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Wait Not, Want Not: The Importance of the Statute of Limitations in Qui Tam *False Claims Act Cases*

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The False Claims Act (FCA)[1] originated during the Civil War at President Lincoln's request to counter seemingly rampant fraud by suppliers for the Union army.[2] More recently, the False Claims Act has enjoyed a renaissance in large part as a prominent tool in the Obama Administration's efforts to combat fraud committed by healthcare providers receiving federal funding.[3] In particular, since President Obama took office in 2009, the Departments of Justice and Health and Human Services have dramatically increased efforts to recover fraudulently obtained Medicare payments from healthcare providers who knowingly submitted inflated claims and claims for payment to which the providers were not entitled.[4] The renewed popularity of the False Claims Act results mainly from its relatively unique characteristic that expressly permits private individuals called "relators" to bring civil actions against defrauders on behalf of the United States.[5] Such lawsuits are known as "*qui tam* actions."[6] In recent years, the Department of Justice has lauded the "public-private partnership" of the *qui tam* mechanism as a

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[1] 31 U.S.C. § 3729 *et seq.* (2012).

[2] *See* United States *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180, 184 (5th Cir. 2009) (describing enactment of original False Claims Act).

[3] U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GENERAL, SPRING 2011 SEMIANNUAL REPORT TO CONGRESS, PART III: LEGAL & INVESTIGATIVE ACTIVITIES RELATED TO MEDICARE & MEDICAID 3–4 (2011), *available at* http://oig.hhs.gov/reports-and-publications/archives/semiannual/index.asp.

[4] Tracy Russo, *HEAT: A Year of Tracking Health Care Fraud*, THE JUSTICE BLOG (Aug. 27, 2010), http://blogs.justice.gov/main/archives/934 (discussing joint efforts since May 2009 of DOJ and HHS to combat fraud and abuse within Medicare and Medicaid).

[5] *See Grubbs*, 565 F.3d at 184 & n.6 (citations omitted).

[6] *See* Rockwell Int'l Corp. v. United States, 549 U.S. 457, 463 n.2 (2007) (explaining that term comes from Latin "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who pursues this action on our Lord the King's behalf as well as his own.").

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significant method of enforcement against those who defraud the Government.[7]

Government support of *qui tam* False Claims Act lawsuits is premised upon the idea that the government may better combat fraud against it by encouraging "insider" relators to come forward with information about FCA violations that might otherwise go undiscovered.[8] Yet there is an undeniable potential for abuse of the *qui tam* model by opportunistic relators driven by greed or revenge to bring less than meritorious FCA claims.[9]

The False Claims Act allows relators to recover between fifteen and thirty percent of any recovery obtained through a *qui tam* action.[10] Although the government receives a majority of any award recovered in any False Claims Act lawsuit, the relator's percentage may afford a substantial recovery given that False Claims Act defendants are generally liable for treble damages.[11]

In addition to having to repay three times the amount of the fraudulent proceeds they acquire, defendants to *qui tam* False Claims Act allegations often must expend significant amounts of time and resources investigating allegations and mounting defenses thereto, regardless of the validity of a

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[7] Press Release, Dep't of Justice, *Justice Department Recovers $3 Billion in False Claims Act Cases in Fiscal Year 2011* (Dec. 19, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html.

[8] *See* Pamela H. Bucy, *Federalism and False Claims*, 28 CARDOZO L. REV. 1599, 1603 (2007).

[9] *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) ("As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than public good.").

[10] 31 U.S.C. § 3730(d)(1), (d)(2).

[11] *Id.* § 3729(a)(1).

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relator's contentions.[12] Although it is not clear at this point whether such costs are passed along to healthcare consumers,[13] the threat of this unintended consequence looms as massive amounts recovered in False Claims Act cases in recent years suggest that defendants face the unpleasant choice of paying substantial settlements or risking similarly large litigation expenses to deflect relators' claims. Indeed, even legislators in recent years acknowledge fearing that some healthcare providers may be coming to view such expenses as a "cost of doing business."[14] This concern speaks to the deeper problem that if healthcare providers do in fact "budget" for the cost of defending FCA actions, those costs likely will be passed along to the consumers, either as the direct source of healthcare providers' revenue or indirectly through tax funding of Medicare and Medicaid disbursements.

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[12] *See* Pamela H. Bucy, *States, Statutes and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, The University of Alabama School of Law (Apr. 2, 2009), *available at* http://ssrn.com/abstract=1372345.

[13] *Compare* Wally Kennedy, *Freeman Health System to Pay $9.3 Million for Improperly Compensating Physicians for Referrals*, JOPLIN GLOBE (Nov. 5, 2012), *available at* http://www.joplinglobe.com/topstories/x880888555/Freeman-Health-System-to-pay-9-3-million-for-improperly-compensating-physicians-for-referrals (quoting hospital representative as saying that, "In the future, patients will not see a difference in our costs because of" hospital's agreement to pay $9.3 million settlement related to violations of False Claims Act and other federal healthcare anti-fraud law), *with* Thomas Catan, *Drug Makers Agree to $421 Million Settlement*, WALL ST. J. (Dec. 8, 2010), *available at* http://online.wsj.com/article/SB10001424052748703296604576005674095414668.html (noting that defendant "Roxanne Laboratories[ ] . . . said the expense of protracted litigation would have added to the cost of producing medicines and affected its competitiveness.").

[14] Statement of Sen. Chuck Grassley, U.S. Senate Committee on the Judiciary, Hearing on "Protecting American Taxpayers: Significant Accomplishments and Ongoing Challenges in the Fight Against Fraud" (Jan. 26, 2011), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da165adbf&wit_id=e655f9e2809e5476862f735da165adbf-0-1.

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As discussed more thoroughly herein, one relatively simple way to decrease both the costs of discovery, litigation defense, and to possibly limit damage awards in *qui tam* False Claims Act litigation is to de-incentivize dilatory litigation tactics by relators by clarifying the False Claims Act's statute of limitations.[15] In particular, there is a need to eliminate uncertainty over that statute's tolling provision[16] by limiting tolling to *qui tam* actions in which the government has intervened. This appears consistent with congressional intent[17] and also helps to assure that a would-be relator will not conceal defendants' fraud for an indefinite period of time while relators' potential recovery accrues. This, in turn, would help to prevent frustration of the original purpose of the *qui tam* action and have the salutary effect of assuring timely prosecution of egregious frauds.

I. THE FALSE CLAIMS ACT

The original False Claims Act of 1863 imposed criminal sanctions on non-military personnel responsible for submitting "false claims" for payment to the United States Government.[18] However, that Act also permitted private relators to bring *qui tam* actions to prosecute the fraud on the government's behalf.[19] Under these provisions, successful relators received one-half of damages recovered.[20] Subsequent congressional amendments diluted the

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[15] 31 U.S.C. § 3731(b).

[16] *Id.* § 3731(b)(2).

[17] United States *ex rel.* Sanders v. N. Am. Bus Indus., Inc., 546 F.3d 288, 295 (4th Cir. 2008).

[18] *See* Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 781–82 (2000).

[19] *See Grubbs*, 565 F.3d at 184 & n.6 (citations omitted).

[20] *Id.* at 184 n.6 (citing False Claims Act of Mar. 2, 1863, ch. 67, 12 Stat. 696).

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False Claims Act's *qui tam* provisions, rendering relators' use of *qui tam* lawsuits infrequent and largely unsuccessful.[21]

Congress reversed this trend in 1986, when it again amended the FCA to encourage *qui tam* lawsuits by private whistleblowers.[22] Among these changes, the 1986 amendments increased recovery available to relators, including the addition of the fairly substantial mandatory minimum of fifteen percent of damages.[23] The amendments also expanded the limitations period applicable to civil FCA claims.[24] The results were notable. From the time the amendments took effect through 2008, *qui tam* relators filed 6,199 False Claims Act cases that resulted in over $13.6 billion of total damages awarded through settlements and judgments, of which relators have received more than $2.2 billion.[25]

False Claims Act recoveries over the past four years have been even more remarkable,[26] in part because of the Obama administration's tenacious pursuit of those who defraud the Federal Government.[27] Indeed, the Patient

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[21] Bucy, *supra* note 12, at 1527 (citing various congressional amendments).

[22] Bucy, *supra* note 12, at 1527; *see* Pub. L. No. 99-562, 100 Stat. 3153 (1986).

[23] Bucy, *supra* note 12, at 1527–28 (citations omitted).

[24] *Id.* at 1528; *see also* note 12.

[25] *Id.* at 1528, *see also* note 6 (citing Civil Div., U.S. Dep't of Justice, *Fraud Statistics* (2008), *available at* http://www.justice.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (visited Nov. 27, 2012)).

[26] Civil Div., U.S. Dep't of Justice, *Fraud Statistics: October 1, 1987—September 30, 2012* (Dec. 7, 2011), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf [hereinafter *Fraud Statistics*].

[27] *See* U.S DEP'T OF HEALTH & HUMAN SERVS., HEAT TASK FORCE, http://www.stopmedicarefraud.gov/heattaskforce/index.html (last visited Aug. 22, 2012).

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Protection and Affordable Care Act (PPACA), enacted in March 2010, further amended the False Claims Act to promote *qui tam* actions.[28]

Most notably, the PPACA significantly reduced the so-called "public disclosure bar" on *qui tam* FCA actions based upon publicly-disclosed information.[29] This change was enacted in three parts: First, whereas the previous FCA appeared to require dismissal for lack of subject matter jurisdiction of *qui tam* complaints based on public information, the FCA as amended by the PPACA now provides courts with some discretion to retain jurisdiction over such actions.[30] Second, the PPACA refined the definition of what qualifies as "publicly-disclosed information" in a way that expands the permissible bases of relators' allegations.[31] Lastly, the PPACA broadened the "original source exception" to the public disclosure bar, which permits relators to base *qui tam* actions on publicly-disclosed information where the relator's allegations are based upon the relator's own independent knowledge.[32] Through all of these measures the PPACA has increased relators' ability to maintain FCA claims and has resulted in a recent boom of such claims.[33]

Over 2,000 False Claims Act cases were filed between 2009 and 2011, the vast majority were initiated by *qui tam* relators. During that same time period, settlements and judgments of False Claims Act cases totaled more

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[28] Josh Savitz & Erica Trachtman, *False Statements & False Claims*, 49 AM. CRIM. L. REV. 703, 737 (Spring 2012) (citing Pub. L. No. 111–148, 124 Stat. 119 (2010) (codified as amended throughout Titles 26 and 42, United States Code)).

[29] Patient Protection and Affordable Care Act, H.R. 3590 ("PPACA") § 1303(j), codified at 31 U.S.C. § 3731(e)(4) (2010).

[30] PPACA § 1303(j)(2), codified at 31 U.S.C. § 3731(e)(4)(A).

[31] PPACA § 1303(j)(2), codified at 31 U.S.C. § 3731(e)(4)(B).

[32] *Id.*

[33] Beverly Cohen, *KABOOM! The Explosion of* Qui Tam *False Claims Under the Health Reform Law*, 166 PENN ST. L. REV. 77, 77 (Summer 2011).

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than $8.5 billion, of which relators received nearly $1.2 billion.[34] In 2011 alone, relators received over $532 million of the more than $3 billion total amount of False Claims Act settlements and judgments.[35]

A. ELEMENTS OF A SUBSTANTIVE FALSE CLAIMS ACT VIOLATION

The same definitions apply to all relevant provisions of the False Claims Act[36] ("FCA"). The statute defines "claim" as "a request or demand . . . for money or property that . . . is presented to an officer, employee, or agent of the United States."[37] Thus, a healthcare provider is vulnerable to FCA liability anytime it submits a claim for payment directly or indirectly seeking reimbursement from Medicare, Medicaid or any other federally-funded healthcare program.[38] Although the FCA does not explain what makes a claim "false" and "fraudulent," courts generally construe these terms as requiring "a defendant to have aimed to extract from the government money the government otherwise would not have paid."[39] A claim is "knowingly" false if the defendant acted with actual knowledge, or deliberate ignorance or reckless disregard, of "the truth or falsity of" the claim at issue.[40]

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[34] Civil Div., U.S. Dep't of Justice, *Fraud Statistics: 1987–2011* (Sept. 30, 2012), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

[35] *See Fraud Statistics*, *supra* note 26, at n.248.

[36] *See* 31 U.S.C. § 3729(b).

[37] *Id.* § 3729(b)(2)(A)(i).

[38] *See generally Grubbs*, 565 F.3d 180 (affirming and reversing in part dismissal of *qui tam* FCA complaint alleging fraudulent submissions to Medicare by various healthcare providers).

[39] *See, e.g.*, United States *ex rel.* Mikes v. Strauss, 274 F.3d 687, 696 (2d Cir. 2001) (internal quotations omitted).

[40] 31 U.S.C. § 3729(b)(1).

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The *prima facie* elements of a False Claims Act violation depend on which subsection(s) of the FCA gives rise to the particular cause of action.[41] Nonetheless, at the heart of each major substantive FCA prohibition[42] is the use of a false claim material to the United States' decision to pay or withhold payment from the defendant. In all such cases, there must be a "false claim" and the defendant(s) must have acted with "knowledge" as defined by the FCA.[43]

B. *QUI TAM* LAWSUITS UNDER THE FALSE CLAIMS ACT

Congress's amendments of the False Claims Act in 1986 strengthened the FCA's *qui tam* provisions in a way that, among other things, enhanced financial rewards for relators whose *qui tam* actions prove successful.[44] As noted above, under the amended FCA, a relator is entitled to recover between fifteen and thirty percent of the treble damages awarded in a *qui tam* FCA lawsuit.[45] The statute dictates what percentage relators may recover and indicates that a relator's recovery depends in part on whether the United States opts or declines to intervene in the *qui tam* action, a decision left to the

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[41] *See, e.g.*, United States *ex rel.* Schmidt v. Zimmer, Inc., 386 F.3d 235, 242 (3d Cir. 2004).

[42] 31 U.S.C. § 3729(a)(1)(A)–(B) & (a)(1)(G) (2012); *see* 31 U.S.C. § 3729(a)(1), (a)(2) & (a)(7) (2012).

[43] *Id.*

[44] *See* Bucy, *supra* note 12, at 1527–28 (describing amendments).

[45] 31 U.S.C. § 3730(d)(1) (describing awards when government intervenes in *qui tam* lawsuit); *see also id.* at § 3730(d)(2) (explaining award when government declines intervention).

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discretion of the Attorney General's office.[46] Regardless of its choice, the United States remains the "real party in interest" to any FCA action.[47]

Many of the False Claims Act lawsuits occurring under the auspices of the recent amendments have been initiated by *qui tam* relators.[48] Relators must file their *qui tam* FCA complaints under seal and serve the government with a copy of the complaint, together with "substantially all material evidence and information" in the relator's possession.[49] The complaint must then remain sealed for at least sixty days or until the court orders the seal lifted, ostensibly so that the government may investigate the merits of the relator's allegations without "tipping off" the defendant.[50] The government may move to extend the seal "for good cause shown."[51] In addition to allowing government investigation, certain mechanisms built into the FCA and discussed below aim to limit *qui tam* actions to avoid meritless, duplicative or harassing *qui tam* litigation.

1. THE "PUBLIC DISCLOSURE" BAR

One safeguard against superfluous *qui tam* False Claims Act lawsuits is the so-called "public disclosure bar," which provides that a private individual may only sue under the FCA if the information underlying that individual's FCA allegations has not been publicly disclosed or, if the information has been made public, the individual is otherwise "an original source of" such

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[46] *See id.* § 3730(c).

[47] *See, e.g.*, United States *ex rel.* Westrick v. Second Chance Body Armor, Inc., 771 F. Supp. 2d 42, 47 (D.D.C. 2011) ("[T]he United States is the real party in interest in a *qui tam* action filed by a relator.").

[48] *See Fraud Statistics*, *supra* note 26.

[49] 31 U.S.C. § 3730(b)(2).

[50] *Id.*

[51] *Id.* § 3730(b)(3).

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information.[52] The "original source" provision only benefits a would-be relator who "has knowledge that is independent of and materially adds to the publicly disclosed [information], and who has voluntarily provided the information to the Government before filing an action under" the FCA's *qui tam* provision.[53] If these requirements are not met, a court cannot entertain the prospective relator's FCA lawsuit.[54]

This limitation on subject-matter jurisdiction over *qui tam* FCA actions aims to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits."[55] As such, the FCA requires that a prospective relator claiming to be an "original source" of information about FCA violations have "direct and independent knowledge" of the alleged violation.[56] It follows that a relator cannot base his *qui tam* FCA claims upon a "mere suspicion that there must be a false or fraudulent claim lurking around somewhere."[57] This principle helps effectuate the statute's plain language meant to, and courts' role of, filtering out unfounded *qui tam* FCA claims.[58]

2. RULE 9(B)

Heightened pleading requirements should also serve to prevent individuals from asserting meritless claims under the False Claims Act. As

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[52] 31 U.S.C. § 3730(e)(4)(A).

[53] *Id.* § 3730(e)(4)(B).

[54] *Id.* § 3730(e)(4)(A).

[55] Graham Cnty. Soil & Water Conserv. Dist. v. United States *ex rel.* Wilson, 130 S. Ct. 1396, 1407 (2010).

[56] *See, e.g.*, United States *ex rel.* Grayson v. Advanced Mgmt. Technol., Inc., 221 F.3d 580, 582–83 (4th Cir. 2000) (internal quotations omitted).

[57] United States *ex rel.* Vuyyuru v. Jadhav, 555 F.3d 337, 353 (4th Cir. 2009).

[58] *See Graham Cnty.*, 130 S. Ct. at 1407.

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with all federal claims for relief, all *qui tam* complaints arising under the FCA must satisfy the relatively lenient general pleading requirement of Federal Rule of Civil Procedure 8(a)(2), which requires that a complaint state facts establishing a "plausible," rather than merely "conceivable," claim for relief.[59] Further, as the FCA is fundamentally a fraud statute,[60] a *qui tam* relator must plead FCA violations with the particularity required by Federal Rule of Civil Procedure 9(b),[61] which requires that pleadings allege "fraud or mistake" with "particularity."[62]

The basic test of whether a complaint alleges fraud with sufficient particularity is relatively uniform across federal courts, requiring details of "the time, place and contents of the false representation[], as well as the identity of the person making the misrepresentation and what that person obtained thereby."[63] In other words, the party alleging fraud must identify the "who, what, where, and when of the" purported fraud at issue.[64] These

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[59] Ashcroft v. Iqbal, 556 U.S. 662, 674–75 (2009) (internal quotation marks omitted) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)).

[60] United States v. Neifert-White Co., 390 U.S. 228, 232 (1968) ("[B]oth the history and language of the False Claims Act, as well as the thrust of our prior decisions[,] . . . suggest that the Act was intended to reach all types of fraud.").

[61] *See Iqbal*, 556 U.S. at 686 (quoting FED. R. CIV. P. 9(b)).

[62] FED. R. CIV. P. 9(b). *See also Iqbal*, 556 U.S. at 686–87 (2009) (noting that Rule 9(b) does not give a party "license to evade the less rigid—though still operative—strictures of Rule 8.").

[63] *See, e.g.*, *Grubbs*, 565 F.3d at 186 (citation omitted); *see also* United States *ex rel.* Joshi v. St. Luke's Hosp., 441 F.3d 552, 556 (8th Cir. 2006) (citations omitted).

[64] *See* United States *ex rel.* Duxbury v. Ortho Biotech Prods. L.P, 579 F.3d 13, 30 (1st Cir. 2009) (citations and internal quotations omitted); *accord Joshi*, 441 F.3d at 556 (citation and internal quotations omitted) (applying standard articulated in *Grubbs* and adding that, "[p]ut another way, the

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requirements ensure that allegations of fraud are sufficiently specific to give defendants notice of the "precise misconduct" charged against them and also to "protect defendants' reputations by safeguarding them against spurious allegations of immoral and fraudulent behavior."[65] Thus, Rule 9(b), like the FCA's public disclosure bar, should provide a check on *qui tam* FCA claims by relators motivated by "personal ill will or the hope of gain" and who lack sufficient information to actually establish an FCA violation.[66]

3. THE STATUTE(S) OF LIMITATIONS

Lastly, in theory, the False Claims Act's statute of limitations should prompt relators to file their *qui tam* lawsuits in a relatively timely fashion. Otherwise, relators could and would have a powerful financial incentive to simply "sit on their claims" for an indefinite period of time, thereby letting their potential recovery from alleged false claims "to build up over time," before notifying the government of fraud against it.[67] Presumably to avoid this result, the FCA's statute of limitations mandates that:

> A civil action under section 3730 may not be brought—
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> (1) more than 6 years after the date on which the violation of section 3729 is committed, or

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complaint must identify the who, what, where, when, and how of the alleged fraud.").

[65] United States *ex rel.* Repko v. Guthrie Clinic, P.C., 557 F. Supp. 2d 522, 526 (M.D. Pa. 2008) (citation and internal quotations omitted).

[66] *See* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) (alteration in original) (citations omitted) ("[*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing fraud upon the Treasury is to make perpetrators of them liable to actions by private persons acting, if please, under the strong stimulus of personal ill will or the hope of gain.").

[67] United States *ex rel.* Sanders v. N. Am. Bus Indus., 546 F.3d 288, 295 (4th Cir. 2008).

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> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
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> whichever occurs last.[68]

Unfortunately, subparagraph (2) of the foregoing is ambiguous with regard to when, if ever, a *qui tam* relator may benefit from the tolling provision contained therein and, as elaborated below, this uncertainty has caused fairly substantial confusion on a practical level. In particular, courts have been and remain split as to whether the tolling provision in section 3731(b)(2) applies to *qui tam* FCA cases in which the United States has declined to intervene.[69] The varying applications of this statute, as well as the reasons for such applications and their potential implications for defendants in *qui tam* FCA lawsuits, are explained below.

II. INTERPRETING THE STATUTE OF LIMITATIONS IN *QUI TAM* ACTIONS

As noted above, due in large part to the expansion accomplished by the 1986 amendments to the False Claims Act, the FCA is now frequently used as a major means of enforcing Medicare fraud and abuse laws.[70] The FCA's *qui tam* provisions are particularly influential in this context, where private relators, often insider employees or officers of healthcare providers and pharmaceutical or medical device manufacturers, have increasingly sought to enforce the FCA against entities those individuals perceive to be defrauding

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[68] 31 U.S.C. § 3731(b).

[69] *See Sanders*, 546 F.3d at 296 (citations omitted) (noting that this "issue has admittedly given rise to different approaches in the federal courts.").

[70] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 3, at 4–5.

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federally-funded healthcare programs.[71] Many of these *qui tam* lawsuits are premised upon alleged violations the Government might not otherwise prosecute,[72] and thus at times provide a valuable added option to curb fraud on the government.

Yet the *qui tam* action may at times be a double-edged sword. A greedy relator may find it advantageous to hold off on notifying the Government of fraud, at least for a while, as the amount a potential defendant obtains from the government by way of false claims, and therefore the relator's potential recovery, continues to increase.[73] Indeed, legislative history indicates that, for all the relator-friendly changes in the 1986 Amendments, Congress intended

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[71] *See* Winn W. Halverhout et al., *The 2012 OIG Work Plan: A Review of Key Focus Areas*, 14 J. HEALTH CARE COMPLIANCE No. 2, Mar.–Apr. 2012, 39, 39 ("[T]he government has used the False Claims Act to recover nearly six billion dollars over the past two years, and there has been a rise in *qui tam* (whistleblower) suits."). *See also* Richard P. Church, *Enrollment Strategies for Managing Successor Liability in Health Care Transactions*, ASPATORE (Aug. 2012), 2012 WL 3058523, *6 n.10 ("Under the FCA, false claims are subject to treble damages plus potential penalties of $5,500 to $11,000 per claim. Of particular importance[,] . . . the [FCA] provides for *qui tam* relators to bring an action on the government's behalf and participate in a portion of the recovery directly. This incentive has created substantial energy around private whistleblower actions under facts that prosecutors would likely often not pursue.").

[72] *See* Church, *supra* note 71, at *6. *See also*, *e.g.*, Steven D. Tibbets, *The (Latest) Final Rule on FAPIIS: What It Means and What to Do About It*, 47 PROCUREMENT L., Spring 2012, at 1, 22–23 (footnotes and citations omitted) ("Under the False Claims Act, relators—i.e., whistleblowers—who report fraud can receive a substantial percentage of any amount the government recovers as a result of the report. Thus, the False Claims Act creates an incentive for potential whistleblowers to assert claims.").

[73] *See Sanders*, 546 F.3d at 295–96 (citations omitted).

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for the FCA's statute of limitations to be tolled only for cases in which the government was a party.[74]

Nonetheless, not all courts have read the False Claims Act statute of limitations the same way. As detailed below, at least one court in each Circuit has considered whether the tolling provision applies to relators. Of those courts that have held the tolling provision of section 3731(b)(2) applicable to *qui tam* actions, most have indicated that a relator qualifies as the "official of the United States" referenced in that statute.[75] Others seem inclined to apply the FCA's tolling provision across the board.[76] However, the majority of courts have declined to toll the statute of limitations in *qui tam* FCA actions unless the Government has intervened and is therefore actively participating in the lawsuit.[77] As explained below, the last and majority position provides

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[74] *See* H.R. REP. NO. 99-660 at 25 (1986) ("It was brought to the attention of the Committee that fraud is often difficult to detect and that the ***statute of limitations should not preclude the Government*** from bringing a cause of action under this Act if ***they were not aware*** of the fraud. The Committee agreed that this was unfair and so expanded the statute of limitations. However, the Committee ***did not intend to allow the Government to bring fraud actions ad infinitum***, and therefore imposed the strict 10 year limit on False Claims Act cases.") (emphasis added).

[75] *See* United States *ex rel.* Hyatt v. Northrop Corp., 91 F.3d 1211, 1217–18 (9th Cir. 1996). *See also* United States *ex rel.* Hudalla v. Walsh Constr. Co., 834 F. Supp. 2d 816, 824 (N.D. Ill. 2011); United States *ex rel.* Klein v. Omeros Corp., ___ F. Supp. 2d ___, 2012 WL 4874031, *1–2 (W.D. Wash. Oct. 15, 2012) (affirming continued validity of *Hyatt*).

[76] *See* United States *ex rel.* Ven-a-Care, Inc. v. Actavis Mid Atlantic LLC, 659 F. Supp. 2d 262, 273–74 (D. Mass. 2009) (citing United States *ex rel.* Pogue v. Diabetes Treatment Ctrs., Inc., 474 F. Supp. 2d 75, 82–89 (D.D.C. 2007); United States *ex rel.* Salmeron v. Enter. Recovery Sys., Inc., 464 F. Supp. 2d 766 (N.D. Ill. 2006); United States *ex rel.* Gonzalez v. Fresenius Med. Care, 2008 WL 4277150, *7–8 (W.D. Tex. Sept. 2, 2008)).

[77] *See Sanders*, 546 F.3d at 296 (noting that majority of district courts follow this approach); *id.* at 293 (holding that FCA tolling provision applies

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the best interpretation of the False Claims Act's statute of limitations in terms of statutory interpretation, policy and practical considerations.

A. THE FIRST MINORITY APPROACH: ARBITRARY TOLLING

Some courts have decided that in some circumstances relators may avail themselves of the tolling provision in the False Claims Act statute of limitations.[78] For instance, in *United States ex rel. Harris v. Lockheed Martin Corp.*, the Ninth Circuit declared that section 3731(b)(2) should apply even in *qui tam* actions where the United States has not intervened.[79] Applying a somewhat tortuous analysis, the court validated its approach by noting that, in such cases, "a *qui tam* plaintiff" must be the "official of the United States" referenced in the FCA's statute of limitations because "[t]he *qui tam* plaintiff is the only person charged with the responsibility to act in [such] circumstances."[80] The court did limit the tolling, however, such that "the three-year extension of the statute of limitations begins to run once the *qui*

"only in cases in which the United States is a party."). *See also* United States *ex rel.* Thistlethwaite v. Dowty Woodville Polymer, Ltd., 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998) ("By the clear statutory language, the Relator's time is not extended to three years after the United States official learns of the violation. That provision only applies to the government.") (citations omitted); United States *ex rel.* El-Amin v. George Washington Univ., 26 F. Supp. 2d 162, 172–73 (D.D.C. 1998); United States *ex rel.* Schuhardt v. Washington Univ., 228 F. Supp. 2d 1018, 1029 (E.D. Mo. 2002); United States *ex rel.* Bauchwitz v. Holloman, 671 F. Supp. 2d 674, 694–95 (E.D. Pa. 2009); United States *ex rel.* King v. Solvay S.A., 823 F. Supp. 2d 472, 538 (S.D. Tex. 2011), *order vacated in part on other grounds*, 2012 WL 1067228 (S.D. Tex. Mar. 28, 2012); United States *ex rel.* Gale v. Omnicare, Inc., 2012 WL 4473265, *5 (N.D. Ohio Sept. 26, 2012).

[78] *See Hyatt*, 91 F.3d at 1217–18 (citations omitted). *See also Harris*, 2012 WL 5866204 at *11.

[79] *Hyatt*, 91 F.3d at 1217 (citations omitted).

[80] *Id.* (citation and internal quotations omitted).

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tam plaintiff knows or reasonably should have known the facts material to his right of action."[81]

Notably, the court in *Hyatt* nonetheless found that the False Claims Act allegations before it were untimely, rejecting the relator's contention that "the FCA statute of limitations began running when officials within the United States Government learned of the alleged fraud through service of [the relator's] complaint" on the government.[82] The court found this position untenable, as it "would permit relators to control the length of their own limitations period by withholding their allegations until they are prepared to sue," which in turn "would frustrate the purposes of a limitation period and the purposes of the [False Claims] Act."[83] The court noted the danger in allowing relators "to wait nearly ten years to sue," which could "allow fraud to continue and losses to mount."[84] Additionally, it could possibly "interfere with law enforcement," in light of the five-year statute of limitations on criminal fraud charges, as "the government will lose the right to seek a criminal penalty" whenever "relators wait over five years to report the fraud."[85]

Other courts have, albeit less clearly, followed the approach first adopted in *Hyatt*. For example, in *United States ex rel. Hadalla v. Walsh Construction Co.*, a court in the Northern District of Illinois rejected a defendant's "statute of limitations defense" because the relator had filed the *qui tam* lawsuit "within three years after he became aware of [the defendant's] billing practices" at issue in that case and "within ten years of the alleged

[81] *Id.* at 1217–18.

[82] *Id.* at 1218.

[83] *Id.*

[84] *Id.*

[85] *Id.* (citation omitted).

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FCA violations upon which he sue[d]."[86] Similarly, in an unpublished opinion, the Third Circuit indicated agreement with *Hyatt* by stressing that the timing of a relator's knowledge of the alleged fraud was of paramount importance in determining whether the court should "apply the six year statute of limitations in § 3731(b)(1), or the three year limitation in § 3731(b)(2)."[87]

B. The Second Minority Approach: Blanket Tolling

On the other hand, some district courts have rejected the reasoning of *Hyatt* and its kind in favor of a broader application of the tolling provision in subsection 3731(b)(2) to *qui tam* actions. Perhaps the most detailed analysis in this vein was performed by a court in the District of Columbia in *United States ex rel. Pogue v. Diabetes Treatment Centers*.[88] The court in *Pogue* purported to consider the language of section 3731(b)(2) as well related legislative history and policy before concluding that the FCA's limitations tolling provision clearly applies to relators regardless of whether the government has intervened in a *qui tam* action.[89]

Looking first to the statutory text, the *Pogue* court concluded that the tolling provision should apply to both relators and the Government because the statute "does not differentiate between" *qui tam* FCA actions and FCA suits pursued by the United States and it "does not contain any negative words of exclusion," suggesting that the Government but not relators should benefit from the tolling provision; "the structure of § 3731(b)" groups together, then distinguishes relators and the United States; and subsection

[86] United States *ex rel.* Hudalla v. Walsh Construction Co., 834 F. Supp. 2d 816, 824 (N.D. Ill. 2011).

[87] United States *ex rel.* Malloy v. Telephonics Corp., 68 F. App'x 270, 273 (3d Cir. 2003).

[88] *See* United States *ex rel.* Pogue v. Diabetes Treatment Centers of America, Inc., 474 F. Supp. 2d 75, 82–89 (D.C. Cir. 2007).

[89] *See id.*

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3731(b)(2) "use[s] a very specific phrase" to indicate who may benefit from the tolling provision instead of a "generic, careless label" that might inadvertently conflate government official and *qui tam* relator.[90]

Next, though noting that "[n]o further inquiry is appropriate" because it found the plain language of the statute clear, the *Pogue* court nonetheless examined legislative history and congressional intent behind the FCA, which the Court deemed "perfectly harmonious with" its interpretation.[91] In particular, the Court remarked that House and Senate reports both "talk in specific terms about the knowledge of government officials[ ] . . . and do not reveal any intent to allow the limitations period to be based on someone else's knowledge."[92] Moreover, the *Pogue* court rejected as incongruous the premise underlying "the *Hyatt* school of cases . . . that (b)(2)'s reference to an 'official of the United States' must implicitly include relators," proclaiming that "the Court cannot warp a statute's plain language merely to make sense out of the legislative history."[93] Thus, as the Court in *Pogue* had determined that the FCA's tolling provision clearly applied to relators and government officials alike, it disregarded contrary explanations of legislative history.[94]

Lastly, the *Pogue* court looked to "[p]urposes of the FCA" to support its declaration that the False Claims Act's statute of limitations could be tolled for *qui tam* relators in any case.[95] The Court identified these purposes as primarily "to detect, punish and deter the submission of false claims, while seeking to restore funds to the federal fisc."[96] Acknowledging that FCA relators are "often motivated largely by self-interest to report and prosecute

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[90] *Id.* at 84–86.

[91] *Id.* at 85.

[92] *Id.* at 86.

[93] *Id.* at 87.

[94] *Pogue*, 474 F. Supp. 2d at 87.

[95] *See id.* at 87–89.

[96] *Id.* at 87.

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alleged false claims," the Court added that the FCA's *qui tam* "provisions seek to strike a balance between the interests of the government and the self-interest of relators."[97] The *Pogue* court opined that its interpretation of the FCA statute of limitations "advances those governmental interests" in two ways, as "[m]easuring (b)(2)'s limitations period by the government's knowledge, and never the relator's," could assure "that (1) the government's rights will never be impaired by the relator's conduct; and (2) the government will be able to recover upon the maximum amount of claims within the overall ten-year repose period."[98]

The *Pogue* court also downplayed the concern expressed by other courts that tolling the limitations period for *qui tam* actions could allow relators to "sleep on their rights," deciding instead that relators really "have no rights on which to sleep" and may in fact be subjected to reduced recoveries for not acting promptly.[99] In addition, the court predicted that denying tolling in *qui tam* actions where the Government declined intervention would produce "vexing scenarios" in which the government might "increase the defendant's exposure by deciding to intervene at the outset" ***or*** "after the litigation has advanced significantly," a result the *Pogue* court perceived as "antithetical to the purposes of statutes of limitations and repose, which seek in part to afford some measure of predictability and finality to litigation."[100] The court similarly rejected "the *Hyatt* approach" as creating "the flipside" of such problems, as "if relators and the government are only bound by their own knowledge, then the government could expand the statute of limitations by intervening in a *qui tam* case."[101]

Other district courts have reached similar results, though without equally in-depth analysis. For instance, in *United States ex rel. Salmeron v.*

[97] *Id.*

[98] *Id.* at 87–88.

[99] *Id.* at 88.

[100] *Pogue*, 474 F. Supp. 2d at 88.

[101] *Id.* at 89.

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Enterprise Recovery Systems, a court in the Northern District of Illinois rejected a defendant's plea to apply the *Hyatt* approach, noting that the defendant's stance "essentially ignore[s]" that section 3731(b) suggests courts should initiate the limitations period from whichever alternative "occurs last."[102] Further, the *Salmeron* court declared that "*Hyatt* reads like a conjurer's trick" that "converts the *qui tam* plaintiff" into an "official of the United States," a manipulation amounting to "judicial legislation" contrary to the FCA's plain language.[103] Accordingly, the court tolled the statute of limitations and found the relator's claims were not time-barred.[104]

This approach was also recently adopted by a court in the District of Massachusetts in *United States ex rel. Ven-A-Care, Inc. v. Actavis Mid Atlantic LLC*.[105] In that case, the court noted and briefly described various courts' divergent interpretations of whether and under what circumstances the tolling provision in the FCA statute of limitations applies to *qui tam* actions.[106] Acknowledging that the issue is "debatable," the court found cases like *Pogue* and *Salmeron* seemingly "most consistent with the language of the statute," which "does not expressly limit the tolling provision to the Government" and vests the person who initiated the action with "the right to conduct" the *qui tam* FCA action, such that "the relator has the right to invoke the provisions of the statute, including the tolling provision."[107] The *Ven-A-Care* court also remarked that, while the "drafters of the FCA knew how to delineate between the rights and responsibilities of the Government" and private parties, "they chose not to limit the tolling provision to the

[102] United States *ex rel.* Salmeron v. Enterprise Recovery Systems, 464 F. Supp. 2d 766, 769 (N.D. Ill. 2006) (citing 31 U.S.C. § 3731(b)).

[103] *Id.*

[104] *Id.* at 770.

[105] United States *ex rel.* Ven-A-Care, Inc. v. Actavis Mid Atlantic LLC, 659 F. Supp. 2d 262 (D. Mass. 2009).

[106] *Id.* at 273 (citations omitted).

[107] *Id.* (quoting 31 U.S.C. § 3730(c)(3)).

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Government."[108] Accordingly, the court extended the tolling provision in subsection 3731(b)(2) to the *qui tam* action.[109]

C. THE MAJORITY APPROACH: TOLL ONLY IF THE UNITED STATES HAS INTERVENED

The majority's approach, expressed and applied by both district courts and some appellate panels, have for a number of reasons declined to apply the tolling provision of section 3731(b)(2) to *qui tam* False Claims Act cases in which the United States has declined to intervene. Perhaps the leading case articulating the rationale underlying this approach comes from a 2008 decision of the Fourth Circuit in *United States ex rel. Sanders v. North American Bus Industries*, in which the court held "that Section 3731(b)(2) extends the FCA's statute of limitations beyond six years only in cases in which the United States is a party."[110]

Contrary to the cases described above, the *Sanders* court remarked that it "would be problematic to read the text of the statute any other way."[111] Specifically, the tolling provision itself "refers only to the United States—and not to relators," thereby suggesting that "Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period . . . depends on the knowledge of a nonparty to the" *qui tam* action.[112] Moreover, the government's knowledge of "material information" would not put the relator on notice, such that the limitations period in a non-intervened *qui tam* action "cannot reasonably begin" based

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[108] *Ven-A-Care, Inc.*, 659 F. Supp. 2d at 274.

[109] *Id.*

[110] United States *ex rel.* Sanders v. North American Bus Industries, 546 F.3d 288, 293 (4th Cir. 2008).

[111] *Id.*

[112] *Id.*

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upon the Government's knowledge.[113] Furthermore, government officials are not "charged with responsibility to ensure that a relator brings a timely FCA action."[114] Thus, the court reasoned, it would contravene statutory text to extend the tolling provision to relators in cases to which the United States is not a party.[115]

The *Sanders* court next bolstered its analysis by comparing the language of section 3731(b)(2) to that in 28 U.S.C. § 2416(c), which contains nearly identical language and "tolls the generally applicable statute of limitations in actions brought by the United States—and only the United States—until 'facts material to the right of action' are actually or constructively known by an 'official of the United States charged with the responsibility to act in the circumstances.'"[116] The court also rejected the relator's argument that the tolling provision should apply because section 3731(b)(2) refers to "[a] civil action under section 3730" and section 3730 describes both direct and *qui tam* actions.[117] The court found this argument unavailing for two reasons. First, the statute would make no sense if read to apply to non-intervened *qui tam* actions because it specifically distinguishes between *qui tam* and direct actions, and second, the phrase "a civil action" in the context of the statute of limitations is "restrictive language referring to the United States—and not to relators," and makes clear that the tolling provision only applies to the subset of civil actions in which the Government is an actual party.[118]

The *Sanders* court concluded its analysis by citing the "numerous practical difficulties" that would result from extending the section 3731(b)(2)

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113 *Id.* at 294.

114 *Id.*

115 *Id.*

116 *Sanders*, 546 F.3d at 294.

117 *Id.* (internal quotations omitted).

118 *Id.* at 294–95 (citations omitted).

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tolling provision to non-intervened *qui tam* actions.[119] First, the court noted, if the statute of limitations were dependent on the knowledge of a nonparty government official, defendants and the Government would be subjected to undue burdens as defendants would be forced to seek out and litigate the identity and knowledge of the relevant government official and the Government "would be subjected to disruption and expense in responding to discovery requests in actions in which the Government affirmatively chose to avoid those concerns by declining to intervene."[120]

Moreover, relators would be able "to sit on their claims for up to ten years" before notifying the Government, let alone potential defendants, of the fraud allegations.[121] This concern, enhanced by the fact that "relators would have a strong financial incentive to allow false claims to build over time" and thereby increase relators' "own potential recovery" before filing a complaint, gives rise to a number of undesirable results.[122] For example, relators would be able to "extend the limitations period at will," which would make "the six-year limitation period in Section 3731(b)(1) superfluous in nearly all FCA cases," so that extending the tolling provision to relators would contravene the need "to give effect, if possible, to every clause and word of a statute."[123] In addition, "allowing relators to sit on their claims" for up to ten years "would undermine the purposes of" the FCA's *qui tam* provisions, namely "to combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot or will not."[124] Finally, broadly tolling the FCA statute of limitations would prevent the Government from criminally prosecuting predicate fraud whenever the relator fails to notify the

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[119] *Id.* at 295.

[120] *Id.*

[121] *Id.*

[122] *Sanders*, 546 F.3d at 295.

[123] *Id.* (citations omitted).

[124] *Id.* (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 547 (1943)).

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government of the suspected false claims within five years of the last such claim.[125] Thus, the court declined to extend section 3731(b)(2) to non-intervened *qui tam* FCA cases.

Other courts have reached the same result based on a variety of theories, mostly incorporating at least some of the reasoning articulated in *Sanders*. Some have simply proclaimed without more that the plain language of section 3731(b)(2) applies only to the government, presumably due to the reference to an "official of the United States."[126] Other courts have reiterated this premise and have added some "practical" considerations mentioned in *Sanders* for instances that extending the tolling provision "would allow future *qui tam* relators to allow false claims to build up, to the detriment of the government and thereby obtain a larger recovery by sitting on their hands until the end of the ten year period."[127]

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[125] *Sanders*, 546 F.3d at 295.

[126] *See, e.g.*, Thistlethwaite v. Dowty Woodville Polymer, Ltd., 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998), ("By the clear statutory language, the Relator's time is not extended to three years after the United States official learns of the violation. That provision applies only to the government."). *See* United States *ex rel.* Schuhardt v. Washington Univ., 228 F. Supp. 2d 1018, 1029 (E.D. Mo. 2002) (stating, without elaboration, that "[t]he statute of limitations for FCA cases, in which the government does not intervene, is six years.") (citing 31 U.S.C. § 3731). *See also Gale*, 2012 WL 4473265 at *5 (explaining and holding that language of subsection 3731(b)(2) supports applying six-year limitations period and not tolling provision to *qui tam* actions in which United States has not intervened); United States *ex rel.* King v. Solvay S.A., 823 F. Supp. 2d 472, 538 (S.D. Tex. 2011), *order vacated in part on other grounds*, 2012 WL 1067228 (S.D. Tex. Mar. 28, 2012) ("Subsection 3731(b)(2) refers only to the United States[.] . . . Allowing relators to take advantage of a tolling provision that specifically mentions the government and does not refer to relators runs contrary to the purpose of allowing *qui tam* relators to proceed with the action in the first place.").

[127] United States *ex rel.* El-Amin v. George Washington Univ., 26 F. Supp. 2d 162, 172–73 (D.D.C. 1998) (citations omitted).

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A court in the Eastern District of Pennsylvania in *United States ex rel. Bauchwitz v. Holloman* undertook its analysis of the tolling issue by starting with an examination of ***when*** the limitations period begins.[128] Noting "a lack of unanimity" on this issue, the court deduced from both "the plain language of § 3729(a)" and precedent of the Supreme Court and the Third Circuit "that the application for payment, rather than payment of the claim, triggers the accrual of an [FCA] action."[129] Based on reasoning quite similar to that employed in the *Sanders* line of cases, the court concluded that it would be "inconsistent with established legal principles and the purpose of the FCA" to allow relators to wait "for damages to start accumulating before starting the FCA clock ticking."[130] In other words, "[i]f a private relator knows a claim is false when it is made, he cannot wait until payment is made to blow the whistle," as "the government will suffer increased harm while losses increase" whenever a relator with knowledge of fraud prolongs the time before he apprises the Government of the false claims involved.[131]

Having determined that an FCA cause of action accrues when the defendant makes a false claim, the *Bauchwitz* court next assessed whether the tolling provision in section 3731(b)(2) would apply to *qui tam* actions in which the Government has not intervened.[132] The court observed that the earlier Third Circuit opinion suggested "an expansive view of the relator's status" consistent with the *Hyatt* line of cases.[133] However, the court further noted that such an "expansive view" had been invalidated by the Supreme

[128] United States *ex rel.* Bauchwitz v. Holloman, 671 F. Supp. 2d 674, 685 (E.D. Pa. 2009).

[129] *Id.* at 685–86 (citations omitted).

[130] *Id.* at 688.

[131] *Id.*

[132] *Bauchwitz*, 671 F. Supp. 2d at 693 (citations omitted).

[133] *Id.* at 693–94 (citing Rodriguez v. Our Lady of Lourdes Med. Ctr., 552 F.3d 297 (3d Cir. 2008)); *see* United States *ex rel.* Malloy v. Telephonics Corp., 68 F. App'x 270 (3d Cir. 2003).

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Court in *United States ex rel. Eisenstein v. City of New York*.[134] In *Eisenstein*, the Court held that a "relator cannot be deemed to have the same status as the government" in a non-intervened FCA action because, though the Government retains "an interest in an FCA case in which it has not intervened," that "interest does not convert the government's status as a real party in interest to that of a 'party' in the litigation."[135] The *Bauchwitz* court construed *Eisenstein* to preclude application of the section 3731(b)(2) tolling provision in non-intervened *qui tam* actions.[136]

In sum, the line of cases declining to apply the tolling provision in section 3731(b)(2) to non-intervened *qui tam* FCA cases repeatedly stress the importance of constraining the time in which relators might bring such cases to avoid thwarting both the FCA's anti-fraud impetus and the efficiency principles underlying the *qui tam* mechanism. This overriding rationale, coupled with practical concerns about discovery complications and disagreement over whether the relator is in fact an "official of the government," has produced the leading opinion that the statute of limitations for False Claims Act cases should be tolled only for cases in which the United States is an active participant. The varying interpretations of how the FCA statute of limitations applies in *qui tam* actions may significantly impact defense costs to healthcare providers and, indirectly, increase costs passed along to healthcare consumers. The potential increase in consumer costs will presumably correspond with the time span of allegations, therefore lending in favor of constraining the limitations period to the fullest extent possible.

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[134] United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928 (2009).

[135] *Bauchwitz*, 671 F. Supp. 2d at 694 (citing *Eisenstein*, 556 U.S. at 932–34).

[136] *Bauchwitz*, 671 F. Supp. 2d at 694–95 (citations omitted).

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III. Financial Ramifications of Proliferating *Qui Tam* FCA Actions

The recent dramatic increase in FCA recoveries may impact the healthcare industry in various ways. The Obama Administration has made clear the importance of reducing healthcare costs, including through FCA enforcement,[137] so much so that in 2009 the Departments of Justice and Health and Human Services (HHS) formed the "HEAT Task Force"[138] with the intent of bringing "the fight against Medicare fraud" to "a Cabinet-level priority."[139] The FCA is among the most powerful weapons[140] in this fight, as it permits *qui tam* actions premised not only upon direct violations of the FCA but also indirectly[141] upon violations of other anti-fraud statutes.

Perhaps the most important laws in this later class are the federal Anti-Kickback Statute[142] ("AKS") and the physician self-referral law, more commonly known as the Stark Act,[143] both of which can only be directly

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[137] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GENERAL, SPRING 2011 SEMIANNUAL REPORT TO CONGRESS, PART III: LEGAL & INVESTIGATIVE ACTIVITIES RELATED TO MEDICARE & MEDICAID (2011), *available at* https://oig.hhs.gov/reports-and-publications/archives/semiannual/2011/spring/SAR03-Legal+Investigative.pdf.

[138] "HEAT" stands for Health Care Fraud Prevention and Enforcement Action Team. *See HEAT Task Force*, STOPMEDICAREFRAUD.GOV, http://www.stopmedicarefraud.gov/aboutfraud/heattaskforce/index.html (accessed Aug. 22, 2012).

[139] *Id.*

[140] U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 137.

[141] *See, e.g.*, United States *ex rel.* Wilkins v. United Health Grp., Inc., 659 F.3d 295, 305 (3d Cir. 2011) (citations omitted) (discussing distinction between FCA claims based on "factually" versus "legally" false claims).

[142] 42 U.S.C. § 1320a–7b (2012).

[143] 42 U.S.C. § 1395nn (2012). *See also Physician Self-Referral*, CMS.gov, http://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelf

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enforced by the government.[144] As courts now universally recognize the validity of *qui tam* FCA claims premised upon a defendant's "false certification" of compliance with the AKS and/or Stark Act, relators now have the power to indirectly enforce statutes they could not otherwise invoke. This increased power in turn presumably heightens the vulnerability of defendant healthcare goods and service providers, which in turn may have the perverse effect of *increasing* healthcare costs as FCA defendants pass along increased litigation and settlement costs to consumers.

These effects could be dramatically magnified with any expansion of the amount of time a relator may "sit on" allegations of fraud while false claims-related damages continue to accrue. Indeed, the costs facing FCA defendants are quite disproportionate to the actual cost of any false claim to the United States. Specifically, FCA defendants must not only reimburse the government for fraudulently-obtained funds, they must pay that amount two more times due to the treble damages allowed by the FCA.[145] It is unclear whether and in what amount such costs will be passed on to healthcare consumers.[146]

However, it is clear that potential defendants are specifically allocating substantial resources, which presumably could otherwise be expended for furnishing or producing healthcare-related goods and services, to the expense of defending and possibly litigating FCA cases. For instance, in 2011, pharmaceutical manufacturer Abbott Laboratories set aside $1.5 billion in litigation reserves in light of settlement discussions with the Department of Justice related in part to FCA-related allegations.[147] Similarly, also in 2011,

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Referral/index.html?redirect=/PhysicianSelfReferral (accessed Aug. 22, 2012) (describing Stark Law and discussing its several names).

144 *See* 42 U.S.C. § 1320a–7b(a) (making clear that prohibitions in AKS are criminal in nature); *see also* 42 U.S.C. § 1395nn(g) (describing "sanctions" for Stark Law violations).

145 *See* 31 U.S.C. § 3729(a).

146 *See* Kennedy, *supra* note 13; *cf.* Catan, *supra* note 13.

147 *See, e.g.*, Press Release, Abbott Labs., Abbott Report Strong Ongoing Third Quarter Results; Confirms Double-Digit Ongoing Earnings Growth

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pharmaceutical manufacturer Amgen reserved $780 million to settle, among other things, *qui tam* allegations of false claims to Medicaid due to Amgen's sales and marketing activities.[148] Even the DOJ recognizes that defendants may be beginning to treat FCA defense as a cost of doing business,[149] which if true threatens to divest the FCA of any deterrent power and render it simply a device for restitution and punishment.

These facts highlight the merit of the reasoning of the majority of courts declining to toll the FCA's statute of limitations in non-intervened *qui tam* cases. This is particularly true of the premise that tolling the statute would defeat the purposes of the False Claims Act and its *qui tam* provisions by enabling relators to hide, for a protracted period of time, information about false claims from the government and conceal allegations from defendants until it is convenient for relators to sue.[150] It is likely that damages would accumulate between the points in time where the relator learned of the fraud and when he finally chose to sue. This accumulation is magnified if the defendant is found liable because the defendant is required to pay treble damages.[151]

Additionally, with the passage of time, any information in a defendant's possession relating to the alleged false claims may become increasingly

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Outlook for 2011 (Oct. 19, 2011), *available at* https://www.abbott.com/news-media/press-releases/2011-oct19.htm.

[148] *See* Press Release, Amgen, Amgen's Third Quarter 2011 Revenue & Adjusted Earnings Per Share (EPS) Each Increased 3 Percent to $3.9 Billion and $1.40 (Oct. 24, 2011), *available at* http://www.amgen.com/media/media_pr_detail.jsp?releaseID=1620695.

[149] Press Release, U.S. Dep't of Justice, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act & Qui Tam Enforcement (June 7, 2012), *available at* http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html.

[150] *See, e.g.*, *Sanders*, 546 F.3d at 294.

[151] *See* 31 U.S.C. § 3729(a).

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difficult, or even impossible, to locate when the defendant finally does learn of the FCA allegations. Defendants may not become aware of FCA allegations until much later because even after a relator decides to file an FCA complaint the government may request that the complaint remain sealed for at least an additional sixty days.[152] The only limitation on the government's ability to extend the seal is a statutory requirement that the government show "good cause" for such extension.[153] This secretive procedure may prevent defendants from learning of FCA allegations for months, even though the passage of time increases the likelihood that defendants may be unable to locate information related to the alleged false claims.[154] These discovery costs not only burden FCA defendants with discovery costs over and above possible damages liability, they further create an incentive to settle *qui tam* allegations that may in fact be meritless.

Thus, the cost of FCA allegations to a defendant could increase exponentially with any time beyond the FCA's fairly generous six-year statute of limitations[155] during which the relator may pile on allegations that add to the defendant's already heavy dual burdens of defense and settlement or damage costs. The argument to the contrary in the *Pogue* line of cases—that would-be relators are unlikely to "sleep on their rights," and do not really have a strong incentive to do so in order to allow claims and damages to accumulate, because the "original source" bar might reduce or foreclose potential recovery in a *qui tam* action[156]—is puzzling and seems plainly inaccurate. There is no indication that after seven, eight, or nine years there might be a "public disclosure" of information about FCA violations that was previously hidden for the previous six years, and indeed such result seems counterintuitive at best. Moreover, one main purpose of the FCA's *qui tam* mechanism is to allow private relators to bring to light violations that might

[152] *See id.* § 3730(b).

[153] *Id.*

[154] *Id.*

[155] 31 U.S.C. § 3731(b)(1).

[156] *Pogue*, 474 F. Supp. 2d at 88.

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otherwise remain hidden from the government and inhibit the United States' ability to seek recompense for such violations.[157]

Accordingly, the lone argument against the damage accumulation and financial motivation rationale for ***not*** tolling the statute of limitations in non-intervened *qui tam* False Claims Act cases is easily defeated. This leaves the necessary inference that excess expense of defending *qui tam* FCA cases, and the related prospect of defendants in the healthcare industry passing such costs along to consumers, could and should be curbed by constraining relators to the six-year limitations period. This conclusion is supported by the history and purpose of the False Claims Act, as well as practical considerations underlying its application. Consequently, in *qui tam* FCA actions in which the government has declined to intervene, relators' allegations must be based on false claims activity that has occurred within the six years preceding the date on which the relator chooses to file his complaint. The practice will result in the best outcome for both the defendants and United States, and therefore consumers can avoid assuming some of the costs to defendants of the FCA litigation.

[157] *See* Bucy, *supra* note 12, at 1530 ("Government officials confirm the importance of insiders: 'Whistleblowers are essential to our operations. Without them, we wouldn't have cases. '") (quoting Lawrence J. Rhoades of HHS) (additional citations omitted).

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