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KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law

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ABSTRACT

Since its inception in 1863, the federal False Claims Act (the "Act") has included provisions whereby citizens can assist in the detection and enforcement of frauds against the government. To increase fraud recoveries, the Act authorizes private citizens ("relators") to sue on behalf of the government ("qui tam" lawsuits) when they detect a fraud that is not already the subject of a federal enforcement action.

Periodically, Congress has adjusted the Act's qui tam provisions in order to balance its dual goals of creating, on the one hand, sufficient incentives for private parties to detect and pursue frauds, but to discourage, on the other hand, qui tam actions where the federal government already has the ability to discover and prosecute the fraud on its own. Over the years, Congress aimed to attain the "golden mean"—an equitable balance between encouraging private fraud detection that increases federal fraud recoveries but discouraging "parasitic" qui tam actions where the relator merely asserts fraud claims that have already been made public.

The most recent adjustments to the qui tam provisions of the Act occurred with the enactment of health reform, the Patient Protection and Affordable Care Act. Amidst a national recession that ballooned the ranks of the uninsured and reports of rampant health care frauds that were robbing millions of dollars from federal health care programs, Congress sought to expand incentives for private citizens to detect and report health care frauds.

However, by eliminating the two predominant statutory limitations to qui tam jurisdiction, the PPACA has enormously broadened the ability of relators to commence qui tam lawsuits under the Act. First, the PPACA revised the Act's "public disclosure" provisions to dramatically

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increase the sources of public information that relators may utilize as bases for their qui tam actions. And second, the PPACA revised the Act's "original source" rule to eliminate the "direct knowledge" requirement, formerly the most stringent requirement that relators needed to satisfy to maintain their suits. Thus, the PPACA's reforms signal a new age of extremely broad qui tam authority.

This Article will examine these recent amendments to the qui tam provisions of the False Claims Act, focusing on the enormous expansion of relators' ability to commence qui tam actions, and changes to the qui tam bar that are likely to result.

INTRODUCTION

Since its inception in 1863, the federal False Claims Act[1] (the "Act") has included provisions whereby citizens can assist in the detection and prosecution of frauds against the government.[2] To increase fraud recoveries, the Act authorizes private citizens ("relators") to sue on behalf of the government ("qui tam" lawsuits) when they detect a fraud that is not already the subject of a federal enforcement action.[3] To compensate the relators when their qui tam actions are successful, the Act rewards them with a share of the damages recovered from the defrauding parties.[4]

Periodically, Congress has adjusted the Act's qui tam provisions in order to balance its dual goals of creating, on the one hand, sufficient incentives for private parties to detect and pursue frauds, but to discourage, on the other hand, qui tam actions where the federal government already has the ability to discover and prosecute the fraud on its own.[5] Generally, Congress has sought to limit the availability of qui tam actions whenever it believed the Act allowed private citizens to share in the bounty of fraud recoveries without providing any genuine assistance to federal fraud enforcement efforts.[6] Concomitantly, Congress has sought to increase the availability of qui tam actions when it believed the Act discouraged useful private fraud detection.[7] Thus, over the years, Congress has aimed to attain the "golden mean"—an

1. *See* 31 U.S.C. §§ 3729-33.
2. *See id.* § 3730.
3. *See id.* § 3730(b), (e)(3).
4. *See id.* § 3730(d).
5. *See generally* Beverly Cohen, *Trouble at the Source: The Debates Over the Public Disclosure Provisions of the False Claims Act's Original Source Rule*, 60 MERCER L. REV. 701, Part II (2009).
6. *Id.*
7. *Id.*

equitable balance between encouraging private fraud detection that increases federal fraud recoveries and discouraging "parasitic" qui tam actions where the relator merely asserts fraud claims that are already public.[8]

The most recent adjustments to the qui tam provisions of the Act occurred with passage of the Patient Protection and Affordable Care Act (the "PPACA"),[9] signed into law on March 23, 2010. In response to a national recession that ballooned the ranks of the uninsured[10] and reports of rampant fraud in the federal health care programs,[11] Congress sought to expand incentives for private citizens to detect and report health care frauds.[12]

However, by eliminating the two predominant statutory limitations to qui tam jurisdiction, the PPACA has broadened the ability of relators to commence qui tam lawsuits under the Act enormously.[13] First, the PPACA revised the Act's "public disclosure" provisions to increase dramatically the sources of public information that relators may utilize as bases for their qui tam actions.[14] And second, the PPACA revised the Act's "original source" rule to eliminate the "direct knowledge" requirement, formerly the most stringent qualification that relators needed to satisfy to maintain their suits.[15] While minor revisions to the

8. *See* United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (describing the "golden mean" as a balance between "adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own").

9. Pub. L. No. 111-148 (2010).

10. *See* Richard Wolf, *Number of Uninsured Americans Rises to 50.7 million*, USA TODAY, Sept. 17, 2010, http://www.usatoday.com/news/nation/2010-09-17-uninsured 17_ST_N.htm ("More than 50 million people were uninsured last year, almost one in six U.S. residents, the Census Bureau reported Thursday. The percentage with private insurance was the lowest since the government began keeping data in 1987. The reasons for the rise to 50.7 million, or 16.7%, from 46.3 million uninsured, or 15.4%, were many: workers losing their jobs in the recession, companies dropping employee health insurance benefits, families going without coverage to cut costs.").

11. *See* Parija Kavilanz, *Health Care: A 'Goldmine' for Fraudsters*, CNNMONEY.COM (Jan. 13, 2010), http://money.cnn.com/2010/01/13/news/economy/ health_care_fraud (reporting that fraud bilked the U.S. health care system "of as much at $100 billion per year").

12. *See infra* Parts III and IV; *see also* Jeff Weinstein & Scott Honiberg, *New Medicare Fraud and Abuse Provisions Under the PPACA*, HEALTH LEADERS MEDIA (July 12, 2010), http://www.healthleadersmedia.com/content/FIN-253639/New-Medicare-Fraud-and-Abuse-Provisions-Under-the-PPACA (stating that by revising the Act, "Congress hopes more instances of false claims will be disclosed, thus potentially resulting in more recovery by the government").

13. *See infra* Parts III and IV.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

Act's qui tam language wrought these changes,[16] the PPACA's reforms signal a new age of extremely broad qui tam authority.[17]

I. THE FALSE CLAIMS ACT

The False Claims Act provides that anyone who knowingly presents a false claim for payment to the federal government or improperly retains an overpayment from the federal government is liable for a civil penalty of $5,000 to $10,000 per claim, plus three times the damages suffered by the government.[18] The Act was adopted during the Civil War to combat fraud in war procurement contracts,[19] but since that time it has been applied to a wide range of government contracts.[20] In the health care context, the Act has become widely used in combating fraud in federal programs such as Medicaid and Medicare.[21]

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16. *See* 31 U.S.C. § 3730(e)(4).

17. *See infra* Part IV; *see also* Weinstein & Honiberg, *supra* note 12 (opining that the revisions to the False Claims Act "very likely will result in a substantial increase in lawsuits against health care providers").

18. *See* 31 U.S.C. § 3729(a). The definition of a false claim was expanded in 2009 to include the improper retention of an overpayment. *Id.* § 3729(b)(3); *see* Cohen, *supra* note 5, at Part I (explanation of the False Claims Act).

19. *See, e.g.*, United States *ex rel.* Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 324 n.8 (1st Cir. 1994) (stating that "[t]he FCA originally was enacted 'in order to combat rampant fraud in Civil War defense contracts'"); United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (stating that the Act was adopted during the Civil War "to combat fraud and price-gouging in war procurement contracts"); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991) (stating that the act was "adopted in 1863 in response to rampant fraud by Civil War defense contractors").

20. *See* Weinstein & Honiberg, *supra* note 12 ("The FCA is one of the government's most important tools in fighting fraud.").

21. *See The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the Senate Comm. on the Judiciary*, 110th Cong. 2 (2008) (statement of Michael Hertz, Deputy Assistant Attorney Gen., Civil Div., U.S. Dep't of Justice), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da134a117&wit_id=e655f9e2809e5476862f735da134a117-1-1 (providing details on recent health care recoveries at that time under the Act) [hereinafter Hertz]; Brooks E. Kostakis, *Crafting a Hybrid Weapon Against Healthcare Fraud: Reflecting upon the Government's Use of the Civil False Claims Act as an Incentive for Whistleblowers and Advocating a More Aggressive Utilization of Permissive Exclusion as a Deterrent Measure*, 37 U. MEM. L. REV. 395, 410 (2007) (stating that there has been "a significant rise in the amount of healthcare fraud actions" brought under the Act, and that the government obtained $1.4 billion in recoveries in 2005 fiscal year alone); Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 60 (1999) (stating that the Act is "a potent and appropriate weapon to use against fraudulent health care providers"); *see also* Carolyn J. Paschke, *The Qui Tam Provision of the Federal False Claims Act: The Statute in Current Form, Its History and Its Unique Position to Influence the Health Care Industry*, 9 J. L. & HEALTH 163, 179 (1994-95) (noting that complex healthcare schemes involving overutilization or excessive billing

The qui tam[22] provisions of the Act allow relators to sue much like citizen prosecutors.[23] Relators with knowledge of false claims submitted to the federal government may file a complaint on behalf of the government against the defendant and share in the financial recovery.[24] The complaint is filed initially under seal to allow the government an opportunity to investigate the allegations and to decide whether it wishes to intervene in the action.[25] Depending upon whether the government intervenes or the relator prosecutes the case on his own, and upon the extent to which the relator's knowledge assists the lawsuit, the relator may collect up to 30% of the recovery.[26] Where recoveries in health care cases often result in multi-million dollar recoveries due to the large number of individual claims that may be involved,[27] the relator's share serves to incentivize private citizens to detect, report, and pursue health care frauds.

II. HISTORIC ATTEMPTS TO BALANCE THE QUI TAM PROVISIONS[28]

A. *The Initial Version of the Qui Tam Provisions Allowing Parasitic Lawsuits*

Since they were enacted, the qui tam provisions of the Act have reinforced the government's fraud enforcement efforts by inducing informers "to betray [their] coconspirators," described as inducing "a rogue to catch a rogue."[29] The original Act set a high incentive for

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"could only be detected by employees or individuals working within a system who have knowledge of its operations").

22. "*Qui tam*" is an abbreviation for "*qui tam pro domino rege quam pro seipso*," meaning literally "he who as much for the king as for himself." *Prawer*, 24 F.3d at 324 n.7 (citation omitted).

23. *See* 31 U.S.C. § 3730.

24. *See id.* § 3730(b), (d).

25. *See id.* § 3730(b).

26. *See id.* § 3730(d).

27. *See* Hertz, *supra* note 21 (stating that recent payments by health care companies for alleged violations of the False Claims Act included, *inter alia*, Merck & Company paying over $650 million, Bristol-Myers Squibb Company paying over $515 million, Amerigroup Illinois, Inc. paying $172 million, and Medco Health Solutions, Inc., paying $155 million).

28. *See* Cohen, *supra* note 5, at Part II (discussing historic changes to the qui tam provisions of the Act).

29. United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 679 (D.C. Cir. 1997); *see also* United States *ex rel.* Springfield v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (describing the original qui tam provisions as: "[P]assed upon the theory, based on experience as old as modern civilization, 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, if you please, under the strong stimulus of personal ill will or the hope of gain.").

private fraud detection by allowing successful qui tam relators to collect one-half of the financial recovery against the defrauding parties.[30]

The qui tam provisions were not utilized to their utmost, however, until the New Deal and World War II created more opportunities for dishonest government contractors to defraud the government.[31] But, at that time, the Act did not restrict "parasitic" lawsuits,[32] as it placed no limits whatsoever on the sources from which relators could derive their fraud allegations.[33] Relators could file qui tam lawsuits and seek one-half of the recovery even though they had merely copied federal indictments or derived their claims from public disclosures made in ongoing congressional investigations.[34]

This problem with parasitic qui tam filings was clearly revealed in *Marcus v. Hess*,[35] where the relator created his qui tam complaint by literally copying a criminal indictment to which the defendants had already pled.[36] The *Marcus* relator had not discovered the fraud; in fact,

30. *See Findley*, 105 F.3d at 679 (noting that the Act permitted a successful qui tam relator to collect one-half of the recovery against the defendants); *Springfield*, 14 F.3d at 649 (stating that the original Act promised plaintiffs one-half of the damages and forfeitures ultimately recovered and collected); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991) (stating that a successful relator was entitled to collect half of the damages and forfeitures).

31. *See Findley*, 105 F.3d at 679 (stating that in the 1930's and 1940's, increased government spending "opened up numerous opportunities for unscrupulous government contractors to defraud the government"); *Springfield*, 14 F.3d at 649-50 (stating that after the decade in which New Deal and World War II government contracts boomed, qui tam lawsuits surged).

32. *See* United States *ex rel*. Prawer v. Fleet Bank of Maine, 24 F.3d 320, 324 (1st Cir. 1994) (stating that the qui tam provisions then in effect were "too susceptible to abuse by 'parasitic' relators"). The *Prawer* court declared that in order to determine if a qui tam action is parasitic, we should "ask whether the qui tam case is receiving 'support, advantage or the like' from the 'host' case (in which the government is a party) 'without giving any useful or proper return' to the government." *Id.* at 327-28; *see also Stinson v. Prudential*, 944 F.2d at 1154 (characterizing parasitic qui tam lawsuits as "copycat" suits).

33. *See* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S. Ct. 1396, 1406 (2010) ("As originally enacted, the FCA did not limit the sources from which a relator could acquire the information to bring a *qui tam* action.").

34. *See* United States *ex rel*. Rost v. Pfizer, Inc., 507 F.3d 720, 727 (1st Cir. 2007) (stating that "[t]he qui tam mechanism has historically been susceptible to abuse, however, by 'parasitic' relators who bring FCA damages claims based on information within the public domain"); *Findley*, 105 F.3d at 679 (stating that "*[q]ui tam* litigation surged as opportunistic private litigants chased after generous cash bounties and, unhindered by any effective restrictions under the Act, often brought parasitic lawsuits copied from preexisting indictments or based upon congressional investigations"); *Stinson v. Prudential*, 944 F.2d at 1153 (stating that a number of relators commenced qui tam actions where they learned of the fraud "through the inspection of government criminal indictments").

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

36. *See id*. at 558 (noting that the relator filed his qui tam complaint after the defendants had been indicted for defrauding the government, had pleaded *nolo*

it was publicly known and being actively prosecuted. Even though the relator possessed no additional information to assist the government, the Supreme Court upheld the relator's right to share in the recovery.[37] The Court declared that it was foreclosed from dismissing the action because neither the Act nor its legislative history barred it.[38]

B. The 1943 Adjustment to the Act Aimed at Curbing Parasitic Suits

In the wake of the public outcry against the Act following *Marcus*, President Roosevelt signed a bill tightening the qui tam provisions in 1943.[39] The amendments compromised the House and Senate versions of the bill.[40] The House version entirely deleted the qui tam provisions.[41] The Senate bill retained the provisions, but addressed the *Marcus* problem by barring qui tam lawsuits that were based upon information already in the possession of the government, unless the information was "original with such person [the relator]."[42] Ultimately, Congress adopted the Senate's version, but deleted the original source provision.[43] The final version[44] simply barred lawsuits that were "based upon evidence or

contendere, and had been fined). *See Prawer*, 24 F.3d at 325 (discussing the *Marcus* case); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992) (referring to the *Marcus* case as "the high-water mark for parasitic *qui tam* actions," as the relator's qui tam complaint appeared to have been copied from a criminal indictment).

37. *See Marcus*, 317 U.S. at 545 ("We conclude that these acts are covered by the statute under consideration.").

38. *See id.* at 546-47 (concluding that the government's objections to the relator were "directed solely at what the government thinks Congress should have done rather than at what it did"); *see also Springfield*, 14 F.3d at 649-50 (describing the *Marcus* lawsuit); *Prawer*, 24 F.3d at 325 (describing the outcome in *Marcus* and noting that the Court found no bar in the text of the Act, no intent to impose one in the legislative history, and declined to establish one on its own initiative); *Stinson v. Prudential*, 944 F.2d at 1153 (discussing the *Marcus* finding that "the Act did not require that a *qui tam* plaintiff contribute new information to the discovery of the fraud").

39. *See Prawer*, 24 F.3d at 325 (stating that "[i]n response to public outcry over the [*Marcus*] decision, Congress acted quickly to restrict the universe of litigants who could avail themselves of the FCA's qui tam provisions"); *Findley*, 105 F.3d at 680 (noting that the *Marcus* case spurred Congress to take action to prevent "piggy-back lawsuits").

40. *See Prawer*, 24 F.3d at 325 (stating that "[t]he amendments reflected compromise between the House and Senate").

41. *Id.* (stating that "the House bill would have repealed the qui tam provisions altogether").

42. *Id.* at 325 (describing competing versions of the bill); *Springfield*, 14 F.3d at 650 (noting the "careful compromise" between the House and Senate versions of the bill).

43. *See, e.g.*, *Prawer*, 24 F.3d at 325 (noting that the "original source" provisions were dropped in conference); *Springfield*, 14 F.3d at 650 (noting that the Senate's original source provision was dropped in conference without explanation); *Stinson v. Prudential*, 944 F.2d at 1153 (noting that the final version dropped the original source exception).

44. *See Springfield*, 14 F.3d at 650 (describing the final version as "the product of careful compromise").

information in the possession of the United States . . . at the time such suit was brought."[45]

Following the 1943 amendment, the number of qui tam cases declined.[46] Unfortunately, the government knowledge bar failed to preserve the right for relators to bring a qui tam action even when they had been the very individuals who had discovered the fraud and had alerted the government to it.[47] Therefore, the "government knowledge" standard frustrated qui tam activity by genuine whistleblowers who had uncovered the fraud on their own, but who were required by law to report it to the government.[48]

In 1984, *United States* ex rel. *Wisconsin v. Dean*[49] illustrated this problem with the government knowledge standard.[50] In *Dean*, the U.S. Court of Appeals for the Seventh Circuit barred a qui tam action brought by the State of Wisconsin because the state had reported the fraud to the federal government,[51] as it was required to do by law, before filing its complaint.[52] In accordance with the plain terms of the Act, the Court barred the lawsuit because the federal government possessed knowledge of the fraud prior to the time the state filed its complaint.[53] Moreover, the court refused to preserve the lawsuit on the basis that Wisconsin had original knowledge of the fraud, because Congress had dropped the

45. *See Findley*, 105 F.3d at 680. *See also* Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997) ("[O]nce the United States learned of a false claim, only the Government could assert its rights under the FCA against the false claimant.") (internal quotation marks omitted).

46. *See* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S. Ct. 1396, 1406 (2010) ("In the years that followed the 1943 amendment, the volume and efficacy of *qui tam* litigation dwindled.").

47. *See Findley*, 105 F.3d at 680 (stating that "the Act contained no protection for those whistleblowers who furnished evidence or information to the government in the first place").

48. *See id.* at 680 (stating that the government knowledge standard "killed the goose that laid the golden egg").

49. United States *ex rel.* Wis. Dep't of Health & Soc. Servs. v. Dean, 729 F.2d 1100 (7th Cir. 1984).

50. *See id.* at 1103 ("[T]he jurisdiction bar . . . applies whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge.") (citation omitted).

51. *See id.* at 1104; *see also, e.g.*, United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1016 (7th Cir. 1999) (stating that the government knowledge standard "created its own perverse set of incentives" because "whistle blowers were afraid to turn over their juiciest evidence of fraud to the government because disclosure would prevent them from using that evidence to get their reward in a *qui tam* action").

52. *Dean*, 729 F.2d at 1104 (7th Cir. 1984). *See Findley*, 105 F.3d at 680 (discussing how in the *Dean* case, the government knowledge standard "eliminated the financial incentive to expose frauds against the government").

53. *Dean*, 729 F.2d at 1104-06.

"original source" provision in the final version of the bill.[54] Thus, the State of Wisconsin was barred from being a relator despite its having conducted an extensive and costly investigation to uncover the fraud, and notwithstanding its having been the means by which the federal government had learned of the fraud.[55]

C. The 1986 Amendments to Revitalize the Qui Tam Provisions[56]

After *Dean*, the National Association of Attorneys General adopted a resolution urging Congress "to rectify the unfortunate result" of *Dean*.[57] Congress agreed that the qui tam provisions were "out of whack,"[58] and sought to "reinvigorate" them.[59] In 1986, Congress once again adjusted the balance between the dual goals of encouraging private fraud detection[60] but discouraging parasitic suits where the relators made no useful contribution to the action.[61] The "principal intent" of the

54. *Id.* at 1104 (holding that although Congress's main concern was parasitic suits, "the language and effect of the 1943 amendment in fact is much broader"). *See* United States *ex rel*. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d at 650 (D.C. Cir. 1994) (noting that because the original source provision had been deleted in conference, "the court found no clear intent to preserve it in the legislative history"); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991) (discussing the *Dean* decision).

55. *Dean*, 729 F.2d at 1104-06. *See* United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 325 (1st Cir. 1994) (describing the *Dean* case as "the point of greatest retreat from Hess"); *Findley*, 105 F.3d at 679 (describing how in the *Dean* case, the state was barred from its own qui tam action because it had reported the fraud to the federal government, as required by statute); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992) (citing to the *Dean* case to show that "[t]he 'government knowledge' standard embodied in the 1943 amendment eventually worked at cross-purposes with the qui tam provisions of the FCA").

56. *See* Cohen, *supra* note 5, at Part III.

57. *Prawer*, 24 F.3d at 326 (describing the resolution of the National Association of Attorneys General to rectify *Dean*); *Springfield*, 14 F.3d at 650 (discussing the resolution adopted by the National Association of Attorneys General to rectify *Dean*); *Stinson v. Prudential*, 944 F.2d at 1154 (stating that the *Dean* decision was "viewed as unnecessary inhibiting the detection and prosecution of fraud on the government").

58. United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1016 (7th Cir. 1999).

59. *Doe*, 960 F.2d at 321 (stating that "[i]n 1986, Congress set out to reinvigorate the FCA's *qui tam* provisions"); *see also Prawer*, 24 F.3d at 326 (stating the conclusion of the lawmakers that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds").

60. At the time the 1986 amendments were being developed, there were estimates that the U.S. treasury lost $25 to $70 billion a year in contracting fraud. *See Springfield*, 14 F.3d at 651 n.4.

61. *See, e.g.*, *Lamers*, 168 F.3d at 1016 (stating that after *Dean*, Congress sought to achieve "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own"); *Springfield*, 14 F.3d at 651 (stating that the 1986 amendments represented "still another congressional effort to

amendments "was to have the qui tam suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus* decision, and the restrictiveness of the post-1943 cases."[62] The amended version of the qui tam provisions aimed to achieve the "golden mean," a balance between "adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own."[63]

To encourage private fraud investigations such as that carried out by Wisconsin in *Dean*, Congress repealed the "government knowledge" standard[64] and replaced it with a provision barring jurisdiction over the relator when the relator's fraud allegations had already been publicly revealed.[65] To discourage the type of parasitic lawsuit embodied in *Marcus*, Congress required relators to meet stringent requirements to avoid dismissal.[66]

The 1986 version of the qui tam provisions of the Act provided that no court would have jurisdiction over a relator if the relator based the

reconcile avoidance of parasitism and encouragement of legitimate citizen enforcement actions"); *Doe*, 960 F.2d at 321 (stating that "[t]he 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud").

62. *Doe*, 960 F.2d at 321 (citing *Stinson v. Prudential*, 944 F.2d at 1154); *see also* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S. Ct. 1396, 1406-07 (2010) ("Congress overhauled the statute once again in 1986 'to make the FCA a "more useful tool against fraud in modern times."'") (citing Cook Cnty. v. United States *ex rel.* Chandler, 538 U.S. 119, 133 (2003) (quoting S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266)).

63. *Springfield*, 14 F.3d at 649; *see also Graham Cnty.*, 130 S. Ct. at 1407 (stating that the 1986 amendments were "an effort to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in *Hess*"); United States *ex rel.* Rost v. Pfizer, Inc., 507 F.3d 720, 727 (1st Cir. 2007) (stating that "Congress has tailored the FCA to 'walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior'") (overruled on other grounds); *Stinson v. Prudential*, 944 F.2d at 1154 (quoting Sen. Grassley's statement that the 1986 amendments "sought to resolve the tension between . . . encouraging people to come forward with information and . . . preventing parasitic lawsuits").

64. *See* United States *ex rel.* Biddle v. Bd. of Trustees of the Leland Stanford, Jr., Univ., 161 F.3d 533, 538 (9th Cir. 1998) (noting that the 1986 amendments abandoned the standard for the jurisdictional bar that precluded actions "based upon evidence or information in the possession of the United States").

65. *See Graham Cnty.*, 130 S. Ct. at 1400 (2010) ("The Act now contains a provision barring *qui tam* actions based upon the public disclosure of allegations or transactions in certain specified sources.").

66. *See Doe*, 960 F.2d at 322 (stating that "to avoid the blatant opportunism embodied in cases like *Marcus*, Congress enacted narrowly circumscribed exceptions to *qui tam* jurisdiction").

complaint upon certain public disclosures,[67] unless the relator was an "original source" of the information.[68] A broad range of public disclosures could bar a qui tam action. The statute defined public disclosures as "allegations or transactions[69] in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media."[70] If a relator based his qui tam action upon any of these public disclosures, he would be jurisdictionally barred from bringing suit, unless he could show that he was an "original source."[71]

The original source rule, in turn, required the relator to demonstrate that he had "direct and independent knowledge" of the fraud, and that he had "voluntarily provided the information to the Government before

67. *See Graham Cnty*., 130 S. Ct. at 1400 (referring to provisions in the Act barring *qui tam* actions based upon public disclosures).

In addition to suits based upon certain types of public disclosures, three other types of qui tam actions were prohibited under the 1986 version of the Act, and have been retained in the current version of the Act. First, no action may be brought by a former or present member of the armed forces against a member of the armed forces arising out of service. *See* 31 U.S.C. § 3730(e)(1) (2010). Second, no qui tam action may be brought against a member of Congress, a member of the judiciary, or a senior executive branch official, if the government already has knowledge of the fraud. *See id.* § 3730(e)(2). Third, no person may commence an action based upon a fraud, which is already the subject of a civil suit or an administrative civil money penalty proceeding in which the federal government is already a party. *See id.* § 3730(e)(3).

68. The basis for the "original source" rule was that the relator should be rewarded only when he brings new information to the government, regardless of how he acquired the information. *See*, *e.g.*, United States *ex rel.* Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 521 & n.8 (9th Cir. 1998) (describing the basis for the original source rule and noting that "where the allegations of the fraud are already public knowledge, the relator confers no additional benefit upon the government by subsequently repeating the fraud allegations in the complaint"); United States *ex rel.* Findley v. FPC-Boron Emps.' Club, 105 F.3d 675, 688 (D.C. Cir. 1997) (stating that an action is barred where the relator "merely echoes" public disclosures "that already enable the government to adequately investigate the case and to make a decision whether to prosecute").

69. The term "allegation" has been defined in the qui tam context as "a conclusory statement implying the existence of provable supporting facts." *Findley*, 105 F.3d at 687. The term "transaction" has been defined as "suggest[ing] an exchange between two parties or things that reciprocally affect or influence one another." *Id.*; *see Springfield*, 14 F.3d at 654-55 (finding that pay vouchers and telephone records were not allegations or transactions because they were mere "information" and did not "rise to the level of 'allegations or transactions'").

70. *See, e.g.*, United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1155-56 (3d Cir. 1991) (quoting the public disclosure provisions of the Act and describing these provisions as "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator").

71. *See id.* at 1160 (declaring that because it had concluded that the fraud allegations alleged by the Stinson law firm had been publicly disclosed, the qui tam provisions of the Act next required the court to determine whether Stinson qualified as an original source).

filing [the qui tam complaint]."[72] The intent of the original source rule was to ensure that a relator who filed a qui tam case after a public disclosure of the fraud would have valuable firsthand knowledge to assist the prosecution of the case (direct knowledge), and that he had discovered the fraud by his own means (independent of the public disclosure).[73]

In the more than two decades following the 1986 amendments to the Act, the government and defendants made numerous motions challenging the relators' qualifications to bring suit.[74] The parties debated whether public disclosure had occurred, and if so, whether the relator was an original source.[75] Unfortunately, the answers provided by the courts hearing these debates were unclear.[76] Courts in various jurisdictions disagreed with one another on numerous public disclosure and original source issues, so that there was little consistency across jurisdictional lines.[77] As health care false claims recoveries reached hundreds of millions of dollars,[78] enhancing the attractiveness of the relators' shares, the arguments over public disclosure and the original source rule became more strident, and the inconsistencies more troubling.[79] Adding to the confusion, studies reported that health care

72. *See id.* ("The statute defines 'original source' as 'an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section.'") (quoting 31 U.S.C. § 3730(e)(4)(B)). Courts have defined "voluntary" as meaning "uncompelled." *See, e.g.*, United States *ex rel*. Paranich v. Sorgnard, 396 F.3d 326, 340 (3rd Cir. 2005). Accordingly, where a relator was required to furnish information pursuant to an investigative subpoena, the court held that the disclosure of information was not voluntary. *See id.* (holding that the disclosure was not voluntary where the government initiated contact via a subpoena demanding information).

73. *See, e.g.*, United States *ex rel*. Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1049 (8th Cir. 2002) (stating that the requirement that the relator's knowledge be direct "reflects the congressional intent to avoid parasitical suits in which the plaintiff contributed nothing"); United States *ex rel*. Devlin v. California, 84 F.3d 358, 362 (9th Cir. 1996) (declaring that the relator did not have direct knowledge, and therefore "did not make a genuinely valuable contribution to the exposure of the alleged fraud"); *Stinson v. Prudential*, 944 F.2d at 1154 (stating that the intent of the original source rule is "to encourage persons with first-hand knowledge of fraudulent misconduct to report fraud").

74. *See* Cohen, *supra* note 5, at Parts IV-VI.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See* Hertz, *supra* note 21 (reporting multimillion dollar payments made by health care entities for violations of the False Claims Act); *see also* James J. Belanger & Scott M. Bennett, *The Continued Expansion of the False Claims Act*, 4 J. HEALTH & LIFE SCI. L. 26, 28 (2010) ("All of the 25 highest-dollar settlements under the FCA have been healthcare related, as have more than 60 of the top 100 settlements.").

79. *See* discussion at Cohen, *supra* note 5, at Parts IV-VI.

frauds were increasing to the point where they added alarmingly to ever-escalating health care costs.[80]

III. THE PPACA AMENDMENTS TO THE FALSE CLAIMS ACT TO ENCOURAGE MORE QUI TAM LAWSUITS

As part of the impetus to enact health care reform in the Obama administration, Congress considered means by which it could make health insurance available to the large and ever-growing number of uninsureds.[81] Amid reports that health care fraud was robbing millions of dollars annually from federal health care programs,[82] Congress turned to the False Claims Act as a means to enhance fraud detection and enforcement. As a result, Congress sought to increase incentives to private citizens to detect and report health care frauds that the federal government otherwise would be unlikely to discover.[83]

Consequently, when Congress passed the Patient Protection and Affordable Care Act (the "PPACA")[84] in March 2010, the law included several adjustments to the qui tam provisions of the False Claims Act to expand the ability of private citizens to sue.[85] Most significantly, Congress altered the public disclosure and original source rules, which formerly had been the two most important means of limiting parasitic qui tam lawsuits.[86] Although the changes to the express language of the Act appear to be fairly minimal,[87] by limiting what constitutes public

80. *See* Kavilanz, *supra* note 11 (reporting that the Medicare program is the "single biggest victim" of health care fraud).

81. *See NewsHour: Health Reform: What Changes for the Uninsured?* (PBS television broadcast March 23, 2010), *available at* http://www.pbs.org/newshour/bb/health/jan-june10/health2_03-23.html (reporting comments of Ray Suarez: "One of the main goals of the new law is to make sure most Americans have insurance coverage. Thirty-two million more Americans would obtain coverage beginning in 2014.").

82. *See* Kavilanz, *supra* note 11 (reporting an estimated $100 billion a year taken from the U.S. health care system by fraud, with federal health programs being the biggest victims); *see also* Belanger & Bennett, *supra* note 78, at 29 (estimating that "fraudulent billings to federal healthcare programs were between approximately $26.1 and $87.3 billion in 2009, and could increase to between $48 and $160 billion by 2018").

83. *See* Greenberg Traurig, LLP, *Health Reform Legislation Provisions Regarding Fraud and Abuse*, HEALTH & FDA BUS., (April 2010), *available at* http://www.ahcancal.org/advocacy/Documents/GTAlertHRRegardingFraudAbuse.pdf, (stating that the revisions to the False Claims Act were "calculated to increase whistleblower litigation").

84. Pub. L. No. 111-148 (2010).

85. *See id.* § 1303(j)(2), 124 Stat. 901-02 (2010) (codified at 31 U.S.C. § 3730(e)(4)).

86. *See* discussion at *infra* Parts III.A-B, IV.

87. Further, as the revisions to the False Claims Act were buried in thousands of pages of new law, it was not immediately apparent how significant they would be. *See* Sean A. Timmons, *Fraud and Abuse Provisions in the PPACA*, N.C. B. ASS'N HEALTH L.

disclosure and by deleting the stringent "direct knowledge" requirement of the original source rule, Congress dramatically expanded the ability of relators to maintain qui tam lawsuits.[88]

A. *The Limitation of Sources of Public Disclosure*

The 1986 version of the Act defined public disclosures to also include, in addition to disclosures from the news media, public disclosures from "a criminal, civil, or administrative hearing" and "a congressional, administrative, or Government Accounting Office [GAO] report, hearing, audit, or investigation."[89]

The Act did not expressly declare whether the criminal, civil, and administrative hearings which constituted public disclosures included state and local hearings or were intended to be limited to federal hearings.[90] However, courts generally concluded that these hearings were not limited to federal sources.[91] As a result, the public disclosure language typically swept in all state, local, and federal adjudicatory proceedings.[92]

A split of judicial interpretation, however, existed with regard to administrative reports, audits, and investigations. Some courts contended that this statutory language referred to federal administrative agencies only.[93] The Third Circuit Court of Appeals reasoned that because the term "administrative" was sandwiched between two distinctly federal entities—Congress and the GAO—it was likely that Congress was referring exclusively to federal forums.[94] In contrast, other

SEC. NEWSL. (May 20, 2010), *available at* http://healthlaw.ncbar.org/newsletters/prognosis-may-2010/fraud-and-abuse-provisions-in-the-ppaca-.aspx.

88. *See* discussion at *infra* Part IV.

89. *See, e.g.*, United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1498 n.10 (11th Cir. 1991) (quoting the public disclosure provisions of the Act).

90. *See, e.g.*, Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 130 S. Ct. 1396, 1405 (2010) (noting that the text of the Act did not specify whether the hearings are federal only).

91. *See id.* (observing that "[n]o court has ever taken such a view of these sources," i.e., holding that the hearings referred to in the public disclosure provisions of the Act were limited to federal sources only).

92. *See* cases discussed in *id.* at 1405 n.10.

93. *See, e.g*., United States *ex rel.* Dunleavy v. Cnty. of Delaware, 123 F.3d 734, 745 (3d Cir. 1997) (concluding that "Congress was not referring to administrative reports produced by non-federal government sources").

94. *See id.* (stating that "[w]e find it hard to believe that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character"); *see also* United States *ex rel.* Precision Co., v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992) (stating that "[t]he starting point for interpreting a statute is the language of the statute itself").

courts interpreted these terms more broadly. They contended that the administrative reports, audits, and investigations referred to in the Act could emanate from state and local agencies as well, so that fraud allegations from these sources also qualified as public disclosures.[95] This expanded reading of the public disclosure language of the Act required relators to establish that they were original sources whenever they based their complaints upon any state or local administrative information that had been disclosed to the public.[96] This split in judicial interpretation was finally resolved in 2010 in *Graham County Soil & Water Conservation Dist. v. United States* ex rel. *Wilson*,[97] wherein the Supreme Court held that the Act's reference to administrative reports, hearings, audits, and investigations included state and local, as well as federal, public disclosures.[98]

These expansive readings of the Act's sources of public disclosure have been sharply curtailed by the PPACA. The PPACA's revisions to the Act clearly limit those categories of public disclosures to "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party" and a "Federal report, hearing, audit, or investigation."[99] As a result, state and local criminal, civil, and administrative proceedings no longer constitute sources for public disclosures.[100] Even in federal court, public disclosures do not emanate from private proceedings in which the federal government is not a party.[101] Further, state and local

Moreover, it was clear that Congress intended to exclude disclosures from state legislatures, as the statute expressly provided that only congressional information potentially constituted public disclosure. *See Dunleavy*, 123 F.3d at 745 (describing the term "congressional" as "unquestionably federal in character"). Since state legislative information was excluded, it is likely that Congress also intended to exclude state and local administrative reports, hearings, audits, and investigations as well.

95. *See, e.g.*, United States *ex rel.* McElmurray v. Consol. Gov't of August-Richmond Cnty., 501 F.3d 1244, 1252 (11th Cir. 2007), *rehearing denied en banc*, 255 F. App'x 504 (11th Cir. 2007) (finding that reports prepared by the Environmental Protection Division of the Georgia Department of Natural Resources are public disclosures under the Act); United States *ex rel.* Battle v. Bd. of Regents, 468 F.3d 755, 762 (11th Cir. 2006) (finding audits conducted by the State of Georgia Department of Audits and Accounting to be public disclosures); United States *ex rel.* Devlin v. Cnty. of Merced, No. 95-15285, 1996 U.S. App. LEXIS 17681, at *6-7 (9th Cir. 1996) (finding a report of the audit and study of the Los Angeles County Child Welfare Services issued by the Adult and Family Services Division of the California Department of Social Services was publicly disclosed when it was disseminated to a number of parties).

96. *See McElmurray*, 501 F.3d at 1253-54.

97. *Wilson*, 130 S. Ct. 1396 (2010).

98. *Id.* at 1411 (concluding that the term "administrative in [31 U.S.C. § 3730(e)(4)(A)] is not limited to federal sources").

99. 31 U.S.C. § 3730(e)(4)(A)(i)-(ii).

100. *Id.*

101. *See id.* § 3730(e)(4)(A)(i) (describing public disclosures as only those federal criminal, civil, or administrative hearings "in which the Government or its agent is a party"). As a result, federal adjudicatory proceedings where the parties are private

reports, hearings, audits, and investigations no longer qualify as public disclosures. These three broad classes of information[102] thus have been carved out from what potentially constituted public disclosures under the 1986 version of the Act.

B. *The Deletion of the "Direct Knowledge" Requirement from the Original Source Rule*

The 1986 version of the Act also required that once public disclosure had occurred, a relator must establish that he was an original source by demonstrating, *inter alia*, that he had "direct and independent knowledge of the information on which the allegations are based."[103] The direct knowledge requirement was by far the greatest limitation to the availability of original source protection. Most courts read the term "direct" extremely narrowly, holding that original source relators must demonstrate that they did not learn of the fraud from any intermediate source, either from another document or from another person.[104]

litigants no longer qualify as public disclosures. *See also* Weinstein & Honiberg, *supra* note 12 (stating that "information disclosed in private [federal] litigation may now potentially be used as the basis of a whistle-blower suit under the FCA").

102. The three classes of excluded information are, first, state and local adjudicatory proceedings, 31 U.S.C. § 3730(e)(4)(A)(i), second, federal adjudicatory hearings where the federal government is not a party, *id.* § 3730(e)(4)(A)(i), and third, state and local reports, hearings, audits, and investigations, *id.* § 3730(e)(4)(A)(ii).

103. *See, e.g.*, United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1160 (1991) (3d Cir. 1991) ("The statute defines 'original source' as 'an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section.'").

104. *See, e.g.*, *Stinson v. Prudential*, 944 F.2d at 1160-61 (holding that the relator's knowledge was not direct where it came through two intermediaries: the Provident employee who prepared the memorandum that the relator received in civil discovery, and the discovery procedure itself by which the memorandum was produced); United States *ex rel.* Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 513 (3d Cir. 2007) (finding that the relator was not an original source because he derived his knowledge of the fraud from a document provided by the Coast Guard); United States v. Applera Corp., 155 F. App'x 291, 291 (9th Cir. 2005) (mem.) (ruling that the relator did not have direct knowledge because his knowledge was obtained from publicly available patent materials, journal articles, grant applications, or derived secondhand from another individual's research notes and grant files); United States *ex rel.* Grynberg v. Praxair, Inc., 389 F.3d 1038, 1054 (10th Cir. 2004) (ruling that the relator's knowledge was not direct because he derived it secondhand from an individual who had firsthand knowledge as a result of his employment); United States *ex rel.* Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 177 (5th Cir. 2004) (stating that "direct" means "knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others"); Hays v. Hoffman, 325 F.3d 982, 990-91 (8th Cir. 2003) (holding that the relator's information was not direct where it was obtained from an individual with direct knowledge who was unwilling to come forward as a whistleblower, and declaring that "[t]o be independent, the relator's knowledge must not be derivative of the information of others, even if those others may qualify as original

Effectively, this drastically limited the pool of potential relators to only those who had either participated in the fraud or observed it firsthand.[105] A relator with direct knowledge was deemed to be one who "saw [the fraud] with his own eyes," and whose knowledge was "unmediated by

sources"); United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 336 F.3d 346, 355 (5th Cir. 2003) (interpreting "direct" by its "plain meaning" as "derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others"), *abrogated by* Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007); United States *ex rel.* Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 525 (9th Cir. 1998) (declaring that a relator does not have firsthand knowledge of a fraud when he derives it secondhand from another individual who witnessed it firsthand as a result of his employment with the defendant); United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538, 1548 (10th Cir. 1996) (holding that the relator did not have direct knowledge of the fraud where "he was not the individual actually performing the investigations" of the defendant); United States *ex rel.* Fine v. Advanced Scis., 99 F.3d 1000, 1007 (10th Cir. 1996) (finding that the relator did not have direct knowledge because he "was not the individual who discovered the facts but he was the supervisor to whom the auditors reported" and that "he learned of [the fraud] through the discoveries of others"); United States *ex rel.* Devlin v. California, 84 F.3d 358, 362 (9th Cir. 1996) (stating that a relator does not have direct knowledge if he learns of it secondhand from a person with firsthand knowledge); Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1477 (2d Cir. 1995) (per curiam) (finding that the relator's information was not direct and independent because he obtained it "from the media, from administrative reports prepared for the Army Corps, and from arbitration hearings concerning the cost overruns"). *But see* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1249, 1258 (S.D. Fla. 1989) (ruling that the relator's knowledge was direct where it was obtained through personal correspondence with the Director of the Health Care Financing Administration's Bureau of Eligibility, Reimbursement and Coverage, and from personal communications with a subscriber of the defendant whose claims had been unsatisfactorily processed by the defendant).

105. *See, e.g.*, *Atkinson*, 473 F.3d at 520 (describing persons with firsthand knowledge as those "who are either close observers or otherwise involved in the fraudulent activity"); *Dunleavy*, 123 F.3d at 745 (noting Congress's statement that "detecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity"), *abrogated by Wilson*, 130 S. Ct. at 1396; United States *ex rel.* Fine v. Chevron, U.S.A., Inc. 72 F.3d 740, 742 (9th Cir. 1995) (noting that "the paradigm qui tam case is one in which an insider at a private company brings an action against his own employer"); *see also* United States *ex rel.* Paranich v. Sorgnard, 396 F.3d 326, 336 (3rd Cir. 2005) (finding that the relator had direct knowledge because he was involved in the fraudulent billing scheme); United States *ex rel.* Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys., 276 F.3d 1032, 1050 (8th Cir. 2002) (finding that the relators had direct knowledge due to their "communications with defendants themselves, [their] participation in the anesthesia procedures which were later fraudulently billed by the defendant," their seeing the defendant "anesthesiologist filling out the forms used for billing with misleading information," and their "familiarity with the hospital records disclosing [the] defendants' fraud"); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1017 (7th Cir. 1999) (holding that the relator "had 'direct' knowledge of the way that [Green Bay Transit] was implementing its tripper service" because he observed the GBT buses firsthand); United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993) (finding that the relator had direct knowledge because "he acquired it during the course of his employment").

anything but [his] own labor."[106] By requiring the relator to learn of the fraud firsthand, by either seeing it himself or being directly involved, the "direct knowledge" requirement placed stringent limits on who could serve as a relator.[107] The only exception that courts were willing to

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106. Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992); *see also Paranich*, 396 F.3d at 335-36 (defining "direct" as "marked by absence of an intervening agency, instrumentality, or influence: immediate," "seen with the relator's own eyes," and "by the relator's own efforts, and not by the labors of others, and . . . not derivative of the information of others"); *Grynberg*, 389 F.3d at 1052-53 (stating that the relator's knowledge must be "marked by the absence of an intervening agency . . . [and] unmediated by anything but [his] own labor"); United States *ex rel.* McKenzie v. Bellsouth Telecomm., 123 F.3d 935, 941 (6th Cir. 1997) (defining "direct" as "marked by absence of intervening agency"); United States *ex rel.* Devlin v. Cnty. of Merced, No. 95-15285, 1996 U.S. App. LEXIS 17681, at *14 (9th Cir. July 19, 1996) (stating that "a relator has 'direct and independent' knowledge if he discovers the information underlying his allegations of wrongdoing through his own labor"). *But see Stinson* v. Prudential, 944 F.2d at 1173 (Scirica, J., dissenting) (observing that "[m]uch valuable information is obtained through 'intermediaries' of some kind," and that "[e]liminating information that has come through intermediaries would bar a large number of potential relators").

For example, a relator who witnessed healthcare fraud firsthand when providing medical services was deemed to have direct knowledge of the fraud. *See* United States *ex rel.* Barron v. Deloitte & Touche, L.L.P., 106 F. App'x 284, 285 (5th Cir. 2004) (finding that evidence that the relator provided medical services at one of the relevant school districts and observed defendant's presentation on Medicaid billing was sufficient to establish direct knowledge of the fraud); s*ee also Aflatooni*, 163 F.3d at 525-26 (noting, but ultimately rejecting, an argument by the relator that his knowledge was direct because it was learned firsthand by virtue of his position as a participating physician, by speaking with patients, and by reviewing their medical records).

107. *See, e.g.*, United States *ex rel.* Kinney v. Stoltz, 327 F.3d 671, 675 (8th Cir. 2003) (ruling that the relator was not an original source because there was no evidence that he had direct knowledge of the defendant's wrongdoing, having made no claims against defendant until after the alleged fraud was revealed in discovery in the underlying litigation); *Hays*, 325 F.3d at 990-91 (rejecting the relator because his information was secondhand, coming from a whistleblower who was unwilling to come forward); *Devlin v. California*, 84 F.3d at 361 (finding that the relator's knowledge was not direct because he derived it secondhand from another individual); *Devlin v. Merced*, 1996 U.S. App. LEXIS 17681, at *15 (finding that the relators did not have direct knowledge because they had acquired it indirectly through the DSS investigators who had prepared the Case Study and through the Chief of DSS's Child Welfare Service Division); United States *ex rel.* Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 704 (8th Cir. 1995) (finding that where the relator derived his information from visits to the job site, publicly filed payroll records, and interviews with defendant's employees, he was "simply gathering information . . . [and] as such, he was a recipient of information and not a direct source").

Due to the direct knowledge requirement, qui tam relators have been barred when they learned of the fraud from FOIA responses, public filings, or other individuals. *See, e.g.*, United States *ex rel.* Dhawan v. N.Y. Med. Coll., 252 F.3d 118, 121 (2d Cir. 2001) (concluding that the relator did not satisfy the direct and independent knowledge requirement because he relied on the findings of two audits by the New York City Health & Hospitals Corporation rather than on his own suspicions of fraud); United States *ex rel.* Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 389 (3d Cir. 1999) (holding that the relator did not have independent information where he learned of the fraud from a FOIA response); United States *ex rel.* Kreindler & Kreindler v. United Tech. Corp., 985 recognize was that relators were deemed to have direct knowledge if they had conducted an extensive investigation into the fraud, and had largely pieced together a complex pattern of fraud from seemingly innocuous and unrelated information.[108]

This former requirement that original sources have "direct knowledge" of the fraud has been wholly deleted from the Act by the PPACA. The current version of the original source rule requires only that the relator demonstrate, *inter alia*, that he "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."[109] Therefore, once public disclosure occurs, qui tam relators no longer have to demonstrate that they actively participated in the fraud or observed it with their own eyes. Instead, they can learn of the fraud second- or third-hand from any source whatsoever, as long as their knowledge is independent, i.e., that they did not learn of the fraud

F.2d 1148, 1159 (2d Cir. 1993) (finding that the relator had no direct knowledge when it acquired the knowledge from the defendant).

108. *See* Cohen, *supra* note 5, at Part V.B.3. *Compare* United States *ex rel.* Haight v. Catholic Healthcare W., 445 F.3d 1147, 1155 (9th Cir. 2006) (stating that the relator was an original source because he "put in substantial time and effort into uncovering the allegations"), *and Lamers*, 168 F.3d at 1017-18 (finding the relator to be an original source because he acquired knowledge of actual bus route operations by personally observing them by walking the streets, and declaring that "Congress wanted to encourage busybodies who, through independent efforts, assist the government in ferreting out fraud."), *and* United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., 19 F.3d 562, 568 (11th Cir. 1994) (finding the relator to be an original source where he acquired his knowledge of a Medicare fraud through three years of his own claims processing, research, and correspondence with members of Congress and HCFA), *with* United States *ex rel.* Mathews v. Bank of Farmington, 166 F.3d 853, 865 (7th Cir. 1999) (ruling that the relator was not an original source because "[t]he fraud alleged is a simple affair," and "[i]t would not take Sherlock Holmes to figure it out," so that the difficulty involved in unveiling the fraud "falls well short of the mark").

109. 31 U.S.C. § 3730(e)(4)(B) (2010). The original source requirement under the 1986 version of the Act that a relator with direct and independent knowledge must also have "voluntarily provided the information to the Government before filing an action under this section" has been retained. *See id.*

from the public disclosure itself,[110] and their knowledge materially adds to the public disclosure.[111]

IV. THE EXPLOSION IN QUI TAM AUTHORITY UNDER THE REVISED ACT

By both substantially limiting what constitutes public disclosure and substantially expanding the ability of relators to obtain original source protection,[112] the PPACA has tampered with the two predominant limitations to the availability of qui tam lawsuits that existed under the 1986 version of the Act. What remains is virtually no protection from otherwise "parasitic" lawsuits that emanate from information disclosed in state and local forums and in private litigation in federal court.[113] Moreover, if the relator files suit post-public disclosure, he may obtain original source protection without having to satisfy the former stringent requirement that he possess direct knowledge of the fraud to avoid the jurisdictional bar.[114]

Now that there are no restrictions against qui tam relators alleging fraud claims that have already been disclosed in state, local, and private federal proceedings, or in state and local reports, hearings, audits, and investigations,[115] it follows that there is a wealth of information publicly available from these sources that will not constitute public disclosures

110. Under the 1986 version of the Act, most courts had agreed that the independent knowledge requirement prohibited the relator from using the public disclosures themselves as the claims made in the complaint. *See, e.g.*, *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1045 (stating that a relator's knowledge is not independent of the public disclosure "if it was derived from the public disclosure"); United States *ex rel.* Branhan v. Mercy Health Sys. of S.W. Ohio, No. 98-3127, 1999 U.S. App. LEXIS 18509, at *7 (6th Cir. Aug. 5, 1999) (defining "independent" as meaning that the relator "does not depend or rely upon the public disclosures"); *Mistick*, 186 F.3d at 389 (declaring that "a relator who would not have learned of the information absent public disclosure [does] not have 'independent' information within the statutory definition of 'original source'"); *McKenzie*, 123 F.3d at 941 (defining "independent knowledge" as knowledge that "is not 'dependent on public disclosure'").

111. Because of the "materially adds to" requirement, independence will not save a qui tam complaint that alleges no additional facts than were stated in the public disclosure. Therefore, the "independent" and "materially adds to" requirements work together to encourage a relator to report the fraud to the federal government as soon as possible. Otherwise, public disclosure could occur before the qui tam complaint is filed, and if the public disclosure covers all of the information known to the relator, result in dismissal of the complaint even if the relator learned of the fraud independently.

112. *See supra* Part III.

113. *See supra* Part III.A.

114. *See supra* Part III.B. The relator may also obtain original source protection if prior to the public disclosure he voluntarily disclosed to the government the information upon which his complaint is based. *See* 31 U.S.C. § 3730(e)(4)(B).

115. *See* 31 U.S.C. § 3730(e)(4)(A)(i), (ii); *supra* Part III.

under the Act and will not risk a relator's dismissal.[116] Indeed, there is no prohibition against a relator's copying verbatim filings made in these forums to use in his qui tam complaint. Because this information is no longer deemed to constitute public disclosure, the relator will not have to satisfy any of the original source requirements. This narrowing of the definition of public disclosure is thus an enormous expansion of the ability of relators to commence qui tam lawsuits.

In fact, the limitation of public disclosure effectively creates certain privileged classes of potential relators. State and local government employees could be in a favorable position to act as qui tam relators if they routinely become aware of frauds through their job duties before the information is reported in the news media.[117] In fact, state and local governments themselves could act as qui tam relators, so that the Act may well provide a source of additional financing for these governmental entities.[118] To that end, state and local governments may wish to encourage their employees to report frauds they discover through their jobs to their employers, and discourage the employees from acting as relators themselves. These governments could contractually foreclose employees from commencing qui tam suits based upon information learned in the course of their employment,[119] or provide disincentives to

116. *See* Greenberg Traurig, *supra* note 83 ("[B]y narrowing this [public disclosure] language, a wide swath of whistleblower claims that would be prohibited by the former public disclosure rule may now be permitted to proceed.").

117. As noted by some courts prior to the PPACA revisions to the Act, allowing government employees to commence qui tam lawsuits based on information derived from their employment might create perverse incentives for state and local employees to spend their employment hours searching for frauds that could serve as the bases of qui tam lawsuits, or even to withhold reporting the frauds to their governmental supervisors. *See, e.g.*, United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 745 (9th Cir. 1995) (observing that allowing government employees to commence qui tam suits based on frauds they learned while on duty would create "perverse incentives," such as to "spend work time looking for personally remunerative cases . . . rather than doing their assigned work" and to "conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain"); *see also* Cohen, *supra* note 5, at 747 n.237.

118. *See, e.g.*, United States *ex rel.* Wis. Dep't of Health & Soc. Servs. v. Dean, 729 F.2d 1100 (7th Cir. 1984) (wherein the State of Wisconsin acted as a qui tam relator).

119. Several commentators have opined that the Act's retaliation provisions, prohibiting employers from penalizing employees from filing qui tam actions, 31 U.S.C. § 3730(h), would prevent employers from requiring employees to waive their qui tam rights. *See* Joel R. Levin & Charles W. Mulaney, *Recovery Audits Contractors as Whistleblowers: How Medicare and Medicaid Auditors Can Receive a "Double Kickback" from the Government as Qui Tam Plaintiffs*, 20 BNA'S HEALTH L. REP. 82, 82 (2011) (stating that due to the Act's retaliation provisions, employers would be prohibited from "prohibit[ing] their employees from filing qui tam actions based on billings they access through their job duties"). However, it is questionable whether the Act's retaliation provisions would be applied in this manner, as they generally are thought to prevent employers from penalizing employees for filing qui tam actions against the

commencing qui tam actions by rewarding them for reporting frauds. Indeed, by deleting state and local disclosures from the definition of public disclosures under the Act, the revised public disclosure provisions could serve as a financial incentive for state and municipal governments to act as the eyes and ears of the federal government in detecting and reporting frauds involving federal funds.

The deletion of state, local, and private federal hearings from the definition of public disclosure also may place attorneys in a favored position to serve as qui tam relators. Litigators have access to masses of discovery that typically only they and the producing parties ever see.[120] Often, a court sees discovery only to the extent it is produced via motions and hearings.[121] Therefore, attorneys reviewing discovery materials may become aware of federal frauds revealed in these documents that no other member of the public sees.[122] Because these state, local, and private federal litigations no longer constitute sources of public disclosure, attorneys who discover frauds in these contexts do not have to establish that they are original sources of the information.[123] Under the 1986 version of the Act, meeting the requirements of the original source rule was virtually impossible for attorney relators.[124] Courts often ruled that attorneys lacked direct knowledge because they had discovered the

employer itself, not to prevent qui tam actions against other parties. *See, e.g*., Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 733 (7th Cir. 1999) (wherein an employee charged her employer with retaliation for terminating her allegedly due to her investigation of false claims made by the employer).

120. *See, e.g.,* United States *ex rel.* Springfield v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994) (holding that unfiled discovery does not constitute public disclosure because it is not "*actually* made public through filing"); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149, 1170 (3d Cir. 1991) (Scirica, J., dissenting) (observing that "the general public has no real access to the [unfiled discovery] information until it is publicly filed").

121. *See* discussion of whether unfiled litigation discovery is publicly disclosed at Cohen, *supra* note 5, at Part VII.B.

122. *See, e.g.*, *Stinson v. Prudential*, 944 F.2d 1149; United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Blue Cross Blue Shield of Ga., Inc. 755 F. Supp. 1040 (S.D. Ga. 1990); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of Am., 736 F. Supp. 614 (D.N.J. 1990); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247 (S.D. Fla. 1989) (wherein the Stinson law firm commenced a series of qui tam lawsuits against insurance companies for Medicare fraud, based upon information learned in discovery while representing a client who was injured in an automobile accident); *see also* discussion of the *Stinson* cases at Cohen, *supra* note 5, at Part IV.

123. *See* 31 U.S.C. § 3730(e)(4)(A)(i) (limiting litigation sources of public disclosure to "a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party").

124. *See infra* notes 125, 126 (discussing hurdles faced by the attorney relators in the *Stinson* cases).

fraud second-hand through a discovery document.[125] Even if attorney relators could clear the "direct knowledge" hurdle, courts ruled that they lacked independent knowledge because they had learned of the fraud from the public disclosure itself,[126] i.e., the production of discovery materials in a criminal, civil, or administrative hearing. Consequently, the elimination of state, local, and private federal hearings from public disclosure and removal of the direct knowledge requirement may potentially unleash a vast army of attorneys to serve as qui tam relators for frauds that are revealed in discovery conducted in these forums.[127]

Besides attorneys and state and local governmental employees, private auditors and investigators may also be in favored positions to act as qui tam relators. By the very nature of their professions, auditors and investigators may become privy to frauds involving the expenditure of federal funds.[128] Due to the PPACA revisions to the Act,[129] unless these individuals learn of the frauds from the federal sources that still comprise public disclosure or from the news media,[130] they are free to serve as qui tam relators regarding information they discover through their

125. *See, e.g.*, *Stinson v. Prudential*, 736 F. Supp. at 622 (ruling that Stinson's knowledge was not direct because it had learned of the fraud by "stumbl[ing] across" the documents that revealed the fraud, not by firsthand observation of the fraud itself). *But see Stinson v. Provident*, 721 F. Supp. at 1258 (finding that Stinson had direct knowledge because it had obtained its knowledge of the fraud by its direct relationship with its client's personal injury lawsuit).

126. *See, e.g.*, *Stinson v. Blue Cross Blue Shield of Ga.*, 755 F. Supp. at 1051 (misquote in original) (quoting *Stinson v. Prudential*, 736 F. Supp. at 622 (declaring, in dicta, that Stinson would not qualify as an original source because it had learned of the fraud through the public disclosure of judicial discovery, "not by virtue of any direct relationship to, or interest in claims procedures")).

127. *See Stinson v. Prudential*, 944 F.2d at 1171 (Scirica, J., dissenting) (observing that "civil discovery is a fertile source of information relating to government fraud"); Weinstein & Honiberg, *supra* note 12 ("[T]he new law will allow plaintiffs' counsel to begin combing through public records and information disclosed in private litigation in the hope of turning up information that can be used as the basis for a suit under the FCA.").

128. *See, e.g.*, Levin, *supra* note 119 (opining that Recovery Audit Contractors, private contractors utilized by the federal government to audit Medicare and Medicaid billing records, might be able to commence qui tam actions based on overpayments they uncover during their audits); *see also* United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538, 1540 (10th Cir. 1996) (describing a situation wherein the relator commenced a qui tam action based upon information he learned when he was a former employee of the Office of the Inspector General, United States Department of Energy); United States v. CAC Ramsay, Inc., 744 F. Supp. 1158, 1159 (S.D. Fla. 1990) (describing a situation wherein relator Weinstein commenced a qui tam action based upon information he learned when he was formerly a Special Agent for the U.S. Department of Health and Human Services Office of the Inspector General).

129. *See* discussion *supra* Part III.

130. *See* 31 U.S.C. § 3730(e)(4)(A).

professions, without the necessity to establish that they are original sources.[131]

The elimination of state and local forums and private federal lawsuits as sources of public disclosure might appear to be contrary to the goal of the Act to foreclose parasitic lawsuits, since citizens could simply report frauds in their qui tam complaints that have already been exposed in these forums.[132] Nevertheless, this change to the Act has the potential to bring numerous cases to the federal government where it had little possibility of learning of the frauds on its own. While federal fraud enforcement agencies may be well aware of frauds disclosed in their own branches of government and in news reports, it is unlikely that federal agencies would be aware of frauds detected in state and local arenas or in federal litigations between private parties.[133] As a result, allowing relators to initialize their qui tam actions based upon information revealed in state and local forums would be an extremely helpful tool if utilized to alert the federal government to otherwise undetected fraud. In turn, enhanced fraud recoveries may help to finance the expanded health insurance coverage that is the most significant component of the health reform package implemented by the PPACA.[134]

Similar to the narrowing of what constitutes public disclosure, deleting the direct knowledge requirement from the "original source" definition is a significant expansion of the Act's qui tam provisions.[135] Deletion of direct knowledge has removed the greatest obstacle to original source protection.[136] Now there are not only readily available reserves of state, local, and federal information that do not constitute public disclosure, but also in the event that public disclosure of the fraud occurs before the qui tam complaint is filed, the greatest restriction to obtaining original source protection (direct knowledge) has been removed.[137]

Legal commentators have complained that deletion of the direct knowledge requirement allows relators to commence qui tam lawsuits

131. *See, e.g.,* Levin & Mulaney, *supra* note 119 (discussing private auditors' acting as qui tam relators).

132. *See* discussion of parasitic lawsuits exemplified by the *Marcus* case *supra* Part II.A.

133. *See, e.g.,* United States *ex rel.* Dunleavy v. Cnty. of Delaware, 123 F.3d 734, 746 (3d Cir. 1997) (noting there was no suggestion the federal Department of Housing and Urban Development had any knowledge of misrepresentations by the defendant County other than what the County had submitted in its Grantee Performance Report).

134. *See NewsHour*, *supra* note 81 (reporting that the PPACA will provide coverage to 32 million more Americans by 2014).

135. *See generally* discussion, *supra* Part III.B.

136. *Id.*

137. *Id.*

without having any personal knowledge of the fraud.[138] While this is undoubtedly a valid complaint, relators are still required by the federal procedural rules to allege fraud with particularity.[139] Presumably, allegations that are overly general or without support will be subject to dismissal at the early stages of litigation.[140]

Nevertheless, the only remnant of the historic prohibitions against "parasitic" qui tam lawsuits is the codified requirement that to qualify as an original source, the relator's information must "materially add to" the public disclosure.[141] This is currently the only significant limitation to attaining original source status. Undoubtedly, the future legal battles over original source status will be waged here. As the term "materially adds to" is not defined in the Act,[142] it will turn to a determination of the courts as to what extent a relator's new detail must add to the public disclosure in order to qualify that relator as an "original source."

At a minimum, this provision provides the government an assurance that a relator's mere repetition of the public disclosure will be insufficient to qualify that relator as an "original source." The "materially adds to" requirement increases the likelihood that a relator's

138. *See, e.g.*, Scot T. Hasselman, Andrew C. Bernasconi, & Nathan Fennessy, *Analysis and Implications of Fraud Abuse and Program Integrity Provisions of the Affordable Care Act*, REED SMITH HEALTH CARE REFORM REV. June 2010, at 3, *available at* http://www.reedsmith.com/_db/_documents/Reed_Smith_Health_Care_Reform_Review_-_PPACA_201006040543.pdf ("The elimination of the 'direct knowledge' requirement threatens to force FCA defendants to face wholly unsupported allegations and 'fishing expeditions' that are otherwise not based on any factual premise."); Peter B. Hutt II, *False Claims Act: Weakening The Public Disclosure Defense,* METROPOLITAN CORP. COUNS., June 2, 2010, http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=June&artYear=2010&EntryNo=11025 (opining that deletion of the direct knowledge requirement "runs directly contrary to the entire purpose of the public disclosure bar, which is to ensure that bounties are awarded only to true whistleblowers with firsthand knowledge of fraud").

139. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *see also* Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (stating that allegations of fraud must "be 'specific enough to give defendants notice of the particular misconduct,'" (quoting Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001)), including "the 'who, what, when, where, and how' of the misconduct charged" (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))).

140. *See* United States *ex rel.* Ebeid v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) (declaring that "'[I]n alleging fraud or mistake,' Rule 9(b) requires a party to 'state with particularity the circumstances constituting fraud or mistake,' including 'the who, what, when, where, and how of the misconduct charged'" and dismissing the qui tam complaint for failure to meet the particularity requirements) (citation omitted).

141. 31 U.S.C. § 3730(e)(4)(B) ("'[O]riginal source' means an individual who . . . has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions. . . ."). The relator may also qualify as an original source if he voluntarily provides the information to the government prior to the public disclosure. *See id.*

142. *See id.*

contributions will be genuinely helpful to the prosecution of the fraud; however, where a relator learns of the fraud from the public disclosure, and subsequently embarks on an investigation that ultimately discloses additional facts, the language of the Act is unclear as to whether those additional facts will be deemed independent of the public disclosure (necessary for original source status) or derived from it and therefore subject to dismissal. Furthermore, if the government itself commences an investigation of the fraud post-public disclosure, it is conceivable that the relator's new facts may be deemed to "materially add to" the public disclosure even when the government has already discovered the same facts through its own investigation.

CONCLUSION

The historic adjustments to the qui tam provisions of the False Claims Act have alternated between two extremes: one extreme of allowing permissive qui tam provisions which result in "parasitic" lawsuits and the opposite extreme of disallowing qui tam lawsuits even where the relator independently discovered the fraud. The recent revisions to the Act are decidedly in favor of relators. The PPACA's changes to the public disclosure provisions allow relators to bring what were previously thought of as "parasitic" lawsuits, whereby their complaints duplicate information already disclosed publicly in state and local forums and in private federal lawsuits. Furthermore, once public disclosure occurs, the PPACA has eliminated the most demanding requirement for original source status—that the realtor have direct knowledge of the fraud. The relator need no longer demonstrate that he has firsthand information to qualify as an original source. In fact, the only substantial protection against parasitic suits is that the relator's information must "materially add to" the information that was publicly disclosed.

Therefore, this new version of the Act takes a pragmatic view of fraud enforcement.[143] The federal government is much less likely to be aware of state and local sources of information or federal lawsuits between private parties, so they are both permissible sources of qui tam allegations. After public disclosure occurs, the relator can still commence a qui tam action by alleging additional facts that he learns from any source other than the public disclosure itself. The current focus of the qui tam provisions is therefore clearly on facilitating the discovery of frauds by private citizens when it is unlikely that federal fraud enforcement agents will detect the frauds on their own. The ultimate

143. *See* Greenberg Traurig, *supra* note 83 (stating that the "PPACA arguably creates a more functional analysis" of qui tam status).

goal of such amendments is to increase the amount of fraud detection and the quantity of fraud recoveries.

Perhaps this enormous expansion of the qui tam provisions is understandable in view of our current health care climate. As a country, we are intent upon containing health care costs and suspect that flagrant fraud is occurring. Once relators start filing qui tam lawsuits under the revised Act and those cases begin their journeys through the court system, it will presumably become apparent whether private fraud detection and financial recoveries are being enhanced by the new Act. In particular, it will be seen if allowing relators to duplicate state and local disclosures and filings from private federal lawsuits forces the government to share the recoveries for frauds it would likely have detected on its own with relators who provide little real assistance.[144]

144. *See id.* ("What remains to be seen is how these [qui tam] provisions will be interpreted and applied by the courts in litigated proceedings.").