing the fraud.⁶⁰ The Act defines an “original source” as “[a]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.”⁶¹ Once the relator properly serves the government with the complaint containing material evidence of the alleged fraudulent activity, the government has sixty days to decide if it wants to proceed with the action.⁶² If the government decides to proceed with the action, the relator can continue as a party, but the government has the primary responsibility for prosecution.⁶³ If the government declines to intervene, the relator can continue the action alone; however, upon a showing of good cause, the court may permit the government to enter the suit at a later date.⁶⁴

The monetary reward to the relator differs depending on whether the government chooses to intervene or not. As mentioned above, in cases where the government intervenes in the action, the relator can recover anywhere between 15% and 25% of the award or settlement amount.⁶⁵ However, if the government does not intervene in the action, the relator can recover between 25% and 30% of the proceeds.⁶⁶ In addition to a percentage of the proceeds, the court has discretion to award the relator reasonable expenses incurred, plus reasonable attorneys’ fees.⁶⁷

60. *Id.* § 3730(e)(4)(A).

61. *Id.* § 3730(e)(4)(B).

62. *Id.* § 3730(b)(2).

63. *Id.* § 3730(c)(1). As a party to the action, the relator is subject to certain limitations. *Id.* § 3730(c)(2). For example, notwithstanding the objections of the relator, the government may dismiss the action if it provides notice to the relator and may settle the action if the court determines the settlement to be fair, adequate and reasonable. *Id.* § 3730(c)(2)(A)-(B). Also, the court may restrict the relator’s participation in the litigation if the government or the defendant shows that the relator’s unrestricted participation would be burdensome or would be for purposes of harassment. *Id.* § 3730(c)(2)(C)-(D).

64. *Id.* § 3730(c)(3).

65. *Id.* § 3730(d)(1).

66. *Id.* § 3730(d)(2).

67. *Id.* § 3730(d)(1).

In some cases the relator may receive a reduced amount of the proceeds recovered, or no reward at all. For example, if the court finds that the relator played an insignificant role in advancing the case to litigation (e.g., the information provided to the government was insignificant, or the disclosure of specific information relating to the fraud was based primarily on other sources), the court can award an amount it deems appropriate so long as it does not exceed 10% of the proceeds recovered in the case.⁶⁸ Similarly, if the court finds that the relator planned or participated in the alleged fraudulent activity, it has discretion to reduce the relator's share of the proceeds to the extent it considers appropriate.⁶⁹ Finally, if the relator is convicted of criminal conduct for his or her role in the alleged fraud, s/he will be dismissed from the action and will not receive *any* share of the proceeds recovered in the action.⁷⁰

As a result of the 1986 Amendments, a qui tam relator is also protected from retaliation by his or her employer. Specifically, "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because of his or her role in an FCA action or investigation "shall be entitled to all relief necessary to make [him or her] whole."⁷¹ In addition to litigation costs and reasonable attorney fees, "[s]uch relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination."⁷²

II. GOVERNMENT USE OF THE FALSE CLAIMS ACT TO COMBAT FRAUD AND ABUSE

A. *Department of Justice Guidance*

The Attorney General is responsible for investigating and prosecuting violators under the FCA.⁷³ As a division of the Department of Health and Human Services ("DHHS"), the Office of Inspector General ("OIG") works with the DOJ on national

68. *Id.*

69. *Id.* § 3730(d)(3).

70. *Id.*

71. *Id.* § 3730(h).

72. *Id.*

73. *Id.* § 3730(a).

projects to combat Medicare and Medicaid fraud and abuse.⁷⁴ In using the FCA to pursue national initiatives,⁷⁵ the government has been criticized for being unfair and overzealous. For example, on August 12, 1999, the American Hospital Association ("AHA") sent a letter to the DOJ demanding that prosecutors improve the way they use the FCA against hospitals.⁷⁶ Citing the August 8, 1999, GAO Report to Congress on Medicare Fraud and Abuse, the letter expressed concern about "overreaching and injustice in the government's use of the False Claims Act against hospitals."⁷⁷ In order to address allegations of heavy-handed tactics regarding the application of the FCA, Deputy Attorney General Eric H. Holder ("the Deputy") issued a memorandum on June 3, 1998 ("DOJ Memorandum"), to all United States Attorneys, First Assistant United States Attorneys, Civil Health Care Fraud Coordinators in the Offices of the United States Attorneys, and Trial Attorneys in the Civil Division Commercial Litigation Section ("the Prosecutors").⁷⁸ The DOJ Memorandum was issued "[t]o emphasize the importance of pursuing civil False Claims Act cases against health care providers in a fair and even-handed manner, and to implement new

74. The OIG gives recommendations to the DOJ for civil and criminal action. Also, as part of its responsibilities, the OIG issues fraud alerts on certain areas vulnerable to fraud and abuse and advisory opinions regarding certain proposed transactions. The OIG also publishes model compliance plans and has the power to impose civil monetary penalties and to recommend exclusions from Medicare when individuals violate the anti-kickback statute.

75. The DOJ defines "national initiatives" as nationwide investigations that "deal with a common wrongful action accomplished in a like manner by multiple, similarly situated health care providers." ERIC H. HOLDER, U.S. DEP'T OF JUST., GUIDANCE ON THE USE OF THE FALSE CLAIMS ACT IN CIVIL HEALTH CARE MATTERS (June 3, 1998) [hereinafter "DOJ GUIDANCE"]. Examples of national initiatives are Physicians at Teaching Hospitals ("PATH") (focusing on inappropriate billing practices by teaching hospitals for services actually performed by residents); Laboratory Unbundling ("Operation Bad Bundle") (focusing on inappropriate billing for laboratory services in separate components which should have been billed as one service); 72-Hour Window Rule (focusing on inappropriate billing for outpatient services received within 72 hours of a hospital admission and which were already paid by Medicare's inpatient reimbursement); Prospective Payment System ("PPS") Transfer (focusing on inappropriate billing practices that indicated a patient discharge when in fact the patient was transferred to another hospital); and DRG Pneumonia Upcoding (focusing on inappropriate upcoding of simple pneumonia to complicated pneumonia in order to obtain a higher Medicare reimbursement). *Id.*

76. *Fraud and Abuse: AHA Blasts Justice Department for Inconsistent Use of False Claims Act*, Health Care Daily Rep. (BNA), at d3 (Aug. 26, 1999).

77. *Id.*; see *infra* Part II.C for discussion of the GAO Report.

78. See DOJ GUIDANCE, *supra* note 75.

procedures with respect to the development and implementation of national initiatives.”⁷⁹

The bulk of the DOJ Memorandum gives specific guidance on how to deal with national initiatives pursued by the DOJ (the “Guidance”). Generally, the Deputy instructed that Prosecutors should focus on overarching legal and factual issues while avoiding a rigid approach that fails to consider the individual facts and circumstances of each case.⁸⁰ In order to accomplish these goals, when investigating national initiatives, Prosecutors should always ascertain whether there is a sufficient legal and factual predicate to allege a violation under the FCA.⁸¹ In other words, Prosecutors should ask whether the alleged violator (1) submitted a false claim *and* (2) submitted the claim with knowledge of its falsity.⁸² When determining whether a false claim exists, the Deputy instructed that Prosecutors should carefully examine relevant statutory and regulatory provisions along with the interpretive guidance, take steps to verify the validity and accuracy of any data relied upon, and conduct pertinent investigations.⁸³ Next, when determining whether the alleged wrongdoer “knowingly” submitted false claims, Prosecutors should consider the following factors: whether the alleged wrongdoer was on notice of the rule or policy upon which the potential violation would be based, the clarity of the rule or policy, the pervasiveness of the false claims, any existing compliance plans in place, any previous remedial efforts to correct improper conduct, whether the alleged wrongdoer made any attempt to contact the program agency regarding clarification of a billing rule at issue, and whether the alleged wrongdoer was part of a prior audit or billing admonition.⁸⁴

In addition to verifying the sufficiency of legal and factual predicates, the Deputy mandated that the Attorney General’s Advisory Committee and the Civil Division create working groups to oversee the development and implementation of national initiatives.⁸⁵ Also, Prosecutors are required to use “contact letters” to allow potential violators an adequate opportunity

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Although this list is not exhaustive and will not apply to every case, it serves as a general reminder for prosecutors to think about in a given situation.

85. *Id.*

to discuss the allegations at issue before a demand for settlement is made.⁸⁶ Additional mandates for Prosecutors include: considering alternative suitable remedies as well as the ability of the alleged wrongdoer to pay a specific settlement amount; considering the impact of the action on the community when dealing with rural and community hospitals; avoiding the appearance of coercion in cases where the alleged violator is not represented by counsel; minimizing burdens imposed on providers during investigations; and promoting cooperation with audit or investigation of the alleged wrongdoing.⁸⁷

B. Office of Inspector General Guidance

On the same day the DOJ Memorandum was issued, Inspector General June Gibbs Brown issued a memorandum to the Inspector General for Investigations, the Deputy Inspector General for Audit Services, and the Assistant Inspector General for Legal Affairs regarding "best practice guidelines" for national project initiatives ("OIG Memorandum").⁸⁸ The OIG Memorandum delineates six guidelines for OIG agents to follow when participating in national projects to eliminate particular fraud and abuse practices.⁸⁹

First, the OIG will "set an appropriate minimum monetary threshold and/or percentage error rate" for each national project as a guideline to determine which health care providers may be engaging in fraudulent billing practices.⁹⁰ Second, in order to promote equitable treatment among providers and to minimize variations among judicial districts, the OIG intends to consistently apply investigative protocols, settlement agreement terms, and corporate integrity provisions.⁹¹ Third, the OIG will determine the availability of its own resources for a particular initiative before referring such initiative to the DOJ or any other law

86. *Id.*

87. *Id.*

88. *Department of Health and Human Services Office of Inspector General National Project Protocols, Released June 3, 2 Health Care Fraud Rep. (BNA) 431, 464 (June 6, 1998) [hereinafter "OIG Protocols"]*.

89. *Id.*

90. *Id.* Although the threshold will vary depending on the national project, it will be determined by looking at various factors such as "Medicare and/or Medicaid revenues, total health care revenues, prior audits and notice to the provider community, provider size, number of erroneous claims, and overpayment liability." *Id.*

91. *Id.*

enforcement partner.⁹² Fourth, the OIG will work with all law enforcement agencies and with the Health Care Financing Administration ("HCFA") in order to notify representatives of the targeted health care industry or provider community, where appropriate, prior to the formal initiation of the national project.⁹³ Fifth, the OIG will evaluate the legal basis and sufficiency supporting a national project before referring any data or information regarding the development of the project.⁹⁴ Finally, the OIG will designate certain individuals from each OIG component involved in a national project as contacts, in order to facilitate lines of communication between the involved parties in each particular project.⁹⁵

C. Government Accounting Office Reports

The Government Accounting Office ("GAO") is an independent, nonpartisan government agency that works for Congress to oversee and improve government operations. After evaluating federal government expenditures and federal program operations, the GAO frequently issues reports to Congress and recommends actions on how to make the government more effective and responsive. Pursuant to the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999⁹⁶ and the Consolidated Appropriations Act of 2000,⁹⁷ the GAO is required to monitor the DOJ's compliance with the June 3, 1998 Guidance. The GAO has issued four reports regarding this matter—in February 1999, August 1999, March 2000, and, most recently, in March 2001.

In the February 1999 report ("February 1999 Report"), the GAO surveyed all ninety-three U.S. Attorneys in order to examine early implementation of the Guidance, and met with members of the AHA and a state hospital group to discuss their concerns regarding the Guidance.⁹⁸ Specifically, the GAO

92. *Id.* This self-assessment is for the purpose of giving notice to the OIG's law enforcement partners regarding the resources it is able to commit to a particular initiative. *Id.*

93. *Id.*

94. *Id.* at 464.

95. *Id.*

96. Pub. L. No. 105-277, 112 Stat. 2681.

97. Pub. L. No. 106-113, 113 Stat. 1501 (codified as amended at 42 U.S.C.A. § 1395b-6).

98. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS ON MEDICARE FRAUD AND ABUSE, Early Status of DOJ's Compliance With False Claims Act Guidance, at 2 (Feb. 1, 1999) [hereinafter "GAO FEBRUARY 1999 REPORT"].

looked at whether the DOJ had implemented the required protocols in national health care initiatives.⁹⁹ The February 1999 Report indicated that the DOJ had incorporated the Guidance into its training programs on health care fraud issues and had an evaluation program, which was conducted every few years, to review DOJ operations.¹⁰⁰ In general, the GAO was unable to comprehensively evaluate the use of the Guidance in all of the national initiatives since many offices were still preparing documentation to guide the U.S. Attorneys.¹⁰¹ Of the five major national health care investigations (i.e., Physicians at Teaching Hospitals, Laboratory Unbundling, 72-Hour Window Rule, PPS Transfer, and DRG Pneumonia Upcoding), only the Laboratory Unbundling and the PPS Transfer working groups had finalized guidance for offices participating in these investigations.¹⁰² Interestingly, the February 1999 Report noted that since the Guidance was issued, nearly seven times as many national initiative cases were closed as were opened.¹⁰³ Approximately 53% of these cases were from the Laboratory Unbundling project, 46% were from the 72-Hour Window Rule project, and less than 1% were from the DRG Pneumonia Upcoding project.¹⁰⁴ However, whereas 99% of the 72-Hour Window Rule cases were settled (1% were closed without adverse action), 88% of the Laboratory Unbundling cases were closed without adverse action (12% were settled).¹⁰⁵ The high percentage of Laboratory Unbundling cases that closed without adverse action raised a suspicion as to the merit of the DOJ allegations in those cases.

The GAO report issued on August 6, 1999 ("August 1999 Report") was more critical of the DOJ's efforts to follow the Guidance in national initiatives.¹⁰⁶ In evaluating the implementation and use of the Guidance, the GAO focused on the status of the DOJ workgroups in implementing initiative-specific guidance, the implementation of the Guidance at selected U.S. Attorney offices, and the DOJ's efforts to monitor

99. *Id.*

100. *Id.* at 5.

101. *Id.* at 3.

102. *Id.* at 5.

103. *Id.* at 7.

104. *Id.* at 8.

105. *Id.*

106. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS ON MEDICARE FRAUD AND ABUSE, DOJ's Implementation of False Claims Act Guidance in National Initiatives Varies (Aug. 6, 1999), available at <http://www.gao.gov/openrecs99/abstracts/he99170.htm> [hereinafter "GAO AUGUST 1999 REPORT"].

compliance with the Guidance.¹⁰⁷ The GAO again surveyed state hospital associations' concerns regarding the DOJ's use of the FCA.¹⁰⁸ While the GAO indicated in the August 1999 Report that the DOJ had made further progress in implementing the Guidance since its February 1999 Report, and that all the work groups had completed the implementation of initiative-specific guidance consistent with the requirements of the Guidance, the GAO was skeptical about the DOJ's effort to monitor compliance with the Guidance.¹⁰⁹ In attacking the DOJ's efforts, the GAO stated that the "DOJ's process for assessing the U.S. Attorneys' Offices' compliance may be superficial" and that the "assessments appear to involve little more than reviewers asking supervisors what they have done to ensure compliance with the [G]uidance."¹¹⁰ The August 1999 Report also indicated that the actions of the selected sample of U.S. Attorney Offices were in varying degrees inconsistent with the Guidance, and there were questions about whether some of the offices were promptly incorporating the Guidance in their initiatives.¹¹¹ On a positive note, the August 1999 Report indicated that the issuance of the Guidance had lessened the concerns of the state hospital associations regarding national initiatives.¹¹² In order to improve its oversight of appropriate use of the Guidance, the GAO recommended that the DOJ develop specific guidelines for reviewers on how to evaluate compliance, and require each reviewer to independently determine if his/her office is indeed complying with the Guidance.¹¹³

On March 31, 2000, the GAO issued a third report on the DOJ's progress between December 1999 and March 2000 ("March 2000 Report").¹¹⁴ Specifically, the March 2000 Report assessed what progress the DOJ had made in responding to prior recommendations by the GAO, and what the DOJ had done to resolve the Laboratory Unbundling controversy.¹¹⁵ In

107. *Id.* at 1.

108. *Id.*

109. *Id.* at 4.

110. *Id.*

111. *Id.*

112. *Id.* at 5.

113. *Id.* at 17.

114. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS ON MEDICARE FRAUD AND ABUSE, DOJ Has Made Progress in Implementing False Claims Act Guidance (Mar. 31, 2000), available at <http://www.gao.gov/openrecs99/abstracts/he99170.htm> [hereinafter "GAO MARCH 2000 REPORT"]

115. *Id.* at 2.

particular, the GAO targeted the U.S. Attorney offices that had been slow to implement the Guidance.¹¹⁶ On the whole, the March 2000 Report concluded that the DOJ has made progress in complying with its own Guidance, creating a more effective evaluation process, and improving efforts in the Laboratory Unbundling initiative.¹¹⁷ On the topic of compliance and evaluation of compliance, the March 2000 Report indicated that the DOJ: (1) has developed a pre-evaluation process to prepare offices for on-site reviews; (2) has added an additional, more detailed, set of interview questions to evaluate compliance protocols; (3) now requires annual independent internal reviews to certify compliance with the Guidance; and (4) has expanded the role of the working groups with an emphasis on monitoring compliance.¹¹⁸ As for the Laboratory Unbundling initiative, the March 2000 Report indicates that the offices that were in transition when the compliance guidelines were issued had made progress in correcting previous deficiencies, and were now in compliance with the guidelines.¹¹⁹ Although the March 2000 Report indicated some improvement in the Laboratory Unbundling initiative, it did not indicate effective use of the FCA in other fraud and abuse national initiatives.

Recently, the GAO issued a fourth report to evaluate the DOJ's progress with ensuring compliance with the Guidance ("March 2001 Report").¹²⁰ Specifically, the March 2001 Report sought to determine whether (1) the DOJ had improved its oversight of U.S. Attorneys' Offices to ensure compliance with the Guidance, and (2) the U.S. Attorneys' Offices were conducting the Prospective Payment System Transfer and Pneumonia Upcoding initiatives ("Initiatives") in accordance with the Guidance.¹²¹ In order to evaluate the DOJ's oversight of U.S. Attorneys' Offices, the GAO discussed ongoing compliance efforts with DOJ officials and reviewed materials related to periodic evaluations.¹²² To determine whether the Initiatives were being conducted in a manner consistent with the Guidance, the

116. *Id.*

117. *Id.* at 9-10.

118. *Id.* at 5-6.

119. *Id.* at 6-9.

120. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES ON MEDICARE FRAUD AND ABUSE, *DOJ Has Improved Oversight of False Claims Act Guidance* (March 30, 2001), available at <http://www.gao.gov/cgi-bin/fetchrpt?rptno=GAO-01-506> [hereinafter "GAO MARCH 2001 REPORT"].

121. *Id.* at 2.

122. *Id.*

GAO interviewed members of the working groups that coordinated each Initiative and reviewed files for both Initiatives in four of the ninety-four U.S. Attorneys' Offices.¹²³ Generally, the March 2001 Report concluded that the DOJ has taken steps to improve its oversight of compliance with the Guidance and has conducted the Initiatives in a manner consistent with the Guidance.¹²⁴ However, the March 2001 Report indicated that the hospital association representatives who were interviewed in the districts of the four U.S. Attorneys' offices that were visited continued to express concerns about the appropriateness of the DOJ's use of the FCA in civil health care matters.¹²⁵

D. The Government's Role in Improving the FCA

When enacting the original Informer's Act, President Lincoln descriptively stated: "Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortune of the Nation while patriotic blood is crimsoning the plains of the South and their countrymen are mouldering [sic] in the dust."¹²⁶ Although the application of the FCA in the health care industry does not equate with such an illustrative description, the modern day crooked provider is somewhat analogous to the historical war thief. These are the individuals we seek to punish, and who are worthy of such punishment.

However, when the FCA is used to force unwitting providers into settlements, it becomes a powerful weapon against which many defendants are virtually powerless to rebut allegations of wrongdoing. While the government is rightfully praised for pursuing deliberate violators, it is equally worthy of condemnation when the morally innocent become wrongfully entrapped. Although the March 2000 Report and the March 2001 Report indicate that the DOJ has made progress with regard to applying its own Guidance, the success has been confirmed only in a small percentage of U.S. Attorneys' Offices. In the March 2001 Report, the GAO visited only 4% of the total U.S. Attorneys' Offices in order to review materials supporting compliance with the Guidance in conducting the Initiatives.¹²⁷ Needless to say, the DOJ's recent efforts are a step in the right direction and

123. *Id.*

124. *Id.* at 3.

125. *Id.*

126. 89 CONG. REC. 10847 (1943) (quoting President Lincoln).

127. See GAO MARCH 2001 REPORT, *supra* note 120, at 2.

should not be ignored. It is certainly significant that the DOJ is attempting to comply with its Guidance. However, only time will tell if, indeed, the efforts to comply with the Guidance in conducting other national initiatives are manifested in subsequent GAO reports and whether compliance with the Guidance can be confirmed in all of the U.S. Attorneys' Offices.

In the meantime, the government should avoid using the FCA as "a vehicle for regulatory compliance."¹²⁸ The DOJ can effectuate internal improvement by surveying not only the overall implementation of the Guidance in each office, but also the relative understanding of the Guidance by each Assistant United States Attorney. As far as improving relations with potential violators, alleged wrongdoers should be allowed to explain how and why particular items or procedures were coded a certain way when complex billing regulations are involved. Or, when the DOJ relies on data as an indication of unlawful billing practices, alleged wrongdoers should be given the opportunity to explain why the data may not be accurate.¹²⁹ By encouraging a more cooperative relationship, the DOJ is less likely to face accusations of abusive and coercive enforcement tactics. However, additional government improvement of its enforcement tactics is only a starting point for remedying the problems with the FCA. In order to achieve an effective and equitable FCA, judicial and legislative efforts must align with executive efforts. The next section discusses the role of the judiciary in effectuating positive changes in the Act.

III. JUDICIAL INTERPRETATIONS OF THE PUBLIC DISCLOSURE JURISDICTIONAL BAR

The public disclosure jurisdictional bar is significant because it limits the relator's ability to bring a lawsuit. Eliminating parasitic lawsuits has been a goal of the Act since the 1943 Amendments, and the public disclosure bar is the vehicle used to prohibit such lawsuits. However, it continues to be one of the most widely litigated components of the Act. The 1986 Amend-

128. *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp.2d 1034, 1045 (N.D. Ill. 1998).

129. In a July 1998 report, the GAO indicated that hospitals raised legitimate concerns about how the DOJ used data from different sources as the sole basis for liability under the FCA. U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESS, *Medicare: Application of False Claims Act to Hospital Billing Practices*, at 18 (July 10, 1998). The report also suggested that providers be given the opportunity to cast doubt on the accuracy of such data before legal action is threatened or undertaken. *Id.*

ments broadened the scope of the jurisdictional bar in order to encourage private individuals to assist the government in attacking fraud.¹³⁰ However, due to the divergent interpretations of the appellate courts, the correct application of the public disclosure provision remains largely a mystery.

A. *What is a Public Disclosure?*

The FCA prohibits jurisdiction over a qui tam action if the action is based upon [a] public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.¹³¹

In order to assert the jurisdictional bar as a defense, the defendant must show that (1) there has been a public disclosure of allegations or transactions; (2) in a criminal, civil or administrative hearing, *or* in a congressional, administrative or GAO report, hearing, audit or investigation, *or* from the news media; (3) the relator's suit is *based on* this public disclosure; and (4) the relator is not the *original source* of the information.¹³²

1. Court Interpretations of a "Public" Disclosure of "Allegations or Transactions"

The requirement of a "public" disclosure has been interpreted differently by the courts. In defining "public disclosure" the courts have considered what the words mean, when the public disclosure occurs and to what extent the allegations or transactions must be disclosed. The word "public" is generally defined as "pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or

130. See 145 CONG. REC. E1546-01, E1546 (daily ed. July 14, 1999) (statement of Rep. Berman).

131. 31 U.S.C. § 3730(e)(4)(A)(1994). Additionally, under this provision no court shall have jurisdiction over actions brought by current or former members of the armed forces, *id.* § 3730(e)(1); actions against members of Congress or the judiciary, or a senior executive branch official if the government has prior knowledge of the allegations that serve as the basis for the allegation, *id.* § 3730(e)(2)(A); and actions based on another civil suit or administrative civil monetary proceeding where the government is already a party, *id.* § 3730(e)(3).

132. *Cf.* United States *ex rel.* Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1409 (9th Cir. 1995).

many; general; open to common use.”¹³³ “Disclosure” is defined as the “Act of disclosing. Revelation; the impartation of that which is secret or not fully understood.”¹³⁴ The combination of these definitions leaves room for interpretation. For example, are allegations and transactions “public” if they are “open to all” but only one person has actually seen them? Similarly, are allegations and transactions “revealed” if they are available for perusal by the public but no one has actually seen them?

The courts have employed different rationales in analyzing whether a public disclosure has occurred. For example, the First Circuit has determined that something becomes public when the information is available to “strangers to the fraud transaction” if they chose to look for it.¹³⁵ Similarly, the Second Circuit has held that information becomes public when it is placed in the “public domain.”¹³⁶

Some courts disagree about whether the information must *actually* be disclosed to constitute a public disclosure, or whether the mere *potential* to discover the information is sufficient. The Third Circuit held that absent a protective court order, discovery material disclosed to another party is potentially available to the public and therefore constitutes a public disclosure.¹³⁷ In contrast, the District of Columbia Circuit held that theoretical disclosure or potential accessibility to information is not sufficient to invoke the jurisdictional bar.¹³⁸ Instead, the disclosed

133. BLACK’S LAW DICTIONARY ABRIDGED 854 (6th ed. 1991).

134. *Id.* at 320.

135. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1990); *see also, e.g., United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 322-23 (2d Cir. 1992) (holding that public disclosure occurred because information was divulged to employees of defendant-corporation who were “strangers to the fraud”).

136. *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990); *accord United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652-55 (D.C. Cir. 1994); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993) (determining that discovery information containing the allegations by relator was publicly disclosed when the information was filed with the court because “[i]t was available to anyone who wished to consult the court file.”).

137. *Stinson*, 944 F.2d at 1158.

138. *Springfield*, 14 F.3d at 652; *accord United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999); *Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997); *MK-Ferguson*, 99 F.3d at 1544.

information must be “in the public eye.”¹³⁹ One court determined that disclosure by the state government to the federal government is a public disclosure because it is actually available to the public.¹⁴⁰ Also, most courts have held that information obtained via the Freedom of Information Act (“FOIA”) is publicly disclosed.¹⁴¹

The extent to which the information must be made public is another issue the courts have encountered. The Second Circuit decided that the information does not need to be widespread in order to be publicly disclosed.¹⁴² The Tenth Circuit determined that a public disclosure occurs if “the allegations [are disclosed] to *any member* of the public not previously informed thereof.”¹⁴³ In contrast, the Seventh Circuit had stated that the disclosure must either be to the public at large, or to a public official “whose duties extend to the claim in question in some significant way.”¹⁴⁴ Some courts disagree about whether dissemination of public allegations or transactions to employees of the alleged wrongdoer constitutes public disclosure.¹⁴⁵

Another question the courts have addressed is what kind of information qualifies as “allegations and transactions” for purposes of section 3730(e)(4)(A). The Ninth Circuit explained that information alone, without the allegation of fraudulent ac-

139. *Springfield*, 14 F.3d at 653; *accord* *United States ex rel. Branhan v. Mercy Health System*, No. 98-3127, 1999 WL 618018 (6th Cir. Aug. 5, 1999); *Bank of Farmington*, 166 F.3d at 860; *cf. MK-Ferguson*, 99 F.3d at 1545.

140. *MK-Ferguson*, 99 F.3d at 1545.

141. *United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 (3d Cir. 1999) (holding that United States Department of Housing and Urban Development’s response to an FOIA request is a public disclosure); *Schumer*, 63 F.3d at 1520 (explaining that “[i]n the FOIA context, information cannot be deemed disclosed until a member of the public requests the information and receives it from the government.”); *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999) (same). *But see* *United States v. Pentagen Techs. Int’l Ltd. v. CACI Int’l Inc.*, No. CIV.2925, 1995 WL 693236, at *9 (S.D.N.Y. Nov. 22, 1995) (unpublished) (holding that FOIA information is not publicly disclosed).

142. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992).

143. *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996) (emphasis added); *accord* *Ramseyer*, 90 F.3d at 1520-21.

144. *Bank of Farmington*, 166 F.3d at 861.

145. *Compare Doe*, 960 F.2d at 319-20 (holding that public disclosure occurred when federal government informed employees on site that it was investigating fraudulent overcharging under defense contracts), *with* *Schumer*, 63 F.3d at 1519 (holding that disclosure to employees does not constitute public disclosure), *and* *Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991) (holding that a public disclosure did not occur where a government employee disclosed to himself, as a member of the public, information upon which his suit was based).

tivity, is not enough to trigger the jurisdictional bar.¹⁴⁶ However, the court went on to explain that the distinction between “allegations” and “information” rarely matters because “where the public knows of information proving an allegation, it necessarily knows of the allegation itself.”¹⁴⁷ The Sixth Circuit has determined that the allegations or transactions should not consist of merely innocuous information, but rather must create “an inference of impropriety.”¹⁴⁸ More specifically, the Third Circuit requires disclosures to reveal either “the allegations or the elements of the underlying fraudulent transaction.”¹⁴⁹

In *Springfield Terminal Railway Co. v. Quinn*¹⁵⁰, the District of Columbia Circuit outlined a test for determining when information constitutes allegations or transactions sufficient enough to alert the government of potential fraudulent activities: where $X + Y = Z$, Z represents the allegation of the fraud and X and Y represent the essential elements.¹⁵¹ Thus, in order for a public disclosure of allegations or transactions to occur, the disclosure of X and Y must yield an inference of Z (i.e. that fraud has been committed).¹⁵² In *Springfield*, the court determined that the information disclosed in an earlier discovery proceeding did not rise to the level of allegations or transactions because there was no indication of fraud revealed in the disclosed information.¹⁵³ Similarly, in an unpublished opinion by the Sixth Circuit, the court determined that while HCFA records containing data of Medicare payments were definitely considered information, “they alone do not illustrate a fraud perpetrated by Defendants,

146. *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992); cf. *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) (holding that general allegations of widespread fraud in a GAO report that do not name defendant is insufficient to trigger jurisdictional bar).

147. *Wang*, 975 F.2d at 1418.

148. *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 331-32 (6th Cir. 1998).

149. *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3d Cir. 1997); accord *United States ex rel. Mistick v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 388 (3d Cir. 1998); *United States ex rel. Findley*, 105 F.3d 675, 686-87 (D.C. Cir. 1996); see also *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (requiring that the material elements of the alleged fraudulent activity must be disclosed); accord *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000).

150. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).

151. *Id.* at 654-56.

152. *Id.*

153. *Id.* at 655-56.

and do not constitute ‘allegations and transactions’.”¹⁵⁴ Thus, there had been no public disclosure of allegations or transactions.¹⁵⁵

Once the allegations and transactions are sufficient to alert the government of potential fraud, the courts generally reject the argument that special expertise or unique knowledge (i.e., special knowledge which allows an individual to put together information as fraud) defeats the jurisdictional bar. For example, in *Springfield*, the District of Columbia Circuit held that “expertise in the field of engineering would not in itself give a qui tam plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts.”¹⁵⁶ In *Findley v. FPC-Boron Employees’ Club*,¹⁵⁷ the same court stated “[a] relator’s ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed.”¹⁵⁸

2. Court Interpretations of the Enumerated Means By Which Allegations or Transactions Must be Publicly Disclosed

Not only must there be a “public disclosure” of “allegations or transactions,” but also the allegations or transactions must be publicly disclosed “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.”¹⁵⁹ The courts have taken different approaches in deter-

154. *United States ex rel. Branhan v. Mercy Health System of Southwest Ohio*, No. 98-3127, 1999 WL 618018, at *8 (6th Cir. Aug. 5, 1999) (unpublished disposition).

155. *Id.*

156. *Springfield*, 14 F.3d at 655. *But see* *United States v. Bank of Farmington*, 166 F.3d 853, 864 (7th Cir. 1999) (explaining, in dicta, that it may be possible for an individual to be an original source in an unusually complex situation where pieces of information are disclosed but the fraud itself is hidden until some astute plaintiff puts the pieces into perspective).

157. *Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675 (D.C. Cir. 1997).

158. *Id.* at 688; *see also* *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1245 (9th Cir. 2000) (rejecting relator’s argument that its unique knowledge removes jurisdictional bar).

159. 31 U.S.C. § 3730(e)(4)(A) (1994). Since there are no modifying words (e.g., “such as”) in this provision preceding the list to indicate that what follows are merely examples, the list of appropriate modes of disclosure appears to be exhaustive. However, at least one court has held otherwise. *Compare* *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997) (stating that list is exhaustive), *with* *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1004

mining what constitutes a “hearing,” an “administrative report,” and an “administrative investigation.”

The Third Circuit broadly interpreted criminal, civil or administrative hearings to include “allegations and information disclosed *in connection with* civil, criminal, or administrative litigation.”¹⁶⁰ Thus, the court determined that discovery proceedings are proceedings in a civil lawsuit.¹⁶¹ The Third Circuit also determined that the United States Department of Housing and Urban Development’s (“HUD”) response to an FOIA request constituted an “administrative . . . report” and that the response occurred “in a[n] . . . administrative . . . investigation” as required by 31 U.S.C. § 3730(e)(4)(A).¹⁶² The District of Columbia Circuit similarly held that “hearing” is synonymous with “proceeding.”¹⁶³ Relying on the District of Columbia Circuit, in a recent case the Ninth Circuit decided that extensive proceedings of the Emergency Medical Services Agency and its governing entity are administrative hearings under section 3730(e)(4)(A).¹⁶⁴ In a recent case, the Fourth Circuit broadly interpreted an “administrative hearing” to include the filing of an administrative complaint that was not under seal.¹⁶⁵ A number of courts have also rejected the argument that administra-

(10th Cir. 1996) (stating that the list does not identify the only means by which public disclosure can occur).

160. *Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1156 (3d Cir. 1990) (emphasis added).

161. *Id.* at 1161; *accord* *United States ex rel. Mistick v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 385 (3d Cir. 1998); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1350 (4th Cir. 1994); *see e.g.* *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993); *United States ex rel. Precision Co.*, 971 F.2d 548, 554 n.5 (10th Cir. 1992); *cf. Springfield*, 14 F.3d at 652 (finding that public disclosure occurs when documents are filed with an agency or court during administrative proceedings or civil litigation); *A-1 Ambulance Serv.*, 202 F.3d at 1243-44 (same).

162. *Mistick*, 186 F.3d at 383-84. The court stated that “HUD’s response to the FOIA request originated with the department of the federal government and constituted official federal government action, and therefore this response plainly satisfie[s] the definition of ‘administrative’.” *Id.* at 383; *see also* *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *Dunleavy*, 123 F.3d at 745; *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997).

163. *Springfield*, 14 F.3d at 652.

164. *A-1 Ambulance Serv.*, 202 F.3d at 1243-44.

165. *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000).

tive hearings must be federal in nature in order for the public disclosure bar to apply.¹⁶⁶

3. Court Interpretations of When A Qui Tam Action Is “Based Upon” A Public Disclosure

Whether or not allegations or transactions are “based upon” the public disclosure is also construed differently by the courts. In assessing this element, the courts have considered whether the allegations or transactions have to be *similar* to the public disclosure or whether they must be *directly derived* from the public disclosure.

The Court of Appeals for the Fourth Circuit in *Siller* concluded that “based upon” means actually “derived from.”¹⁶⁷ The court looked at the plain meaning of “based upon,” which was defined as to “use as a basis for,” and thus determined that “[a] relator’s action is ‘based upon’ a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based.”¹⁶⁸

In contrast to the Fourth Circuit, the majority of the courts have interpreted “based upon” to mean “substantially similar to” or “supported by.” The Second Circuit determined that a relator’s allegations were “based upon” a public disclosure because they were, in essence, “[t]he same as those that had been publicly disclosed prior to the filing of the qui tam suit . . . regardless of where the relator obtained his information.”¹⁶⁹ The

166. *A-1 Ambulance Serv.*, 202 F.3d at 1244. Although the court in *Dunleavy* determined that “administrative” when used in conjunction with “report” must be a federal report, *Dunleavy*, 123 F.3d at 744, this decision is not inconsistent with those courts that have determined that “administrative” when used in conjunction with “hearings” does not require federal origination. Since the word “administrative” is used twice in § 3730(e)(4)(A), it is logical to conclude that Congress did not intend to limit “criminal, civil or administrative hearings” only to federal hearings. On the other hand, since “congressional, administrative, or [GAO] report, hearing, audit or investigation” are grouped together in a second separate categorization, Congress likely intended “report, hearing, audit or investigation” in this context to originate with the federal government.

167. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *accord United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999) (stating that “based upon” is not synonymous with “similar to” but can be substituted for “derived from”).

168. *Siller*, 21 F.3d at 1348 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 180 (1986)).

169. *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992); *accord McKenzie v. BellSouth Telecomms., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) (“In construing ‘based upon’ to mean ‘supported by’ we effectively preclude individuals

Tenth Circuit similarly determined that “based upon” is understood to mean “supported by.”¹⁷⁰ The test for determining “supported by” is whether “substantial identity” exists between the publicly disclosed allegations or transactions and the relator’s complaint.¹⁷¹

Some courts have taken this interpretation a step farther by delineating the extent to which the relator’s allegations or transactions must be “based upon” the public disclosure. In line with this interpretation, the Tenth Circuit determined that if the relator’s action is “partly based upon publicly disclosed allegations or transactions,” then that action is “based upon” such allegations or transactions.¹⁷² In rejecting the relator’s argument that the action must be “solely” based upon the publicly disclosed information, the court explained: “To insert the term ‘solely’ into § 3730(e)(4)(A) would impermissibly expand federal jurisdiction by allowing qui tam plaintiffs to avoid the more exacting ‘original source’ requirement simply by asserting an additional count.”¹⁷³

Based on the above, in order to successfully assert the public disclosure bar, the defendant must show that the information in the relator’s complaint was based upon a public disclosure, of allegations or transactions, in an appropriate medium (e.g., a civil, criminal or administrative hearing, etc.). The outcome for the defendant will be contingent upon how broadly or narrowly the court interprets this language, and how carefully the court examines each necessary requirement. For example, the relator would benefit from a narrow interpretation of “public disclosure” to require “actual” versus “theoretical” disclosure. In

who base any part of their allegation on publicly disclosed information from bringing a qui tam suit.”); *Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562, 566-67 (11th Cir. 1994); *United States ex rel. Kriendler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1158 (2d Cir. 1993); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992).

170. *United States ex rel. Precision Co. v. Koch Indust., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992); *accord United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford, Jr. Univ.*, 161 F.3d 533, 539-40 (9th Cir. 1998); *United States ex rel. Findley v. FPC-Boron Employee’s Club*, 105 F.3d 675, 682-84 (D.C. Cir. 1997); *McKenzie*, 123 F.3d at 940; *United States ex rel. Fine v. MK-Ferguson*, 99 F.3d 1538, 1545 (10th Cir. 1996); *Cooper*, 19 F.3d at 567; *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652-55 (D.C. Cir. 1994); *Kreindler*, 985 F.2d at 1158; *Wang*, 975 F.2d at 1419; *Doe*, 960 F.2d at 324.

171. *Precision Co.*, 971 F.2d at 552; *accord MK-Ferguson*, 99 F.3d at 1545; *cf. Findley*, 105 F.3d at 688 (holding that public disclosure applies because relator’s complaint “merely echoes publicly disclosed . . . transactions.”).

172. *Precision Co.*, 971 F.2d at 552; *accord Kreindler*, 985 F.2d at 1158.

173. *Precision Co.*, 971 F.2d at 552; *accord MK-Ferguson*, 99 F.3d at 1546-47.

contrast, the defendant would benefit from a finding that “public” is a disclosure to *any person* rather than to the *public at large*.

Also, a court’s failure to consider each necessary requirement for a “public disclosure” may result in the defendant’s successful assertion of the jurisdictional bar. For example, a defendant may be able to successfully assert the jurisdictional bar if the court finds there has been a “public disclosure” but fails to analyze whether the information in the public disclosure rises to the level of “allegations or transactions.” Similarly, the defendant may prevail if a court finds there has been a “public disclosure” of “allegations or transactions,” but fails to analyze whether the information contained in the relator’s complaint was actually “based upon” such allegations or transactions, or whether the allegations or transactions were publicly disclosed in an appropriate medium.

If the defendant is successful in showing that an appropriate “public disclosure” has occurred, the relator can still circumvent the jurisdictional bar if he or she is the “original source” of the information publicly disclosed. The next section discusses the divergent court interpretations of the “original source” provision.

B. Who is an Original Source?

The original source provision is relevant only if the defendant has proven that the allegations or transactions were publicly disclosed by an appropriate statutory means, and the relator’s action is based upon the information publicly disclosed.¹⁷⁴ If so, then the defendant can invoke the jurisdictional bar *unless* the relator is the original source of the information that was publicly disclosed.¹⁷⁵ As mentioned above, the Act defines “original source” as an “individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . which is based on the information.”¹⁷⁶ Thus, in order to be an original source, the individual must show that s/he (1) has direct knowledge; (2) has

174. See, e.g., *Mackenzie*, 123 F.3d at 938-39; *Wang*, 975 F.3d at 1417 (stating that “[o]ne only need be an ‘original source’ of one’s information if one’s allegation has been publicly disclosed . . .”).

175. 31 U.S.C. § 3730(e)(4)(A) (1994).

176. *Id.* § 3730(e)(4)(B).

independent knowledge; and (3) voluntarily provided the information to the government before filing an action. In addition to these requirements, some courts require that the relator be the person who provided the information to the entity that made the public disclosure,¹⁷⁷ whereas others have explicitly rejected this additional requirement.¹⁷⁸ Also, some courts have determined that the relator must have disclosed the information to the government before the public disclosure occurred.¹⁷⁹

1. Court Interpretations of When a Relator Has “Direct and Independent Knowledge”

To be an original source, the relator must have both “direct” and “independent” knowledge of the information on which the allegations of fraud are based. While these two elements are distinct, many courts interpret them simultaneously. Taken together, “direct and independent knowledge of information on which the allegations are based refers to direct and independent knowledge of any essential element of the underlying fraud transaction.”¹⁸⁰ “Direct” has been interpreted to mean (1) first-hand knowledge,¹⁸¹ in the sense that the relator must actually

177. *Kreindler*, 985 F.2d at 1159 (stating that since it was not demonstrated that the original complaint relied on information disclosed by appellants before they filed the complaint, the appellants could not be the “original source” of publicly disclosed information); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990); *Wang*, 975 F.2d at 1418 (stating that a qui tam plaintiff “must have directly or indirectly been the source to the entity that publicly disclosed the allegations on which a suit is based).

178. *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994) (holding that the relator does not need to be the source that provided the allegations on which the action is based to the disclosing entity in order to be an original source); *United States v. Bank of Farmington*, 166 F.3d 853, 865 (7th Cir. 1998) (same); *United States ex rel. Findley*, 105 F.3d 675, 690 (D.C. Cir. 1996) (same); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996) (same).

179. *Findley*, 105 F.3d at 690 (holding that the relator must have filed suit before the disclosure occurred); *Bank of Farmington*, 166 F.3d at 866 (same); *McKenzie*, 123 F.3d at 942 (holding that the relator must have filed suit before the disclosure occurred and must have been the source providing the information to the government).

180. *United States ex rel. Springfield v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (stating that relator must have “‘direct independent knowledge’ of any essential element of the underlying fraud transaction”).

181. *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1017 (7th Cir. 1999) (stating that the relator had “direct” knowledge because he observed defendant’s actions firsthand); cf. *Eitel v. United States*, No. 99-35099, 2000 WL 1529237, at *1 (9th Cir. Oct. 16, 2000) (explaining that relator’s knowledge was not direct and independent because he discovered the information alleging fraud second-hand rather than discovering the information firsthand) (unpublished); *Fine*, 99 F.3d at 1007 (stating that secondhand knowledge is not “direct and independent” since it is

see the fraudulent activity with his or her own eyes,¹⁸² (2) “marked by the absence of an intervening agency,”¹⁸³ and (3) “gained by the relator’s own efforts and not required from labors of others.”¹⁸⁴ As an additional requirement, the District Court of Columbia requires the relator to have direct knowledge of the publicly disclosed allegations or transactions, not just direct knowledge of the information in his or her complaint.¹⁸⁵ Under these definitions, individuals who have “direct” knowledge are typically employees of defendant or other close observers who witnessed the fraudulent activity.¹⁸⁶ However, despite having direct knowledge, some courts have found that individuals who do not have firsthand knowledge of the fraud cannot qualify as original sources.¹⁸⁷

based on the work of others); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1990) (finding that the relator did not have direct knowledge because the information came through two intermediaries).

182. *Wang*, 975 F.2d at 1417; *see also United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1548 (10th Cir. 1996) (stating that the relator did not have direct knowledge because he was “not an observer of the purported fraud”).

183. *Stinson*, 944 F.2d at 1160. *Accord United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000) (determining that attorney-relators did not use their own efforts to uncover allegations of fraud); *Springfield*, 14 F.3d at 656.

184. *Fine*, 99 F.3d at 1006-07 (explaining that the relator did not have direct knowledge because knowledge came from work of auditors not through his own labor); *see also MK-Ferguson*, 99 F.3d at 1548 (stating that the relator did not have direct knowledge because “he did not himself discover the allegedly fraudulent practices.”).

185. *United States ex rel. Findley*, 105 F.3d 675, 690 (D.C. Cir. 1996).

186. *See, e.g., Springfield*, 14 F.3d at 359 (finding relators had direct knowledge of the fraud because they learned of the fraud through their “own efforts and experience, which . . . included personal knowledge of the arbitration proceedings and interviews with individuals and businesses identified in the telephone records.”); *Wang*, 975 F.2d at 1417-18 (finding relator-employee to have direct knowledge of the fraud because “he saw [it] with his own eyes” and his knowledge was “unmediated by anything but [his] own labor.”); *Cooper v. Blue Cross & Blue Shield of Florida*, 19 F.3d 562, 568 (11th Cir. 1994) (finding the relator had direct knowledge because he acquired knowledge of the fraud “through three years of his own claims processing, research, and correspondence with members of Congress and HCFA”).

187. *See, e.g., Findley*, 105 F.3d at 676 (holding that despite the relator’s direct knowledge of the allegations in the complaint derived from a conference he attended, relator did not have direct knowledge because he did not have firsthand knowledge of the information that had been placed in the public domain over the previous forty years); *United States ex rel. Kriendler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993) (holding that despite the relator’s additional research and investigation, he did not have direct knowledge because he was not “the source of the core information”); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 554 (10th Cir. 1992) (stating that the relator does not have direct knowledge

“Independent” has been interpreted to mean that the information known by the relator does not depend or rely upon the public disclosure.¹⁸⁸ In *Houck on behalf of the United States v. Folding Administration Committee*,¹⁸⁹ the Seventh Circuit explained that a relator does not have “independent” knowledge if he or she would not have learned of the information absent public disclosure.¹⁹⁰ Similarly, in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, the Tenth Circuit determined that investigations that are “merely continuations of, or derived from previous investigations” are not “independent” investigations.¹⁹¹ In quantifying the amount of information a relator must possess, the Third Circuit explained that while “it is not necessary for a relator to have all the relevant information in order to qualify as ‘independent,’ the relator must possess substantive information about the particular fraud which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.”¹⁹²

Another consideration that has arisen in the context of analyzing independent knowledge is whether the relator’s knowledge is independent of the public disclosure if she has special expertise that permitted her to understand the significance of the information disclosed. The Second Circuit rejected the argument that a plaintiff’s background knowledge enabling him to understand the significance of the information contained in the court files was enough to make his knowledge “independent” of the publicly disclosed information.¹⁹³ In fact, the court ex-

because the relator’s knowledge was information derived from other individual’s investigations).

188. *Houck on behalf of the United States v. Folding Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989) (stating that there is no evidence that plaintiff would have learned about the claims without public disclosure). *Accord Grayson*, 221 F.3d at 583; *Springfield*, 14 F.3d at 656; *Stinson*, 944 F.2d at 1160.

189. *Houck on behalf of the United States v. Folding Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989)

190. *Id.*; *accord Stinson*, 944 F.2d at 1160; *see also United States ex rel. Mistick v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 389 (3d Cir. 1999) (holding that the relator did not have “direct and independent” knowledge because the critical elements of its claim were learned from a FOIA request.); *Wang*, 975 F.2d at 1419 (stating that “A ‘whistleblower’ sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a ‘conspiracy of silence’ and not their mimics.”) (citing S. REP. NO. 99-345, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5271).

191. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 554 (10th Cir. 1992).

192. *Stinson*, 944 F.2d at 1160.

193. *United States ex rel. Kriendler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1159 (2d Cir. 1993).

plained, if the plaintiff's argument prevailed then "a cryptographer who translated a ciphered document in a public court record would be an 'original source,' [which is] an unlikely interpretation of the phrase."¹⁹⁴ Similarly, the Fourth Circuit recently determined that "specialized" experience as government contract lawyers did not make attorney-relators an "original source."¹⁹⁵

2. Court Interpretations of Whether the Information Was "Voluntarily Provided"

An "original source" must not only have "direct and independent" knowledge, but also must have "voluntarily" provided the information on which the publicly disclosed allegations are based to the government before filing suit.¹⁹⁶ The plain meaning of the word "voluntary" is "unconstrained by interference; unimpelled by another's influence; spontaneous; acting of oneself . . . [p]roceeding from the free and unrestrained will of the person . . . resulting from free choice, without compulsion or solicitation."¹⁹⁷ In explaining why the requirement for an individual to "voluntarily" disclose the information of fraudulent actions was added to the FCA, Senator Grassley stated that the requirement "[i]s meant to preclude the ability of an individual to sue under the qui tam section of the False Claims Act when . . . the individual was a source of the allegations only because the individual was subpoenaed [sic] to come forward."¹⁹⁸

Generally, the courts find that the relator cannot be incentivized, required or compelled to disclose the fraudulent information, but rather must willingly choose to come forward with the information.¹⁹⁹ Additionally, some courts require the relator to voluntarily provide the information to the government

194. *Id.* (quoting *Stinson*, 944 F.2d at 1160).

195. *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 583 (4th Cir. 2000).

196. 31 U.S.C. § 3730(e)(4)(B) (1994).

197. BLACK'S LAW DICTIONARY ABRIDGED 1088 (6th ed. 1991).

198. 132 CONG. REC. S11238-04 (statement of Sen. Grassley).

199. *See, e.g., United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743-44 (9th Cir. 1995) (en banc) (holding that an employee who is required to uncover fraud as part of job responsibility does not voluntarily disclose information); *United States v. Reagan*, No. 99-15847, 2000 WL 152936, at *1 (9th Cir. Oct. 16, 2000) (same) (unpublished); *United States ex rel. Leblanc v. Raytheon Co., Inc.*, 913 F.3d 17, 20 (1st Cir. 1990) (same).

before the public disclosure, not just before the complaint is filed.²⁰⁰

Thus, whether a relator is an “original source” will depend upon the court interpretation. For example, in a jurisdiction that requires the relator to be the informant to the disclosing entity, a relator would not be an “original source” even if he or she had “direct” and “independent” knowledge of the information publicly disclosure, but did not provide the information to the disclosing entity. Also, a relator would not be an “original source” in a jurisdiction requiring the relator to provide the publicly disclosed information to the government prior to disclosure, if he or she did not do so.

C. *The Judiciary’s Role in Improving the FCA*

The conflicting interpretations of the jurisdictional bar indicate the latent defects in the textual drafting of the qui tam provisions. The ultimate goal of the provisions should be to strike a balance between encouraging private individuals with inside information to report fraudulent activity, and preventing parasitic lawsuits by individuals who seek to take advantage of an opportunistic situation and provide no service to the government.²⁰¹ Although the 1986 Amendments sought to achieve this middle ground, the interpretation of the various words in the public disclosure bar can be skewed to favor either side. This section proposes how the provisions should be interpreted to regain the equilibrium between these competing extremes.

1. How to Interpret “Public Disclosure”

Qui tam lawsuits are becoming increasingly popular. More than 3,000 qui tam suits have been filed since 1986.²⁰² Of these cases, more than 53% have been brought in the last three years.²⁰³ After all, with recent fraud settlements in the hundreds

200. See, e.g., *United States ex rel. Findley v. FPC-Boron Employees’ Club*, 105 F.3d 675, 690-91 (D.C. Cir. 1996); accord *United States v. Bank of Farmington*, 166 F.3d 853, 866 (7th Cir. 1999).

201. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (“Seeking the golden mean between adequate incentives for whistleblowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own, Congress has frequently altered its course in drafting and amending the qui tam provisions since initial passage of the FCA over a century ago.”).

202. W. Jay DelVecchio, *Qui Tam Action: Some Practical Considerations*, SE34 A.L.I.-A.B.A. 479 (1999).

203. *Id.*

of million dollars range, who wouldn't want to receive a percentage of the recovery?²⁰⁴ Qui tam relators are unquestionably lured by the prospect of financial utopia.²⁰⁵ Hence, their interests are not aligned with those of the government. In the intuitive words of the Supreme Court:

As a class of plaintiffs qui tam relators are different in kind than the Government. They are motivated primarily by the prospects of monetary reward rather than public good Qui tam relators are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc.²⁰⁶

For precisely these reasons, the "public disclosure bar" needs to be carefully interpreted so that public plunderers do not take advantage an opportunistic situation.

a. Meaning of "Public" and "Allegations or Transactions"

First, what does "public" mean? On its face the word connotes "more than one."²⁰⁷ Also, the common sense understanding of the word "public" suggests an element of "openness" or "discoverability."²⁰⁸ "Disclosure" on its face suggests something that is "revealed."²⁰⁹ Thus, information regarding fraud passed from one person to another (e.g., from one employee to another) is not a public disclosure, *unless* that information is available to the general public (i.e., available to "strangers to the

204. See, e.g., Press Release, Department of Justice, *Attorney General Announces Largest Department of Justice Fraud Settlement In History* (December 2000), available at <http://www.usdoj.gov/opa/pr/2000/December/697ag.htm> (announcing that The Healthcare Company—formerly known as Columbia/HCA—agreed to pay a settlement of \$745 million, plus interest, for alleged false billing practices); *Fraud and Abuse: Fresenius Sued By Private Insurers Following Guilty Plea in Medicare Fraud Case*, Health Care Daily Rep. (BNA), at d12 (Feb. 23, 2000) (stating that Fresenius Medical Care, a provider of dialysis services in the United States, agreed to pay \$385 million in civil fines to settle FCA charges).

205. One of the changes in the 1943 Amendments decreased the amount of the relator's reward from 50% to 25%. In a statement by Representative Walter, he explained:

Those people who have been interested in informer suits who appeared before the subcommittee and the conferees, have objected to the 25% provision. When we pinned them down to the reason for their objection it was that they felt they ought to get more money for rendering a very doubtful service.

89 CONG. REC. 10846 (1943).

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

207. BLACK'S LAW DICTIONARY ABRIDGED 854 (6th ed. 1991).

208. *Id.*

209. *Id.* at 320.

fraud”²¹⁰). However, the context of “public disclosure” becomes complicated when considering the distinction between “actual” and “theoretical” disclosure. For example, if something is available via FOIA, but has not been requested by anyone, it is theoretically available, but until the request is produced, it is not publicly disclosed.²¹¹ “Public accessibility” should not be confused with “public disclosure.” As the Third Circuit noted:

Information may be publicly disclosed—for example, it may appear buried in an exhibit that is filed in court without fanfare in an obscure case—and yet not readily accessible to the general public. And information may be easily accessible to the public—it may be available under FOIA to anyone who simply files a request—but unless there is a request and the information is actually produced, it is not publicly disclosed.²¹²

Information available through FOIA is publicly disclosed when the requesting party receives the information.²¹³ The FOIA’s primary purpose is to ensure that government activities are “opened to the sharp eye of public scrutiny.”²¹⁴ Based on the Supreme Court opinion in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*,²¹⁵ there is a good chance the Court would find that FOIA requests trigger public disclosure. In that case, the Court held that the disclosure of information pursuant to FOIA constitutes a “public disclosure” within the meaning of the Consumer Product Safety Act.²¹⁶ Specifically, the Court stated: “As a matter of common usage the term ‘public’ is properly understood as including persons who are FOIA requesters. A disclosure pursuant to the FOIA would thus seem to be most accurately characterized as a ‘public disclosure’ within the plain meaning of [the Consumer Product Safety Act].”²¹⁷ Following this reasoning, information obtained through a HCFA report listing Medicare reimbursements of a

210. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1990).

211. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995) (explaining that “[i]n the FOIA context, information cannot be deemed disclosed until a member of the public requests the information and receives it from the government.”).

212. *United States ex rel. Mistick v. Housing Auth. of Pittsburgh*, 186 F.3d 376, 383 n.3 (3d Cir. 1999).

213. *See supra* note 141 for case law discussion of a FOIA “public disclosure.”

214. *United States Dep’t of Justice v. Reporters Comm.*, 489 U.S. 749, 774 (1989).

215. *Consumer Product Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

216. *Id.* at 102.

217. *Id.* at 108-109.

health care entity is publicly disclosed because it is available to anyone who requests it.²¹⁸ Also, since HCFA is an agency, the report listing Medicare reimbursements is derived from an administrative investigation.²¹⁹

Perhaps more significant is whether the “publicly disclosed” information rises to the level of “allegations or transactions.” The publicly disclosed “allegations or transactions” must contain some indication of an inference of fraudulent activity which can be discerned by a reasonable person. Information alone should not be enough to trigger the jurisdictional bar,²²⁰ but the courts should be extremely lenient in determining an inference of fraud. Any discernable indication of fraudulent activity from any publicly disclosed information should give rise to “allegations or transactions.” For example, if information obtained from HCFA records is the sole basis for a relator’s complaint, in some instances an argument can be made that the information contained in the record rises to the level of allegations or transactions. The cases can be distinguished by comparing an individual who is made aware of a specific existence of fraud and simply finds information confirming such fraud with an individual who has no prior knowledge of a particular fraud but uncovers fraud using his own diligence or ingenuity.

To illustrate, suppose the government announces a national initiative focusing on fraudulent billing practices in the area of pneumonia coding. Subsequent to this announcement, if an individual uses information from HCFA records to bring a lawsuit against a hospital for unusually high incidents of complicated pneumonia, the information derived from the HCFA form contains “allegations” of fraud. However, if there is no inference of fraud alleged in a particular area or by a particular industry, and an individual uses his own skills or knowledge to deduce fraudulent behavior, then the information derived from the HCFA records would not rise to the level of allegations or transactions.²²¹ If individuals were allowed to wait for the government

218. United States *ex rel.* Branhan v. Mercy Health Sys. of S.W., No. 98-3127, 1999 WL 618018, at *2 (6th Cir. 1999).

219. *Id.* (citing United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 323-24 (2d Cir. 1992)).

220. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992).

221. This situation should not be confused with cases in which a relator argues that his expertise in a particular area or his special ability to make sense of information bars jurisdiction where all material elements of fraud are already publicly disclosed. See *supra* notes 156-58 and accompanying text.

to announce its fraud focus and then request information on providers related to that particular area, the Act would encourage a plethora of opportunistic individuals to file qui tam lawsuits. This is exactly what the jurisdictional bar intends to prevent.

b. Enumerated List of Public Disclosure Mediums

In the absence of any words of limitation (e.g., “such as”), the statute suggests that “*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 . . .*” is an exhaustive listing of appropriate modes of disclosure.²²² However, “hearing” and “investigation” should be loosely interpreted. In accordance with the opinion of the Third Circuit in *Stinson*, “hearings” should include any allegations and/or transactions “disclosed *in connection with* a civil, criminal or administrative [hearing].”²²³ Therefore, any information disclosed in discovery proceedings, pre-trial motions, etc. would be considered to be “in connection with” a hearing.

Also, there is nothing in the statute indicating that a “civil, criminal, or administrative hearing” applies only to *federal* civil, criminal and administrative hearings. In fact, because the statute lists “administrative hearings” twice in the same sentence, with the second listing being in a *congressional* context, logic infers that the first listing is *not* in the *congressional* context. It is unlikely that the legislators would repeat “administrative hearing” twice in the same provision if they had intended each to have the same meaning. Thus, the courts should avoid inferring this restriction.

c. Meaning of “Based Upon”

As discussed above, the courts disagree as to whether “based upon” means “derived from” or “supported by.”²²⁴ The Fourth Circuit in *United States ex rel. Siller v. Becton, Dickinson & Co.*²²⁵ examined the plain meaning of the words “based upon”

222. 31 U.S.C. § 3730(e)(4)(A) (1994); *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997).

223. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1156 (3d Cir. 1990).

224. See *supra* Part III.A.3 for a discussion of whether “based upon” means “derived from” or “supported by.”

225. *United States ex rel. Siller v. Becton, Dickinson & Co.*, 21 F.3d. 1339 (4th Cir. 1994).

(i.e., to “use as a basis for”) to infer that the words mean “derived from.”²²⁶ Although the Fourth Circuit’s rationale is the minority approach, the logic behind the court’s reasoning is consistent with the purpose of the public disclosure provision. The purpose of the public disclosure bar is to keep individuals out of the lawsuit who heard information of fraudulent activities elsewhere, unless that individual was the original source of the information. Therefore, a relator should be prohibited from entering the lawsuit if the information which serves as the basis for his complaint was taken or “derived from” the actual public disclosure. To say that the relator’s complaint need only be “supported by” the public disclosure ignores the necessary tangential connection between the information in the relator’s complaint and the information in the public disclosure.

However, more significant is the distinction between whether the relator’s complaint must be “solely” based upon or “partly” based upon the public disclosure.²²⁷ The argument that the information must be “solely” based upon the publicly disclosed allegations or transactions again reads into the text a requirement that does not exist. Congress could have chosen to specify that the relator’s complaint must be “solely” based upon the public disclosure if it intended that result. Since Congress did not choose to do so, information contained in the complaint that is based “partly” upon the public disclosure should be sufficient to invoke the jurisdictional bar (assuming the relator does not have original source status). To allow otherwise would permit individuals to circumvent the jurisdictional bar by adding a few components to the complaint which slightly vary from the public disclosure and are therefore not “solely” based upon the disclosure.²²⁸ This narrow interpretation would encourage parasitic lawsuits.

2. How to Interpret “Original Source”

The existence of the “original source” provision supports the notion that the FCA intends to encourage only those individuals who have actually seen the fraudulent activity to come forward

226. *Id.* at 1347-50.

227. *See supra* Part III.A.3.

228. In *Precision Co.*, the Tenth Circuit stated: “[W]ith a little artful pleading, all qui tam plaintiffs could pass the jurisdictional threshold by fashioning complaints only ‘partly based’ upon publicly disclosed allegations or transactions.” *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992).

with their information. In the words of Senator Grassley, one of the sponsors of the 1986 FCA amendments:

The most effective way to catch fraud or other wrongdoing is to have 'insider' information. Insiders help make investigations more targeted, more effective and more efficient. Congress has long recognized the value of insiders. That is why Congress established laws to encourage and protect whistle blowers.²²⁹

Similarly, a 1986 Senate report indicated, "[d]etecting fraud is usually very difficult without the cooperation of the individuals who are either close observers or otherwise involved in the fraudulent activity."²³⁰ Furthermore, the plain meaning of a "whistleblower" means "an *employee* who refuses to engage in and/or reports illegal or wrongful activities of *his employer or fellow employees*."²³¹ The "original source" provision speaks specifically to these types of individuals as indicated by the "direct" and "independent" requirement. However, it includes not only employees, but for example, any individual who may stumble upon the fraudulent activity and actually observe the unlawful practices. Thus, if there is a public disclosure, the "true insider" is protected because he or she has "direct" knowledge of the publicly disclosed information. As indicated by some of the courts of appeals, the logical interpretation of the word "direct" refers to an individual who has firsthand knowledge.

Additionally, not only must an individual have "direct" knowledge, but this knowledge must also be "independent." This means the relator must obtain the information via his or her own efforts rather than through the efforts of others. For example, if employee A tells employee B about the fraudulent practices of his employer, and employee B sees the fraud and reports it, employee B will likely not have "independent" knowledge because it was not procured through his own efforts.

An "original source" must also "voluntarily" provide the information to the government before filing suit. The word voluntary is clear on its face—it means "resulting from free choice,

229. 144 CONG. REC. S7675-02 at 7676 (daily ed. July 8, 1998).

230. S. REP. NO. 99-345, at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269; *see also* Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) (stating that "qui tam suits are meant to encourage private insiders privy to a fraud on the government to blow the whistle on the crime."); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamonte, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1990) (referring to the paradigm qui tam plaintiff as the "whistleblowing insider").

231. BLACK'S LAW DICTIONARY ABRIDGED 1596 (6th ed. 1991) (emphasis added).

without compulsion or solicitation.”²³² Therefore, the act of disclosing the information to the government before the public disclosure must be a result of the relator’s free will. The FCA rewards those brave enough to speak in the face of a “conspiracy of silence.”²³³

Lastly, some courts have read into the statute an additional requirement that the relator play a role in disclosing the public information. In other words, the relator must have been the individual who provided the information to the disclosing entity. There is nothing in the language of the statute or the legislative history that indicates the intent or need for such a requirement. In fact, it is inconsistent with the purpose of the statute. For example, if an individual brought information to the government concerning the fraudulent billing practice of his employer, and the press was informed of this allegation and printed it in the paper, that individual is still the “original source” of the information. To prevent such an individual from taking part in the lawsuit because he was not the individual who provided the press with the information would completely abrogate the intended purpose of the “original source” provision. There is no need for this requirement once the relator can show she had “direct and independent” knowledge of information and voluntarily provided such information to the government before the disclosure.

By interpreting the “public disclosure bar” in a manner consistent with the intended purpose of the Act, the judiciary would help clarify the inconsistent applications of this provision. The next section examines role of the legislature in remedying some of the current problems with the Act.

IV. LEGISLATIVE PROPOSALS

Since the 1986 Amendments, there have been a number of proposals seeking, once again, to amend the FCA. This section focuses on some of the significant bills introduced in Congress in order to analyze current criticisms of the Act, and to evaluate the potential validity and viability of such proposals as a means of correcting some of the problems that still exist.

232. *Id.* at 1575.

233. S. REP. NO. 99-345, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5271.

A. False Claims Amendments Act of 1992

The False Claims Amendments Act of 1992²³⁴ ("FCAA of 1992") proposed a number of changes. In pertinent part, the FCAA of 1992 would again have revised the public disclosure jurisdictional bar.²³⁵ Specifically, the FCAA of 1992 would have revised the entire public disclosure bar to insure that a court would not have jurisdiction over an action in which all the material facts of a cause of action were obtained from a media report or a disclosure to the *general* public of a document (1) created by the Federal Government; (2) filed in a lawsuit to which the Federal Government is a party; or (3) relating to an active investigation by the Federal Government—unless the individual bringing the action was the original source of such material information.²³⁶ The proposed amendment would have redefined "original source" to mean an individual with independent knowledge of the material facts and allegations, who has volun-

234. H.R. 4563, 102d Cong. (1992). This bill was passed in the House by voice vote on August 11, 1992, and was received in the Senate and read twice and referred to the Committee on Judiciary on August 12, 1992. However, the bill died in the Senate Committee on the Judiciary. H.R. 4563, 102d Cong. (1992), *available at* <http://thomas.loc.gov/cgi/bin/bdquery/D?..-bdQN9J:@@L-/bss/d102query.htm>.

235. In one report the House Committee on the Judiciary explained that "clarifications . . . are necessary in light of a number of incorrect interpretations of the parasitic suit ban in the current Act." H.R. REP. NO. 837, 102d Cong., 2d Sess. 12 (1992). In addition to the proposal to revise the public disclosure jurisdictional bar, the FCAA of 1992 also would have placed limitations on government employees filing qui tam actions, *see* H.R. 4563, 102d Cong., § 1, and it would have amended the whistleblower protection, *id.* § 5. Regarding federal employees filing qui tam actions, it would have allowed the government to dismiss a qui tam relator from the action if the relator was a government employee and (1) before bringing the action the employee failed to disclose all material evidence and information that relates to the cause of action in issue to the Inspector General (or, in cases where there is no Inspector General, disclosed the information to the Attorney General); (2) before bringing the action the employee failed to notify his or her supervisor and the Attorney General (where the employing agency has an Inspector General); and (3) the Attorney General had not filed an action based on such information within twelve months of the disclosure of such information (unless the Attorney General had filed an extension of the twelve-month period, and was granted such extension). *Id.* § 2; *cf.* S. 2785 IS, 102nd Cong. § 3 (1992). The False Claims Technical Amendment Act of 1992 would have prohibited court jurisdiction over any action that is based, in whole or in part, upon information obtained in the course or scope of government employment. However, this bill died in the Subcommittee on Courts and Administrative Practice. The FCAA of 1992 would have protected whistleblowers where an employee could show by a preponderance of the evidence that the employer's retaliatory action against the employee was based on the lawful filing of a cause of action against the employer, unless, the employer could show by clear and convincing evidence that the action would have been taken against the employee regardless of the lawful cause of action filed. *Id.* § 5.

236. *Id.* § 3.

tarily provided them to the Government.²³⁷ The person bringing the action would also have been an “original source” of any additional material facts or allegations that were developed as a result of the information he or she provided to the Government.²³⁸ The FCAA of 1992 would have eliminated the requirement that the *qui tam* relator must have “direct” knowledge of the falsity.

The FCAA of 1992 also would have eliminated all the enumerated outlets of public disclosure, with the exception of news media reports and documents that are created by the government, filed in a lawsuit where the government is a party, or related to a current government investigation, unless the individual was an “original source” of the information.²³⁹ Such a change would allow, for example, an individual who obtained public information via a state civil, criminal, or administrative hearing, and who had no prior knowledge of fraud, to bring a lawsuit as a *qui tam* relator in federal court (so long as the federal government had no knowledge of the fraud). This example is only one of the many possible situations that could occur if the public disclosure provision was construed in this way. Furthermore, the elimination of the “direct” requirement from the “original source” provision would create the potential for “parasitic” individuals, who have no firsthand knowledge of the alleged fraudulent activity, to bring a lawsuit as a *qui tam* relator.

The addition of the modifier “general” also would have broadened the interpretation of “public.” Since “general” is defined as “pertaining to . . . the . . . class, as distinguished from that which characterizes the . . . individual,”²⁴⁰ the addition of this word would have required a wider dissemination of the disclosed allegations or transactions before they were considered “public.” Not only would this encourage “parasitic” suits, but it would also open the floodgates to litigation over what constitutes disclosure to the general public (e.g., how many people comprise “general”?).

237. *Id.*

238. *Id.*

239. *Id.*

240. BLACK'S LAW DICTIONARY ABRIDGED 682 (6th ed. 1991).

B. *The False Claims Amendments Act of 1993*

The False Claims Amendments Act of 1993²⁴¹ ("FCAA of 1993") was very similar to the FCAA of 1992 in many respects.²⁴² The Senate version of the FCAA of 1993 would have eliminated, rather than replaced, the public disclosure jurisdictional bar from the Act, and instead would have allowed the government to dismiss a relator from an action in certain situations.²⁴³ Specifically, the government could dismiss the relator if (1) the material facts which served as the basis for the cause of action were derived from an open fraud investigation that the executive branch of the government was actively pursuing, or (2) the relator learned of the information underlying the fraudulent violation in the course of his or her employment and failed to take certain administrative steps.²⁴⁴ However, the FCAA of 1993 would have provided an opportunity for the relator to contest a government motion to dismiss, which would not be made public without the relator's consent and which would not be subject to discovery by the defendant.²⁴⁵

About three months after the FCAA of 1993 was introduced in the Senate, a similar bill was introduced in the House.²⁴⁶ In pertinent part, the House bill would have allowed the government to dismiss a relator from an action if the relator "learned

241. S. 841, 103d Cong. (1993); see also H.R. 2915, 103d Cong. (1993). The Senate version of the FCAA of 1993 was referred to the Committee on Judiciary on April 29, 1993, and then to the Subcommittee on Courts and Administrative Practice on June 24, 1993, where it died. H.R. 2915, 103d Cong. (1993), available at <http://thomas.loc.gov/cgi-bin/bdquery/D?..../temp/~bd—E5I:@@L—/bss/d103query.htm> (last visited Mar. 15, 2001). The House version of the FCAA of 1993 was referred to the House Committee on Judiciary on August 6, 1993, and then to the Subcommittee on Administrative Law and Governmental Relations on August 16, 1993, where it died. *Id.*

242. Like the FCAA of 1992, the FCAA of 1993 contained limitations on government employees bringing suit as qui tam relators. S. 841 § 2. The whistleblower protection provision of the FCAA of 1993 was identical to the whistleblower protection provision in the FCAA of 1992. *Id.* § 4. In contrast to the FCAA of 1992, however, the FCAA of 1993 would have added two additional sections. First, Section 6 proposed a change to the statute of limitations by requiring an action to be brought within six years from the date on which the unlawful act occurred. *Id.* § 6. However, the six year statute of limitations excluded time periods where a government official, charged with the authority to act, did not know and could not reasonably be expected to know about the material facts of the cause of action. Second, Section 7 would have replaced the Deputy Attorney General with the Assistant Attorney General as the official with the authority to issue investigative demands. *Id.* § 7.

243. S. 841 § 2.

244. *Id.* The administrative steps parallel those delineated in the FCAA of 1992.

245. S. 841, 103d Cong., § 2.

246. H.R. 2915, 103d Cong. (1993).

all the necessary and specific facts underlying the material allegations” from (1) a fraud investigation actively pursued by the government; or (2) from a news media report or congressional hearing or report if the executive branch was actively pursuing such investigation before the individual filed his or her complaint.²⁴⁷ In all other respects, the House version paralleled the Senate version.

The proposed changes in the FCAA of 1993 were more drastic than the changes proposed by the FCAA of 1992. As mentioned above, the Senate version would have allowed the government to dismiss a private individual from a lawsuit only if the material substance of the relator’s lawsuit was *derived from* an open and active government fraud investigation, or the relator learned of the information in the course of his or her employment and failed to take required administrative steps.²⁴⁸ A private individual who gets information of a fraudulent activity from a government investigation is obviously not the type of *qui tam* relator contemplated by the FCA. Therefore, it seems redundant to allow the government to dismiss an individual under these circumstances. Also, the use of the words “derived from” would likely have required *all* of the material allegations in the relator’s complaint to come from the government investigation in order for the government to dismiss—a definite step in the wrong direction.

Like the FCAA of 1992 provisions, and the Senate provisions of the FCAA of 1993, the House version would have eliminated only those private individuals who obtained information already known by and in the presence of the government. However, these provisions would have created an avenue for significant abuse of the *qui tam* provisions. The purpose of the *qui tam* provisions is not to encourage such opportunistic behavior, but rather to reward individuals who “mak[e] it *possible* for the United States, in an appropriate action to recover against people who ha[ve] perpetrated frauds against the United States.”²⁴⁹

C. Health Care Claims Guidance Act

In contrast to the FCAA of 1992 and 1993, the Health Care Claims Guidance Act (“HCCGA”), sponsored by Representa-

247. *Id.* § 2.

248. S. 841 § 2.

249. 89 CONG. REC. 10845 (1943) (emphasis added).

tive McCollum,²⁵⁰ did not favor the qui tam relator. This bill would have added a new provision to the Act setting forth rules for certain actions based on health care claims. First, the HCCGA sought to prohibit actions from being brought under the FCA if (1) the alleged damages to the government were not material; (2) the claim submitted relied on (and correctly used) erroneous information supplied by a federal agency or agent, or relied on (and correctly applied) written statements of federal policy provided by the federal agency or agent that affected such claim; or (3) the alleged violator was in substantial compliance with a model compliance plan issued by the Secretary of Health and Human Services.²⁵¹ Second, the HCCGA would have changed the standard of proof from “a preponderance of the evidence” to “clear and convincing evidence.”²⁵² Third, the HCCGA would have defined certain terms, including “claim,”²⁵³ “damages,”²⁵⁴ “federally funded health care program”²⁵⁵ and “material amount.” The HCCGA explained that definition of “material” would follow the definition used by the American Institute of Certified Public Accountants (“AICPA”).²⁵⁶ Furthermore, an amount would have been considered “material” only if it exceeded a proportion of the total amounts of the claims submitted by or on behalf of the alleged violator to the *same* federally funded health care program, and for the *same* calendar year, as the claim upon which the action was based.²⁵⁷ Lastly, the bill explained the special circumstances under which claims would

250. H.R. 3523, 105th Cong. (1998). Although there was strong support for this bill in the 105th Congress, the bill has not yet been re-introduced. An effort to pass the identical bill introduced in the Senate, S. 2007, was abandoned after the Deputy Attorney General issued his memorandum, discussed above, on the appropriate use of the false claims act in health care related matters. Perhaps this memorandum is also the reason for the loss of support for H.R. 3523.

251. *Id.*

252. *Id.*

253. ‘Claim’ was defined as “a claim (as defined in section 3729(c)) made with respect to a federally funded health care program.” *Id.*

254. ‘Damages’ were defined as “the amount of overpayment made by the United States Government with respect to a claim.” *Id.*

255. ‘Federally funded health care program’ was defined as “a program that provides health benefits, whether directly, through the purchase of insurance, or otherwise, that is established under — (A) title XVIII, XIX, or XXI of the Social Security Act, or (B) title 10, United States Code.” *Id.*

256. *Id.*

257. *Id.*

be aggregated and how a material amount of damages would be measured if the claims were aggregated.²⁵⁸

One good idea in the HCCGA was the proposal to prohibit actions where an alleged wrongdoer could show that he relied upon erroneous federal information.²⁵⁹ If an individual seeks out federal advice in order to assure compliance and relies on such advice, then that individual should be protected from subsequent action. This proposal is a good way to diminish the vulnerability of providers as a result of misinterpreting complicated regulations. It seems only appropriate to insulate individuals from liability in situations where the government itself issued erroneous advice.

In contrast, there are a number of illogical proposals suggested in the HCCGA. First, as mentioned above, the HCCGA sought to prohibit actions where the alleged damages to the government were not material.²⁶⁰ The HCCGA mentions that the AICPA definition of "material" would have been used as the standard of measure.²⁶¹ Furthermore, an amount would have only been considered "material" if it exceeded a proportion of the total amount of claims submitted by the alleged violator to the same health care program for the same year as the claim upon which the action is based.²⁶² Based on this interpretation, the government might be prohibited from bringing an action because an amount is not proportionally "material" but is nevertheless in excess of a million dollars. Using the AICPA materiality standard of 10%, an entity that had billed Medicare for \$10 million in a given year would not be liable under the

258. Claims could be aggregated only if acts or omissions causing the alleged damages were part of a pattern of related acts or omissions by such person. *Id.* If damages were aggregated, whether a material amount existed would be determined by comparing the aggregate damages to the total claims submitted by the alleged violator to the same federally funded health care program, but for each of the calendar years in which any claim upon which the aggregate damages were based was submitted. *Id.*

259. *See id.* § 2.

260. *Id.*

261. *Kohler's Dictionary for Accountants* explains with regard to 'materiality' that "[s]ome accountants have endeavored to establish standards of materiality by rules of thumb, as, by requiring that any item or item class the money amount of which is 5% or more of total assets or 10% or more of a net income appear as an integral detail of a financial statement." KOHLER'S DICTIONARY FOR ACCOUNTANTS 323 (6th ed. 1983). However, the explanation recognized that "[s]uch a rule, however, leaves unsolved the problem of smaller items whose disclosure may be essential, regardless of their size, as where certain items, now of minor importance, may develop into major items with the passage of time or upon the happening of events now contingent or even unknown." *Id.* at 323-324.

262. H.R. 3523, 105th Cong. § 2.

FCA unless the damages to the government exceeded the “material” amount of \$1 million. Considering the number of potential violators, such a prohibition could cost the government astronomical amounts of money in a given year, and guilty individuals could escape prosecution. The government should be entitled to recover any amount of money it wrongfully paid out, and should not be limited in doing so by a “materiality” requirement.

The proposal also sought to protect individuals who are in substantial compliance with a model compliance plan issued by the Secretary of HHS.²⁶³ This proposal creates the potential for guilty individuals to hide behind a “model compliance plan”²⁶⁴ even if that individual is deliberately engaging in fraudulent acts. Such individuals should not be able to disclaim wrongdoing with the existence of a compliance plan.

Finally, the HCCGA would have revised the standard of proof from a “preponderance of the evidence” to “clear and convincing evidence.”²⁶⁵ Generally, “Congress has chosen the “preponderance of the evidence” standard when it has created substantive causes of action for fraud.”²⁶⁶ One court explained: “Because the Act neither requires a showing of fraudulent intent nor is punitive in nature, we find no justification for applying a burden of proof higher than preponderance of the evidence.”²⁶⁷ In contrast, the “clear and convincing” standard is generally used when there is a potential deprivation of a due process right involved.²⁶⁸ Although proponents of this amendment would likely argue that the heightened standard is justified in light of the confusion and complexity of the regulations at hand, the differentiation of the burden of proof standard in FCA cases would create a dangerous precedent. Certainly, there are other regulations that are equally complex. If this ar-

263. *Id.*

264. Model compliance plans are created by the OIG to serve as a guide for health care providers to reduce fraud and abuse in federal health care programs. The OIG has issued a number of model compliance plans in order to help health care entities to correct and prevent fraudulent activities in specified areas and to help reduce the risk of criminal and civil liability.

265. H.R. 3523, 105th Cong. § 2.

266. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659 (1991) (citing 31 U.S.C. § 3731(c) (False Claims Act); 42 C.F.R. § 1003.114(a) (1989) (Medicare and Medicaid fraud under 42 U.S.C. § 1320a-7a)) (citations omitted).

267. *Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 728 (8th Cir. 1985).

268. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (requiring a ‘clear and convincing’ standard to be used before the state can terminate paternity rights).

gument warrants merit for the FCA, others may argue that there is a similar need to make an exception for other non-health care regulations. Furthermore, a heightened burden would likely result in a significant increase in litigation because the government would have a more difficult burden to meet. Thus, changing the burden of proof in FCA cases would be inconsistent with both legislative and judicial precedent.

D. The Legislature's Role in Improving the FCA

One way to change the application of the FCA is to amend the Act. As indicated by the number of amendments to the Act since its enactment in 1863, there has been a consistent need for changes and clarifications. Nevertheless, due to the failure of all proposals to amend the Act since 1986, there is a strong resistance to taking this approach again. Although there are some good intentions behind the congressional proposals over the past few years, many of the bills suggest changes that do not coincide with the original legislative purpose of the Act, and/or would not fix the current problems. However, certain changes could be made to harmonize the application of the Act with its intended purpose.

In addition to the interpretation problems with the public disclosure jurisdictional bar discussed above, there is also a general outrage regarding the severity of the civil monetary penalties. Two of the primary reasons providers are unlikely to litigate the merits of their case are (1) the imposition of severe civil monetary penalties, and (2) the possibility of exclusion from all federal health care programs. Although the Act is supposed to have a remedial effect,²⁶⁹ the severity of the penalties seem to indicate a punitive purpose.²⁷⁰ Reducing the civil monetary penalty amount is one way to minimize the harsh effects of the FCA. Perhaps the damages could be measured proportionally against the monetary loss to the government. For example, instead of having a set penalty amount for each fraudulent claim, the amount could be measured as a set percentage of the unlawfully obtained amount. Hypothetically, if the civil monetary penalty was set at 50% of the damages sustained by the government, and \$100,000 was determined to be the damages amount,

269. See *United States v. Griswold*, 24 F. 361, 366 (D. Ore. 1885).

270. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S.Ct. 1858, 1869 (2000) (stating that damages under the FCA are punitive in nature).

then the guilty party would owe the government \$50,000 in penalties, plus treble damages. The fixed percentage would be established in accordance with what would effectively deter individuals from engaging in the unlawful behavior.²⁷¹ Or, the Act could set a threshold above which the amount accumulated in civil monetary penalties becomes “grossly disproportional” to the underlying crime.²⁷² For example, a civil monetary penalty amount in excess of 80% of the unlawful amount taken from the government could be considered “grossly disproportional.” The Act could also be amended to eliminate civil monetary penalties in cases where an entity alleges the crime was committed by a “rogue employee” and can show (1) it had a respectable compliance plan in place, and (2) it had no knowledge of the alleged fraudulent activity.²⁷³

Probably more daunting than civil monetary penalties is the possibility of exclusion from federal health care programs. A higher standard for permissible exclusion would help equalize the balance of power between the DOJ and providers. Currently, section 1128(b)(7) of the Social Security Act authorizes the Secretary of DHHS and the OIG to exclude individuals or entities from federal health care programs if such individuals or entities submit false or fraudulent claims to the government.²⁷⁴ Thus, if an individual or entity submits *one* fraudulent claim, that individual or entity faces the possibility of exclusion from all federal health care programs. Instead, the law could require that permissive exclusion only applies if the violator is found guilty of a certain percentage of the claims in issue as compared with all the claims submitted in a given year. Alternatively, the law could require a set monetary threshold above which permissive exclusion would be applicable.²⁷⁵ Similarly, the law could

271. For an excellent discussion about how complete and optimal deterrence is calculated, see TIMOTHY S. JOST & SHARON L. DAVIES, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 266-293 (1999).

272. In a recent Supreme Court opinion, the Court found that a forfeiture of \$357,144 in a case where the defendant tried to take the money out of the country without reporting it would be grossly disproportional to the crime and would not pass muster under the Eighth Amendment’s Excessive Fines Clause. *United States v.ajakajian*, 118 S. Ct. 2028, 2030 (1998); cf. *Hudson v. United States*, 118 S. Ct. 488 (1997); *United States v. Halper*, 490 U.S. 435 (1989).

273. JOST & DAVIES, *supra* note 271, at 315.

274. Criteria for Implementing Permissive Exclusion Authority Under Section 1128(b)(7) of the Social Security Act, 62 Fed. Reg. 67,392 (1997).

275. However, a set monetary threshold fails to account for proportional violations among the guilty parties.

require a finding of two separate civil judgments against an individual or entity before that individual or entity could be permissively excluded from the program. The FCA could also provide for certain safe harbors in order to protect “honest” mistakes. For example, as suggested by the HCCGA, the Act could prohibit suits from being brought against individuals who “reasonably” relied on erroneous governmental advice.

Regarding the *qui tam* provisions, the Act should be amended to require the relator to specifically plead in the complaint how he or she is an “original source” of the information that serves as the basis for the allegations in the complaint. Also, the Act should be amended to allow complete judicial discretion as to the amount the relator should receive in a given case. The amount of the award should be based on the significance of the relator’s role in uncovering the fraudulent activity.²⁷⁶ As described in 31 U.S.C. § 3730(d)(3), the court should consider the role of the relator “in advancing the case to litigation and any relevant circumstances pertaining to the violation [of the FCA]” when determining an appropriate amount.

CONCLUSION

The FCA is a powerful weapon in the war against health care fraud and abuse. When used appropriately, it is undeniably beneficial to society as a whole. However, when the Act is used to force unwitting providers into settlement and is interpreted inconsistently with its intended purpose, we must recognize the need for change. The executive, legislative and judicial branches of the government all play significant roles in influencing the FCA. The executive branch, as the enforcer of the law, needs to use fair and consistent tactics when using the FCA. The legislative branch, as the creator of the law, needs to amend the Act so that it is equitably applied. The judicial branch, as the interpreter of the law, needs to decipher the public disclosure jurisdictional bar in a manner consistent with the intended purpose of the Act—which is to prevent parasitic lawsuits by individuals who offer no service to the government. By working together, the three branches of our government can remedy the problems

276. On February 10, 1994, Representative Duncan introduced a bill, H.R. 3848, to limit the relator’s amount to \$1 million. However, the bill never generated significant support, and died on August 18, 1994, in the Subcommittee on Administrative Law and Governmental Relations. H.R. 3848, 103rd Cong. (1994) *available at* <http://thomas.loc.gov/cgi-bin/bdquery/-D?..../temp/~bdZb4B:@@L—/bss/d103query.htm> (last visited Mar. 15, 2001).

that still exist in the FCA. Individually, each branch has taken steps in the right direction. However, with a cooperative effort, we may hopefully start to notice significant progress towards improvement.