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False Claims Act Circuit Splits: FCA Issues That May Soon Reach the Supreme Court or Lead to Congressional Amendment—Part I

By Robert S. Salcido*

Under the False Claims Act there are multiple circuit court splits related to how power should be allocated between the United States and the relator and whether the relator has contributed sufficient value to merit obtaining a significant portion of the government's recovery. In this first part of a multi-part article, the author discusses the circuit splits addressing the proper allocation of power between the government and relators, and how they should be resolved. Subsequent parts of the article, which will appear in upcoming issues of Pratt's Government Contracting Law Report, *will explore circuit splits addressing whether relators should be permitted to advance actions when they fail to report non-public information to the government, the False Claims Act and Rule 9(b), and will offer conclusions.*

The False Claims Act ("FCA") is the government's primary weapon to police fraud committed against the government. The FCA's *qui tam* provisions authorize private citizens, known as "relators," to file lawsuits where they have suffered no personal injury and obtain a substantial statutory bounty from funds that otherwise would be remitted to the government.[1]

In crafting the FCA, Congress confronted many challenges. One was to provide private plaintiffs with sufficient incentives to file an action and yet not usurp the executive branch's constitutional power to enforce the law.[2] Another was to allow private persons to receive a statutory bounty from the government

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[1] Under the *qui tam* provisions, a private person files the lawsuit under seal, and the government determines whether to intervene or decline to intervene in the action. 31 U.S.C. § 3730(b). If the government intervenes, it assumes primary responsibility to litigate the action. *Id.* § 3730(c)(1). Alternatively, if the government declines, the relator may litigate as the government's assignee. *Id.* § 3730(b)(4)(B); *Vermont Agency of Nat. Resources v. United States*, 529 U.S. 765, 773–74 (2000).

[2] *See, e.g., United States ex rel. Ridenour v. Kaiser-Hill Comp., L.L.C.*, 397 F.3d 925, 934–35 (10th Cir. 2005) (noting that courts should construe FCA provisions consistently with the Constitution's Take Care clause, which requires that the executive branch maintains sufficient

that is proportionate to the value that the private person contributed in filing the action so that excessive wealth (in the form of recoveries) is not redistributed from the government, the actual victim in any FCA action, to private persons and their counsel.[3]

In seeking to strike the right balance in the allocation of power and providing an appropriate reward when the relator actually contributes valuable information rather than repeating public information or information disclosed in a prior *qui tam* lawsuit (and, hence, no "whistleblower" is needed), Congress, at times, used ambiguous language that presents, as the U.S. Supreme Court has noted, "many interpretative challenges" for courts.[4] These "many interpretative challenges" have resulted in multiple circuit splits. Indeed, going into 2018, there are more than one half dozen circuit court splits regarding the FCA. Given the overall goals underlying the FCA, not surprisingly, some splits center on how power should be allocated between the United States and the relator and whether relators (private citizens) motivated by their private financial interest, should have equal authority and power as the United States. These splits include:

- Under Section 3730(b)(1), which requires that the Attorney General "give written consent to the dismissal" of an FCA action, does the relator, when the United States declines to participate in the action, have the power to settle FCA lawsuits when the United States does not believe that a settlement is in the United States' interest and therefore refuses to provide written consent to the dismissal of the underlying FCA action?
- Under Section 3730(c)(2)(A), which authorizes the "Government [to] dismiss the action notwithstanding the objections of the person initiating the action if . . . the court has provided the person with an

control over *qui tam* actions so that there is no violation of its duty to enforce the laws of the land).

[3] For example, Congress created various bars to the relator's action to preclude lawsuits that do not sufficiently benefit the government to merit a reward. For example, under the public disclosure bar, 31 U.S.C. § 3730(e)(4), Congress barred actions that are substantially similar to specified information in the public domain, unless the relator is the original source of the information in the public domain or materially adds to the information in the public domain. Similarly, under the first-to-file rule, 31 U.S.C. § 3730(b)(5), Congress prohibited all actions that are based upon the facts underlying a pending *qui tam* action.

[4] *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015) (noting in construing 31 U.S.C. § 3730(b)(5) that the "*qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together smoothly like a finely tuned machine").

opportunity for a hearing on the motion," does the United States have essentially an unfettered right to dismiss the litigation that is brought in its name, or can the relator compel the FCA action to continue when the United States does not believe that the FCA action advances its interest?

- Under Section 3731(b)(2), which extends the statute of limitations beyond six years if an "official of the United States" did not know of a right of action within three years of the time in which the action is brought, can the relator be considered an "official of the United States" and have the statute of limitations extended if the relator did not know of a right to action within three years of the time in which the relator filed?

Other circuit splits center on whether the relator's action brings sufficient value such that a substantial portion of the government's recovery should be transferred to a private individual. More specifically, these splits include:

- Under Section 3730(b)(5), which bars relators from intervening or bringing an FCA action "based on the facts underlying" a pending FCA action, there have been multiple splits, including:
    - Does the bar prohibit relators from amending the complaint to join additional relators?
    - Does the bar prohibit relators from proceeding when they file a viable *qui tam* action, but some other relator previously filed a defective *qui tam* that is subject to dismissal?
    - Does the bar prohibit relators from proceeding when the prior-filed *qui tam* is no longer pending?
- Under Section 3730(e)(4), which, unless the relator qualifies as an original source, prohibits actions based upon the "public" disclosure of specified types of information, what disclosures qualify as "public"? Is a disclosure to a single individual sufficient to be a public disclosure? Are employees and agents of the defendant members of the public? Are government employees members of the public such that disclosures to them are public disclosures?
- In applying Fed. R. Civ. P. 9(b) to FCA actions, must the relator, who presumably is an insider privy to fraud, be able to specify at least a single false claim with specificity to be permitted to proceed with an FCA action?

Resolving those circuit splits is important for multiple reasons. First, the FCA is a national statute that should be applied uniformly, but, instead, as a result of these multiple splits, it is applied differently depending upon in which circuit the lawsuit is pending. Second, such a divergence in application results in forum—shopping, since relators, who frequently file their lawsuits against companies operating across the country,[5] strategically file their actions in jurisdictions based upon which jurisdiction is deemed most favorable based upon its case law and which U.S. Attorney's Office may view their claims more sympathetically. Third, the splits indicate which issues are more likely to be reaching the Supreme Court in the near term in an era in which the Court has been taking FCA cases almost annually. Fourth, the splits also indicate issues that may soon result in additional congressional amendments to the FCA.

CIRCUIT SPLITS ADDRESSING THE PROPER ALLOCATION OF POWER BETWEEN THE GOVERNMENT AND RELATORS

Courts have split regarding whether the government should have the ultimate say regarding whether an FCA case is dismissed, either on the relator's motion or the government's, and whether Congress ever considered the relator to be an "official of the United States." Set forth below is a description of the splits and how they should be resolved.

Section 3730(b)(1) and the Government's Power to Oppose Dismissal of an FCA Action

Section 3730(b)(1) mandates that an FCA "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." This provision has its origin in the FCA's initial passage in 1863.[6] The purpose of the provision is to ensure that the executive branch can bar the relator from dismissing the lawsuit when the relator is not acting in the public's best interest.[7]

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[5] In cases against defendants operating in several jurisdictions, relators have flexibility regarding where to file the action. Under the FCA, an action "may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transactions business, or in which any act proscribed by section 3729 occurred." 31 U.S.C. § 3732(a).

[6] *See* Act of March 2, ch 67, 12 Stat. 696 (1863) ("Such suit may be brought and carried on by any person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.").

[7] *Searcy v. Philips Electronics North America Corp.,* 117 F.3d 154, 159 (5th Cir. 1997) (noting that, although Congress substantially revised the FCA in 1986, it did not revise this provision, which had its roots in the original FCA and thus reasoned that, as "far as we can tell, Congress decided that it should combine its effort to reinvigorate the *qui tam* provisions of the Act with a continuation of its policy of encouraging the government to monitor relators' actions and step in when relator is not acting in the best interest of the public").

In construing Subsection (b)(1), the precise issue upon which circuits have split concerns whether the United States, in a case in which it does not intervene, can unilaterally veto a settlement reached between the relator and defendants when the United States is not a party to the litigation. For example, imagine a scenario where the United States declines to intervene; the relator and the defendant litigate over a period of years, incurring substantial cost; and they ultimately reach a settlement and thus move to dismiss the action. At that point, can the United States, after spending the litigation on the sidelines, refuse to consent to settlement or dismissal, under Subsection (b)(1), and thereby compel the relator and defendant to continue to litigate the matter through trial?

The majority of circuits—specifically, the U.S. Courts of Appeals for the Fourth, Fifth, and Sixth Circuits—have ruled in the affirmative, noting that the FCA's plain language and purpose support the conclusion that the FCA grants the executive branch a unilateral veto over the relator's decision to dismiss a *qui tam* that is not in the United States' interest.[8] For example, as to the plain language, the Fifth Circuit, in *Searcy,* noted that Subsection (b)(1) is "unambiguous" in providing that dismissal may be granted only if the Attorney General provides his or her "written consent to the dismissal"[9] and that, given that this statutory language has existed since the FCA's initial passage in 1863, the plain language should be given full force.[10] As to policy, the court noted that this interpretation fully effectuates the statutory purpose of prohibiting relators from undertaking actions contrary to the public interest because, if this provision were not enforced, there is a danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States, and,

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[8] *See United States ex rel. Michaels v. Agape Senior Community, Inc.*, 848 F.3d 330, 339–40 (4th Cir. 2017) (noting that, instead of "freeing relators to maximize their own rewards at the public's expense, Congress granted the Attorney General the broad and unqualified right to veto proposed settlements of qui tam actions" and agreeing "with the district court, and with the Fifth and Sixth Circuits, that the Attorney General possesses an absolute veto power over voluntary settlements in FCA qui tam actions"); *United States ex rel. Smith v. Lampers*, 69 Fed. Appx. 719, 721 (6th Cir. 2003) (the language of Subsection (b)(1) "means that a relator may not seek a voluntary dismissal of any qui tam action under the FCA without the government's consent") (citation omitted); *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000) ("We now join the Fifth Circuit in rejecting the Ninth Circuit's analysis, and hold that a relator may not seek voluntary dismissal of any *qui tam* action without the Attorney General's consent."); *Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997).

[9] 117 F.3d at 159.

[10] *Id.*

thus, Section 3730(b)(1) allows the government to resist these tactics and protect its ability to prosecute matters in the future.[11]

The U.S. Court of Appeals for the Ninth Circuit, in *United States ex rel. Killingsworth v. Northrop Corp.,*[12] reached a different conclusion, finding that the government's veto power extended to only the initial 60-day (or extended) pre-intervention review period and that the government could not unilaterally veto a settlement between relator and defendant when the government had not intervened in the action. Specifically, the court noted that, after the relator files the action, the government, under Subsections (b)(2)–(4), may elect to intervene and proceed with the action within 60 days, or seek an extension of the 60-day period, prior to determining whether to proceed with the action or note its declination. If the government declines to intervene during this time frame, the relator has a right to proceed with the action. If the relator proceeds, it has, under Subsection (b)(4), the "right to conduct the action." The court ruled that the "right to conduct a *qui tam* action obviously includes the right to negotiate a settlement in that action," and, therefore, the government, under these circumstances, does not possess a unilateral veto and does not have the ultimate power to control litigation brought in its name where it is the alleged victim of the fraud.[13]

Section 3730(C)(2)(A) and the Government's Authority to Dismiss *Qui Tam* Lawsuits That Do Not Advance the Government's Interest

Section 3730(c)(2)(A) provides that "[t]he Government may dismiss [a *qui tam*] action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."[14] Congress created this provision in 1986 and did not amend it in its 2009 and 2010 FCA amendments. Although Subsection (c)(2)(A) provides that the government may dismiss the action notwithstanding the relator's objection, the provision does not indicate the standard that courts will use to review the government's exercise of prosecutorial discretion to dismiss an action filed in its name.

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[11] *Id.* at 160. The rule does not apply to involuntary dismissals. *See, e.g., United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 91 (2d Cir. 2008) ("While the False Claims Act appears to bar dismissal of *qui tam* actions absent the Attorney General's consent, . . . we have previously construed this provision to apply only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal.") (citations and internal quotation omitted).

[12] 25 F.3d 715 (9th Cir. 1994).

[13] *Id.* at 722.

[14] 31 U.S.C. § 3730(c)(2)(A).

Courts have split regarding the appropriate standard to use in evaluating the government's dismissal motion. The D.C. Circuit, relying upon the separation-of-powers doctrine; the government's broad discretion in initiating or continuing a criminal prosecution; and the language of § 3730(c)(2)(A), which grants the "Government," not the court, unilateral authority to "dismiss the action notwithstanding the objections of the person initiating the action," ruled that the government has what amounts to "an unfettered right to dismiss" a *qui tam* action.[15] The court reasoned that nothing "in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States. The provision neither sets 'substantive priorities' nor circumscribes the government's 'power to discriminate among issues or cases it will pursue.' "[16] The court noted that, although "the government conceded at oral argument that there may be an exception for 'fraud on the court,' " there was "no evidence of that sort . . . presented," and, thus, the court had no occasion to determine whether this exception would apply under § 3730(c)(2)(A).[17]

By contrast, the Ninth Circuit applies a "two-step analysis . . . to test the [government's] justification for dismissal: (1) identification of a valid govern-

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[15] *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). In *Swift*, the relator, a Department of Justice lawyer, contended that three Department of Justice ("DOJ") Office of Legal Counsel employees had conspired to defraud the government of $6,169.20 using falsified time sheets and leave sheets.

[16] *Id.* at 253 (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 (1985)). Although, in *Swift*, the court created this rule in the context of a case where the defendants had not been served the complaint, the D.C. Circuit subsequently applied *Swift's* interpretation of § 3730(c)(2)(A) in a case where the defendant had been served. *See Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). In *Hoyte*, the relator had contended that the defendant, the American National Red Cross, had failed to report that it had mishandled blood supplies. The government moved to dismiss under § 3730(c)(2)(A). The court, finding that, as in *Swift*, "there is no evidence . . . of fraud on the court or any similar exceptional circumstance to warrant departure from the usual deference we owe the Government's determination whether an action should proceed in the Government's name," affirmed the district court's dismissal. *Id.* at 189.

[17] *Id.* A fraud on the court is generally described as a "a scheme to interfere with the judicial machinery performing the task of impartial adjudication," which "is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury" and includes as examples "the bribery of a judge or the knowing participation of an attorney in the presentation of perjured testimony." *United States ex rel. Berg v. Obama*, 656 F. Supp. 2d 107, 109, n. 1 (D.D.C. 2009) (citations omitted), *aff'd,* 2010 U.S. App. LEXIS 13599 (D.C. Cir., June 30, 2010). DOJ, in its recent internal memorandum regarding Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (dated Jan. 10, 2018), has stated that it believes that the D.C. Circuit's unfettered discretion standard is the appropriate standard. *Id.* at 7.

ment purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the United States satisfies the two-step test, the burden switches to the relator to demonstrate that the dismissal is fraudulent, arbitrary and capricious, or illegal."[18]

The FCA Statute of Limitations Tolling Provision

The FCA has a general statute of limitations of six years, but also a tolling provision, 31 U.S.C. § 3731(b)(2), under which the plaintiff may extend the statute of limitations for up to 10 years if the action is brought within three years of when an "official of the United States" knew, or should have known, of facts material to a right of action.[19] Congress created the tolling provision in 1986. Although it subsequently amended the FCA's statute of limitations in other respects, Congress did not revise this tolling provision in its 2009 and 2010 amendments.[20] The circuit split has focused on whether the relator can

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[18] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir. 1998), *aff'g sub nom. United States ex rel. Sequoia Orange Co. v. Sunland Packing*, 912 F. Supp. 1325 (E.D. Cal. 1995). *Accord United States ex rel. Ridenour v. Kaiser-Hill Comp., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005) (adopting the Ninth Circuit standard in *Sequoia Orange* and stating that that standard is correct because it "recognizes the constitutional prerogative of the Government under the *Take Care Clause*, comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss"). *See also United States ex rel. Wickliffe v. EMC Corp.*, 473 Fed. Appx. 849 (10th Cir. 2012). In *Wickliffe*, the government moved to dismiss the relator's action because it had settled a related action and believed that the relator's action was barred under the first-to-file rule. *Id.* at 850. Because the defendant had not been served, the court considered it an open question whether its prior precedent in *Ridenour* controlled, and considered whether to apply the *Sequoia Orange* standard or the *Swift* unfettered right rule. *Id.* at 853. Because *Sequoia Orange* presented a broader standard, and the court determined that, even under that broader standard, the relator's action could not survive, the court applied the *Sequoia Orange* rule. *Id.* (finding that dismissal was appropriate because it is "rationally related to the government's interest in ending a duplicative action that would result in no recovery for the government"). Other courts have similarly ruled, in light of the circuit split, to apply *Sequoia Orange* because they found that, even under that broader standard, the case was subject to dismissal. *See, e.g., United States ex rel. Nicholson v. Spigelman*, No. 10 C 3361, 2011 U.S. Dist. LEXIS 74258, at *4–5 (N.D. Ill. July 8, 2011) (finding that dismissal rationally related to the government's interest when the government contended that the actual damages alleged were $320 and that, even if statutory penalties and treble damages are added to that amount, the burdens on the government of monitoring the case, filing briefs to clarify its position on questions of law, responding to discovery requests and preparing government officials for depositions would cost the government more in expenses than it could recover). In *Swift*, the D.C. Circuit rejected the *Sequoia Orange* rational basis test because it did not believe that the FCA provided the judiciary with general oversight of the Executive's Judgment. *See id.*, 318 F.3d at 253.

[19] 31 U.S.C. § 3731(b).

[20] In 2009, Congress clarified when the government's complaint would relate back to the

be characterized as an "official of the United States" and thereby potentially extend the six-year FCA statute-of-limitations period.

The Fourth and Tenth Circuits, based upon the provision's plain language and purpose, hold that the provision does not apply to the relator because the relator is not an "official of the United States," and, thus, the relator has a six—year statute of limitations.[21] Under this line of reasoning, courts have ruled that the tolling provision applies only if the government has intervened in the action because Section 3731(b)(2) applies to only government officials.

Conversely, the Ninth Circuit has ruled, in *United States ex rel. Hyatt v. Northrop Corp.*,[22] that relators may invoke equitable tolling if the relator did not know, and reasonably should not have known, of a right to action more than three years before bringing the action. In *Hyatt*, the Ninth Circuit ruled that the plain language of Section 3731(b)(2) dictated that it apply to relators because "there is nothing in the entire statute of limitations subsection which differentiates between private and government plaintiffs at all. If Congress had intended the tolling provisions of § 3731(b)(2) to apply solely to suits brought

relator's complaint for statute-of-limitations purposes.

21 *United States ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 293 (4th Cir. 2008) ("We hold that Section 3731(b)(2) extends the FCA's statute of limitations beyond six years only in cases in which the United States is a party. It would be problematic to read the text of the statute any other way. Section 3731(b)(2) refers only to the United States—and not to relators. Thus, Congress intended Section 3731(b)(2) to extend the FCA's default six-year period only in cases in which the government is a party, rather than to produce the bizarre scenario in which the limitations period in a relator's action depends on the knowledge of a nonparty to the action."); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725–26 (10th Cir. 2006) (finding that § 3731(b)(2) "was not intended to apply to private *qui tam* relators at all. We recognize that this interpretation creates the possibility that a relator who learns of fraudulent activity seven years after it occurs would be barred from bringing suit. However, this result is more in accord with the FCA's stated purpose of encouraging prompt action on the part of relators and would discourage those relators who chose to delay on bringing an FCA claim, or refrain from informing the government of the fraud, to allow increasing damages to accrue. Congress cannot have intended such a result.").

22 91 F.3d 1211 (9th Cir. 1996), *vacated on other grounds*, 117 S. Ct. 2476 (1997). *United States ex rel. Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9th Cir. 1997) (ruling that the tolling provision applies for the benefit of the relator, as well as the government, and that the three-year extension begins to run upon the relator's knowledge of false claims). In ruling that the relator may avail itself of the three-year tolling provision, the 9th Circuit concluded that the relator did not need to demonstrate fraudulent concealment in order to invoke the tolling provision. *See Lehman Brothers*, 123 F.3d at 1308 ("Although fraudulent concealment forms part of the historical rationale for the doctrine of equitable tolling, neither § 3731(b)(2) nor [Ninth Circuit precedent] imposes a requirement that a *qui tam* plaintiff must allege fraudulent concealment to actuate tolling under the FCA.").

by the Attorney General, it could have easily expressed its specific intent."[23] The court concluded that, because the relator stands in the shoes of the government, the statute of limitations is tolled if the relator did not reasonably know of a right to action within three years of the time in which the action was filed.[24]

Several district courts have adopted a third line of precedent, which is that the relators may invoke equitable tolling if the official of the United States charged with responsibility to act does not know, and should not know, of facts

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[23] *Id.* at 1214.

[24] Of course, although not addressed by the court, the designation of a relator as an "official of the United States" would be contrary to the Constitution's Appointments Clause. *See, e.g.*, *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1041–42 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757–59 (9th Cir. 1993); *United States ex rel. Givler v. Smith*, 775 F. Supp. 172, 179 (E.D. Pa. 1991); *see also United States ex rel. Colunga v. Hercules Inc.*, No. 89-cv-954B, 1998 U.S. Dist. LEXIS 21811, at *12 (D. Utah Mar. 6, 1998) (stating that "the plain meaning of 'official of the United States' means a person holding office of the United States . . . . That is not the relator in an FCA case. The relator is not an official of the United States. If a relator was an official of the United States the Appointments Clause . . . might be violated by the statute.").

Courts have recognized that relators operate with different motives than United States officials. As the Fifth Circuit noted in *United States ex rel. Foulds v. Tex. Tech Univ.*, 171 F.3d 279 (5th Cir. 1999), relators can never be deemed to be "responsible federal officers," and, thus, Congress could not have delegated to relators the United States' exemption from Eleventh Amendment restrictions on suing states, because relators pursue private profit rather than the public good:

> *Qui tam* plaintiffs cannot qualify as surrogates of "responsible federal officers" who have the right to represent the sovereign to sue the respective states. Indeed, the Supreme Court has recognized this fact. In a recent case, it stated that, "[a]s a class of plaintiffs, *qui tam* relators are different *in kind* than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 . . . (1997) (unanimous opinion) (emphasis added). Importantly, the Supreme Court specifically noted "[t]hat [just because] a *qui tam* suit is brought by a private party 'on behalf of the United States,' does not alter the fact that a relator's interests and the Government's do not necessarily coincide." *Id.* at 1877 n.5.

Foulds, 171 F.3d at 293. This view of *qui tam* plaintiffs is not new, and the court drew upon history to emphasize its point:

> Furthermore, Sir Edward Coke's class description of *qui tam* plaintiffs hardly suggests a historical understanding of relators as responsible representatives of the sovereign. He described the common informers who institute penal actions for the government as "viperous vermin" that prevent "[t]he King [from] commit[ting] the sword of his justice or the oil of his mercy." Gerald Hurst, *The Common Informer*, 147 CONTEMP. REV. 189–90 (1935). In short, these descriptions of the historical *qui tam* plaintiff undermine the concept that she is deputized to stand in for the "responsible federal officers" to whom the states have surrendered their sovereign rights. *Id.*

material to the right of action more than three years prior to the relator bringing the action.[25] It is not addressed here, however, because no circuit court, to date, as adopted this precedent.

RESOLVING THESE CIRCUIT SPLITS

In resolving these circuit splits regarding the proper allocation of power between the relator and the United States, courts should apply the FCA's plain language to rule that:

- Under Section 3730(b)(1), the United States must indeed "consent to the dismissal" and that the relator does not have the power to overrule the government.
- Under Section 3730 (c)(2)(A), the United States has essentially unfettered discretion to dismiss litigation that is brought in its name.
- Under the FCA statute-of-limitation tolling provision, consistent with its language, the tolling provision's express language is triggered from the lack of knowledge of a "responsible government official" and thus can apply to only the United States, not the relator, and that the relator has a six-year statute of limitations.

Not only are these conclusions consistent with the FCA's plain language, but they also effectuate the FCA's purpose, which, as multiple courts have recognized, is to advance the government's interest, and not merely to enrich relators or their counsel.[26] Moreover, as the Supreme Court has recognized, in

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[25] *See, e.g., United States ex rel. Pogue v. Diabetes Treatment Ctrs* , 474 F. Supp. 2d 75 (D.D.C. 2007). *Accord United States ex rel. Wood v. Allergan, Inc.*, No 10-CV-5845, 2017 U.S. Dist. LEXIS 50103, at *45–46 (S.D.N.Y. Mar. 31, 2017) (following *Pogue*¸ noting that, although "there are strong arguments on both sides of this divide, the Court finds the thorough and well-reasoned textual analysis of Judge Lamberth in *Pogue* most convincing") (citation omitted); *United States ex rel. Williams v. City of Brockton*, No. 12-cv-12193, 2016 U.S. Dist. LEXIS 178032, at *27 (D. Mass. Dec. 23, 2016); *United States ex rel. Colunga v. Hercules Inc.*, No. 89-cv-954B, 1998 U.S. Dist. LEXIS 21811 (D. Utah Mar. 6, 1998). The Tenth Circuit disavowed *Colunga* in *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726 (10th Cir. 2006). *See* 472 F.3d at 726 (finding that the court's construction of the FCA's statute of limitations would run afoul of the "absurdity doctrine" in that the FCA's statute of limitations could not rationally turn on the knowledge of a nonparty). Aside from the "absurdity doctrine," another court referred to this type of analysis as "bizarre," *United States ex rel. Sanders v. N. Am. Bus. Indus.*, 546 F.3d 288, 293 (4th Cir. 2008), and another referred to it as "tortured." *See United States ex rel. Hunt v. Cochise Consultancy, Inc.*, No. 5:13-cv-02168, 2016 U.S. Dist. LEXIS 56518, at *7 (N.D. Ala. Apr. 28, 2016).

[26] *See, e.g., United States v. Health Possibilities*, P.S.C., 207 F.3d 335, 340 (6th Cir. 2000) ("The FCA is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud against public monies") (citation omitted); *United States v. Northrop*

FCA actions, the United States is the real party in interest.[27] The Supreme Court has also recognized that, as a class, relators are different in kind than the United States in that they pursue their own private financial gain and not the public interest.[28]

Given that the purpose of the statute is to advance the government's interest, that the government is the victim of the fraud and is the real party in interest, and that the government is charged with pursuing the public good and not the private interest of the relator, the statute should be construed in accordance with its plain language to mandate that the United States must expressly consent to the termination of any FCA litigation and have the unfettered right to dismiss any *qui tam* action that is not in the government's interest and that relators cannot be deemed to be responsible government officials for purposes of tolling the statute of limitations.

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Subsequent parts of this article, which will appear in upcoming issues of *Pratt's Government Contracting Law Report*, will explore circuit splits addressing whether relators should be permitted to advance actions when they fail to report non-public information to the government, the False Claims Act and Rule 9(b), and offer conclusions.

Corp., 59 F.3d 953, 968 (9th Cir. 1995) ("The private right of recovery created by the provisions of the FCA exists not to compensate the *qui tam* relator, but the United States. The relator's right to recovery exists solely as a mechanism for deterring fraud and returning funds to the federal treasury.").

27 *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 930 (2009) (United States is "a real party in interest" in a case brought under the FCA.).

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