NOTES

Putting an End to False Claims Act Hush Money: An Agency-Approval Approach to Qui Tam Prefiling Releases

I. INTRODUCTION

The False Claims Act ("FCA") deputizes private citizens to combat fraud against the United States government by offering them a portion of the bounty.[1] This concept has existed in some form for hundreds of years—the strategy of "setting a rogue to catch a rogue."[2] Medieval England used it in place of police forces.[3] The American Colonies caught pirates this way.[4] Even Abraham Lincoln protected the Union Army from faulty equipment by encouraging corrupt military suppliers to report one another.[5] In modern American history, the FCA has proven extraordinarily effective at using this ancient tactic. The Act fines wrongdoers triple the amount of damages suffered by the government, plus $5,000 to $10,000 for every false statement the violator made.[6] Between 1987 and 2013, the federal government recovered more than $27 billion as a result of modern-day privateers coming forward under the FCA to claim their bounties on fraud.[7]

The FCA "enhance[s] the Government's ability to recover losses sustained as a result of fraud against the Government"[8] and covers a wide range of fraudulent activities including "present[ing] . . . a false or fraudulent claim for payment," "us[ing] a false record or statement material to a false or fraudulent claim," and "avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government."[9] The FCA further includes a qui tam provision that

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1. *See* 31 U.S.C. § 3730(b) (2012) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government.").

2. CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Howard).

3. Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 86 (1972) ("In the early stages of English criminal law, enforcement of penal statutes was limited by the lack of an effective public police force. To rectify this inadequacy, the courts permitted private accusers to bring bills to enforce penal laws." (footnote omitted)).

4. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 776 (2000) (citing Act for the Restraining and Punishing of Privateers and Pirates, 1st Assemb., 4th Sess. (N.Y. 1692), *reprinted in* 1 COLONIAL LAWS OF NEW YORK 279, 281 (1894) (permitting informers, after filing suit, to receive part of the fines imposed on officers who failed to pursue privateers and pirates)).

5. *See infra* Part II.B.

6. *See* 31 U.S.C. § 3729(a)(1).

7. U.S. DEPT. OF JUSTICE, FRAUD STATISTICS—OVERVIEW, 1–2 (2013), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf, *archived at* http://perma.cc/2BBS-F7HS.

8. S. REP. NO. 99-345, at 1 (1986).

9. 31 U.S.C. § 3729(a)(1)(A), (B), (G).

allows private citizens to bring claims on behalf of the government.[10] Individuals who bring such claims are called "relators."[11] This provision entices relators to file FCA claims by offering up to thirty percent of the government's recovery if the suit is successful.[12]

Under the FCA, once a relator files suit he cannot release the claim without government approval.[13] However, the Act does not similarly restrict prefiling releases of qui tam claims—i.e., releases of legal claims against the individual defrauding the government that the relator signs before filing a lawsuit.[14] In recent years, numerous companies have taken advantage of the omission of prefiling restrictions by requiring terminated employees to sign releases that waive qui tam rights in exchange for generous severance packages. Because companies can offer potential relators the complete certainty of severance packages but a relator must weather the costs and risks of litigation to win only thirty percent of FCA damages, potential relators rationally choose the certainty of a severance package over the mere potential of partial damages.[15] Therefore, using severance packages to cover up fraud may cost companies significantly less than allowing terminated employees to bring qui tam claims. Additionally, companies pay this "presettlement" to terminated employees, not the defrauded government, shifting funds away from the rightful owner of the claims to terminated employees.

In deciding whether to enforce these qui tam provisions, courts primarily take the government-knowledge approach. If the government has already investigated the fraud, the contract is enforced and the former employee cannot bring the claim. Alternatively, if the government had not investigated the claim at the time of the employee's release, courts may refuse to enforce these provisions.[16] Unfortunately, the simple elegance of this solution is

10. *Id.* § 3730; U.S. DEPT. OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER 2 (2011), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf, *archived at* http://perma.cc/G45J-BR48.

11. *Id.*

12. 31 U.S.C. § 3730(d); U.S. DEPT. OF JUSTICE, *supra* note 10, at 3.

13. 31 U.S.C. § 3730(b).

14. *See id.*

15. *Id.* § 3730(d); *see* United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 965–66 (9th Cir. 1995) (discussing the economic incentives for relators to take smaller but certain settlements instead of filing qui tam claims under the FCA).

16. *See, e.g.*, United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 333 (4th Cir. 2010) (holding that the disclosure of fraud allegations to the government prior to the filing of a qui tam suit required that a release barring such claims brought in the suit be enforced); United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1171 (10th Cir. 2009) (holding that a release of qui tam claims was enforceable under the government-knowledge approach); United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 231 (9th Cir.

misleading: it misaligns insider incentives, presents information-obtainment difficulties, and denies the government the ability to supplement its own prosecutorial efforts—one of the FCA's major stated goals.[17]

Part II of this Note recounts the history of the False Claims Act and the Act's evolution into its current version.[18] It also highlights the failure of the 1946 jurisdictional bar that prevented relators from bringing suits on information that the government already knew—a precursor to the flaws seen today in the courts' similar approach to reviewing prefiling releases. Part III explains the current government-knowledge approach and the enforceability of prefiling releases. It also highlights the approach's many deficiencies, some of which parallel the deficiencies in the rejected government-intervention approach that one district court proposed.[19] Part IV proposes that Congress should adopt an agency-approval approach. Under this approach, federal courts would enforce prefiling FCA qui tam releases only upon viewing evidence that a federal agency completed an investigation into the specific instance of fraud alleged in the FCA suit. The agency that completed the investigation must have unearthed no fraudulent behavior and certified that the company could contract for enforceable prefiling releases of qui tam FCA claims.[20] This approach aligns whistle-blower incentives because insiders would not be able to presettle a qui tam claim for less than the potential government recovery amount without prior government approval. This approach also maximizes fraud detection, deterrence, and recovery for several reasons: First, insiders could only financially benefit from knowledge of fraud by bringing qui tam suits and, second, from each successful claim, the government could recover at least 210 percent damages (treble damages less the maximum potential relator recovery).[21] Furthermore, the increase in government detection and recovery capabilities strengthens incentives for companies to avoid committing fraud in the first place. Finally, this approach is consistent with the

1997) (holding a release to be enforceable because the "government had full knowledge of the plaintiff's charges"); *Northrop*, 59 F.3d at 953 (holding that a release of qui tam claims was unenforceable because "the government only learned of the allegations of fraud and conducted its investigation *because of the filing of the qui tam complaint*").

17. *See Northrop*, 59 F.3d at 963 ("It is commonly recognized that the central purpose of the *qui tam* provisions of the FCA is to 'set up incentives to supplement government enforcement' of the Act . . . ." (quoting United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (1994))).

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* note 158 and accompanying text.

postfiling settlement requirement under the FCA that prevents a relator from settling without government approval.

II. THE HISTORY OF THE FALSE CLAIMS ACT: FROM THE THIRTEENTH CENTURY TO THE LINCOLN LAW TO TODAY

A. The Origins and Development of Qui Tam in England and America: Who as Well for the King as for Himself

Throughout the history of qui tam statutes like the FCA, the government has struggled to find the right balance between incentivizing fraud reporting and deterring vexatious and collusive lawsuits. "Qui tam" is the accepted abbreviation for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who as well for the king as for himself sues in this matter."[22] This special type of proceeding is rooted in a common-law method of joining royal and private causes of action in thirteenth-century England.[23] Royal interests received special treatment during this time, and a separate royal court system heard suits addressing the King's interests.[24] Plaintiffs would allege a private wrong that affected royal interests in order to gain access to the royal courts. This was advantageous because royal courts were perceived as more adequate and fair than many local courts.[25] For example, in addition to the private wrong, plaintiffs pleaded royal interests like "the king's interest in lands held under royal tenure, . . . an interest in the safety and well-being of his men, . . . and the dignity of the crown"[26] to transform a case from a private cause of action into a royal one. Later, royal courts expanded their jurisdiction, and this type of qui tam strategy was no longer necessary; however, despite this change, many statutes began to allow private parties to sue to redress public wrongs.[27]

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22. BLACK'S LAW DICTIONARY 1444 (10th ed. 2014); Note, *supra* note 3, at 83.

23. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) ("Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interests."); Note, *supra* note 3, at 85 ("Only by alleging a royal interest could a private party gain access to the royal courts, since in the thirteenth century these courts generally considered only matters involving the king.").

24. *See* Note, *supra* note 3, at 83–85.

25. *See Vt. Agency of Natural Res.*, 529 U.S. at 774; Note, *supra* note 3, at 85.

26. Note, *supra* note 3, at 83 n.13 (citations omitted).

27. *See id.* at 85–86.

Qui tam suits in early America were virtually identical in procedure and structure to their English counterparts.[28] Although there is little evidence that colonists actually brought common-law qui tam actions, there were many informer statutes expressly providing for qui tam suits.[29] For example, the First Congress passed statutes allowing private citizens to sue and recover half the fine for a failure to file census returns, half the penalty and forfeiture for a violation of spirits duties, or half the forfeiture for unlicensed trading with Native American tribes.[30]

On both sides of the Atlantic, qui tam provisions attracted abuse of two kinds: collusive informers and vexatious suits brought by informers.[31] Collusive informers brought qui tam suits against their friends and associates and either obtained confessed judgments for only a portion of the wrongdoing or permitted the wrongdoer to prevail at a staged trial.[32] With a judgment already rendered, other informers or the government were precluded from bringing future actions to recover full damages.[33] Similarly, plaintiffs who knew little or nothing about the alleged wrongdoing but sought a share of any recovery nonetheless brought vexatious lawsuits.[34] These plaintiffs abused qui tam provisions and sapped defendant and judicial resources by filing opportunistic claims based on nonexistent, obsolete, or public information.[35]

In England, Parliament initially attempted to combat such abuses by abolishing informer provisions altogether, but it found this impeded enforcement of penal laws because informers helped expose criminal abuses.[36] More effectively, Parliament eliminated the preclusive effects of qui tam suits, preventing wrongdoers from escaping liability with the use of collusive informers.[37] Parliament also imposed penalties on those who brought vexatious suits, imposed a

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28. *See id.* at 97.

29. *Vt. Agency of Natural Res.*, 529 U.S. at 776.

30. *See id.* at 777 n.6 (citing Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–38; Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 102, qui tam statutes passed by the First Congress); James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the* United States ex rel. Gravitt v. General Electric Co. *Litigation*, 18 OHIO N.U. L. REV. 35, 37 (1991).

31. *See* Note, *supra* note 3, at 89, 97.

32. *See id.* at 89.

33. *See id.* at 89–90.

34. *See id.* at 89.

35. *Id.*

36. *See id.* ("This attempt proved unworkable since informers were still needed to enforce the penal laws of England.").

37. *See id.* at 89–90.

one-year statute of limitations and a strict venue requirement, and removed some of the pleading restrictions on qui tam defendants.[38] In addition to instituting similar measures to prevent qui tam abuses, American legislatures also gave the government exclusive control over penal actions.[39] This hindered informer abuses and vested the decision to prosecute solely in the government, which allowed the government to pardon the entire penalty, including the portion to the abusive relator, instead of just the government's own share.[40]

Beginning in the nineteenth century, the use of qui tam provisions to enforce penal laws in America and England diminished as public agencies became more effective at law enforcement.[41] But qui tam lived on in the United States as the centerpiece of its most powerful tool for fraud prevention: the False Claims Act.

B. The Lincoln Law

During the Civil War, defense contractors perpetrated rampant fraud. Contractors sold the Union boots made of cardboard, gun powder barrels that contained only saw dust, and rotted ship hulls painted over to look new; they also repeatedly sold the same work animals.[42] In response, Congress passed the False Claims Act of 1863 ("1863 Act"). Senator Henry Wilson summarized the need for the new law during debate leading up to the bill's passage:

> Investigating committees in both Houses of Congress have reported the grossest frauds upon the Government. . . . The Government finds, however, that it has no law adequate to punish them. . . . This bill is reported for the purpose of ferreting out and punishing those enormous frauds upon our Government . . . . We have all of us seen enough, since this rebellion broke out, of frauds perpetrated upon the Government, and above all, and more than all, perpetrated upon our soldiers in the field; and I trust that the Senate will pass this bill, or some bill that will put fraudulent contractors in a position where they may be punished for their frauds.[43]

The 37th Congress saw the qui tam provision as a tool that would promote the discovery of fraud. Senator Jacob Howard, who sponsored the legislation, aptly explained how the provision incentivized informants to come forward and partners in fraud to turn on each other:

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38. *See id.* at 90.

39. *See id.* at 97–98.

40. *Id.* at 98.

41. *See id.* at 99–101.

42. *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, 1264 (2013) (citing 132 CONG. REC. H6482 (daily ed. Sept. 9, 1986) (statement of Rep. Berman)).

43. CONG. GLOBE, 37th Cong., 3d Sess. 956 (1863) (statement of Sen. Wilson).

> The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. . . . In short, . . . I have based the fourth, fifth, sixth, and seventh sections 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.[44]

The 1863 Act provided civil and criminal penalties for submitting fraudulent claims for payment to the U.S. government.[45] Under this version of the Act, Congress defined false claims to include presenting "any claim upon or against the Government of the United States" to "any person or officer in the civil or military service of the United States" while "knowing such claim to be false, fictitious, or fraudulent."[46] The Act also specifically indicated that many other acts of treachery against the U.S. military were punishable under the Act, including submitting false vouchers, making false oaths, forging signatures, submitting forged papers, conspiring to defraud, stealing or embezzling, concealing government property, and purchasing weapons from soldiers.[47] The Act gave private citizens the right to file suit on behalf of the U.S. government against those submitting fraudulent claims.[48] Wrongdoers could face fines equal to double the amount of damages the government suffered as a result of the fraud, as well as a $2,000 civil penalty for each false claim submitted, regardless of whether there was actual damage or loss.[49] A relator who brought a successful suit was then entitled to one-half of the total penalty that the defendant paid.[50]

The 1863 Act proved extraordinarily effective at affordably detecting and deterring fraud.[51] In the words of a federal district court in Oregon:

> [The False Claims Act] is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory . . . that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.[52]

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44. *Id.* at 955–56 (statement of Sen. Howard).
45. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696; Helmer, *supra* note 42, at 36.
46. Act of Mar. 2, 1863, ch. 67 § 1, 12 Stat. 696, 696.
47. *Id.*
48. *Id.* § 4, 12 Stat. 698.
49. *Id.* § 3, 12 Stat. 698; Helmer & Neff, *supra* note 30, at 36.
50. Act of Mar. 2, 1863, ch. 67 § 6, 12 Stat. 698.
51. Helmer, *supra* note 42.
52. United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).

However, the lucrative nature of FCA claims also produced negative externalities as rogues of another sort entered the fray.

C. Parasitic Suits and the 1943 Amendment: An Overreaction

While the 1863 Act effectively uncovered fraud,[53] it also attracted numerous parasitic lawsuits based on information relators learned from criminal indictments.[54] In the most important of these cases, *United States ex rel. Marcus v. Hess*,[55] electrical contractors conspired to defraud the government through collusive bidding; they were indicted and pleaded nolo contendere, resulting in a $54,000 fine.[56] Subsequently, the petitioner filed a qui tam suit against the contractors under the FCA, resulting in a $150,000 settlement.[57] The Attorney General used this case as an opportunity to protest the duplicitous nature of FCA litigation and the common practice of parasitic lawsuits brought under the Act.[58] In an amicus curiae brief, the Attorney General contended that:

> [E]ffective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863.[59]

The *Hess* Court rejected the Attorney General's complaints, stating it lacked the authority to invalidate the Act, even though some sections may have been bad policy.[60]

Despite the Supreme Court's decision in *Hess*, Congress soon adopted several of the Attorney General's considerations,[61] implementing his assertion that agencies alone had become sufficient

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53. Helmer, *supra* note 42, at 1267.

54. *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1249 (S.D. Fla. 1989); Helmer, *supra* note 42, at 1267–71 (discussing World War II–era parasitic suits and the accompanying congressional response).

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

56. *Id.* at 545.

57. *Id.*

58. *See* Helmer, *supra* note 42, at 1267–69.

59. *Hess*, 317 U.S. at 547.

60. *Id.* at 541–42:

> Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will.

61. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608; *see* Helmer, *supra* note 42, at 1268–70 (discussing *Hess* and the subsequent 1943 Amendment).

to investigate and prosecute fraud.[62] Although the House of Representatives wanted to remove the FCA's qui tam provision entirely,[63] Congress settled on an amendment ("1943 Amendment") that significantly modified the procedure of bringing False Claims Act suits and decreased the payouts to successful relators.[64] Specifically, the amendment required that relators filing qui tam suits allege information that the government does not yet know:

> The court shall have no jurisdiction to proceed with [any suit brought under the False Claims Act] whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.[65]

This jurisdictional bar, which this Note will refer to as the "new-knowledge requirement," applied even when the government made no effort to investigate or prosecute the fraud in question.[66] While the change largely eliminated parasitic suits, the new-knowledge requirement disincentivized relators from incurring the cost of bringing qui tam suits under the FCA altogether because they could not accurately predict what evidence or information the government possessed.[67] The amendment also required the relator to present all of his or her evidence to the government at the time the complaint was filed; the government then had sixty days to decide whether it would intervene and litigate the matter itself. [68]

Significantly, the 1943 Amendment charged courts to determine a "fair and reasonable" bounty to award the relator, within statutorily defined bounds,[69] an extreme departure from the guaranteed recovery of fifty percent under the 1863 Act. The 1943

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62. *See* Helmer, *supra* note 42, at 1272 ("[T]he 1943 amendments to the False Claims Act had been passed largely on the unsupported assumption that the Attorney General and Department of Justice were able and willing to do an adequate job of prosecuting fraud against the public treasury.").

63. *See* H.R. 1203, 78th Cong. (1943) (including language eliminating qui tam provisions that did not pass the Senate); 89 CONG. REC. 7570, 7571 (1943) (discussing the House resolution and proposing amendments). *See generally* Helmer, *supra* note 42, at 1269–70 (discussing the different goals of House and Senate regarding the 1943 Amendment to the False Claims Act).

64. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608.

65. *Id.*

66. *See* United States *ex rel.* Lapin v. Int'l Bus. Machs. Corp., 490 F. Supp. 244, 248 (D. Haw. 1980) (holding that the court had no jurisdiction over FCA action because the plaintiff made no allegations beyond information he already gave to the government before bringing the suit); S. REP. NO. 99-345, at 12 (1986) ("[C]ourts have since adopted a strict interpretation of the jurisdictional bar as precluding any *qui tam* suit based on information in the Government's possession, despite the source.").

67. *See* Helmer & Neff, *supra* note **Error! Bookmark not defined.**, at 39–40.

68. Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608.

69. Pub. L. No. 78-213, 57 Stat. at 609.

Amendment drastically reduced the maximum statutory damages awarded to relators.[70] If the government intervened, the relator could recover up to ten percent of the total penalty the defendant incurred, and if the government declined to intervene, the relator could recover up to twenty-five percent of the total penalty.[71]

While the diminished ratio and increased uncertainty of recovery also discouraged relators from bringing claims, the new-knowledge requirement diminished the desirability of bringing qui tam suits under the FCA because defendants could usually find a government official somewhere who had knowledge of the fraud.[72] In some instances, courts barred relators from bringing qui tam suits because they reported the fraud to the government before filing suit.[73]

As a result of the 1943 Amendment, False Claims Act suits virtually disappeared.[74] Between 1943 and 1986, only six to ten qui tam cases were filed each year.[75]

D. The 1986 Amendment: The Rebirth of the False Claims Act

Congress revitalized the False Claims Act in 1986 ("1986 Amendment") to combat growing fraudulent activity among military contractors and in the healthcare sector.[76] A 1981 U.S. Government Accountability Office ("GAO") report on fraud indicated that between October 1, 1976, and March 31, 1979, known fraud accounted for between $150 and $200 million in losses for the U.S. government.[77] The Department of Justice estimated that fraud drained up to ten percent of the entire federal budget, or up to $100 billion annually.[78] The GAO study also noted that the government never discovers most fraud and that those committing fraud are rarely prosecuted.[79] Congress recognized that it had erred in 1943 when it assumed that

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70. Helmer & Neff, *supra* note **Error! Bookmark not defined.**, at 39.

71. Pub. L. No. 78-213, 57 Stat. at 609.

72. *See* Helmer & Neff, *supra* note **Error! Bookmark not defined.**, at 39–40.

73. *Id.* at 40; *see, e.g.*, United States v. Aster, 275 F.2d 281 (3d Cir. 1960) (holding there is no exception to the government-knowledge rule, even when the relator provided the information supporting an indictment).

74. Helmer, *supra* note **Error! Bookmark not defined.**, at 1271.

75. S. REP. NO. 110-507, at 3 (2008).

76. *See* S. REP. NO. 99-345, at 1 (1986).

77. S. REP. NO. 99-345, at 2 (1986); 1 U.S. GOV'T ACCOUNTABILITY OFFICE, AFMD-81-73, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT AND HOW CAN IT BE CONTROLLED (1981), http://www.gao.gov/products/AFMD-81-57, *archived at* http://perma.cc/7EEK-LVVV. The GAO report analyzed seventy-seven thousand cases of fraud and other illegal activities reported in twenty-one federal agencies. *Id.* at i.

78. S. REP. NO. 99-345, at 2 (1986).

79. *Id.* at 2–3.

agencies alone were sufficient to prevent fraud, and it designed an amendment to incentivize private parties to bring qui tam suits once again.[80]

The 1986 False Claims Act ("FCA") increased payouts to successful relators for three reasons: to incentivize whistle-blowers to file more qui tam suits, to increase government recovery, and to enhance penalties to violators.[81] If the government intervened, relators recovered between fifteen and twenty-five percent of the total penalty; if the government did not intervene, relators recovered between twenty-five and thirty percent of the total penalty.[82] These larger shares would also come from a larger pie: Congress increased the penalties for submitting false claims to between $5,000 and $10,000 per claim[83] and further increased the recovery of actual losses that the government suffered from double to treble recovery.[84]

The 1986 changes also expressly overturned the new-knowledge requirement and replaced it with a public disclosure bar.[85] Under the public disclosure bar:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[86]

This new jurisdictional bar prevented parasitic suits by excluding qui tam claims based on information disseminated to the public, thus limiting FCA qui tam suits to relators with inside knowledge.[87] However, the jurisdictional bar provided for an "original source" exception that allows any "individual who has direct and independent knowledge of the information on which the allegations are based and

80. *See* Helmer, *supra* note 42, at 1272 ("[Congressional hearings and factual analysis] demonstrated that while the DOJ was prosecuting some fraud cases, it was simply being overwhelmed by the level of fraud against the taxpayers.").

81. False Claims Amendments Act of 1986, Pub L. No. 99-562, 100 Stat. 3153; *see* S. REP. NO. 99-345, at 1 (1986) ("[T]he Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government."). Hereinafter, unless otherwise indicated, references to the "FCA" refer to the current iteration of the Act.

82. § 3, 100 Stat. at 3156–57.

83. § 2, 100 Stat. at 3153.

84. *Id.*

85. § 3, 100 Stat. at 3157.

86. *Id.*

87. *Id.*

has voluntarily provided the information to the Government before filing an action" to bring a suit under the FCA.[88] Furthermore, where information had been public for six months and the government had not acted on it, qui tam filers could recover up to ten percent of the government's damages under the 1986 Amendment.[89] To prevent frivolous or vexatious qui tam claims, the FCA now gave courts discretion to award defendants reasonable attorney's fees if a plaintiff's claims were "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[90]

Additionally, the 1986 Amendment cemented the applicable standard of proof as preponderance of the evidence and clarified the required degree of knowledge and intent as actual knowledge of, deliberate ignorance of, or reckless disregard for the truth or falsity of the claims.[91]

III. THE GOVERNMENT-KNOWLEDGE APPROACH: CONSTRUCTION AND SHORTCOMINGS

Despite Congress's many efforts to properly calibrate the statutory barriers to bringing qui tam suits under the FCA, prefiling releases—the waiver of employees' claims against employers executed before the potential relators file FCA claims—prevent the modern FCA from optimally detecting and deterring fraud. Although most prominent FCA cases feature prefiling FCA releases that arose in the context of settling employment disputes like wrongful discharge, some cases have considered FCA releases in general termination severance packages.[92] For example, an employee-turned-relator in *United States ex rel. Radcliffe v. Purdue Pharma L.P.*[93] waived his employer's liability, including FCA liability, as part of "an enhanced benefits package to which he would not otherwise have been entitled" after he elected to leave the company instead of transferring to a new position as part of a workforce restructuring.[94] The prevalence of these

88. *Id.*

89. § 3, 100 Stat. at 3156. This was seen as justified because but for the relator's suit, the government would not have recovered. *See* S. REP. NO. 99-345, at 22 (1986).

90. § 3, 100 Stat. at 3157.

91. § 2, 100 Stat. at 3154; Helmer & Neff, *supra* note 30, at 44. Previously there had been a federal circuit split regarding whether specific intent to defraud was required. *Id.*

92. *See, e.g.*, United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 324 (4th Cir. 2010) (involving a termination severance package); United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 232 (9th Cir. 1997) (involving settlement of a wrongful discharge claim).

93. *Purdue Pharma*, 600 F.3d at 324.

94. *Id.*

agreements is difficult to determine because they do not become public unless challenged in court. This is a primary criticism of the practice—the fraud is never reported.[95] Nonetheless, the existing evidence supports a reasonable belief that these releases are quite widespread as companies prudently seek to reduce the risk of FCA liability, particularly if they suspect that certain employees have some knowledge of company fraud.[96]

The Ninth Circuit established the predominant test to determine the enforceability of a would-be relator's signed release. The test focuses on whether the government had knowledge of the fraudulent activity at the time the release was signed.[97] The Ninth Circuit crafted the government-knowledge test through two cases in the late 1990s: *United States ex rel. Green v. Northrop Corp.*[98] and *United States ex rel. Hall v. Teledyne Wah Chang Albany*.[99] Two other federal courts of appeals have adopted this approach since then.[100] Under the Ninth Circuit's test, courts enforce prefiling releases and dismiss FCA qui tam actions when the government already had knowledge of the fraud alleged; however, such releases are void as a matter of public policy when the government did not have knowledge of the fraud alleged.[101]

This Part first explains the Ninth Circuit's reasoning in constructing the government-knowledge approach. It then explains the flaws of the approach. Notably, the approach misaligns whistle-blower incentives with the FCA's aims and presents information-obtainment difficulties. Finally, this Part discusses the flaws of the rejected government-intervention approach to assessing enforceability and highlights how the approach's deficiencies parallel those of the government-knowledge approach itself.

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95. *See infra* Part III.B (explaining the flaws of the government-knowledge approach).

96. *See* United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1175 (10th Cir. 2009) (Briscoe, J., dissenting) (arguing that an "express consent rule" would prevent strategic settlement by companies defrauding the government); Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997) (noting that the requirement that the government approve postfiling FCA settlements exists because "relators can manipulate settlements in ways that unfairly enrich them and reduce benefits to the government").

97. *See generally* Todd P. Photopulos & Graham W. Askew, *Having Your Cake and Eating It Too—The (Un)enforceability of Releases on Future Qui Tam Claims*, 1 J. HEALTH & LIFE SCI. L. 145, 152–54 (2008) (discussing the *Northrop* and *Teledyne* decisions).

98. 59 F.3d 953, 956 (9th Cir. 1994).

99. 104 F.3d 230, 233 (9th Cir. 1997).

100. United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 329–30 (4th Cir. 2010); *Lockheed Martin*, 558 F.3d at 1169–70.

101. *See Teledyne*, 104 F.3d at 233 (limiting the *Northrop* decision to situations where the government has not already investigated the fraud).

A. Construction of the Government-Knowledge Approach

In 1988, Michael Green filed a complaint alleging that Northrop wrongfully terminated him for notifying Northrop officials that the company had double-charged the U.S. Air Force and for consulting an attorney.[102] Northrop and Green settled the claim for $190,000 in exchange for Green releasing all current and future claims against the company relating to or arising out of his employment.[103] In 1991, Green filed a qui tam complaint under the FCA alleging fraud based upon the same double-charging scheme discussed in the wrongful termination suit.[104] After Green's allegations, the United States investigated the allegations but declined to intervene.[105] The district court granted Northrop summary judgment, ruling that the release relinquished Green's claim.[106]

The Ninth Circuit overturned the district court and concluded that enforcing the release was contrary to public policy.[107] The court applied the federal common-law test for the enforceability of contracts negatively affecting public policy, which was established in *Town of Newton v. Rumery*[108] and *Davies v. Grossmont Union High School Dist.*,[109] under which "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[110] The Ninth Circuit interpreted *Davies* to require the court:

> (1) to determine whether the agreement waives a right that impacts upon the public interest; (2) [to] determine whether a substantial public interest would be impaired by enforcement of the agreement; and (3) to ascertain the reasons apart from the general interest in settling disputes that support enforcing the agreement.[111]

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102. *Northrop*, 59 F.3d at 956.

103. *Id.* Green agreed to:

> [R]elease, acquit and forever discharge Northrop [and its] employees . . . from any and all claims . . . rights to payment . . . actions and causes of action of every nature, under any theory under the law, whether . . . statutory or other of any jurisdiction, whether known or unknown . . . which he had or held, or has or holds, or may claim to have or to hold by reason of any and all matters . . . including, but not limited to, those arising out of or relating to the Action and/or Green's employment with and separation from Northrop.

Id.

104. *Id.*

105. *Id.* at 956–57.

106. *Id.*

107. *Id.* at 963.

108. 480 U.S. 386 (1987).

109. 930 F.2d 1390 (9th Cir. 1991).

110. *Northrop,* 59 F.3d at 962 (quoting *Davies*, 930 F.2d at 1396).

111. *Id.*

The Ninth Circuit held in *Green* that enforcing the release would impair a substantial public interest by "nullif[ying] the incentives Congress intended to create in amending the provisions of the False Claims Act in 1986."[112] Relators may recover only thirty percent of an FCA settlement, but they may recover all of a private settlement, so the court worried that enforcing prefiling releases would incentivize relators with legitimate claims to accept smaller settlements instead of blowing the whistle on the fraud.[113] In many such situations, the government will not learn of the fraud unless someone files a qui tam claim.[114] And in other instances in which the government declines to intervene, as was the case here, the government will not recover unless a relator brought a qui tam claim.[115]

Two years later, in *Teledyne*, the Ninth Circuit limited the *Northrop* holding to situations in which the government had not previously investigated the matter.[116] Christopher Hall, a Teledyne engineer, helped manufacture tubeshells used to sheath nuclear fuel rods in nuclear reactors.[117] Hall believed that Teledyne's manufacturing methods were inadequate, an opinion that he shared with both Teledyne management and the United States Nuclear Regulatory Commission ("NRC").[118] Both Teledyne and the NRC investigated the matter and found the tubeshell manufacturing methods that Teledyne employed were sufficient to meet customer requirements.[119]

Shortly after voicing his concerns to Teledyne, Hall was suspended for three days for tardiness.[120] Hall then filed a complaint

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112. *Id.* at 963.

113. *Id.* at 965–66. In the words of the Ninth Circuit:

> The situation changes when a potential relator and defendant enter into a *pre*filing release of a *qui tam* claim when, as we assume here, that action makes its [sic] less likely that the government will learn of the fraud. Under these circumstances, the relator is likely to keep the *entire amount* of the settlement proceeds. Because the relator is likely to retain 100 percent as opposed to a maximum 30 percent of the recovery, a rational relator would be willing to accept a substantially smaller amount to settle the claim immediately than to preserve the right to eventually file a *qui tam* action in which the government would retain the lion's share of the proceeds.

Id.

114. *Id.* at 966.

115. *Id.*

116. United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997).

117. *Id.* at 231–32.

118. *Id.*

119. *Id.*

120. *Id.*

with the United States Department of Labor ("DOL").[121] The DOL ultimately agreed with Hall's allegation of improper retaliation, but Teledyne ignored the findings and fired Hall.[122] Hall's state-court complaint for wrongful termination and associated offenses alleged that Teledyne had defrauded its customers, including the federal government, with its defective tubeshell manufacturing methods.[123] In 1993, Teledyne and Hall settled the suit for a "substantial sum of money" and executed a general release for all actions that were or could have been brought by Hall in his wrongful termination suit.[124]

In 1994, Hall filed a qui tam complaint under the FCA alleging that Teledyne committed fraud by falsely assuring its customers that its tubeshell manufacturing techniques were sufficient.[125] The NRC conducted another investigation and again found Teledyne's methods adequate, and the government declined to intervene.[126] The district court granted summary judgment to Teledyne on the grounds that the release previously signed to settle the wrongful termination suit encompassed Hall's qui tam action.[127]

The Ninth Circuit upheld the district court's decision stating that the public interest concerns in *Northrop* were not present here because the government had already conducted an investigation[128]:

> The federal government was aware of Hall's allegations regarding false certifications. Therefore, the public interest in having information brought forward that the government could not otherwise obtain is not implicated. The public interest in the use of *qui tam* suits to supplement federal enforcement of the FCA is also not disturbed, because the federal government had already investigated the allegations prior to the settlement. . . . The government, of course, was not a party to the release, and is therefore not barred by it from pursuing a claim against Teledyne.[129]

Since the Ninth Circuit developed the *Northrop-Teledyne* framework that assesses the enforceability of prefiling FCA releases

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 232. The release stated that it

> includes, but is not limited to, all claims which were, or could have been, brought as claims or counterclaims in the above-referenced action. This Mutual Release of Claims also includes, but is not limited to, any other claims or complaints which could have been brought in any other type of action or proceeding.

Id.

125. *Id.* Specifically Hall alleged that "Teledyne had falsely certified to its customers, including the United States, that its tubeshells had undergone the heat treatment necessary for heightened corrosion resistance." *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 233.

129. *Id.*

on the basis of government knowledge, the Fourth and Tenth Circuits have explicitly adopted it, and the Fifth Circuit has positively reviewed it.[130] At the time of Note's publication, no other federal courts of appeals had considered the issue since the advent of this framework.

B. Flaws of the Government-Knowledge Approach

The government-knowledge approach has an attractive—but deceptive—simplicity to it. Courts will enforce releases when the government already has knowledge of the fraud while refusing to enforce releases when a qui tam claim alleges fraud that the government has not yet discovered. But this approach has many problems: it frustrates the goal of supplementing government prosecution with private suits, a significant purpose of the FCA; it discourages relators from coming forward, even when the government is not aware of fraudulent activity, by putting relators' settlements at risk; and it puts relators in the difficult position of deciding whether to bring a qui tam claim without knowing what information the government possesses.

Furthermore, the government-knowledge approach creates incentives for would-be relators that are inconsistent with the FCA's public policy goals. The *Teledyne* court worried that whistle-blowers would settle out of court and fail to disclose fraud to the government at all:

> The effect of enforcing releases when the government has no knowledge of the *qui tam* claims would be to encourage relators to settle privately and release their claims, thus retaining 100 percent of the recovery, instead of providing the government with information and retaining at most the 30 percent recovery available in a *qui tam* action.[131]

However, this analysis omits some important public policy aspects of the False Claims Act. The FCA had three aims: (1) incentivizing insiders to blow the whistle on fraud, (2) supplementing the government's efforts to recover money lost from fraud, and (3)

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130. United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 329–33 (4th Cir. 2010); United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1169–70 (10th Cir. 2009); *see also* United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 473–74 (5th Cir. 2009) (hinting that it would adopt the government-knowledge approach in the appropriate case, but resting its decision on the fact that the release was signed eleven days *after* filing the qui tam action). *But see* United States *ex rel.* Gebert v. Transp. Admin. Servs., 260 F.3d 909, 919 (8th Cir. 2001) (denying application of the government-knowledge approach because the settlement agreement occurred in the context of a bankruptcy proceeding).

131. *Teledyne*, 104 F.3d at 233.

deterring fraudulent claims.[132] The Ninth Circuit focused on the first public policy concern in formulating the government-knowledge approach[133] at the expense of the other two motivations.[134]

As Chief Judge Mary Beck Briscoe explained in her dissent in *United States ex rel. Ritchie v. Lockheed Martin Corp.*, in which the Tenth Circuit adopted the Ninth Circuit's government-knowledge approach, "[t]he [government-knowledge approach] . . . undermines one of the other public interests under the FCA: the Government's compensatory interest in recouping funds lost due to fraud."[135] The government has two possible reasons not to pursue a civil fraud suit itself: first, the suit lacks merit, or second, the government has insufficient resources to take on the litigation.[136] To maximize recovery, the Government needs relators to litigate claims about known fraud that the Government lacks the resources to litigate itself. The FCA was intended to incentivize private citizens to bring suit on behalf of the government in order to supplement the government's own recovery efforts, but "[b]y allowing contractors to buy off relators whose resources would otherwise be available to pursue fraud claims on behalf of the Government, the exception from *Hall* disregards the Government's compensatory interest in recouping funds lost due to fraud."[137]

Moreover, the government-knowledge approach likely disincentivizes relators from coming forward even when the government has not investigated the fraud. As discussed above, a primary reason for the 1986 Amendment was to repeal the new-knowledge jurisdictional bar that discouraged whistle-blowers from coming forward and crippled the 1943 version of the False Claims Act.[138] Similarly, the government-knowledge approach discourages whistle-blowers that have signed releases from alerting the

132. *Lockheed Martin*, 558 F.3d at 1173–77 (Briscoe, J., dissenting); S. REP. NO. 99-345, at 2, 4, 8 (1986).

133. *See Teledyne*, 104 F.3d at 233 ("It is commonly recognized that the central purpose of the *qui tam* provisions of the FCA is to set up incentives to supplement government enforcement of the Act . . . ." (citation and internal quotation marks omitted)).

134. *Lockheed Martin*, 558 F.3d at 1174 (Briscoe, J., dissenting) ("The Ninth Circuit's analysis in Hall focuses primarily on the first interest: providing insiders with incentives to come forward with information about fraud against the Government."); *see Teledyne*, 104 F.3d at 233. Most of the cases applying the *Northrop-Teledyne* framework have likewise focused on these incentives. *See, e.g.*, United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 481 F.Supp.2d 815, 818–21 (S.D. Tex. 2007) (approving of but not explicitly adopting the government-knowledge approach).

135. *Lockheed Martin*, 558 F.3d at 1173–77 (Briscoe, J., dissenting).

136. *Id.* at 1174

137. *Id.* at 1175.

138. *See* Helmer & Neff, *supra* note 30, at 49–50.

government to fraud, lest the government already be investigating the matter, thereby eliminating possible relator compensation. Filing an FCA case in such a scenario might forfeit the settlement the relator received in exchange for signing the release.[139] At the culmination of an unsuccessful FCA case, one Colorado district court required a relator to return $125,892 received as part of a settlement that included the relator's waiver of the right to initiate any action relating to the relator's employment.[140] Depending on the wording of the release the would-be relator signed, filing a qui tam suit under the FCA might force the relator to forfeit any previous settlement made contingent on waiving claims.

A would-be relator also faces practical difficulties in determining if anyone in the government has already investigated the fraud that the relator intends to expose. Such investigations are generally kept secret from those committing the fraud to prevent them from evading prosecution, so a relator would not be in a position to determine if the government is investigating such fraud until *after* filing the qui tam action. With potential forfeiture of the settlement agreement a viable possibility, it is unlikely that a relator would undertake the costs of an FCA suit for the mere chance to enjoy a portion of any government recovery.

C. The Government-Intervention Approach: A Flawed Alternative

After the proliferation of the government-knowledge approach, a federal court in the Southern District of Georgia sought to augment the approach by considering whether the government declined to intervene in the case.[141] The government-intervention approach sought to avoid many of the ills that plagued the government-knowledge approach, but it also suffered from many serious shortcomings itself and has not gained serious traction. Although the government-intervention approach has contributed little to FCA prefiling release jurisprudence, its flaws inform what a better approach would be.

139. *See, e.g.*, United States *ex rel.* Jimenez v. Health Net, Inc., No. 99–cv–01259–EWN–MJW, 2005 WL 2002435, at *5 (D. Colo. Aug. 19, 2005) (noting that the relator forfeited a $125,000 settlement received in exchange for a waiver of all claims relating to employment and a representation that no claims against the employer were pending because the relator failed to disclose that an FCA suit against the employer was already filed).

140. *Id.*

141. Unites States *ex rel.* Whitten v. Triad Hosps., Inc., No. Civ.A. CV202-189, 2005 WL 3741538, at *5 (S.D. Ga. Oct. 27, 2005) (interpreting the contract at issue narrowly to find the FCA claim was not waived), *rev'd on other grounds*, 210 F. App'x 878 (11th Cir. 2006).

In *Whitten*, a hospital employee entered into a severance agreement under which the hospital paid him $124,000 in exchange for releasing any current or future claims against it.[142] The hospital employee later filed an FCA qui tam action alleging health-care billing fraud.[143] The government declined to intervene in the case.[144] The district court held the severance agreement enforceable because the government declined to intervene.[145] The court reasoned that the public policy interest in encouraging the disclosure of fraud "is served adequately by a rule that prohibits a litigant who has agreed to release his right to serve as a relator from maintaining a *qui tam* action if the government declines to intervene in the action."[146]

The Eleventh Circuit later overturned the case on a narrow contract question,[147] but another federal district court in Georgia later considered the logic of the government-intervention rule and explained its defects.[148] The court reasoned that whether the government declined to intervene should not control the enforceability of the release because "the Government can elect not to intervene for a variety of reasons, many of which—such as availability of U.S. Attorneys—have nothing to do with the merits."[149] Nonintervention does not necessarily indicate government disinterest in the action, as the government stands entitled to most of the proceeds even if it decides not to intervene.[150] Moreover, "a potential relator could not know with certainty that the Government would intervene in an action, [so] less relators would come forward and expose fraud—the key purpose of the FCA."[151]

Although the criticisms of the government-intervention rule address the prudence of enforcing the government's decision to intervene, these same imperfections also permeate the government-knowledge approach. The government's decision not to intervene in a

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142. *Id.* at *2.

143. *Id.* at *1.

144. *See id.* at *2–6 (granting summary judgment to the defendant). Although the opinion never explicitly states that the government declined to intervene, it can be inferred from the structure of the test and the decision to grant summary judgment to the defendant.

145. *Id.* at *5.

146. *Id.*

147. *See* United States *ex rel.* Whitten v. Triad Hosps., Inc., 210 F. App'x 878, 882 (11th Cir. 2006) (determining that the severance agreement did not prevent the employee from bringing a False Claims Act claim).

148. United States *ex rel.* Powell v. Am. InterContinental Univ., Inc., No. 1:08–CV–2277–RWS, 2012 WL 2885356, at *11 (N.D. Ga. July 12, 2012).

149. *Id.*

150. *Id.*

151. *Id.*

case mirrors the government's decision not to bring its own case against those committing fraud. The government may decide not to bring its own claim for a variety of reasons, such as the availability of U.S. Attorneys, but this decision does not necessarily indicate a lack of government interest in a relator filing a qui tam action. Likewise, the uncertainty in assessing whether the government will intervene in a case mirrors the uncertainty in deciding whether the government already has knowledge of the false claims. When relators file qui tam FCA claims, they cannot know with certainty whether the government already has knowledge of the fraud, and hence the prefiling releases deter them from bringing such a claim, the enforceability of which depends on the government's knowledge.

IV. AN ALTERNATIVE APPROACH: PRIOR AGENCY APPROVAL

This Part proposes that Congress adopt an approach that enforces a prefiling FCA release only when the government has approved the release following an investigation. This agency-approval approach is more consistent with the FCA's three aims: First, it aligns whistle-blower incentives by removing the dilemma insiders face when choosing between a certain settlement and the potential partial recovery of an FCA claim. Second, it supplements the government's efforts to recover money lost from fraud by allowing relators to proceed with claims that the government supports but does not have the resources to bring itself. Third, it deters fraudulent claims by strengthening the qui tam provisions of the FCA and making every insider a potential whistle-blower whose silence may not be bought by a prefiling settlement. Additionally, the agency-approval approach mirrors the FCA requirement that the government approve any postfiling release.

This better approach would enforce releases of FCA liability only when the government has approved the release. Chief Judge Briscoe, in her *Lockheed Martin* dissent, proposed that the courts should only enforce prefiling FCA releases when the Attorney General has approved them.[152] In practice, this would probably involve the Attorney General interfacing with various government agencies to determine if any agency had cleared the company of the specific allegations of fraud. Instead of placing the decisionmaking authority with the Attorney General, this Note argues that when a government agency completes an investigation of fraud, it should certify to the

152. United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1175 (10th Cir. 2009) (Briscoe, J., dissenting).

company that the company may contract with employees to waive their right to file qui tam FCA claims about the specific instance of fraud investigated. Such an approach is administratively low cost, as the investigating agency is already interfacing with the company during the investigation. It is also more efficient than the approach that Chief Judge Briscoe proposed, as a second "mini-investigation" by the Attorney General to determine if an agency has investigated the fraud is not necessary.

For example, under Chief Judge Briscoe's proposal, to determine whether to approve the *Teledyne* release, the Attorney General would consult the NRC and other agencies to decide if any had determined the tubeshell production was not fraudulent.[153] However, under the agency-approval approach, after completing its investigation, the NRC itself would certify to Teledyne that it could contract for enforceable releases of qui tam FCA claims regarding the tubeshell production.

A. Consistency with the Three Purposes of the False Claims Act

Under the proposed agency-approval approach, the only way for an insider with knowledge of fraud to profit from such knowledge is to bring a qui tam claim. The approach would prevent employers from exchanging generous severance packages for the would-be relator's silence because releases associated with these severance packages would not be enforced unless the government approved them. This would solve the problem of misaligned incentives discussed in *Northrop*—that would-be relators might release the right to file FCA suits in exchange for small, but guaranteed, out-of-court settlements, and hence never report the fraud in the first place.[154] The lack of agency certification establishes the unenforceability of these releases before their creation, making such agreements unprofitable to employers. The government may simply decline to approve the release. Although companies might still offer unenforceable settlements in exchange for prefiling FCA releases, and some potential relators might mistakenly believe the contracts are enforceable, those allured by the massive FCA damages would quickly learn from their attorneys that the company could not enforce the agreement. Moreover, rationally minded companies should offer smaller

153. *See* United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 231–32 (9th Cir. 1997).

154. United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 965–66 (9th Cir. 1995).

settlements, as they discount for the unenforceability risk, which would reduce the overall appeal of the settlements.

The agency-approval approach would also deter relators from bringing frivolous suits. In situations like that in *Teledyne*—where the NRC had already investigated and determined that the company had not submitted false claims regarding its nuclear reactor sheath manufacturing process[155]—the government should approve the FCA release. But the government should be careful not to approve overly broad releases that might waive qui tam rights to allege other instances of fraud in the company that the government has yet to investigate. For example, if the government had approved a release for Teledyne employees, the release should have been restricted to claims arising out of the same subject matter as the NRC's investigation into the nuclear reactor sheath. Because if Teledyne were also making fraudulent claims to the Department of Health and Human Services regarding the health care it provided to its employees, a general release could bar qui tam claims on the health-care fraud issue when the government has only investigated the nuclear reactor sheath manufacturing. If the government were satisfied with its investigation and conclusion that no fraud occurred, approving a narrowly constructed release would preclude warrantless claims while also permitting meritorious qui tam claims about other instances of fraud.

The agency-approval approach would maximize recovery because it incentivizes whistle-blowers to bring more FCA qui tam suits. The government's knowledge of the fraud would no longer prevent would-be relators who have signed releases from bringing claims. In instances in which the government has knowledge of the fraud but has not brought suit, this approach would not inhibit relators from bringing qui tam suits, as would have occurred under the government-knowledge approach. Chief Judge Briscoe explained this issue in her *Lockheed Martin* dissent, in which she proposed that the Attorney General approve prefiling releases:

> [T]here is still a risk under [*Teledyne*] that the Government will not bring a meritorious claim simply because the Government lacks the resources to do so. The parties will likely know this, and the contractor will pay the relator more money to reflect the probability that resource constraints will preclude the Government from bringing the claim independently. An express consent rule helps prevent this problem by allowing the Government to veto the release of relators who would otherwise pursue meritorious FCA claims with their own resources.[156]

For the government, there is virtually no drawback to incentivizing more qui tam claims, especially because it stands to recover a sizeable

155. *Teledyne*, 104 F.3d at 231.

156. *Lockheed Martin*, 558 F.3d at 1176 (Briscoe, J., dissenting).

portion of the damages awarded in a relator's successful qui tam suit. In every successful case, the government receives at least seventy percent of the recovery.[157] Because the FCA subjects defendants that have been found liable to treble damages, the government stands to recover at least 210 percent of the defrauded money, plus its share of the $5,000 to $10,000 penalty suffered for each false claim a defendant submitted.[158] So, even though the government would have recovered more had it brought the suit itself, qui tam suits are still quite lucrative.

Preventing relators from contracting away their right to bring qui tam actions would further promote fraud detection because only through filing such an action could an insider gain financially from his or her knowledge of fraud. In addition, to get a release approved, a company would need to disclose enough information to satisfy the government that it does not need the relator to bring the fraud to light; this would aid the government goal of increased fraud detection.[159]

If companies cannot presettle qui tam claims with potential relators, they will have one fewer tool to hide fraud; thus, deterrence will be maximized. Further, if any employee who discovers fraud stands to gain up to thirty percent of treble damages, companies would think twice about committing fraud. At the very least, those who commit fraud would not be able to use employees to commit the fraud and then coerce them into signing severance deals that forbid them from filing qui tam actions.

B. Consistency with the FCA Postfiling Requirement

The agency-approval approach mirrors the FCA's treatment of postfiling settlements.[160] Once a relator files a qui tam suit under the FCA, "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for

157. 31 U.S.C. § 3730(d)(1)–(2) (2012) (providing that a relator receive up to, but in any event no more than, thirty percent of the action or settlement's proceeds).

158. *Id.* § 3729(a)(1)(G). The government recovers seventy percent of treble damages, so it recovers seventy percent of three hundred percent damages. Since 0.7 x 300 is 210, the government's minimum damages recovery from an FCA claim is 210 percent. This calculation excludes the $5,000 to $10,000 per claim fine, which increases the government's recovery for every fraudulent claim.

159. *See Lockheed Martin*, 558 F.3d at 1176 (Briscoe, J., dissenting) ("[I]f we require the Government's express consent, then contractors will be forced to disclose enough information to satisfy the Government. This will help the Government investigate the alleged fraud, and it will ensure that the Government is satisfied with its investigation *before* a relator can be released.").

160. *Id.* at 1175.

consenting."[161] This requirement exists because the claim itself belongs to the U.S. government, and a relator should not be able to settle the government's claims without its consent. Likewise, a party should not be able to presettle a future qui tam suit by releasing the right to bring the suit in the first place without the government's consent. Since Congress has given the Attorney General the authority to assess postfiling settlements, it makes sense to extend agencies the same authority to approve prefiling "settlements" after they conduct investigations that do not produce sufficient evidence of fraud.

Although one might argue that it would be administratively cumbersome for the government to approve or disapprove of every agreement that contained a waiver of FCA qui tam rights, this would easily be avoided by requiring the parties seeking approval to submit proof that the alleged fraud at issue has already been investigated by the government and determined not to be fraudulent.[162] As noted above, government agencies, upon completing an investigation of fraud, would only need to tack on one additional task to their investigation: the certification to the company that it has the government's permission to contract for the waiver of FCA qui tam claims for the specific instance of fraud investigated. Thus, in situations like that in *Teledyne*, in which the NRC twice investigated the production of the nuclear reactor sheathes, the NRC would approve the release upon completing its investigations. In situations in which the parties could not present evidence of such an investigation and agency approval, courts would refuse to enforce the agreement and would permit the relator to file a suit.

V. CONCLUSION

The FCA was enacted to offer a bounty to private citizens so that they would report fraud and thereby prevent fraudsters from stealing from the federal government. The government-knowledge approach, currently employed to determine the enforceability of prefiling releases of qui tam rights under the FCA, denies the government the ability to enlist citizens to bring claims on its behalf in many circumstances. A better approach would be to enforce prefiling releases only when the government has given prior consent to the release. This approach would be consistent with the treatment

161. 31 U.S.C. § 3730(b).

162. *See Lockheed Martin*, 558 F.3d at 1177 (Briscoe, J., dissenting) ("[T]he Government will only agree to be a party to the release if it has adequately investigated the alleged fraud and if the settlement provides the Government with adequate compensation.")

received by postfiling releases; promote fraud detection, deterrence, and recovery; properly align whistle-blower incentives; and better align with public policy while also allowing companies to avoid vexatious suits brought in instances in which the government has already determined no fraud occurred.

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