Loyola University Chicago Law Journal

Volume 46
Issue 4 *Summer 2015*

Article 3

2015

United States ex rel. Leveski v. ITT Educational Services, Inc.: The Seventh Circuit Reinvigorates the False Claims Act to Combat Recruiting Abuses by For-Profit Schools

Mark I. Labaton
Partner, Isaacs Friedberg & Labaton LLP, Los Angeles, CA

United States ex rel. Leveski v. ITT Educational Services, Inc.: The Seventh Circuit Reinvigorates the False Claims Act to Combat Recruiting Abuses by For-Profit Schools

*Mark I. Labaton**

The False Claims Act ("FCA") is the government's primary tool in combatting procurement fraud. It allows the United States to litigate cases alleging fraudulent claims against governmental entities, and also allows whistleblowers (called relators) to bring such cases, litigate them on behalf of the government, and collect a share of the proceeds. The viability of the FCA depends on its ability to encourage whistleblowers to come forward and report fraud committed by contractors with the government. One limitation on whistleblowers' ability to litigate FCA cases is the so-called public-disclosure bar, which bars claims that have been publicly exposed.[1] *This bar has an exception for whistleblowers who are original sources of their claims. Consistent with the legislative history of the FCA, the public-disclosure bar should be interpreted narrowly while the original-source exception should be interpreted broadly.*

In a groundbreaking decision, the Seventh Circuit held in United States *ex rel.* Leveski v. ITT Educational Services, Inc.,[2] *that a prior lawsuit against a defendant for the same claim should not trigger the public-disclosure bar when the later lawsuit discloses a different fraud scheme from the one alleged in the earlier lawsuit. A contrary ruling would have largely insulated fraudsters from FCA liability when they alter their method of committing fraud.*

---

* Mark I. Labaton is a partner at Isaacs Friedberg & Labaton LLP in Los Angeles, California. He argued and briefed *United States ex rel. Leveski v. ITT Educational Services, Inc.* in the Seventh Circuit case that is the subject of this Article, and continues to represent Ms. Leveski in that case. This Article is dedicated to the memory of his beloved life partner, Jinnie Hwang, who passed away on July 4, 2014 as a result of a brain aneurysm that burst on July 1, 2014. The author thanks Timothy Cornell, James Moody, and Oren Rosenthal for their thoughtful comments on a draft of this Article.

1. 31 U.S.C. § 3730(3)(4) (2012).
2. 719 F.3d 818 (7th Cir. 2013).

Leveski *builds on the teachings of two earlier recent Seventh Circuit cases.*[3] *Each case in this trilogy reversed district court opinions that unduly restricted application of the FCA.* Leveski *is also seminal because it marked the first time that an appellate court held that an FCA lawyer could solicit whistleblower clients just like lawyers practicing in other areas are able to do. In* Leveski, *the district court sanctioned the lawyer who brought that lawsuit simply because the whistleblower did not know her legal right to bring such a case before that lawyer contacted her, even though there was no public disclosure and, even if there had been, the whistleblower was the original source of the allegations. The Seventh Circuit pointedly rejected such a punitive approach, holding: "The annals of legal history are full of examples of lawyers playing a vital role in encouraging parties to litigate."*[4]

INTRODUCTION

One of the fastest growing sectors of the American economy is the for-profit school industry: a sector that depends for its survival on the largess of the federal government and whose lifeblood is student loans.[5]

3. United States *ex rel.* Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933 (7th Cir. 2012); United States *ex rel.* Baltazar v. Warden, 635 F.3d 866 (7th Cir. 2011).

4. *Leveski*, 719 F.3d at 838.

5. *See, e.g.*, Suevon Lee, *The Explosive Growth of For-Profit Higher Education, By the Numbers: High Tuition, Low Retention Rates, and Aggressive Recruiting Are Great for Business–But Terrible for Education*, MOTHER JONES (Aug. 13, 2012, 5:01 AM), http://www.motherjones.com/media/2012/08/explosive-growth-profit-higher-education-numbers (detailing growth,

Almost all of this industry's revenue comes from federal grants and loans, as virtually all of its students receive federal financial aid paid for through taxpayer funds.[6] Accordingly, the temptation for fraud by companies in this industry is great. As Benjamin Franklin famously observed: "[T]here is no kind of dishonesty into which otherwise good people more easily and frequently fall, than that of defrauding the government . . . ."[7]

Since the Seventh Circuit's opinion in *United States ex rel. Main v. Oakland City University*[8] in 2005, the False Claims Act ("FCA") has become a potential potent weapon to address reckless student recruiting in the for-profit higher education industry—a serious national problem that has damaged our economy and ruined many lives.[9] Yet, the viability of the FCA to protect taxpayers from fraud committed by schools in the for-profit school industry was threatened by a recent district court opinion and sanctions order in a case brought against ITT Educational Services, Inc. ("ITT"),[10] the parent company of a leading for-profit school known for television recruiting advertisements that blanket the daytime airwaves. Those decisions not only threatened to discourage future whistleblowers from coming forward, but also threatened the lawyers who represent them. But that threat abated with the Seventh Circuit's opinion in *United States ex rel. Leveski v. ITT Educational Services, Inc.*[11] *Leveski*, like *Main*, ranks as an important opinion in protecting vulnerable students and taxpayers at large while helping insure that the FCA's purposes are being served and that statute's power is not improperly eroded.[12]

A basic familiarity with the FCA and its history is helpful to understand how *Leveski* advances the FCA's goals. Thus, this Article begins with a discussion of this statute. It then discusses *Leveski* in

---

cost of education, and loan figures in the for-profit higher education industry).

6. James Marshall Crotty, *Obama Tightens Screws on For-Profit Colleges*, FORBES (Oct. 30, 2014, 7:17 AM), http://www.forbes.com/sites/jamesmarshallcrotty/2014/10/30/new-gainful-employment-rules-tighten-screws-on-for-profit-colleges.

7. Benjamin Franklin, *On Smuggling*, LONDON CHRON., Nov. 24, 1767.

8. 426 F.3d 914 (7th Cir. 2005).

9. *See generally* Gayland O. Hethcoat II, *For-Profits Under Fire: The False Claims Act as a Regulatory Check on the For-Profit Education Sector*, 24 LOY. CONSUMER L. REV. 1 (2011).

10. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-cv-0867-TWP-MJD, 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012) (sanctions order), *rev'd*, 719 F.3d 818 (7th Cir. 2013); United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-cv-00867-TWP-MJD, 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011) (dismissal order), *rev'd*, 719 F.3d 818 (7th Cir. 2013).

11. 719 F.3d 818 (7th Cir. 2013).

12. As a result of the Seventh Circuit's opinion, the case was listed as one of the most significant "big suits" of the past year. David Bario, *Big Suits*, AM. LAW., Sept. 2013, at 26.

light of that history and FCA case law.

Nicknamed the Lincoln Law because of President Lincoln's support, the FCA was enacted during the Civil War to combat fraudulent procurement practices. From its inception, and increasingly with its 1986 amendments, the FCA has encouraged private parties with knowledge of fraud against the government to come forward with information that might otherwise remain hidden. To incentivize whistleblowers to expose fraud committed by the recipients of federal funds, the FCA lets whistleblowers—called relators—bring civil lawsuits on behalf of the United States and collect a bounty of up to thirty percent of any recovery.[13]

The relator's standing to pursue FCA cases, however, is limited by a public-disclosure bar.[14] That bar prevents the relator from litigating cases based on conduct that has already been disclosed by the media or in a criminal, civil, or administrative hearing, unless that relator is an "original source" of the allegations at issue.[15] Simple as this concept might seem, this bar has been the second most hotly contested area of FCA litigation since the 1986 amendments.[16] This bar is intended to block lawsuits only where the relator's contribution to uncovering fraud brings no new information to the government; it is not intended to discourage whistleblowing aimed at deterring fraud and ensuring that taxpayers are made whole.[17]

In *Leveski*, the district court found that Ms. Leveski's case was previously publicly disclosed—and therefore barred—by an earlier FCA case against ITT.[18] But the Seventh Circuit reversed, holding that the prior lawsuit did not constitute a public disclosure because Ms. Leveski's complaint alleged two fraud schemes different from the one

---

13. 31 U.S.C. § 3730(d)(2) (2012).

14. *Id.* § 3730(e)(4)(A).

15. *Id.* § 3730(e)(4)(B).

16. *See* James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1274, 1276–77 (2013) (noting that the most litigated area is Federal Rule of Civil Procedure 9(b) and "[t]here are now thousands of published decisions on the 1986 amendments").

17. *See, e.g.*, United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) ("One theme recurring through the legislative history in 1985 is the intent to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud. Congress sought to stop the 'conspiracy of silence' among employees of corporations engaging in fraud."); *see also* S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5269, 5271 (stressing that in order to detect fraud it was necessary to enlist the "cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity").

18. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-cv-0867-TWP-MJD, 2012 WL 1028794, at *13, *18 (S.D. Ind. Mar. 26, 2012), *rev'd*, 719 F.3d 818 (7th Cir. 2013).

scheme previously alleged in an earlier lawsuit.[19]

The district court also found that Ms. Leveski was not an original source, because the court was skeptical that she understood the legal significance of the Program Participation Agreement ("PPA") that ITT signed with the Department of Education ("DOE"). But the Seventh Circuit also reversed, holding that Ms. Leveski clearly possessed sufficient factual knowledge to be an original source.[20]

Finally, the district court sanctioned Ms. Leveski's lawyers because one of them talked to her about the FCA before she became a relator.[21] Here too the Seventh Circuit reversed, holding that attorney solicitation and advice to a potential relator was appropriate.[22]

The Circuit's protection of whistleblowers and their lawyers serves the FCA's aim of encouraging whistleblowers who know about fraud to bring FCA actions, and is seminal in protecting lawyers who righteously solicit such clients—an important buffer in today's legal environment, where the stakes in FCA cases are so high that defendants seeking to avoid accountability have, as here, resorted to bullying and intimidation.[23]

I. BACKGROUND

A. The False Claims Act

The FCA is a federal false and fraudulent claims statute that broadly imposes liability against recipients of taxpayer money—including contractors, beneficiaries, and grantees—who make false or fraudulent claims or statements to federal agencies.[24] The FCA empowers the Department of Justice ("DOJ") to sue on behalf of federal agencies.[25] It

---

19. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 819 (7th Cir. 2013).

20. *Id.* at 836.

21. *Id.* at 839.

22. *Id.* at 839–40.

23. Increasingly in cases involving allegations of egregious conduct, well-heeled defendants have resorted to intimidation tactics. These include suing FCA relators for stealing documents to use as evidence in their FCA cases or for breaching so-called duties to report fraud internally before filing an FCA case. *See* Alison Frankel, *Congress, Whistleblower Lawyers Urge SEC to Police 'De Facto Gag Clauses,'* REUTERS (Oct. 29, 2014), http://blogs.reuters.com/alison-frankel/2014/10/29/congress-whistleblower-lawyers-urge-sec-to-police-de-facto-gag-clauses ("Forbes even ran a blog post in June advising healthcare employers how to take advantage of precedent in such suits.").

24. 31 U.S.C. § 3730 (2012); *see, e.g.*, United States *ex rel.* Hutcheson v. Blackstone Med., Inc., 647 F.3d 377, 392 (1st Cir. 2011) ("'Congress wrote expansively, meaning "to reach all types of fraud, without qualification, that might result in financial loss to the Government."'" (quoting Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 129 (2003))).

25. *See* 31 U.S.C. § 3730(a) (noting that this power stems from the head of the DOJ, the

also allows private parties (called relators, though popularly known as whistleblowers) to bring civil actions on behalf of taxpayers, who are the real victims of government fraud.[26]

To encourage whistleblowers (who are often company insiders) to report frauds that would otherwise likely remain hidden, relators are entitled to a bounty of up to thirty percent of any recovery.[27] Such rewards can be substantial because the FCA allows successful parties to recover treble damages and penalties of up to $11,000 per false claim or statement in support of a false claim.[28]

FCA actions, brought by relators, are called "*qui tam*" suits because they were first brought traditionally under English law by a person *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, that is, by persons who sue "on behalf of the King as well as for himself."[29] Although relators are entitled to a share of *qui tam* recoveries, because the United States is the real party-in-interest in every *qui tam* lawsuit, it has the right to intervene in the case at any time.[30]

Qui tam cases are filed under seal to give the United States time to investigate the allegations and to make a preliminary decision to intervene or to allow the relator and private counsel to proceed on their own.[31] The initial seal period is sixty days from the filing of the complaint, but that period typically is extended, sometimes for years.[32] The courts and the DOJ have consistently stressed that the United States' decision whether to intervene and take over control of *qui tam* lawsuits, or alternatively, to allow the relator with private counsel to control the litigation, is not a reflection of the merits of any particular case.[33]

The FCA's aim has always been to curtail rampant procurement fraud. As Senator Jacob M. Howard, one of the sponsors of the original legislation remarked, the Act offers:

United States Attorney General).

26. *Id.* § 3730(c)(3).

27. *Id.* § 3730(d).

28. *Id.*

29. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000); BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

30. 31 U.S.C. § 3730(c)(2).

31. *Id.* § 3730(b)(2).

32. *Id.*

33. *See, e.g.*, United States *ex rel.* Chandler v. Cook Cnty., 277 F.3d 969, 974 n.5 (7th Cir. 2002) ("There is no reason to presume that a decision by the Justice Department not to assume control of the suit is a commentary on its merits. The Justice Department may have myriad reasons for permitting the private suit to go forward including limited prosecutorial resources and confidence in the relator's attorney.").

> [A] reward to the informer who comes into court and betrays his coconspirator [sic], if he be such; but it is not confined to that class. . . . I have based [it] . . . upon the old-fashioned idea of holding out a temptation, and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.[34]

Originally, the FCA allowed relators to use information taken exclusively from public files "even though that private individual contributed nothing to the exposure of the fraud alleged."[35] One such case, *United States ex rel. Marcus v. Hess*,[36] made its way to the Supreme Court at the outset of World War II. There, the United States indicted some electrical contractors for collusive bidding in a government project. The defendants pled *nolo contendre* and were fined $54,000.[37] Then, in the *qui tam* case arising from the same conduct, the relator obtained a trial verdict of $315,000.[38]

The Supreme Court upheld the verdict, rejecting the argument that allowing such claims would encourage "unseemly races for the opportunity of profiting from the government investigations," because nothing in the original FCA prohibited such conduct.[39] Although the efficacy of the *qui tam* provisions of the FCA depend upon building a private/public partnership between the relator and the government, the DOJ in *Marcus* took the position in an amicus curiae brief that *qui tam* actions should be eliminated because they diluted the DOJ's authority to control these cases.

Following the decision, and as defense contractors were mobilizing the nation's resources in World War II, Congress amended the FCA, effectively rendering its *qui tam* provisions ineffective, by broadly barring all such actions whenever the government presumably had some advance knowledge of the fraud when the "suit was brought."[40] This draconian restriction, sometimes referred to as a "governmental knowledge" bar, hobbled the FCA,[41] because it discouraged potential

34. CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863).

35. United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1497 (11th Cir. 1991).

36. 317 U.S. 537 (1943), *superseded by statute*, 31 U.S.C. § 3730(e)(4)(A) (2006), *as recognized in* Schindler Elevator Corp. v. United States *ex rel.* Kirk, 131 S. Ct. 1885, 1894 (2011).

37. *Id.* at 545.

38. *Id.* at 540.

39. *Id.* at 546–47, 552–53.

40. 31 U.S.C. § 232(c) (Supp. IV 1943).

41. "This amendment erected what came to be known as a government-knowledge bar: '[O]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant.'" Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 294 (2010). As a result, the FCA was no longer an

relators with substantial knowledge of fraud from coming forward when they could not know what information already existed in the government's vast file cabinets.[42]

In 1984, the government-knowledge bar resulted in the dismissal of an otherwise valid Medicare fraud case in *United States ex rel. Wisconsin v. Dean*,[43] a debacle which led the National Association of Attorneys General to adopt a resolution urging Congress to amend the FCA to rectify the problem.[44] Shortly thereafter, Congress considered reviving the FCA to address evidence of massive fraud committed by government defense contractors, who in the 1980s took advantage of Cold War buildup in national defense spending to line their pockets: "As had happened during the Civil War, the Congress began receiving alarming reports of fraud, waste, and abuse"[45] including: $400 for hammers,[46] $640 for toilet seats, $660 for ashtrays,[47] $7,000 for coffee pots,[48] and $16,571 for a three-cubic-foot refrigerator that the Navy purchased from defense contractors.[49] This combination of poor procurement practices along with fraud led Congress to revisit the FCA as a tool to deter and seek redress based upon such conduct.

In 1986, Congress acted to overhaul and to revive the *qui tam* provisions of the FCA. By then, four of the largest defense contractors had been indicted for fraud and a fifth had been convicted, while forty-five other large contractors were under investigation.[50] In addition, the General Accounting Office had concluded that: "For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the Government often *does* pay."[51] Congress recognized that by

---

effective tool against fraud. *Id.* ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled.").

42. United States *ex rel.* Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 684 (D.C. Cir. 1997), *abrogated by* United States *ex rel.* Davis v. Dist. of Columbia, 679 F.3d 832 (D.C. Cir. 2012).

43. 729 F.2d 1100 (7th Cir. 1984).

44. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (1991).

45. Helmer, Jr., *supra* note 16, at 1271.

46. *Id.*

47. Mike Ward, *It's Your Information—How a Federal Law Has Turned Citizens into Giant Slayers*, AUSTIN AM.-STATESMAN, Oct. 6, 1996, at H1 (noting that took a Freedom of Information Act request to "uncover[] the now-famous case of [the] Pentagon's buying of gilt-priced toilet seats . . . .").

48. Helmer, Jr., *supra* note 16, at 1271.

49. *Id.* at 1272.

50. *Id.*

51. S. REP. NO. 99-345, at 13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–27.

"restricting *qui tam* suits by individuals who bring fraudulent activity to the Government's attention, Congress eliminated the financial incentive to expose frauds against the Government."[52] So, Congress amended the FCA to make it a more effective weapon against government fraud. The Senate report supporting the new legislation pointed out that fraud in government procurement posed a major problem, and the FCA was no longer serving its purpose to deter and obtain redress.[53] The "government knowledge" test severely limited FCA actions while fraud was draining between one and ten percent of the federal budget.[54]

Congress' goal was to return the FCA to its purpose of "unleashing a 'posse of ad hoc deputies as relators to uncover and prosecute frauds against the government.'"[55] Congress' "overall intent in amending the *qui tam* section of the False Claims Act [was] to encourage more private enforcement suits."[56] Such private suits were perceived as the way to stem "rising government fraud, especially in the areas of defense contracting and health care benefits."[57] "In the face of sophisticated and widespread fraud," Congress concluded, "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[58]

To revive the FCA, Congress eliminated the "government knowledge" bar[59] and replaced it with a provision that bars *qui tam* cases based upon a prior public disclosure of information by the media or in a criminal, civil, or administrative hearing. Even then, a *qui tam* case can proceed if the relator is an "original source" with direct and independent knowledge of the information on which the allegations are based and who voluntarily provides such information to the government before filing suit.[60]

This public-disclosure restriction bars *qui tam* cases that prey on the efforts of others who have brought the fraud to light, while permitting

---

52. United States *ex rel.* Butler v. Magellan Health Servs., Inc., 74 F. Supp. 2d 1201, 1205 (M.D. Fla. 1999).

53. S. REP. NO. 99-345, at 13.

54. *Id.* at 3.

55. United States *ex rel.* Harrison v. Westinghouse Savannah, Co., 176 F.3d 776, 778 (4th Cir. 1999) (citing United States *ex rel.* Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992)).

56. S. REP. NO. 99-345, at 2–3, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288–89.

57. Hagood v. Sonoma Cnty. Water Agency, 81 F.3d 1465, 1467 n.1 (9th Cir. 1996).

58. S. REP. NO. 99-345, at 13.

59. United States *ex rel.* Rost v. Pfizer, 507 F.3d 720, 729 (1st Cir. 2007), *overruled as recognized by* United States *ex rel.* Wilson v. Bristol-Meyers Squibb, Inc., 750 F.3d 111 (1st Cir. 2014). The author of this Article was counsel for Dr. Peter Rost, the former vice president of marketing at Pfizer, in this case.

60. 31 U.S.C. § 3730(e) (2012).

all other *qui tam* cases in which relators provide valuable information.[61] Logically, such permitted information can be valuable because either the fraudulent scheme was not previously exposed or because the relator adds valuable information as a person with first-hand and independent knowledge of the fraud even if it had already been exposed.[62] Congress also added anti-retaliation and relator attorney fee provisions to the FCA.[63]

With these amendments, the FCA sprung back to life. Whereas from 1943 to 1986, the number of cases brought under the FCA averaged only six per year,[64] that number increased almost fifty-fold after the 1986 amendments, such that in the twenty-seven years since then, more than 9244 cases were brought, an average of more than 300 cases per year.[65] More than seventy percent of such recoveries have come from *qui tam* cases bought by relators rather than brought directly on behalf of the United States by the DOJ.[66] Furthermore, recoveries from FCA cases have skyrocketed from $54 million in 1985, the year before the amendments, to more than $40 billion in the years since.[67] The deterrent value attributable to *qui tam* actions though, perhaps, not quantifiable in monetary terms, is undeniable.[68]

In 2010, Congress again broadened the FCA's public-disclosure/original-source provisions to give the DOJ the discretion to permit a whistleblower to litigate a case even if there has been a public disclosure and the whistleblower is not deemed an original source.[69] Congress also clarified the original-source exception language so that it

61. United States *ex rel.* Davis v. Dist. of Columbia, 679 F.3d 832, 838 (D.C. Cir. 2012).

62. United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1993).

63. 31 U.S.C. § 3130(h).

64. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:9 (West 2013).

65. *Fraud Statistics - Overview: Oct. 2, 1987 - Sept. 30, 2013*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf (last modified Dec. 23, 2013, 2:42 PM).

66. *Id.*

67. *Id.*

68. *See* Timothy Stoltzfus Jost & Sharon L. Davies, *The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement*, 51 ALA. L. REV. 239, 239–318 (1999) (arguing that the FCA has a beneficial deterrent effect). *See generally* William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201 (1998) (arguing that the costs of defending against *qui tam* suits are built into the price of government contracts, thus diminishing the benefit the government derives from these lawsuits).

69. As amended, the relevant section now provides that the "court shall dismiss an action or claim" if there has been a public disclosure "unless opposed by the Government," or if relator is deemed by the court to be an original source. 31 U.S.C. § 3730(e)(4)(A) (2012).

applies when the relator is the source of substantial information of at least one element of the fraud.[70]

B. The For-Profit School Industry

For-profit schools—such as ITT, University of Phoenix, DeVry, and Ashford University—have grown exponentially in recent years. For example, the University of Phoenix, with an enrollment exceeding 300,000, is now the largest school in the United States. In contrast, Pennsylvania State University, one of the largest public state universities in the United States, has approximately 45,000 students.[71]

These rapidly growing for-profit schools also have become the target of congressional and media criticism.[72] There are good reasons for this. The DOE's statistics show that although students at for-profit, post-secondary schools comprise only about thirteen percent of higher-education students, they account for thirty-one percent of student loans, and nearly half of loan defaulters.[73] And, the amount of their defaulted loans exceeds "the yearly tuition bill for all students at public two and four-year colleges and universities."[74] This debt is a huge and growing national problem that victimizes both taxpayers and students,

---

70. *Id.* § 3730(e)(4)(B).

71. See Nat'l Ctr. for Educ. Statistics, *Fast Facts*, U.S. DEP'T OF EDUC., http://nces.ed.gov/fastfacts/display.asp?id=74 (last visited Apr. 26, 2015) (listing the twenty largest degree-granting colleges and universities in the country).

72. *See, e.g.*, S. HEALTH, EDUC., LABOR AND PENSIONS COMM., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS (2012), *available at* http://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf [hereinafter HARKIN REPORT] (discussing federal loans and for-profit education); Editorial, *Lessons of a For-Profit College Collapse*, N.Y. TIMES, July 9, 2014, at A24; Stephen Burd, *The Subprime Student Racket: With Help from Washington, the For-Profit College is Loading up Millions of Low-Income Students with Debt They'll Never Pay Off*, WASH. MONTHLY, Nov./Dec. 2009, *available at* http://www.washingtonmonthly.com/features/2009/0911.burd.html (discussing for-profit colleges and federal student loans); Tamar Lewin, *Hearing Sees Financial Success and Education Failures of For-Profit Colleges*, N.Y. TIMES, Mar. 11, 2011, at A17 (discussing hearing on for-profit colleges); David Halperin, *New Gainful Employment Rule Is Weak, But Predatory For-Profit Colleges Remain on the Ropes*, REPUBLIC REP. (Oct. 30, 2014, 12:00 AM), http://www.republicreport.org/2014/new-gainful-employment-rule-is-weak-but-predatory-for-profit-colleges-remain-on-the-ropes (criticizing the Obama administration's "gainful employment" rule aimed at student loan abuse by colleges); Danny Vinik, *Obama Is Cracking Down on For-Profit Colleges – And Liberals Should Applaud Him for It*, NEW REPUBLIC (Mar. 17, 2014), http://www.newrepublic.com/article/117049/white-house-issues-gainful-employment-regulation-profit-colleges.

73. Press Release, U.S. Dep't of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014), *available at* http://www.ed.gov/news/press-releases/obama-administration-takes-action-protect-americans-predatory-poor-performing-ca.

74. Andrew Martin, *Debt Collectors Cashing In On Student Loan Roundup*, N.Y. TIMES, Sept. 9, 2012, at A1.

disproportionately those going to for-profit schools. Despite the non-dischargeable debt they incur, nearly three-fourths of the for-profit gainful employment programs analyzed by the DOE in 2014 produced graduates who, on average, earned no more than high school dropouts.[75] That is not all.

Moreover, on July 30, 2012, the Senate Committee on Health, Education, Labor and Pensions ("Harkin Committee")—headed by recently-retired Iowa Senator Tom Harkin—issued a scathing report ("Harkin Report") after concluding a comprehensive, two-year investigation of the rapidly growing for-profit schools. The Harkin Report conclusions included the following:

> "Federal taxpayers are investing billions of dollars a year, $32 billion in the most recent year, in companies that operate for-profit colleges. Yet, more than half of the students who enrolled in those colleges . . . left without a degree or diploma within a median of four months;"[76]
>
> "[T]he for-profit colleges examined employed 35,202 recruiters compared with 3,512 career services staff;"[77]
>
> "The vast majority of the students left with student loan debt that may follow them throughout their lives, and can create a financial burden that is extremely difficult, and sometimes impossible, to escape;"[78]
>
> "For profit colleges are rapidly increasing their reliance on taxpayer dollars. In 2009–10, the sector received $32 billion, 25 percent of the total Department of Education student aid program funds;"[79]
>
> The average tuition for a bachelor's degree at the for-profit schools was $62,702 compared to $55,522 at private colleges, and for an associate's degree cost $34,988 at for-profit schools compared to $8,313 at private colleges;[80]
>
> Ninety-six percent of for-profit students take out taxpayer-subsidized student loans compared to thirteen percent of community college students.[81]

Steve Eisman is an investor whose visionary criticism of the subprime-mortgage industry was chronicled by Michael Lewis in his bestselling book *The Big Short*. "Until recently," Eisman said in a much-publicized speech and in testimony for the Harkin Committee, "I thought that there would never again be an opportunity to be involved with an industry as socially destructive and morally bankrupt as a subprime mortgage industry. I was wrong. The for-profit education

---

75. Press Release, U.S. Dep't of Educ., Obama Administration Announces Final Rules to Protect Students from Poor-Performing Career College Programs (Oct. 30, 2014), *available at* http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs.

76. S. HEALTH, EDUC., LABOR & PENSIONS COMM., FOR-PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND INSURE STUDENT SUCCESS 1 (2012), *available at* http://www.help.senate.gov/imo/media/for_profit_report/ExecutiveSummary.pdf.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 3.

81. *Id.* at 7.

industry has proven equal to the task."[82] Eisman attributes that industry's success to influence peddling, watering down of industry regulations, and the increase in public funding for such schools. "[T]he government, the students, and the taxpayer bear all of the risk and the for-profit industry reaps all the rewards," he said.[83] "This is similar to the subprime mortgage sector."[84]

Other striking resemblances between the subprime-mortgage industry and the for-profit education industry are that both rely upon high-pressure, boiler-room-type sales tactics. Both target poor and vulnerable citizens, and both exploit the aspirations of these citizens to realize the American Dream. As a result, both industries have caused millions of low-income Americans to take on debt that they can ill afford, often with no benefit to them.[85]

One striking difference, though, is that the debt that poor people take on to buy a home is dischargeable through bankruptcy. In contrast, the huge debt that low-income Americans take on for a for-profit student loan is non-dischargeable.[86] This is true regardless of whether the person gets a for-profit school degree, much less a job afterward that would provide a salary sufficient to pay off the loan. As Senator Harkin pointed out:

> The difference between the subprime and this is at least in the subprime mortgage crisis you could walk away from your home. . . . These students with these debts cannot walk away from them. . . . So from a strictly money-making perspective, what I have described is a highly successful model. But . . . from an educational perspective and from the perspective of public moneys and disadvantaged students, from an ethical perspective, I think it is a deeply disturbing model.[87]

---

82. Andy Kroll, *Eisman's Next Big Short: For-Profit Colleges*, MOTHER JONES (May 27, 2010, 6:55 AM), http://www.motherjones.com/mojo/2010/05/steve-eisman-big-short-michael-lewis.

83. Steve Eisman, Testimony Before the U.S. Senate Committee on Health, Education, Labor and Pensions Testimony of Steven Eisman, SUBPRIME GOES TO COLLEGE 1 (June 24, 2010), *available at* http://www.help.senate.gov/imo/media/doc/Eisman.pdf.

84. *Id.*

85. *Id.*

86. 11 U.S.C. § 523 (2012) (exceptions to debt dischargeable in bankruptcy).

87. *Bridgepoint Education, Inc.: A Case Study in For-Profit Education and Oversight, Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 112th Cong. 774 (2011). Senator Harkin also noted that:

> America was caught off guard by the subprime mortgage crisis. Fast talking sales people deceived consumers into taking out loans that they knew would never be paid back and financial speculators hid the risk and passed the debt off to investors. What has become clear over the past year, through this committee's investigation, is that there is a class of subprime colleges within the for-profit sector that are doing the exact same thing. Instead of packaging these loans into securities and selling them to

These schools have also targeted low-income minorities.[88] And veterans have been targeted as well, particularly at ITT, according to the Harkin Committee's investigation.[89] As CNN and *Money Magazine* reported in summarizing the committee's findings in this regard, the "GI Bill was designed to help veterans, but the biggest beneficiaries seem to be the for-profit private schools that are raking in taxpayer dollars."[90]

To benefit from Pell Grants and other taxpayer-paid or backed student loans and grants, all the for-profit schools need to do is make sure the student is enrolled for at least thirty days—which is why the recruiters' salaries are often pegged to retaining students in class for thirty days.[91] This is also often all they do, as evidenced by the fact more than half their students stay in school less than three months, while those who stay long enough and accumulate the massive non-dischargeable debt necessary to get a degree from one of these schools have worse job prospects than high school dropouts.[92]

For this and other reasons, the billions of dollars poured into these schools through student loans raise public policy issues beyond the scope of this Article.[93] Specifically, as demonstrated above, one issue raised by the Senate Harkin Committee investigation and by the media

---

> investors, this time they are passing the debt off to American taxpayers in the form of federally guaranteed student loans.

Drowning in Debt: A Financial Outcomes of Students at For-Profit Colleges, 112th Cong. 786 (2011).

88. Burd, *supra* note 72.

89. Aaron Smith, *For-Profit Schools Cash In On the GI Bill*, CNN MONEY (June 26, 2012, 10:46 AM), http://money.cnn.com/2012/06/26/news/economy/veterans-schools; *see For-Profit Colleges Tap GI Bill Loophole For Business*, BLOOMBERG NEWS (July 30, 2014), http://www.ibj.com/articles/print/48808-for-profit-colleges-tap-gi-bill-loophole-for-business ("For-profit colleges, including Carmel-based ITT Educational Services, Inc., accounted for eight of the top 10 recipients of education benefits for U.S. military veterans in the 2012-13 academic year, according to a U.S. Senate report.").

90. *Id.*

91. First-year college students generally have to wait thirty-days for federal student loan disbursements. *See Receiving Aid*, U.S. DEP'T OF EDUC., https://studentaid.ed.gov/fafsa/next-steps/receive-aid (last visited Apr. 26, 2015).

92. United States Department of Education, Notice of Proposed Rulemaking, 49, (Mar. 25, 2014), http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/notice-proposed-rulemaking-march-14-2014.pdf; *see* HARKIN REPORT, *supra* note 72, at 535 (discussing the for-profit educational institution ITT).

93. *See generally* HARKIN REPORT, *supra* note 72 (discussing federal investment in for-profit education). The report of the Harkin Committee raises public and social policy questions as to whether these schools are a costly blight on American society. This much is clear: Given the huge marketing budgets, executive salaries, and profit margins for such schools, as well as the fact that they saddle the American taxpayers and their students with such extraordinary debt, it is hard to see how such an industry can survive absent strong lobbying efforts and forceful litigation tactics.

is the failure of many of these schools to create human capital at the same time that they destroy enormous real capital paid for by taxpayers.[94] To address this issue and to provide a stepladder to upward mobility and success to lower- and middle-class persons by providing a sensible alternative to these for-profit schools, President Obama rolled out a proposal in his 2015 State of the Union Address to provide free community college tuition to qualified students.[95] The Obama Administration's proposal is to make community college free and universal by reducing community-college tuition costs to zero across the economic spectrum.[96] The plan, based on one developed in Tennessee, is estimated to cost $60 billion over ten years.[97]

C. ITT

ITT, a for-profit education corporation with more than 130 locations nationwide, is one of the nation's largest companies offering post-secondary educational training.[98] All for-profit schools have astronomically high default rates;[99] but, even among this group, ITT stands out for having worst default rate of for-profit schools nationwide.[100] And, ITT's high default rate is, in fact, "significantly" underreported because of deceptive practices ITT deploys to delay and

94. *See supra* notes 71–92 and accompanying text (discussing the failures of for-profit education institutions).

95. *See, e.g.*, Richard D. Kahlenberg, *The Genius of Obama's Two-Year College Proposal*, THE ATLANTIC (Jan. 12, 2015, 10:05 AM), http://www.theatlantic.com/education/archive/2015/01/the-genius-of-obamas-two-year-college-proposal/384429/ ("'This proposal would make two years of college the norm in the way that high school was the norm in the last century,'" White House domestic policy advisor Cecilia Munoz explained"); Claire Zillman, *The Case for Obama's State of the Union Free College Proposal, In Six Charts*, FORTUNE (Jan. 20, 2015, 9:33 PM), http://fortune.com/2015/01/20/the-case-for-obamas-state-of-the-union-free-college-proposal-in-6-charts/ (discussing with six charts Obama's free college proposal).

96. *Id.*

97. *Id.*

98. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 819 (7th Cir. 2013) ("ITT is a for-profit institution with over 140 locations . . . .").

99. *See, e.g.*, Bill Alpert, *Clever Is as Clever Does: For-profit Colleges Are Contributing Mightily to the Country's $1 Trillion In Student–Loan Debt. When It Comes to Defaults, ITT Educational Services Is Doing Much More Than its Share*, BARRON'S (Apr. 14, 2012), http://online.barrons.com/articles/SB50001424053111904857404577333971078578982; Kim Clark, *The 5 Colleges that Leave the Most Students Crippled by Debt*, TIME (Sept. 24, 2014), http://time.com/money/3426618/student-loan-default-factories ("Almost 650,000 federal student loan borrowers have defaulted on their debt, new data shows. A handful of for-profit schools are a big part of the problem.").

100. *See, e.g.*, Alpert, *supra* note 99 (discussing ITT student loan debt); Clark, *supra* note 99 (noting that ITT's default rate on loans due in 2011 was the highest of for-profit schools, at about twenty-two percent).

quell defaults.[101] ITT also has one of the highest costs per course credit.[102]

On August 7, 2014, the Securities and Exchange Commission ("SEC") issued a notification, known popularly as a "Wells Notice," informing ITT that the SEC intended to bring an enforcement action against the company for federal securities-law violations.[103] ITT's 2013 Annual Report, filed in October 2014, revealed additional serious problems.[104] But this was not the first period of time that ITT faced

101. HARKIN REPORT, *supra* note 72, at 533 ("Default management is primarily accomplished by putting students who have not made payments on their student loans into temporary deferments or forbearances."). In addition:

- Two-thirds of ITT's revenue now comes from taxpayer-funded student loans, and most of the remainder from taxpayer-funded defense contracts. *Id.* at 517–18.
- ITT was the beneficiary of largely taxpayer-paid loans totaling approximately $1.1 billion in 2010. *Id.* at 542.
- More than half of ITT's students withdraw from school within three months. *Id.* at 531.
- More than thirty-seven percent of ITT's revenue in 2010 was profit and more than nineteen percent was devoted to marketing, the two largest uses of company revenue. *Id.* at 520.
- It costs close to $45,000 in tuition for an associate's degree at ITT compared to approximately $9,000 for an associate's degree from a community college in the same area and close to $94,000 for a bachelor's degree compared to about $43,500 for a bachelor's degree in the same area (ITT in Indianapolis v. Indiana University in Bloomington, Indiana). *Id.* at 523.
- ITT's student default rate exceeded twenty-five percent, and that default rate was deceptively low because ITT manipulated the rate by placing students who should have been in default in forbearance to delay defaults. *Id.* at 533.
- The facts "cast serious doubt on the notion that ITT's students are receiving an education that affords them adequate value relative to cost and calls into question the $1.2 billion investment American taxpayers made" in ITT in 2010. *Id.* at 542.
- Approximately, ninety-five percent of ITT students take out student loans. Alison Sherry, *As For-Profit Colleges Flourish, Focus Turns to Grads' Success and Debt*, DENVER POST (Jan. 17, 2010), http://www.denverpost.com/news/ci_14209838.

102. *Id.*

103. ITT Educational Services, Inc., Annual Report (Form 10-K), at 30–32 (Dec. 31, 2013), *available at* http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=9848558&type=PDF&symbol=ESI&companyName=ITT+Educational+Services+Inc.&formType=10-K&dateFiled=2014-10-16. On the eve of this bad news, on August 4, 2014, ITT's chief executive officer, Kevin Modany, announced that he would be stepping down from the company. *Id.* at 37.

104. These included the following problems: The DOJ is investigating ITT for deceptive trade practices and other wrongdoing as is the Department of Veteran Affairs, the Government Accountability Office, the Federal Trade Commission, and the Department of Defense (the other area from that ITT benefits from government largess). *Id.* at 30. Attorneys General from Arkansas, Arizona, Colorado, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Massachusetts, Missouri, Nebraska, North Carolina, Oregon, Pennsylvania, Tennessee, and Washington are now all investigating ITT's consumer practices, and New Mexico is suing ITT for deceptive practices. *Id.* The U.S. Consumer Financial Protection Bureau issued a Civil Investigative Demand on ITT and in February 2014 filed a complaint in the Southern District of Indiana accusing ITT of subjecting students to undue influence or coercing them into taking out private education loans.

close scrutiny.[105]

D. The FCA and For-Profit Schools

Title IV of the Higher Education Act ("HEA") governs the administration of more than $150 billion in annual federal student financial assistance for higher education.[106] Student financial aid under Title IV comes in two primary forms: grants and loans.[107] The Pell Grant Program—the largest federal grant program—provides grants on a need-based basis to low-income students.[108] These grants do not have to be repaid.[109] Prior to 2010, and during the relevant time period of Ms. Leveski's allegations, students received federal loans from two student loan programs.[110]

In the first, the Federal Family Education Loan Program, dating back to the mid-1960s, the federal government would guarantee loans originated by private lenders against losses from default.[111] In the second, the William D. Ford Federal Direct Loan program, enacted in

---

Id. One ITT location and 87 programs need to raise its Student Retention Rate and five other locations and 158 programs need to raise their graduate placement rates to at least sixty percent by November 1, 2015 or they may lose their accreditation. *Id.* at 28–29. ITT restated its unaudited condensed consolidated financial statements for the fiscal quarters ended March 31, 2013, June 30, 2013, and September 30, 2013 (which is an acknowledgement that those financial statements were false). This was a breach of its contract with a key lender, which could trigger an acceleration of its payments to the full amount it owes. *Id.* at 33. ITT failed to submit 2013 audited consolidated financial statements and Compliance Audits to the DOE by June 30, 2014, and as a result, the DOE determined that ITT's schools were not financially responsible. *Id.* at 24.

105. According to a June 30, 2005 10-Q Report that ITT filed with the SEC:

> On February 25, 2004, federal agents executed search warrants at our corporate headquarters and at ten of our 79 ITT Technical Institutes nationwide. On that same date, our Directors and executive officers and some of our other employees each received a federal grand jury subpoena that was issued, along with the search warrants, by the U.S. District Court, Southern District of Texas, located in Houston, Texas.

ITT Educational Services, Inc., Quarterly Report (Form 10-Q), at 24 (June 30, 2005). According to ITT, that investigation was dropped, without any charges made against the company or its executives, on or about June 24, 2005. *Id.* ITT SEC filings say little about what led to this criminal investigation or what led to its abandonment more than a year after the issuance of these search warrants.

106. *Federal Student Aid: About Us*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/about (last visited Apr. 26, 2015).

107. Anthony J. Guida Jr & David Figuli, *Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other at-Risk Students*, 79 U. CHI. L. REV. 131, 133 (2012).

108. *Id.*

109. *Id.*

110. *Id.*

111. Deborah Lucas & Damien Moore, *Guaranteed versus Direct Lending: The Case of Student Loans*, *in* MEASURING AND MANAGING FEDERAL FINANCIAL RISK 163, 165 (Deborah Lucas ed., 2010).

1994, the government directly lent money to qualifying students.[112] Congress ended the guaranteed loan program in 2010 and replaced it with direct federal student loans starting July 1, 2010.[113]

After the enormous sums of money now administered under the HEA led to abuses,[114] Congress became concerned that "recruiters [of students for institutions of higher education] paid by the head are tempted to sign up poorly qualified students who will derive little benefit . . . and may be unable or unwilling to repay federal guaranteed loans."[115] As a result, in 1992, Congress amended Title IV to prohibit institutions receiving federal financial assistance from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance."[116]

Seeking to maneuver around this prohibition, in 2001, the for-profit education industry lobbied Congress to enact legislation that stated that the incentive-compensation ban would not apply when recruiters receive "a fixed compensation that is paid regularly for services and that is adjusted no more frequently than every six months."[117] This legislation was buried in a bill misleadingly called "The Internet Equity and Education Act of 2001," which passed in the House of Representatives on October 10, 2001, but never got to a floor vote in the Senate after the bill was referred, on September 21, 2001, to Senate Committee on Health, Education, Labor and Pensions.[118]

---

112. *Id.*

113. *See* Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 484 n.111 (2012) (discussing the loan program).

114. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 820 (7th Cir. 2013).

115. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005).

116. 20 U.S.C. § 1094(a)(20) (2012).

117. H.R. 1992, 107th Cong. § 4(a) (2001).

118. Representative Patsy Mink, the chief opponent of the legislation in the House of Representatives, pointed out on the House floor at the time that:

> This is not a debate about distance learning, it is not a debate about how important laptop education is in terms of allowing people to participate in the higher education field at home, safe in their own homes, or in their offices. What this debate is about is whether the Congress is going to live up to its responsibilities to protect the financial integrity of the student loan program. That is all this is about. Members will recall in the late 1980s and in the 1990s there were these tremendous reports from the education institutions about huge, crescendoing default rates. . . . Congress said, this cannot be. We must do something to protect the taxpayers from having to pay out all of these loans that the students were defaulting. So the Congress wisely put into effect three very important rules: One, that the institutions first had to be accredited, and that they

The for-profit industry, however, then lobbied the DOE, which oversees these schools, to adopt a regulation to permit institutions receiving federal financial assistance to pay student recruiters and financial aid officers "fixed compensation . . . as long as that compensation is not adjusted up or down more than twice during any twelve month period, and any adjustment is not based solely on the number of students recruited, admitted, enrolled, or awarded financial aid."[119]

The industry's lobbying of DOE paid off handsomely with the adoption of this regulation by the DOE in 2002.[120] The government official who shepherded this "safe harbor" provision through the DOE was Sally Stroup, the Assistant Secretary for the Office of Postsecondary Education at the DOE from 2002–2006.[121] Before that, she served as the lobbyist for the University of Phoenix, and she is now the Executive Vice President for Government Relations and General Counsel of the Association of Private Sector Colleges and Universities, the lobbying group for the for-profit schools.[122] As is clear from *Leveski*, the for-profit school industry has also deployed extraordinarily

---

> could offer only 50 percent of their programs off campus . . . . The other rule was that there had to be 12 hours of instructional offerings in order to be considered a full-time student. The third was to prevent all those hoaxes that were going on where people were being paid commissions to recruit students to sign up for higher education courses, and this exacerbated the default situation. . . . So we are here today with legislation which will, in essence, repeal those three very important pieces of protective legislation that were added in 1992 and strengthened in 1998.

147 Cong. Rec. H64630-H6487 (daily ed. Oct. 10, 2001) (statement of Rep. Mink), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2001-10-10/html/CREC-2001-10-10-pt1-PgH6463-6.htm. The rule, known as the 50/50 rule, was jettisoned in 2006 as a result of the Higher Education Reconciliation Act. *See* Tiffany Stanley, *On For-Profit Colleges, Congress Gets Schooled – Again*, THE NEW REPUBLIC (October 12, 2010), http://www.newrepublic.com/blog/jonathan-cohn/78333/profit-colleges-congress-gets-schooled%E2%80%94again (discussing Senate hearings on for-profit schools).

119. 34 C.F.R. § 668.14(b)(22)(ii)(A) (2002).

120. *Id.* The lobbying power of this interest group has grown enormously. *See, e.g.*, Sam Dillon, *Online Colleges Receive a Boost from Congress*, N.Y. TIMES (Mar. 1, 2006), http://www.nytimes.com/2006/03/01/national/01educ.html?pagewanted=print (discussing the growth of the power of this lobby).

121. *See* ANDREW P. KELLY, AM. ENTER. INST., MORE THAN MEETS THE EYE: THE POLITICS OF FOR-PROFITS IN EDUCATION 8 (2011) (discussing Stroup's role in shaping for-profit school policy); Burd, *supra* note 72 (noting Stroup's previous role as a lobbyist at the University of Phoenix, where she worked to largely take the teeth out of regulations designed to cut down on abuses); David Halperin, *New For-Profit Lobbyist Is Long-Time Champion of Troubling Policies*, REPUBLIC REP. (July 6, 2012) (describing Stroup's role in sheparding through the "safe harbor" provision). Ms. Stroup was an advocate for the for-profit schools in other ways while serving at the DOE. *See, e.g.*, Dillon, *supra* note 120 (discussing Stroup's role in overseeing a program that eliminated certain funding restrictions for for-profit schools).

122. Halperin, *supra* note 121.

aggressive and heavy-handed litigation tactics to frighten whistleblowers, coerce lawyers, and thereby protect its lucrative business by shielding itself from accountability.

Although this industry has grown rapidly,[123] it also has suffered several setbacks. For example, in 2011 the DOE eliminated the 2002 regulation after determining it was misused by the for-profit schools to circumvent Congress' prohibition on paying recruiters directly or indirectly based on the number of students they recruited.[124] Moreover, court decisions have allowed private enforcement to step in where the government regulators have looked away. Beginning in 2005, in *United States ex rel. Main v. Oakland City University*,[125] the Seventh Circuit held for the first time that recruiting practices that tempt schools to enroll poorly qualified students can form the basis of an FCA action.[126] This groundbreaking decision was based on the restrictions placed on schools that receive funding from federal student financial assistance programs by the HEA.[127]

Following *Main*, *United States ex. rel. Hendow v. University of Phoenix* held that a school's material breach of its PPA conditions will give rise to an FCA action.[128] A relator bringing such an action, however, would still need to allege particular facts establishing that the school illegally compensated its recruiters.[129]

In the archetypal FCA action, such as where a private company overcharges under a government contract, the claim for payment is itself literally false or fraudulent.[130] But the FCA is not limited to just false or fraudulent claims for payment. It also imposes liability for false statements in support of false claims[131] and stretching beyond that it is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."[132] The principles embodied

---

123. HARKIN REPORT, *supra* note 72, at 516.

124. Eric Lichtblau, *With Lobbying Blitz, For-Profit Lobby Diluted New Rules*, N.Y. TIMES Dec. 10, 2011, at A1; *Program Integrity Issues: Incentive Compensation*, U.S. DEPT. OF EDUC. (Feb. 2, 2012), http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/compensation.html. The DOE's regulations now flatly prohibit institutions receiving federal award money from adjusting the salaries of student recruiters and financial aid officers "based in any part, directly or indirectly, upon success in securing enrollments or the award of financial aid." 34 C.F.R. § 668.14(b)(22)(ii)(A) (2014).

125. 426 F.3d 914 (7th Cir. 2005).

126. *Id.* at 916.

127. 20 U.S.C. § 1001 (2012).

128. United States *ex. rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006).

129. *Id.*

130. *Id.* at 1170.

131. *Id.*

132. United States v. Neifert-White Co., 390 U.S. 228, 233 (1968). In amending the FCA in

in this broad construction of a "false or fraudulent claim" have given rise to two doctrines that attach potential FCA liability to claims for payment that are not explicitly and/or independently false themselves: false certification (either express or implied) and promissory fraud.[133] Under either doctrine, if liability could be established based on a for-profit school's recruitment compensation practices, the FCA damages stemming from liability would be monumental, constituting a threat to that company's survival.[134]

To receive federal financial assistance—funneled to the schools through student loans and tuition paid almost exclusively through taxpayer-financed Pell Grants, Stafford loans, and other student loans or grants—institutions of higher education regularly must certify their compliance with multiple federal laws and regulations.[135] By submitting PPAs, all of these schools certify that they are in compliance with Congress' ban on directly or indirectly compensating their recruiters based on the number of students they recruit.[136] These PPAs directly incorporate Congress' statutory language explicitly "directly and indirectly" banning such incentive compensation.[137] These PPAs also require that such institutions cannot pay financial aid representatives based on the loans they help secure.[138]

Federal subsidies under the HEA require two phases of paperwork. In phase one, the school submits a PPA to establish its eligibility to participate in federally subsidized student loan, grant, and scholarship programs. Both a statute[139] and a regulation[140] condition a school's eligibility on the school's commitment to refrain from paying recruiters contingent fees for enrolling students. "The concern is that recruiters paid by the head are tempted to sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans."[141] In phase two, the

---

1986, Congress emphasized that the scope of false or fraudulent claims should be broadly construed to include "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." S. REP. NO. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

133. *Hendow*, 461 F.3d at 1170–71.

134. *Id.* at 1170.

135. *Id.*

136. *Id.*

137. *Id.*

138. 20 U.S.C. § 1094(a) (2012).

139. *Id.*

140. 34 C.F.R. § 668.14(b)(22)(i) (2014).

141. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 916 (7th Cir. 2005).

loan or grant applications are actually packaged by the schools and submitted by the schools and their students. [142]

In *United States ex rel. Graves v. ITT Educational Services, Inc.*,[143] a Texas district court dismissed an FCA case after finding that ITT had not deceived the government in submitting certification documents to the DOE.[144] That judge reasoned that because the DOE's certification at issue did not require that ITT forfeit any money it received if it failed to certify compliance, and payments to ITT were not expressly conditioned on that certification, no false claims could be made out.[145] In addition, because ITT had publicly stated that it was uncertain that it was complying with recruiting compensation requirements—as opposed to saying it was complying when it was not—the relators in that case, and from that earlier pre-*Leveski* timeframe, were not able to show that ITT at that time intentionally made false statements to the DOE.[146] Accordingly the court found no fraud in the inducement or fraud via a false certification.[147]

In breaking new ground in *Main*, Judge Easterbrook parted from this logic and held that if the defendant, Oakland University, "knew about the rule" and nevertheless still told the DOE that "it would comply, while planning to do otherwise," then it was liable for false claims.[148] Thus, *Main* established that schools that directly or indirectly compensate recruiters on the basis of the number of students they recruit could face FCA liability based on the doctrine of promissory. Judge Easterbrook put it this way:

> To prevail in this suit [relator] must establish that the University not only knew . . . that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud. . . . [I]f the University knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.[149]

Following *Main*, in *Hendow*, the Ninth Circuit held that a relator can bring an FCA action when a school directly or indirectly compensates

142. *Id.*
143. 284 F. Supp. 2d 487, 502 (S.D. Tex. 2003).
144. *Id.*
145. *Id.*
146. *Id.* at 503–04.
147. *Id.*
148. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005).
149. *Id.*

its recruiters based on the number of students they recruit, for the same reasoning as Judge Easterbrook did in *Main* and for the additional reason that the case passed the Circuit's false certification test.[150]

These holdings adhere to the text of the FCA, which prohibits all false claims for public money whether or not accompanied by an express false statement.[151] Different courts, including the Ninth Circuit, have held that a claim under the FCA can be false when a party merely falsely certifies compliance with a statute or regulation as a condition to government payment.[152]

In *Hendow*, the relators alleged that the defendant, the University of Phoenix, violated the FCA because, while knowing that it was ineligible for Pell Grant Funds based on its violation of the incentive compensation ban, the school nonetheless submitted requests for such funds to the DOE anyway.[153] This resulted in a direct and illegal transfer of government-insured students' Pell Grant funds into the school account.[154]

Main and *Hendow* are squarely in line with the FCA, which allows the DOJ and relators to bring cases based not only on false claims, but also based on false statements that cause claims to be fraudulent.[155] These decisions also align with the legislative history of the FCA, in which Congress stated its intention that the FCA reaches "all fraudulent attempts to cause the Government to pay our sums of money."[156] Moreover, both decisions are by settled FCA case law holding that "Congress wrote [the FCA] expansively, meaning 'to reach all types of fraud, without qualification, that might result in financial loss to the Government.'"[157]

Potential FCA liability can be enormous. In 2009, the Apollo Group Inc. agreed to pay $78.5 million to settle *Hendow*.[158] And in 2011, the DOJ, which sat largely on the sidelines after lawsuits were brought by whistleblowers against ITT and other schools in the for-profit school

150. United States *ex. rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1172–74 (9th Cir. 2006).

151. 31 U.S.C. § 3729(a)(1) (2012).

152. *Id.* at 1171.

153. *Hendow*, 461 F.3d at 1169.

154. *Id.* at 1170.

155. 31 U.S.C. § 3729(a)(A)–(B).

156. S. REP. NO. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

157. Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 129 (2003) (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

158. Cary O'Reilly & Daniel Golden, *Apollo Settles University of Phoenix Recruiting Suit*, BLOOMBERG (Dec. 14, 2009, 6:45 PM) http://www.bloomberg.com/apps/news?pid=newsarchive &sid=a7cFhPKPB1mA.

industry, along with California, Florida, Illinois, and Indiana, brought "a multibillion-dollar" FCA lawsuit against the Education Management Corporation, "charging that it was not eligible for the $11 billion in state and federal financial aid it had received from July 2003 through June 2011" because of recruiter fraud violations.[159] In describing that lawsuit, the *New York Times* reported: "While the civil lawsuit is one of many raising similar charges against the expanding for-profit college industry, the case is the first in which the government intervened to back whistleblowers' claims that a company consistently violated federal law by paying recruiters based on how many students it enrolled."[160]

The FCA applies to "any request or demand . . . for money or property" where the government provides any portion of the money or property to the "contractor, grantee, or other recipient" or if the government will "reimburse such contractor, grantee or other recipient for any portion of the money or property."[161] Thus, when borrowers default on federally insured loans procured by fraud, FCA liability can include the defaulted loan amount as well as treble damages imposed under the FCA and statutory penalties of up to $11,000 for each false statement made.[162]

E. The Allegations in United States *ex rel.* Leveski v. ITT

Ms. Leveski worked at ITT's location in Troy, Michigan from 1996 to 2007.[163] In 2007, after she left, she brought a *qui tam* action in the Southern District of Indiana at Indianapolis, near the company's Carmel, Indiana headquarters.[164] She alleged two ways in which ITT knowingly submitted false claims to the DOE to receive funding from federal student financial assistance programs. First, she alleged that ITT falsely purported to pay its recruiters based on a host of factors while it actually paid them directly or indirectly based on the number of students recruited.[165] Second, she alleged that it paid Financial Aid Administrators ("FAAs") based on the number of loans they packaged.[166] Both practices are illegal under the HEA, which was

159. Tamar Levin, *For-Profit College Group Sued as U.S. Lays Out Wide Fraud*, N.Y. TIMES, Aug. 9, 2011, at A1.

160. *Id.*

161. 31 U.S.C. § 3729(c) (2012).

162. *Id.* § 3729(g).

163. *Leveski*, 719 F.2d at 819.

164. *Id.*

165. *Id.* at 822.

166. *Id.* at 823.

enacted in 1965 "[t]o strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education."[167]

Ms. Leveski alleged two categories of payments covered by the FCA: guaranteed loans and direct student grants.[168]

Under the now-defunct Federal Family Education Loan Program, a federally guaranteed school loan program in effect during the time covered by Ms. Leveski's action, a participating institution that has entered into a PPA—such as ITT—and an eligible student submit an application to a private lender for a loan on behalf of the student.[169] The lender—typically a bank—issues a check for tuition, made payable to both the student and the institution, for the student to use to pay tuition.[170] The DOE subsidizes interest payments on the loans during the period that the student is actively enrolled in classes and during certain grace periods.[171]

The loans are guaranteed by state agencies or nonprofit organizations and are both subsidized and reinsured by the DOE.[172] If a student defaults, the guaranteeing agency or organization must reimburse the lender for any balance due and could then try to collect any unpaid amount due from the student.[173] If that agency were unsuccessful in such collection efforts, then the DOE would have to reimburse the guaranteeing agency for the loss or accept assignment of the loan.[174] Thus, the federal government would often have to pay out-of-pocket when students defaulted on loan payments for these federally guaranteed loans.

Ms. Leveski also alleged that ITT received funds directly through the federal Pell Grant Program.[175] Only institutions that enter into a PPA may receive Pell Grant funds to disburse to its eligible students.[176] The

---

167. Higher Education Act, Pub. L. No. 89–329, 79 Stat. 1219 (1965).

168. *Leveski*, 719 F.3d at 839.

169. *See, e.g.*, United States *ex rel.* Vigil v. Nelnet, 639 F.3d 791, 794 (8th Cir. 2011) ("Under the FFELP, DOEd pays claims submitted by eligible private lenders for interest-rate subsidies and special allowances granted on behalf of student borrowers.").

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. 20 U.S.C. § 1078(c)(1)(A) (2012); 34 C.F.R. §§ 682.400(b)(3), 682.404, 682.409(a)(1) (2014).

175. *Leveski*, 719 F.2d at 823.

176. *See* United States *ex rel.* Graves v. ITT Educ. Servs., 284 F. Supp. 2d 487, 496 (S.D. Tex. 2003) (explaining that institutions may not receive Pell Grant funds unless they enter into a PPA).

participating school requests funds from the DOE to pay for grants for eligible students.[177] Those funds are then deposited in an institutional account, to be held in trust for the intended student beneficiaries.[178] The student prepares an application for a Pell Grant, which the student may submit directly to the DOE or give to the school to transmit.[179]

As discussed above, if ITT "knew about the rule" prohibiting the payment of incentive compensation to recruiters and told the DOE that "it would comply, while planning to do otherwise,"[180] ITT would face liability under the FCA. In this situation, ITT could be held liable for up to treble damages under the FCA for all, or some portion of, both its direct Pell Grants and for all, or some portion of its federally guaranteed student loans. ITT could also be held liable for penalties—under the FCA—of up to $11,000 for each false claim or statement in support of a claim that it made. This does not include substantial FCA damages and penalties that could flow from establishing liability based on her loan-packaging fraud allegations, which she alleged violated the FCA.

Ms. Leveski's employment at ITT's Troy, Michigan campus began on January 8, 1996,[181] before the adoption of the 2002 DOE regulations. The federal statute and DOE regulation prohibiting the direct or indirect compensation of recruiters and financial aid representatives based on their numbers were effective for the entire period of time covered by her lawsuit. ITT initially hired Ms. Leveski as a recruiter, referred to by ITT as an "Inside Recruitment Representative."[182] She alleged that throughout her employment, ITT made the importance of recruiting "numbers" very clear.[183] Recruiters were told "that if they wanted an increase in pay, they must increase applications, enrollments, and starts."[184] Starts are important because, as mentioned, students need to remain in school for thirty days for their federal student loans to vest and the school to become the beneficiary of such funds.[185]

Although ITT's focus was always on recruiting "numbers," according

---

177. *Id.*

178. 34 C.F.R. § 668.161(b).

179. *See* Microtech Tech. Inst. v. Riley, 139 F.3d 1044, 1046 (5th Cir. 1998) (explaining the rules regarding the Pell Grant program).

180. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005).

181. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 820 (7th Cir. 2013).

182. *Id.*

183. *Id.* at 821.

184. *Id.*

185. First-year college students generally have to wait thirty days for federal student loan disbursements. *See Receiving Aid*, *supra* note 91. At ITT, more than half of enrolled students drop out within three months. HARKIN REPORT, *supra* note 72, at 577.

to Ms. Leveski's lawsuit, it pretended to evaluate recruiters based on multiple criteria, including professional development, the attrition rate of enrolled students, "being a team player," appearance, and attitude.[186] Ms. Leveski alleged that these values rose and fell in tandem with her recruiting numbers.[187] Her success in recruiting students correlated with her alleged success in ITT's other job-evaluation criteria.[188] The other non-quantifiable and easily manipulated criteria masked the fact that ITT was directly and indirectly compensating ITT's recruiters based on the number of students they recruited in violation of the HEA, thereby subjecting ITT to FCA liability.

Ms. Leveski was a recruiter for six years, and after that, a Financial Aid Administer ("FAA") for close to five years.[189] During this time[190] she learned that FAA pay was related almost exclusively to the number of student loans the FAA processed,[191] demonstrating that "ITT only cared about how much federal financial assistance award money she could secure for the school and how quickly she could do it."[192] This pressure to meet loan package goals and secure federal funds as quickly as possible led FAAs "to underreport students' incomes, to overlook discrepancies in the students' applications, and even to falsify financial aid documents."[193]

Ms. Leveski filed her FCA case on July 3, 2007, and she detailed in her complaint specific evidence that led her to reach her conclusions.[194] While the complaint remained under seal, the United States Attorney's Office in Indianapolis investigated the claims but declined to intervene.[195] The case was then unsealed and, as permitted by the FCA, Ms. Leveski's lawyers then began litigating it.

F. The District Court's Holding

Judge William T. Lawrence initially presided over Ms. Leveski's case.[196] He quickly denied a motion to dismiss based on ITT's argument that the case was "substantially similar" to *United States ex rel. Graves v. ITT* and, therefore, should be barred on the basis of an

186. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 821 (7th Cir. 2013).
187. *Id.*
188. *Id.*
189. *Id.* at 822.
190. *Id.* at 823.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 825.
195. *Id.*
196. *Id.*

FCA first-to-file bar.[197] Similar to the public-disclosure bar, the first-to-file bar prevents a relator from bringing claims when a similar case has already been filed.[198] Courts disagree on whether the first-to-file bar "kills" the latter case or merely requires it to stand in line and await disposition of the earlier case.[199]

Judge Lawrence avoided the question by holding—as the Seventh Circuit later also held in addressing the public-disclosure issue—that Ms. Leveski's lawsuit was not similar to the earlier *Graves* case.[200] After largely denying ITT's second motion to dismiss, Judge Lawrence set a schedule for the case to move forward.[201] Although ITT argued that Ms. Leveski's allegations were not particular enough to meet Federal Rule of Civil Procedure 9(b)'s particularity requirements, Judge Lawrence found they were detailed enough for the case to proceed forward, though he did limit the time period of the case from 2001–2007 based on the FCA's six-year statute of limitation.[202]

But then the case was transferred on June 10, 2010 to Judge Tanya Walton Pratt,[203] a newly appointed district court judge. Shortly thereafter, ITT filed a third motion to dismiss in which it argued that the case was barred because: a) it was "based upon publicly disclosed allegations" in the earlier *Graves* case and b) Ms. Leveski was "not the original source of her allegations."[204]

ITT's "new" argument was a repeat of the one it lost on first-to-file grounds with two differences. The two differences were: first, that ITT now based its argument on the public-disclosure bar instead of the first-

197. *Id.* at 825.

198. 31 U.S.C. § 3730(e)(4)(B) (2012).

199. That issue will be decided by the Supreme Court in 2015 on appeal from *United States ex rel. Carter v. Halliburton Co*., 710 F.3d 171 (4th Cir. 2013). The view that the latter case merely forces the second filer to wait in line is consistent with the idea that the bar is designed to encourage relators to come forward quickly and also to avoid confusion as to who should be the point person for the litigation. That view is more in line with the statutory language and legislative history of the FCA. *See, e.g.*, *Halliburton*, 710 F.3d at 183 (holding that the first-to-file bar merely makes the second filer wait in line); *In re* Natural Gas Royalties Qui Tam Litig., 566 F.3d 956, 963 (10th Cir. 2009) (explaining that the first-to-file bar "makes more sense within the overall structure of the FCA"). In 2014, the Supreme Court took certiorari on this issue and an unrelated jurisdictional issue. The DOJ supports the wait-in-line argument. In *United States ex rel. Shea v. Cellco Partnership, Inc.*, 748 F.3d 338, 344 (D.C. Cir. 2014), the District of Columbia Circuit took the position that first-to-file bar permanently blocks cases. Judge Sri Srinivasan, however, dissented and pointed out that the FCA and its legislative history clearly support a "wait-in-line" approach. *Id.* at 349 (Srinivasan, J., dissenting).

200. *Leveski*, 719 F.3d at 829.

201. *Id.* at 825–26.

202. *Id.*

203. *Id.* at 826.

204. *Id.*

to-file bar; and second, after years of litigation, ITT now argued that it had elicited "new evidence" on the basis of Ms. Leveski's deposition testimony that ostensibly supported its argument.[205]

Judge Pratt dismissed the lawsuit with prejudice.[206] In doing so, she held that Ms. Leveski's allegations were publicly disclosed by *Graves*, and that she was not an original source.[207] Thereafter, acting on a motion from ITT and claiming to be using her own inherent authority, Judge Pratt then issued sanctions amounting to $394,998.33 against the law firms representing Ms. Leveski for pursuing what the Judge viewed as a frivolous case and against one of her lawyers, whom she accused of "pluck[ing] a plaintiff out of thin air and tr[ying] to manufacture a lucrative case."[208]

In granting the dismissal motion, Judge Pratt noted that, like Ms. Leveski, the relators in *Graves* worked as ITT recruiters and also "alleged that ITT violated the HEA by compensating its admissions and recruitment representatives based directly on the number of their enrolled students."[209] Judge Pratt relied on *Glaser v. Wound Care Consultants, Inc.*, in which the Seventh Circuit held that the addition of "a few allegations" in a complaint not covered by the previous disclosure is not enough to take the case outside the public-disclosure bar.[210]

It did not matter to the district court that Ms. Leveski alleged a different recruiting-fraud scheme than was alleged in *Graves*—a scheme designed to camouflage the type of misconduct alleged in *Graves*—or that the scheme she alleged spanned a later and greater period of time, or that she also alleged violations of FAA requirements absent from *Graves*.

Decisive for Judge Pratt was that both lawsuits alleged ITT violated recruiting fraud law.[211] Judge Pratt also expressed concern that, before

---

205. *Id.*

206. *Id.* at 826–27.

207. *Id.* at 827. At the time, the public-disclosure bar was a jurisdictional bar, but since then the law changed it so that it no longer remained a jurisdictional bar. 31 U.S.C. § 3730(e)(4)(A) (2012).

208. *Leveski*, 719 F.3d at 819. In making the first holding, the Judge misinterpreted public-disclosure law. With regard to the original-source portion of her opinion, Judge Pratt acknowledged that controlling Seventh Circuit law supported Ms. Leveski's position, but held that she nonetheless, as district court judge, had discretion to ignore controlling circuit law. The Seventh Circuit overturned these sanctions.

209. *Id.* at 827.

210. Glaser v. Wound Care Consultants Inc., 570 F.3d 907, 920–21 (7th Cir. 2009); *see* United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-CV-00867-TWP, 2011 WL 3471071, at *4 (S.D. Ind. Aug. 8, 2011) (noting the dismissal order).

211. *Leveski*, 719 F.3d at 826.

speaking with a lawyer, Ms. Leveski might not have fully appreciated the legal implications of the *Main* decision as it related to the PPAs that ITT's CEO signed and provided to the DOE.[212] Thus, Ms. Leveski's lawsuit was thrown out (and her lawyers were sanctioned) because she supposedly lacked the legal acumen and FCA background to be fully versed in the theory of liability that Chief Circuit Judge Easterbrook established in *Main*. The district court ignored the fact that Ms. Leveski, a layperson with knowledge of all pertinent frauds, was not required to know the exceedingly complex legal significance of these facts.

Holding that Ms. Leveski needed to have expert knowledge of the contents and legal significance of the PPAs made no sense because federal compensation laws required ITT to provide the DOE with signed PPAs. So, the government obviously knew that ITT promised in those PPAs to abide by federal incentive compensation law; the government did not need Ms. Leveski to tell it what those laws were or what promises ITT made. What the government *does* need for the FCA to be effective is a whistleblower able to provide information that the government does not know. Ms. Leveski provided such information based on her personal experience as an ITT insider: she gave the government information based on her personal knowledge and experience that the government did not already know, demonstrating that ITT violated the law while masking its actual recruiter-compensation practices. The district court, however, would have required Ms. Leveski to know about ITT's PPAs and would have required her to understand the legal implications of ITT's signing these documents—information that the government was fully aware of on its own. Ms. Leveski, however, disclosed valuable details of ITT's actual fraudulent conduct, the very thing that the government needs whistleblowers to do.

The FCA also does not require that relators know every document pertaining to the fraud along with the legal significance of such documents. If it did, that standard would unduly limit potential whistleblowers mainly to persons who design and orchestrate massive frauds and/or by virtue of their high company positions are the primary beneficiaries of such conduct. These are the least likely persons to blow any whistles. Such a requirement would also greatly increase the uncertainty of litigation, thereby discouraging relators from coming

212. United States *ex rel.* Leveski v. ITT Educ. Servs. Inc., No. 1:07-CV-0867-TWP-MJD, 2012 WL 266943, at *4–6 (S.D. Ind. Jan. 30, 2012) (ordering on motion to alter or amend the judgment).

forward and undermining the objectives of the FCA.

Left standing, the district court opinion would have had a pernicious and chilling effect on the FCA, making it virtually impossible for relators to bring cases who are not top-level corporate insiders or persons with legal knowledge or who have access to company contracts that the government already knew about. Such a construction of the public-disclosure bar would immunize companies, particularly those that change their fraud scheme frequently to avoid detection or compartmentalize their fraud among numerous employees or offices. The Seventh Circuit did not let this happen.

II. THE SEVENTH CIRCUIT'S HOLDING AND ITS SIGNIFICANCE

Ms. Leveski's lawyers filed timely notices of appeal to the dismissal and sanction's orders.[213] The Seventh Circuit reversed the district court, ruling in Ms. Leveski's favor on three important issues.

First, the Seventh Circuit recognized that the FCA's public-disclosure bar should not be construed to bar a valid FCA case against ITT simply because the school had earlier been subject to a separate FCA lawsuit involving—a superficially similar, but in fact vastly different—fraud scheme from years earlier. Building on precedent, the Seventh Circuit held that to trigger the public-disclosure bar, the publicly disclosed fraud schemes should be substantially the same as the scheme alleged by the later relator.[214] Thus, it was not enough that the same defendant, ITT, was sued in both cases because the fraud schemes alleged in each case radically differed. The Seventh Circuit's rationale is clear: applying the public-disclosure bar at a high level of generality eliminates valid *qui tam* cases and discourages whistleblowers from coming forward, an effect antithetical to the purposes of the FCA.

The Seventh Circuit also recognized that a prior public disclosure of one ITT fraudulent scheme did not inform the government that the company replaced that scheme with another more sophisticated and deceptive one.[215] After the 2002 change in the applicable regulations, ITT quietly adopted a new scheme designed to mask ITT's illegal conduct.[216] This scheme went on until Ms. Leveski blew the whistle.[217] Thus, the Seventh Circuit held that because the newer lawsuit did not disclose the identical scheme exposed earlier, the public-disclosure bar

213. *Leveski*, 719 F.3d at 828.
214. *Id.* at 829.
215. *Id.* at 830.
216. *Id.* at 820.
217. *Id.* at 825.

would not block Ms. Leveski's lawsuit.[218]

This makes sense. After all, if there were no public disclosure of the fraud scheme at issue, then the whistleblower's information is valuable because the lawsuit informs the government about a scheme of which it was not previously aware. Under these circumstances, the whistleblower's lawsuit cannot be parasitic. Because it exposed a previously unknown fraud scheme and a new basis for corporate liability, *Leveski* could not have been brought based on the previously filed lawsuit.

Second, the FCA's public-disclosure bar is limited by an original-source exception, a "savings clause," that is also designed to encourage bona fide whistleblowing. Based on this original-source exception, even if there has been an earlier public disclosure, a relator can still pursue a lawsuit, so long as the relator can show she provided valuable original information to add to that disclosure.[219] There are good reasons to encourage original sources to come forward even when there has been a public disclosure. For example, the relator's substantial or eyewitness information can be more valuable than the information underlying the public disclosure, which might be nothing more than rumors.[220]

As mentioned, the district court would have largely and unduly limited the universe of potential whistleblowers to top-level company officials or those persons who design fraud schemes. The district court's ruling, if upheld, would have severely eroded the FCA because such high-level executives are the very persons, as chief beneficiaries of fraud or most at risk for civil and criminal liability as result of the fraud, that are least likely to blow any whistles.

Moreover, based on the district court's misguided interpretation of the FCA, even high-level officials who were not legal scholars (or lawyers) could be barred from being relators. Significantly, overruling the district court, the Seventh Circuit held that a relator can qualify as an original source without being a high-level corporate executive and without being required to have detailed knowledge of the law.[221] Rather, the relator need only be knowledgeable of the critical facts concealed by the fraudsters; as the Seventh Circuit found with Ms.

218. *Id.* at 836.

219. 31 U.S.C. § 3730(e)(4)(B) (2012).

220. *See, e.g.*, Rockwell Int'l Corp. v. United States, 549 U.S. 457, 472 (2007) ("To bar a relator with direct and independent knowledge of information underlying his allegations just because no one can know what information underlies the similar allegations of some other person simply makes no sense.").

221. *Leveski*, 719 F.3d at 839.

Leveski, a recruiter and loan packager at ITT.[222] The implication of the Seventh Circuit's opinion, consistent with the FCA, is that a relator need only know critical, relevant facts.

Third, the Seventh Circuit warded off ITT's effort to make Ms. Leveski and her lawyers an example to intimidate future whistleblowers and coerce their lawyers. Without any legal or factual basis, as the Seventh Circuit found, ITT sought to punish Ms. Leveski and her lawyers by demanding a whopping $4.7 million in sanctions against the lawyers and Ms. Leveski, collectively and individually.[223] By seeking such sanctions, ITT intended to send a chilling message to those brave enough to challenge its conduct: Initiate an FCA case against us, and we will come after you personally.

While the district court abetted such conduct on the part of ITT,[224] the Seventh Circuit overturned the sanctions and upon remand ordered that the case be re-assigned to a new judge.[225] In addressing the role of lawyers in FCA litigation, the Seventh Circuit held that the reputed solicitation that occurred was not a basis to impose sanctions. A different decision, affirming the district court, would have severely deterred potential whistleblowers from coming forward, thwarting Congress' intent of encouraging them to report such fraudulent conduct. Instead, relying on well-settled Supreme Court precedent, the Seventh Circuit recognized that experienced lawyers are essential to litigating FCA cases.[226]

The Seventh Circuit's opinion formally addressed the issues of public-disclosure law, original-source law, and the law governing

---

222. *Id.*

223. *See* Relator's Motion for Evidentiary Hearing on Motion for Attorney Fees and Sanctions at 1–2, United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-cv-00867 (S.D. Ind. Sept. 29, 2011), ECF No. 271 (including individual sanctions against one attorney who worked on the case for a total of less than ten minutes).

224. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-CV-0867-TWP-MJD, 2012 WL 1028794, at *7 (D. Ind. Mar. 26, 2012). The ostensible basis for this sanctions' order was that even though she was a source of all relevant facts, Ms. Leveski, a lay witness, did not understand the legal basis for her FCA action until she either did her own research or talked with a lawyer. This was odd because the case was predicated on a sophisticated legal theory advanced by Seventh Circuit Chief Judge Easterbrook after an earlier court found no such legal basis to predicate an FCA lawsuit. Thus, Ms. Leveski and her lawyers were to be penalized because she, as a layperson with no legal training, lacked the legal knowledge of one of the nation's most renowned judges or lacked the acumen of a practicing FCA lawyer. The factual record upon which the district court issued sanctions was never clear on this point, and the court had imposed those sanctions without a hearing and without providing other due process.

225. *Leveski*, 719 F.3d at 840.

226. Indeed, because a relator is essentially representing the government in a legal action, the FCA forbids whistleblowers from proceeding *pro se* in such cases as *United States ex rel. Lu. v. Ou*, 368 F.3d 773, 774 (7th Cir. 2004).

solicitation by lawyers of clients in that order. This Article does the same.

A. Public Disclosure

In the public-disclosure section of its opinion, the Seventh Circuit first analyzed whether Ms. Leveski's allegations were "substantially similar" enough to *Graves* to trigger the public-disclosure bar.[227] The Seventh Circuit decided that although both lawsuits alleged that ITT had violated the HEA by illegally paying incentive compensation to recruiters, that similarity was not enough to trigger the public-disclosure bar.[228] The Seventh Circuit held that there were multiple reasons for this.

First, both cases covered different time periods where there was little temporal overlap, with *Graves* covering 1993–1999 and *Leveski* covering 1996–2006.[229] Second, where *Graves* only made allegations about the one department—the recruiting office—Ms. Leveski's lawsuit included ITT's illegal practices in a second entirely different office division: the financial aid office.[230] She alone alleged that the FAAs' salaries "were directly tied" to how much financial aid FAAs' secured.[231] Third, even setting aside Ms. Leveski's additional allegations about the Financial Aid office, the Seventh Circuit saw "significant differences in her allegations about the recruiting office."[232]

The Seventh Circuit, therefore, recognized that Ms. Leveski's recruiting fraud allegations differed significantly from *Graves*. Whereas *Graves* concerned overt payments to recruiters for each student recruited of either five or ten percent "of earned revenue" per recruit (depending on the recruiters status at ITT), *Leveski*'s involved a subtler, more difficult to detect violation of compensation requirements.[233] She alleged that ITT pretended to compensate its recruiters based on five different factors, some of which were not quantifiable—including "appearance, attitude, and participation in continuing education classes"—when in reality the recruiters' salaries actually tracked to their recruiting numbers.[234]

The complaint alleged that in order to deceive the DOE, ITT

227. *Leveski*, 719 F.3d at 829.
228. *Id.*
229. *Id.* at 829–30.
230. *Id.* at 830.
231. *Id.*
232. *Id.*
233. *Id.* at 830–32.
234. *Id.* at 830.

pretended to be in compliance with the HEA safe harbor when it was, in fact, not at all. It also alleged that ITT had replaced the previous fraud scheme described in *Graves* with a new one that masked its actual compensation practices. As the Seventh Circuit recognized:

> The scheme alleged by Leveski, in contrast, [to the one alleged in *Graves*] involves a much more sophisticated—and more difficult to detect—violation of Department of Education requirements. Leveski does not allege that either her compensation or her continuation as an ITT employee depended on explicit percentages or quotas. In fact, she acknowledges that ITT claimed to compensate her based on a wide range of factors (including appearance, attitude, and participation in continuing education classes). But Leveski alleges that how ITT claimed to compensate her and how ITT actually compensated her were very different. Despite ITT's claims, Leveski believes that her compensation was based on only one thing: the number of students Leveski brought into ITT (and as a result, the amount of money Leveski brought into ITT).[235]

Relying on *United States ex rel. Goldberg v. Rush University Medical Center*,[236] the Seventh Circuit noted that reviewing FCA claims, as the district court had done, "at the highest level of generality . . . in order to wipe out *qui tam* suits that rest on genuinely new and material information is not sound."[237] To trigger the public-disclosure bar, the Seventh Circuit held in *Leveski* that it is not enough for two cases to be brought against the same defendant for the same general wrongdoing.[238]

The relators in *Goldberg* were an orthopedic surgeon and a director of real estate at Rush University Medical Center in Chicago.[239] Together, they alleged that Rush was improperly billing Medicare for services performed by teaching physicians that were actually performed by inadequately supervised residents.[240] During the 1990s, both the Department of Health and Human Services and the Government Accountability Office ("GAO") issued research studies concluding that improper billing for services performed by unsupervised residents was a widespread problem in teaching hospitals nationwide.[241] But the relators in *Goldberg* alleged a different scheme from the one described in the governmental reports. The reports had accused teaching hospitals

235. *Id.* at 830–31 (alteration in original).

236. United States *ex rel.* Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933, 934 (7th Cir. 2012).

237. *Leveski*, 719 F.3d at 831 (quoting *Goldberg*, 680 F.3d at 934).

238. *Id.* at 832–33.

239. *Goldberg*, 680 F.3d at 934.

240. *Id.* at 934–35.

241. *Id.* at 934.

of billing for services performed by residents who were not supervised, but the *Goldberg* relators alleged that Rush billed for services performed by residents who were not *adequately* supervised.[242]

According to the relators, Rush scheduled teaching physicians for multiple surgeries at once, such that "even if the teaching physician were present for the 'critical' portion of one [surgery] . . . the surgeon could not have been 'immediately available' for the rest of each procedure" as required by Medicare.[243] After reviewing the relators' allegations, the Seventh Circuit held that the relators

> [A]llege[d] a kind of deceit that the GAO report does not attribute to *any* teaching hospital. Unless we understand the "unsupervised services" conclusion of the [governmental reports] at the highest level of generality—as covering all ways that supervision could be missing or inadequate—the allegations of these relators are not "substantially similar."[244]

Judge Pratt affirmed ITT's motion to dismiss on August 8, 2011,[245] denied a motion for partial reconsideration by Ms. Leveski (based largely on *Baltazar*) on January 30, 2012,[246] and issued her sanctions order against Ms. Leveski's lawyers on March 26, 2012.[247]

Two months later, on May 21, 2012, the Seventh Circuit issued its opinion in *Goldberg*. This chain of events meant that Judge Pratt did not have the benefit of the Circuit's reasoning in *Goldberg* when she wrote her opinions. Nonetheless, this should not have mattered because *Goldberg* logically followed *Baltazar*, as Ms. Leveski argued in her briefs in the district court. Indeed, because *Goldberg* was not decided until later, Ms. Leveski's counsel relied heavily on *Baltazar* in its briefs, prompting Judge Pratt to opine that Ms. Leveski's counsel "overstated the impact of *Baltazar*,"[248] and that *Baltazar* was not a "game-changer."[249] The Seventh Circuit, however, thought *Baltazar* changed the game, and it interpreted its decisions in *Baltazar* and *Goldberg* differently from the district court.

Goldberg held that to bar a subsequent case, factual disclosure of a

---

242. *Id.*

243. *Id.* at 935.

244. *Id.* at 936.

245. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-CV-00867-TWP, 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011).

246. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-CV-0867-TWP-MJD, 2012 WL 266943 (S.D. Ind. Jan. 30, 2012).

247. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-CV-0867-TWP-MJD, 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012).

248. *Leveski*, 2012 WL 266943, at *10–11.

249. *Id.*

fraud scheme must be specific and not made with a high level of generality.[250] *Leveski* held that the specific fraud scheme must be exposed in the prior disclosure for the cases to be substantially similar enough for the public disclosure to apply.[251] A complaint containing allegations of multiple fraud schemes from those previously disclosed should not trigger the public-disclosure bar.[252] The "notice of the fraud" required to trigger the FCA's public disclosure must put the government on actual notice rather than on inquiry notice of the fraud scheme alleged.

Goldberg builds on the teachings of *United States ex rel. Baltazar v. Warden*,[253] where the Seventh Circuit reversed a dismissal based on the public-disclosure bar after it found that the pertinent allegations must be company-specific.[254] There, chiropractor Kelly Baltazar brought an FCA claim against the chiropractic group for which she worked, alleging the group "added to her billing slips services that had not been rendered and [upcoded] for services that had been performed."[255]

Prior to her suit, the GAO issued reports detailing widespread fraudulent Medicare billing practices by chiropractic groups without naming specific groups that were guilty of these abusive practices.[256] Nevertheless, the district judge believed that these reports were enough to preclude federal-court jurisdiction over Baltazar's claim.[257] On appeal, the Seventh Circuit held that that Baltazar's suit was "based on her own knowledge rather than the published reports" and she had "supplied vital facts that were not in the public domain."[258]

The Seventh Circuit analogized the information required to provide a "public disclosure" to the discovery of the fraud required to trigger running of the statute of limitations in securities cases.[259] There is a good reason for such a requirement. As stated by the Seventh Circuit in *United States ex rel. Matthews v. Bank of Farmington*: "The point of public disclosure of a false claim against the government is to bring it to the attention of the authorities."[260]

---

250. United States *ex rel.* Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933, 935 (7th Cir. 2012).

251. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 828–29 (7th Cir. 2013).

252. *Id.* at 827, 833.

253. United States *ex rel.* Baltazar v. Warden, 635 F.3d 866 (7th Cir. 2011).

254. *Id.* at 866–70.

255. *Id.* at 866.

256. *Id.* at 868.

257. *Id.* at 867.

258. *Id.* at 869.

259. *Id.* at 868.

260. United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 861 (7th Cir. 1999).

Baltazar paved the way for *Goldberg* and then *Leveski* by establishing that particular fraudsters—as opposed to an entire industry—had to be identified to trigger a sufficient public disclosure to bar a subsequent lawsuit, because industry-wide disclosures are too general to constitute specific public disclosures of a specific, identified company's fraudulent conduct—a requirement necessary to bring an FCA action.[261]

In *Baltazar*, Judge Easterbrook reasoned that disclosure of an industry-wide practice should not trigger the public-disclosure bar because absent the information supplied by the relator the subsequently filed case could not have been brought.[262] Similarly, absent information of the specific fraud schemes alleged in *Goldberg* and in *Leveski*, those cases could never have been brought. The same straight line of logic requiring specificity applies to fraud schemes as it does to generally-known industry practices; it is not enough to know in a general sense that a company might be committing a certain type of fraud without specific knowledge of precisely how that fraud scheme is being implemented.

The public-disclosure standard established by *Baltazar*, *Goldberg*, and *Leveski* is a practical one requiring an inquiry to determine whether a public disclosure provided information that reveals fraud. These three opinions also are consistent with the statutory language of the FCA and the Seventh Circuit's earlier interpretation of that language because the public-disclosure bar only applies when a relator's case is "based upon" the public disclosure, and most circuits, including the Seventh Circuit, interpret "based upon" to mean "substantially similar to."[263]

Logically, a case can only be "based upon" or "substantially similar to" what has been disclosed. Thus, public disclosure occurs only "when the critical elements exposing the transaction as fraudulent are placed in the public domain."[264] Anything else would unduly deter whistleblower relators from bringing FCA actions.

As the Eleventh Circuit pointed out in *Cooper v. Blue Cross and Blue*

---

261. *Baltazar*, 635 F.3d at 868.

262. *Id.* at 868 ("The United States could not file suit against a chiropractor, tender copies of the 1987, 2000, and 2005 Reports, and rest its case."). Moreover, the decision analogizes to a notice standard akin to the securities law statute of limitations—which runs only upon discovery of the actual fraud, not inquiry notice—and the decision contrasted Ms. Baltazar, as a relator, with the relator in an early case brought on the basis solely of the relator's knowledge of an industry-pervasive practice and where that relator had no information beyond what was publicly disclosed.

263. Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 910 (7th Cir. 2009).

264. United States *ex rel.* Feingold v. AdminaStar Fed., Inc., 324 F.3d 492, 495 (7th Cir. 2003).

Shield of Florida, Inc., a similar holding rejected the same industry-practice proposition:

> To hold otherwise would preclude any *qui tam* suit once widespread—but not universal—fraud in an industry was revealed. The government often knows on a general level that fraud is taking place and that it and the taxpayers are losing money. But it has difficulty identifying all of the individual actors engaged in the fraudulent activity.[265]

Likewise, as the Seventh Circuit held in *Goldberg*:

> We held in *Baltazar* that a very high level of generality is inappropriate, because then disclosure of some frauds could end up blocking private challenges to many different kinds of fraud. Public reports disclosed that more than half of all chiropractors in an audited sample had submitted improper bills to the Medicare and Medicaid programs. We held that this did not disclose a *particular* fraud by a *particular* chiropractor, because no one could use the published reports as the basis of litigation; the government could not seek reimbursement without showing that a particular chiropractor had committed a particular fraud in a particular way, and we held in *Baltazar* that someone who supplied those vital details could not be thrown out of court under § 3730(e)(4)(A).
>
> Similarly, no one who read the GAO report, or followed the progress of the PATH audits, would know or even suspect that Rush University was misrepresenting the "immediate availability" of teaching physicians during concurrently scheduled procedures. The allegations in Gear parroted the GAO report; Gear added nothing to the public disclosure except the name of a teaching hospital, and as the GAO report suggested that *all* (or almost all) teaching hospitals billed for unsupervised work by residents, Gear had not added anything of value. Goldberg and Beecham, by contrast, allege a kind of deceit that the GAO report does not attribute to *any* teaching hospital.[266]

As the Seventh Circuit recognized, the same reasoning clearly applied to *Leveski*: no one reading *Graves* would be alerted to the two new fraud schemes that Ms. Leveski alleged. Thus, that court concluded: "Our lengthy discussion of Leveski's case has shown that Leveski's case appears to be substantial, not frivolous."[267] The case, being remanded, is currently pending in the Southern District of Indiana in Indianapolis.

While *Main* established the viability of FCA actions against for-profit schools like ITT, *Leveski* broke new ground in applying the FCA's

265. Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 566 (11th Cir. 1994).
266. United States *ex rel.* Goldberg v. Rush Univ. Med. Ctr., 680 F.3d 933, 935–36 (7th Cir. 2012).
267. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 839 (7th Cir. 2013).

public-disclosure language by building upon earlier Seventh Circuit law. Together, *Baltazar*, *Goldberg*, and *Leveski* are grounded in an understanding of the FCA, consistent with its aim of encouraging whistleblowers to come forward, these three decisions provide simple, clear, objective, and workable guidelines for adjudicating the scope of the public-disclosure issue.[268]

B. Original Source

Because the Seventh Circuit decided the public-disclosure issue in Ms. Leveski's favor, the court could have avoided addressing the original-source exception to the public-disclosure bar issue. Nonetheless, it also ruled in Ms. Leveski's favor on this issue. The Seventh Circuit held that she had direct and independent knowledge of her allegations and, therefore, was the original source of them.[269]

In *Glaser v. Wound Care Consultants, Inc.*, the Seventh Circuit held that a relator's knowledge was not "direct" if the relator "had no knowledge whatsoever" of the fraudulent conduct before hearing from an attorney.[270] Specifically, ITT argued that because Ms. Leveski never held a high position of authority, never set employee compensation, and never filed PPAs, that somehow meant that she lacked "sufficient knowledge of ITT's illegal compensation practices" to be, in the words of the district court, "a true whistleblower,"[271] a term not defined in any legal opinion.

But the Seventh Circuit found that Ms. Leveski had substantial knowledge of the facts underlying her action,[272] and that her allegations were specific and personal and came from conversations to which she was a party.[273] The Seventh Circuit also pointed out that "we have

268. This aim was embodied in a 2010 change in the FCA that gives the DOJ the discretion to permit a relator to litigate an FCA even when there has been a public disclosure and the relator is not an original source. *See* 31 U.S.C. § 3730(e)(4)(A) (2012). This revision of the FCA, consistent with the FCA's purpose, is an acknowledgement of the fact that the government has only limited resources and cannot bring many meritorious cases, even those where there has been a public disclosure. Just being able to alert the government to a fraud scheme does not accomplish much regarding the purpose of the FCA if the government can only pursue a small amount of such cases.

269. *Leveski*, 719 F.3d at 836.

270. Glaser v. Wound Care Consultants, Inc., 570 F.3d 907, 921 (7th Cir. 2009) (emphasis omitted).

271. United States *ex rel.* Leveski v. ITT Educ. Servs. Inc., No. 1:07-CV-00867-TWP, 2011 WL 3471071, at 7 (D. Ind. Aug. 8, 2011) (dismissal order); *see Leveski*, 719 F.3d at 838–39 (finding that relators need only show "inferential" rather than personal or direct knowledge of fraud).

272. *Leveski*, 719 F.3d at 833–34.

273. *Id.*

never required a relator to have previously occupied a position of authority, and in fact, we have previously found relators who were even greater outsiders than Leveski to possess direct and independent knowledge of their FCA claims."[274]

The Seventh Circuit also implicitly found that Judge Pratt misapplied the law in assessing whether Ms. Leveski was an original source.[275] Judge Pratt noted that while she "acknowledges the principles in" the Seventh Circuit's opinion in *United States ex rel. Lamers v. City of Green Bay*, which should have been binding on her and controlling, she was nevertheless "inclined to adopt the reason set forth in *Schultz v. Devry, Inc.*,"[276] an Illinois district court opinion.[277] Yet, relying largely on *Lamers*[278] and *United States ex rel. Lusby v. Rolls-Royce Corp.*,[279] the Seventh Circuit in *Leveski* reaffirmed existing law that Ms. Leveski need not occupy a position of authority at ITT to be an original source.[280]

The relator in *Lamers*, in fact, was even further removed from observing any fraudulent conduct than Ms. Leveski, and yet the Seventh Circuit held that he possessed sufficient direct and independent knowledge to make him an original source.[281] In *Lamers*, the relator, Alan Lamers, owned a private bus company that had contracted with the City of Green Bay to bus school children.[282] After it lost the contract, he filed an FCA suit alleging that the city of Green Bay, a competitor who obtained a contract, had fraudulently represented to the Federal Transit Administration ("FTA") that it was in compliance with FTA regulations in exchange for FTA funding.[283]

Although he had never worked for Green Bay or witnessed or participated in the city's filing of compliance forms, the Seventh Circuit held that Mr. Lamers was an original source because he had direct and independent knowledge derived from walking the streets of Green Bay and observing the buses in action.[284] Based on these observations, he

274. *Id.* at 838.
275. *Id.* at 838–39.
276. Schultz v. DeVry Inc., No. CIV.A. 07 C 5425, 2009 WL 562286 (N.D. Ill. Mar. 4, 2009).
277. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-CV-00867-TWP, 2011 WL 3471071, at 6 (D. Ind. Aug. 8, 2011) (dismissal order).
278. United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013 (7th Cir. 1999).
279. United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849 (7th Cir. 2009).
280. *Leveski*, 719 F.3d at 838–39.
281. *Lamers*, 168 F.3d at 1017.
282. *Id.* at 1014.
283. *Id.* at 1015.
284. *Id.* at 1017.

alleged that Green Bay failed to comply with FTA regulations.[285] Because his observations called into question whether Green Bay was in compliance with FTA regulations, it was unnecessary for him to prove personal knowledge that Green Bay had fraudulently certified its compliance with FTA regulations at the outset of his suit.[286] Green Bay had to certify that it was in compliance because it received FTA funding, meaning that if Lamers' allegations were true, Green Bay was falsely certifying it was in compliance.[287]

A decade later, in *Lusby v. Rolls-Royce Corporation*, the Seventh Circuit reaffirmed that a relator need not produce a copy of the document making the false claim at the outset of the lawsuit.[288] There, Curtis Lusby, a former Rolls-Royce engineer, brought an FCA suit claiming that the company was falsely certifying that the engines it built for the Air Force conformed to military specifications.[289] In response, Rolls-Royce argued that as an engineer Mr. Lusby had not seen "any of the invoices and representations that Rolls-Royce submitted to its customers."[290] Although Mr. Lusby admitted that he did not have access to the paperwork, he countered that "Rolls-Royce *must* have submitted at least one such certificate [of compliance], or the military services would not have paid for the goods . . . ."[291] The Seventh Circuit agreed that it could be inferred that Rolls-Royce had submitted such certifications.[292] Moreover, it noted that "[s]ince a relator is unlikely to have those documents unless he works in the defendant's accounting department," holding otherwise would have "take[n] a big bite out of *qui tam* litigation."[293]

In *Lamers*, the Seventh Circuit recognized that a whistleblower qualifies as an original source when he or she alleges—as Ms. Leveski did—facts showing the difference between what a government contractor knew to be the truth and what that contractor concealed and misrepresented to obtain government funds.[294]

Lamers, *Lusby*, and now *Leveski* recognize that when the government is aware of the contractual terms, a relator can still bring great value to

285. *Id.*
286. *Id.*
287. United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1017 (7th Cir. 1999).
288. United States *ex rel.* Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854 (7th Cir. 2009).
289. *Id.* at 850.
290. *Id.* at 854.
291. *Id.*
292. *Id.*
293. *Id.*
294. United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1017 (7th Cir. 1999).

an FCA action by disclosing facts revealing or evidencing fraudulent conduct of which the government is not otherwise aware.[295] That is exactly what Ms. Leveski did.

FCA cases can naturally be based on facts that show the difference between what the contractor told or promised the government and the true facts of what the contractor did. Whistleblowers possessing such information provide value, and should be rewarded for bringing critical information to prove fraudulent conduct to authorities' attention. Based on *Lamers* and *Lusby*, the Seventh Circuit, in overruling the district court, held that Ms. Leveski was not required prior to the filing of her lawsuit to have had advance knowledge of the PPAs in which ITT certified compliance with the HEA.[296]

Ms. Leveski's complaint alleged that ITT received federal funding throughout her employment, and ITT could only have received federal funding by falsely certifying compliance with the HEA. Her company-specific facts enabled her to file a complaint that satisfied Rule 9(b). The so-called missing information—that ITT signed a PPA in which it represented it would comply with the recruiting compensation laws—was known to the DOE and, for that very reason, was of no independent value to the DOE or the DOJ. The critical information of falsity, the missing key evidence that ITT was deceiving the government, came from Ms. Leveski.

Despite what ITT told the DOE, Ms. Leveski—and only Ms. Leveski—provided crucial facts of how ITT was, in practice, fraudulently compensating its recruiters. She did not provide a legal theory because she is not a lawyer. Laypersons know facts; they often do not know the legal implications of those facts, and the FCA does not require them to know the law. Knowing the facts was enough. Ms. Leveski provided critical facts establishing ITT's fraud, that is, the method of compensating recruiters per head, which ITT concealed from the DOE.[297]

The district court's conclusion that Ms. Leveski was not a "true whistleblower" not only ignored the court record, but also was contrary

---

295. These cases—and similar holdings from other circuits—are also consistent with amendments to the FCA's original-source language made applicable to complaints filed after 2010. Based on these amendments one can qualify as an original source if one has knowledge that "materially adds to the publicly disclosed allegations or transactions . . . ." 31 U.S.C. § 3730(e)(4)(B)(2) (2012).

296. Leveski v. ITT Educ. Servs., Inc., 719 F.3d 818, 838–39 (7th Cir. 2013).

297. All education institutions receiving federal funding must submit a signed PPA to the DOE as a condition of participating in the federal lending programs. *See* 34 C.F.R. § 668.14 (2014).

to the Seventh Circuit and Supreme Court's (then-applicable) requirements for how to assess whether a whistleblower is or is not an original source, which then required looking to the allegations in the complaint not the public disclosure.[298]

Ms. Leveski, in fact, was a true whistleblower with valuable information for the government, and it was clear to the Seventh Circuit that the company-specific factual allegations in her complaint could only have come from her based on her experience at ITT for over a decade. She provided crucial facts of how ITT was, in practice, compensating its recruiters and how it was paying its FAAs.

Whistleblowers often do not come from the top echelon of companies they sue and they rarely perpetuate the fraud they report. They need not be the chief beneficiaries of fraud or criminal masterminds to bring value to an FCA action. They need not be FCA scholars. The key is that they should have enough original knowledge to add to what has been publicly disclosed. Thus, the Seventh Circuit applied and advanced circuit law consistent with the letter and spirit of the FCA to create a workable interpretation of the public-disclosure bar and its original-source exception. Encouraging whistleblowers with specific and original information serves those FCA purposes.

C. Lawyer Solicitation in False Claims Act Actions

The Seventh Circuit also reversed the District Court's sanctions order.[299] In so holding, the Seventh Circuit noted:

> [T]he district [court] concluded that Leveski's counsel had continued to pursue a "frivolous" case despite "unmistakably clear warnings that [they were] playing with fire by pushing the case forward." As indicated above, we disagree with this conclusion. Our lengthy discussion of Leveski's case has shown that Leveski's case appears to be substantial, not frivolous.[300]

For example, although the district court's entire basis for the sanctions

---

298. As the Seventh Circuit held:

> In evaluating whether Leveski is an "original source" of her claims, we find our language in *Baltazar*, 635 F.3d at 869, particularly enlightening: "The question is whether the relator is an original source of the allegations in the complaint and not, as the district court supposed, whether the relator is the source of the information in the published reports." Thus, it is not appropriate to ask whether Leveski was the original source of the allegations in *Graves*. Nor is it appropriate to ask whether Leveski was the first person to bring HEA violations by for-profit educational institutions to the public's attention. Rather, it is appropriate to ask whether Leveski is the original source of the specific allegations in her complaint.

Leveski, 719 F.3d at 836.

299. *Id.* at 839.

300. *Id.* (citation omitted).

order was that the lawyer who filed the lawsuit, Timothy Matusheski, supposedly "pluck[ed]" Ms. Leveski "out of thin air," the Seventh Circuit after reviewing the relevant facts held that she was a highly knowledgeable relator.[301] The Seventh Circuit also held Mr. Matusheski did nothing wrong and that it was "not troubled by Leveski's admission that she had not contemplated filing suit until Matusheski contacted her."[302] The Seventh Circuit added: "we specifically asked ITT at oral argument what rule of professional conduct that Matusheski's 'recruitment' of Leveski violated. ITT could not supply us with a single rule."[303] As a telling preview of the opinion, at oral arguments for the appeal, Judge Tinder asked the following questions, which were answered as follows by ITT's counsel:

> Judge Tinder: Did the District Court ever find that Mr. Matusheski's solicitation of Ms. Leveski was a violation of a disciplinary code or a Code of Professional Responsibility?
>
> . . .
>
> Mr. Smith: I think her words were, "It's as unseemly as it is unethical."
>
> . . .
>
> Judge Tinder: What finding did she make on that, other than making that general statement of—
>
> Mr. Smith: I don't think she specified. I don't think she went into the specifics . . . .
>
> Judge Tinder: That troubles me. It just seems that her opinion, particularly relative to sanctions, is just dominated by this distaste for the manner in which Mr. Matusheski came into contact with Ms. Leveski.[304]

ITT's lawyer was right: The district court issued sanctions without specifying legal authority forbidding the conduct the court claimed was offensive.[305]

Citing Supreme Court precedent in *Bates v. State Bar of Arizona*,[306] the Seventh Circuit held that lawyers clearly are permitted to advise

---

301. *Id.* at 819, 839.

302. *Id.* at 837.

303. *Id.* at 837 n.2.

304. Oral Argument at 26:32, *Leveski*, 719 F.3d 818 (No. 12-2891), *available at* http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=12&casenumber=2891&listCase=List+case%28s%29.

305. United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-cv-0867-TWP-MJD, 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012) (sanctions order), *overruled by Leveski*, 719 F.3d 818; United States *ex rel.* Leveski v. ITT Educ. Servs., Inc., No. 1:07-cv-00867-TWP-MJD, 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011) (dismissal order), *overruled by Leveski*, 719 F.3d 818.

306. 433 U.S. 350, 376 (1977) (noting that advertising allows a "supplier [attorney] to inform a potential purchaser [client] of the availability and terms of exchange").

potential future clients of both the contents of the law and their rights under the law; it is upon that basis that attorneys are permitted to advertise their services.[307] "After all, 'potential clients rarely know in advance what services they do in fact need,' and in some cases, potential clients do not know that they need any services from an attorney."[308]

Although she knew that most of ITT's students accepted substantial federal funding, Ms. Leveski did not apparently know about the PPAs that ITT's chief executive officer signed until she did some research on her own or a lawyer told her about them.[309] She also lacked the legal training and FCA background to fully understand the legal theory that Judge Easterbrook held for the first time in *Main* formed the basis for FCA liability. From such irrelevant facts, the district court crafted its dismissal and sanctions orders.

As the Seventh Circuit first held in *Baltazar*, there is nothing in the FCA that prevents whistleblowers from bringing a case after being informed of an industry-wide practice or by learning such facts by doing their own independent research so long as the whistleblower has company-specific information to support the allegations in an FCA complaint.[310] As Judge Easterbrook wrote:

> [T]o say that a report identifying a *uniform* practice activates § 3730(a)(4)(A) [the public-disclosure bar] does not imply anything about the effect of a report disclosing that some but not all firms use a practice. Once the GAO concluded that teaching hospitals routinely disregarded the required distinction between work in the teaching program and work as an attending physician, the only extra fact required was that the defendant is a medical school or teaching hospital. That's public knowledge. . . . Baltazar's suit, by contrast, supplied vital facts that were not in the public domain: that Advanced Healthcare Associates not only was submitting false claims but also was submitting them knowing them to be false, and thus was committing fraud.[311]

Leveski follows this logic. The PPAs on which the district court dwelled were a red herring. The key to determining whether one is an original source is the value of that person's information. Here, Ms. Leveski supplied valuable, specific information about ITT's conduct

---

307. *Leveski*, 719 F.3d at 837.

308. *Id.* (quoting *Bates*, 433 U.S. at 386 (Burger, J., concurring in part and dissenting in part)).

309. *See id.* at 838 ("Leveski, ITT points out, was never in a position of authority during her employment; she was never responsible for setting employee compensation or filing PPAs.")

310. United States *ex rel.* Baltazar v. Warden, 635 F.3d 866, 869 (7th Cir. 2011).

311. *Id.*

that was not in the public domain and was based on her personal knowledge and experience.[312]

Ms. Leveski might not have known that she was sitting on information that was potentially valuable to the government until she spoke with a lawyer.[313] This proved decisive to the district court's sanctions order, but it should not have. The Seventh Circuit concluded that was not troubling that Ms. Leveski first learned the potential value of her information from her original lawyer, Mr. Matusheski, and that common occurrence in litigation should not have barred her claims, much less resulted in a sanctions order.[314] Judge Tinder wrote:

> The annals of legal history are full of examples of lawyers playing a vital role in encouraging parties to litigate. If done in a proper manner—that is, within the confines of the applicable rules of professional conduct—there is nothing about such attorney involvement that negates the validity of a suit.[315]

Thus, *Leveski* recognized that lawyers can play a key role in serving the government/private partnership upon which the FCA relies be effective. Lawyers and courts creatively develop and expand the contours of the law by pursuing theories that appear novel at first as in *Main*, which recognized potential FCA liability against for-profit colleges. The Seventh Circuit in Leveski also recognized that lawyers need latitude to pursue these cases vigorously.

Contrary to the FCA, the district court's holding required Ms. Leveski to be conversant with this evolving area of FCA law prior to doing any of her own research and prior to her consulting with a lawyer in order to be a "true whistleblower." Even though no law supported such a conclusion, the district court somehow believed it was fair to require that Ms. Leveski, a layperson with no legal training, to possess the legal knowledge and acumen of an experienced FCA lawyer as a required prerequisite to becoming a relator.

In the current age of social activism and of marketing and competition for clients, solicitation is part of the legal landscape and should not be frowned upon. Instead, it is a constitutional right belonging to lawyers and prospective lawyers, particularly so when it comes to the FCA whose success depends upon encouraging whistleblowers to come forward and identify fraud and the public benefits from these relationships. Sometimes lawyers and courts test or

312. *Leveski*, 719 F.3d at 833–34.
313. *Id.* at 837.
314. *Id.*
315. *Id.* at 838.

refine these boundaries, like in *Main*, where creative lawyers pursued the theory that schools that recruit poorly qualified students through illegal recruiting practices in violation of a statute violated their PPAs by improperly extracting taxpayer funds, and Judge Easterbrook then held that such conduct stated an FCA claim.[316] The Seventh Circuit recognized that lawyers should not be punished for doing their jobs or for being creative or entrepreneurial within the bounds of the law.

CONCLUSION

Due to periodic amendments, and various court decisions, the FCA has had a checkered history of effectiveness following its adoption in 1863. Some amendments, particularly those adopted in 1943, included provisions that took the teeth out of the statute, sharply limiting its efficacy as an important tool to deter fraudulent conduct by government contractors and to recover damages for such abuse.

In 1986, in the face of widespread fraud by such contractors, Congress overhauled the FCA to encourage *qui tam* suits and in so doing, make them effective tools to recover damages and deter misconduct. Critical to the effectiveness of the FCA is: (a) a narrow reading of the public-disclosure bar—applying it only where the disclosure is truly public, not a buried fact in some government filing; and (b) a broad reading of the original-source rule—treating a relator as an original source where she has provided relevant information not previously known to the government and not requiring the relator to fully understand the legal significance of such information.

In *Main*, *Baltazar*, *Rush*, *Lamers*, *Lusby*, and *Leveski*, the Seventh Circuit handed down groundbreaking decisions that have advanced the purposes of the FCA. The language and legislative history of the FCA supports these decisions.

Central to its core purposes, the FCA encourages whistleblowers to come forward if they have personal knowledge of facts valuable to the government showing fraudulent conduct. Laypersons are not expected to have legal knowledge or knowledge of the legal consequences of facts that they discover directly and independently. Although relators might know valuable facts upon which an FCA case can be built, the Seventh Circuit has recognized that the FCA does not require that whistleblowers know the legal implications of those facts.

In so doing, the Seventh Circuit advanced FCA public-disclosure and original-source law. Moreover, in *Leveski*, the Seventh Circuit

---

316. United States *ex rel.* Main v. Oakland City Univ., 426 F.3d 914, 917 (7th Cir. 2005).

strengthened the FCA by strongly endorsing a strong proactive role of whistleblower lawyers in soliciting potential clients, informing them of their rights and the legal significance of the facts known to them. These are important contributions to a statute whose viability depends on whistleblowers coming forward to expose fraud assisted by lawyers willing and able to represent them.