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PULLING THE PLUG ON HEALTH CARE FRAUD: THE FALSE CLAIMS ACT AFTER ROCKWELL AND ALLISON ENGINE

Matthew S. Brockmeier[*]

I. INTRODUCTION

Healthcare costs today in American are among the highest of any industrialized nation. The United States Department of Health and Human Services (HHS), the primary governmental organization responsible for health care spending and administration, spent over $650 *billion* in fiscal year 2007.[1] Notably, that total includes only *government* spending, and does not include the cost of private healthcare, which accounts for a large portion of overall expenditures. In 2006 health care spending in the United States exceeded $2.0 trillion for the first time.[2] In 2007, health care spending reached $2.2 trillion.[3] Health care spending reached 16.2 percent of the gross domestic product in 2007, up from 16 percent in 2006, according to the study. Further, health care spending still is increasing at a faster rate than annual GDP growth,[4] and national health spending is expected to continue to grow to account for a larger percent of our Gross Domestic Product with the impending transition of baby-boomers into the Medicare program.[5]

The costs are just as incredible when viewed at the level of the individual healthcare consumer. In 2002 Americans spent $5,267 per capita for prescription drugs, hospital stays and physician visits, compared with $3,446 per capita for Switzerland, the next highest

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[1] Charles E. Johnson, *United States Department of Health and Human Services: Message from the Chief Financial Officer*, Nov. 15, 2007, *available at* http://www.hhs.gov/afr/financial/message/cfomessage.html (last visited Apr. 6, 2009).

[2] Micah Hartman et al., *National Health Spending in 2007: Slower Drug Spending Contributes to Lowest Rate of Overall Growth Since 1998*, 28 HEALTH AFFAIRS 246, 247 (Jan./Feb. 2009).

[3] *Id.* at 246.

[4] *Id.* at 246, 259-60.

[5] Sean Keehan et al., *Health Spending Projections Through 2017: The Baby-Boom Generation is Coming to Medicare*, 27 HEALTH AFFAIRS w145, w145 (Feb. 26, 2008).

spender.[6] In comparison, the average total cost among other similarly developed nations was $2,193.[7] By the year 2006, that total had risen to $7,025.90 per American.[8] That amount has continued to increase, reaching about $7,421 per person in 2007.[9]

Fraud and abuse in the healthcare industry are rampant and contribute significantly to the exorbitant costs of health care in this country. Estimates vary widely, but it is indisputable that the cost of fraud each year is in the billions. One organization estimates that of the nation's annual health care outlay, at least 3 percent - or $68 billion in calendar-year 2008 - is lost to outright fraud.[10] Other estimates calculated by government and law enforcement agencies place the loss as high as 10 percent of the annual outlay each year.[11] The costs of fraud, whatever the amount, are far-reaching; though "the immediate targets and victims of that fraud are private health payers and government-funded health plans, all of us ultimately pay for the crime – through higher health insurance premiums (or fewer benefits) for employers and individuals, higher taxes, and higher insurance co-payments for privately and publicly insured patients."[12]

As healthcare costs in the United States continue to skyrocket, Americans are demanding legislation and enforcement mechanisms to combat the fraud and abuse that are a leading cause of the exorbitant costs of healthcare. Among the most effective tools currently at the government's disposal is the False Claims Act ("FCA").[13] Since Congress amended the False Claims Act (FCA) in 1986, the government has recovered over $15 billion from fiscal years 1987 through 2005.[14] Notably, more than 75% of these recoveries were from

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[6] Gerard F. Anderson et al., *Health Spending in the United States and the Rest of the Industrialized World*, 24 HEALTH AFFAIRS 903, 904(July/Aug. 2005)

[7] *Id.* at 905.

[8] Keehan et al., *supra* note 5, at w146.

[9] Hartman et al., *supra* note 2, at 246.

[10] National Health Care Anti-Fraud Association, *The Problem of Health Care Fraud*, http://www.nhcaa.org/eweb/DynamicPage.aspx?webcode=anti_fraud_resource_centr &wpscode=TheProblemOfHCFraud (last visited Apr. 4, 2009).

[11] *Id.*

[12] U.S. GEN. ACCOUNTING OFFICE, MEDICARE: HEALTH CARE FRAUD AND ABUSE PROGRAM FINANCIAL REPORT FOR FISCAL YEAR 1997 (1998), *available at* http://www.gao.gov/archive/1998/ai98157.pdf.

[13] 31 U.S.C §§ 3729-3733 (2000).

[14] U.S. GEN. ACCOUNTING OFFICE, INFORMATION ON FALSE CLAIMS ACT LITIGATION (Jan. 31, 2006), *available at* http://www.gao.gov/new.items/d06320r.pdf.

health care entities.[15] Although the use of the FCA in combating health care fraud is not new, its use has skyrocketed to the extent that by 1998, over half of all *qui tam* actions involved the Department of Health and Human Services.[16] The Department of Justice reported that in fiscal year 2007 alone, just under $2 billion was recovered under the federal False Claims Act- a conservative estimate when one considers that the Department of Justice data does not include the billions of dollars returned to the states resulting from civil trials or criminal fines imposed as a direct consequence of False Claims Act filings and prosecutions.[17]

An important provision of the False Claims Act authorizes what are known as *qui tam* actions. *Qui tam* is an abbreviation for "*qui tam pro domino rege quam pro seipso,*" which means "he who as much for the king as for himself." These actions authorize private citizens to sue in the name of the government and share in any resulting damages. *Qui tam* suits have a long history and existed long before this country was founded. The provisions first gained popularity in thirteenth-century England as a supplement to ineffective public law enforcement.[18] At least as early as 1692, the American colonies allowed citizens to sue on behalf of the government.[19] Of the $21 billion recovered by the government between 1986 and 2008 under the Act, over 63 percent, or $13.7 billion, was recovered in cases filed under the FCA's *qui tam* provisions.

As of 2007, there were over 630 *qui tam* health care cases under seal with the government agencies that investigate and prosecute them.[20] Medicare and Medicaid are implicated in the overwhelming

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[15] *See*, Press Release, Department of Justice, *Justice Department Recovers $2 Billion for Fraud Against the Government in FY 2007: More than $20 Billion Since 1986*, (Nov. 1, 2007) *available at* http://www.usdoj.gov/opa/pr/2007/November/07_civ_873.html (last visited Apr. 4, 2009).

[16] U.S. DEP'T OF JUSTICE, HEALTH CARE FRAUD REPORT: FISCAL YEAR 1998, *available at* http://justice.gov/criminal/fraud/docs/reports/1998/heatlhcare.pdf.

[17] U.S. DEP'T OF JUSTICE, FRAUD STATISTICS – OVERVIEW: OCT. 1, 1986 – SEPT. 30, 2008, *available at* http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm (last visited Apr. 4, 2009). See Appendix for a more complete summary.

[18] JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.08 (2d ed. 2001).

[19] CLAIRE J. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT (1st ed. 2004) § 2:5.

[20] Cases remain sealed to assist in their investigation and prosecution. Responses of United States Attorney General Alberto Gonzalez to Questions for the Record Posed

majority of these cases, which can and do result in multiple million dollar settlements or judgments. Recent litigation statistics demonstrate the potential magnitude of FCA *qui tam* claims.[21] The largest *qui tam* recovery to date occurred in 2006, when the government settled claims against the hospital operator Tenet Health Care for $900 million.[22] The second largest, a $730 million recovery from HCA- The Healthcare Company, the largest for-profit hospital chain in the United States, occurred in 2000.[23] Most recently, in a *qui tam* action against pharmaceutical giant Merck, arising from charges that it routinely overbilled the government for some of its most popular drugs, Federal authorities obtained a $650 million settlement resulting from two separate *qui tam* actions. The first was obtained in the U.S. District Court for the Eastern District of Pennsylvania and the other in the U.S. District Court for the Eastern District of Louisiana; both involved the popular cholesterol medications Zocor and Mevacor, the painkiller Vioxx, and the antacid Pepcid.[24] According to the Department of Justice, this was the third largest health care fraud recovery ever.[25] As the examples above clearly show, *qui tam* actions under the False Claims Act have become a powerful tool for exposing and prosecuting fraud. However, examples of its efficacy notwithstanding, a considerable degree of confusion regarding the False Claims Act remains in the courts. Since the most recent amendment of the False Claims Act was passed more than 20 years ago, the lower courts have struggled to interpret the law in a cohesive manner.

One particularly incoherent area of the law involves the interpretation of what is known as the "Public Disclosure Bar."[26] The Public Disclosure Bar, which has existed in one form or another since

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to Former Attorney General Gonzales Following the July 24, 2007, Senate Committee on the Judiciary Hearing Regarding DOJ Oversight. *available at:* http://www.cnss.org/SJC%20QFRs%20-%20July%2018%202006%20Hearing%20Responses-DOJ%20FINAL-011807.pdf

[21] *See generally* Carrie Johnson, *Merck to Pay $650 Million in Medicaid Settlement*, WASH. POST, Feb. 8, 2008, at D1.

[22] Press Release, U.S. Dep't of Justice, Tenet Health Care Corporation to pay U.S. more than $900 Million to Resolve False Claims Act Allegations (June 29, 2006), *available at*: http://www.usdoj.gov/opa/pr/2006/June/06_civ_406.html.

[23] TAXPAYERS AGAINST FRAUD, TOP 20 CASES FALSE CLAIMS CASES, http://www.taf.org/top20.htm.

[24] Linda A. Johnson, *Merck settles third largest health-care fraud case*, DAILY HERALD, Feb. 8, 2008.

[25] *Id.*

[26] 31 U.S.C. § 3730(e)(4)(A) (2000).

1943, limits the jurisdiction of federal courts to hear *qui tam* actions based on "allegations or transactions" which have previously been previously disclosed publicly via certain hearings, reports, or investigations, or in the media, unless the plaintiff is the "original source" of the information.[27] Another area which has engendered a great deal of confusion involves the so-called "presentment" requirement contained in the statute and the requisite level of intent under the Act.[28] Under certain provisions of the Act, the government or a *qui tam* relator is required to show that the claim was actually presented to the government or a government official; in others, though, presentment is not required.

The divergent lower court interpretations of the various elements of the Public Disclosure Bar and other False Claims Act provisions have resulted in a confusing and enigmatic body of case law in an area where consistency and clarity are paramount. Until recently, the United States Supreme Court seemed unwilling to address this issue. In 2007, however, the Supreme Court addressed for the first time the meaning of "original source" for purposes of the False Claims Act's Public Disclosure Bar[29], and more recently addressed the troublesome FCA provision involving presentment.[30]

However, these decisions have intimated a certain reluctance by the Supreme Court to effectuate the statute's purpose by affording it a broad interpretation, if not an outright hostility towards the Act. If the False Claims Act is to remain an effective tool in the fight against fraud and corruption in the health care arena, steps must be taken, by the legislature if not the judiciary, to ensure that the law continues to function in such a way that the viability of *qui tam* suits is maintained and the potential of a powerful weapon against fraud is realized.

II. THE ORIGINS OF THE FALSE CLAIMS ACT

The Federal Civil False Claims Act (which was originally known by a number of names, including the Informer's Act, Lincoln's Law, or the *Qui Tam* statute) was enacted in 1863 to recruit civilian assistance in preventing corruption and fraud in the sale of provisions and supplies by contractors to the Union Army during the Civil War.

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[27] *Id.*

[28] *See* 31 U.S.C. § 3729(a)(1) – (a)(3) (2000).

[29] Rockwell Int'l. Corp. v. United States, 549 U.S. 457 (2007).

[30] Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123, 2125-29 (2008).

Anecdotes from the period abound and include tales of war profiteers defrauding the government by shipping boxes of sawdust in place of supplies and by selling the same horses to the government more than once.[31] Another enterprising rogue bought defective rifles from the government for $17,486 and immediately resold them to a different quartermaster for $109,912.[32]

Congress sought to eradicate these unbelievably fraudulent practices by enlisting citizens to aid the federal government in policing and prosecuting those who would take advantage of their own government. The original *qui tam* provisions of the False Claims Act were "passed 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."[33] As originally enacted, the statute imposed liability for virtually any effort to defraud the government. The original statute also included *qui tam* provisions authorizing private individuals to bring suit on behalf of the government and to share in any recovery.[34]

However, the original statute was also highly susceptible of abuse, as demonstrated by the seminal case, United States ex rel. Marcus v. Hess. In that case, a relator brought suit against respondent electrical contractors for defrauding the government through collusive bidding on Public Works Administration projects in Pittsburgh during the Great Depression.[35] The defendants had been indicted prior to the filing of the action for defrauding the government under the criminal counterpart of the Act.[36] On a plea of *nolo contendre*, they were fined $54,000.[37] Petitioner then, according to the government, filed his own civil *qui tam* suit based on information obtained from the indictment.[38] The government and the defendants argued that Petitioner should not have been permitted to bring suit. The Supreme Court, though, disagreed. The Court reasoned that "neither the language of the statute nor its history lends support to the contention made by respondents and

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[31] *See* Cong Globe, 37th Cong, 3d Sess. 955 (Feb 14, 1863) (Sen. Howard) (providing examples of wartime fraud).
[32] United States ex rel. Marcus v. Hess, 127 F.2d 233, 236 n.14 (3rd Cir. 1942).
[33] United States v. Griswold, 24 F. 361, 366 (D.Or. 1885).
[34] Act of March 2, 1863, ch. 67, § 6, 12 Stat. 698. (1863).
[35] *Hess*, 127 F.2d at 234.
[36] The criminal provisions are now codified in 18 U.S.C.§ 287 (1994).
[37] United States ex rel. v. Hess, 317 U.S. 537, 545 (1942).
[38] *Id.*

the government."[39] The Court further stated that, "even if, as the government suggests, the petitioner has contributed nothing to the discovery of his crime, he has contributed much to accomplishing one of the purposes for which the Act was passed." The Court rejected the policy arguments offered by the government against permitting "profiteering" as irrelevant, noting that the suit resulted in a substantial recovery for the government ($150,000 in 1940s dollars), and that the recovery was obtained at the risk of considerable loss to petitioner, since the statute explicitly provided that petitioner bear the full cost of litigation.[40] The Court concluded that the argument was "directed solely at what the Government thinks Congress should have done rather than at what it did," and counseled that such policy concerns should be directed at Congress, because the Act itself was clear in its authorization of Petitioner's suit. [41]

Public outcry over the resulting decision soon prompted Congress to reconsider the law, and in 1943, eleven months after the decision in Hess was handed down, the False Claims Act was amended to limit the availability of *qui tam* suits.[42] The primary means by which this was achieved was the insertion of a provision that would come to be known as the "Public Disclosure Bar."[43] That provision limited Courts' jurisdiction to hear certain cases, barring *qui tam* suits that were "based on evidence or information the Government had when the action was brought."[44] Congress' attempts to deter parasitic *qui tam* suits proved to be too effective, though. The result in United States ex rel. Wisconsin v. Dean exemplifies the effect that the 1943 Amendments on the viability *qui tam* actions.[45] In that case, the State of Wisconsin brought suit against a doctor for making fraudulent claims to Medicaid. Though the fraud had been discovered by Wisconsin's own investigation, it had reported it to the federal government as required by the terms of its participation in Medicare's reimbursement program. Despite holding that "the information upon which the instant case is based was sufficiently in the possession of the United States to enable the federal government to adequately investigate the case and make a decision whether to prosecute," the district court interpreted the

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[39] *Id.* at 546.
[40] *Id.* at 545-46.
[41] *Id.*
[42] Act of Dec. 23, 1943, ch. 377, § 1, 57 Stat. 608, 609 (1943) (hereinafter 1943 Act).
[43] 31 U.S.C. § 3730(e) (2000).
[44] 1943 Act,, 57 Stat. at 608.
[45] United States ex rel. Wisconsin v. Dean, 729 F.2d 1100, 1104 (7th Cir.1984).

legislative history of the False Claims Act as conferring jurisdiction and denied defendant's motion to dismiss. In reversing, the Court of Appeals for the 7th Circuit declined to read an exception into the Public Disclosure Bar, finding that the legislative history reflected a compromise between the Senate and the House and indicated that the bar was intended to be absolute.[46] Absent clearly expressed legislative intention, the court refused to read an exception into the statute that it believed was not supported by the legislative history based on policy alone.[47]

The Dean decision demonstrated the extent to which the 1943 Amendment had weakened the *qui tam* provisions and how much more difficult it had become to satisfy its jurisdictional requirements. *Qui tam* litigation subsequently became virtually nonexistent.[48] The 7th Circuit's decision in Dean prompted Congress to once again reconsider the Act, and resulted in the passage of the False Claims Amendment Act of 1986.[49] The revision was intended "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government... "[i]n order to make the statute a more useful tool against fraud in modern times."[50] The legislative history in both houses of Congress reveals a sense that fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud.[51] The amendments were intended to revitalize the False Claims Act's *qui tam* provisions and create incentives for private citizens with evidence of fraud to commit their time and resources to supplement the Government's efforts. They were also intended to "correct restrictive judicial interpretations which tended to thwart the effectiveness of the Act".[52]

The primary means by which the government sought to achieve these goals was the insertion of another provision, this time known as the "Original Source Exception."[53] The provision had originally been a

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[46] *Id.*
[47] *Id.*
[48] TAXPAYERS AGAINST FRAUD, WHY ARE TAF AND THE TAF EDUCATION FUND NEEDED?,
http://www.taf.org/whytaf.htm.
[49] Pub. L. No. 99-562, 100 STAT. 3153 (1986) (amending 31 U.S.C. § 3729).
[50] S. REP. NO. 99-345, at 1-2 (1986).
[51] United States ex rel. LaValley v. First Nat'l Bank of Boston, 707 F.Supp. 1351, 1355 (D.Mass.1988).
[52] S. REP. NO. 99-345, at 3-4, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-69.
[53] 31 U.S.C. § 3730(e)(4)(B) (2000).

part of the Senate's proposed amendment in 1943, but for whatever reason did not make it into the version that was enacted. Incidentally, had the proposed provision been law in 1984, when Dean was decided, the *qui tam* action would probably have been allowed.

The original source exception preserves jurisdiction for certain actions that would have previously been barred by the Public Disclosure Bar.[54] It essentially carves out an exception to the Public Disclosure Bar for actions in which the relator was the first to tell the government about the alleged fraud. In addition to the modification of the Public Disclosure Bar and the addition of the Original Source Exception, the 1986 Amendments also significantly enhanced the amount a whistleblower stood to recover in the event that a suit was successful, a maximum of 10% to up to 25%, in an effort to "allow and encourage assistance form the private citizenry" and "bolster the Government's fraud enforcement effort."[55] Congress also adopted a lower burden of proof and allowed *qui tam* plaintiffs to continue to participate in the actions after intervention by the government.[56]

III. THE CURRENT LAW

Under the current False Claims Act, those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds are liable for three times the government's damages plus civil penalties of $5,500 to $11,000 per false claim.[57] The Act encourages private citizens to seek out and report fraud by providing a monetary incentive in the form of a portion of the recovery and in doing so serves as a deterrent to would-be perpetrators of fraud. Private citizens who file qui tam actions are known alternatively as "relators," "plaintiffs," or "whistleblowers," but all three terms merely refer to any interested third party who brings action on behalf of the government.

In general, the False Claims Act covers fraud involving any federally funded contract or program, with the exception of tax fraud. Though the variety of fraudulent schemes that can come within the Act is limited only by the imaginations of perpetrators, some of the more common examples include private contractors falsifying test results or

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[54] 31 U.S.C. § 3730(e)(4)(A) (2000).
[55] S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.
[56] United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir.1991).
[57] 31 U.S.C. §§ 3729-3733 (2000).

other information regarding the quality or cost of products it sells to the Government, health care providers billing Medicare and/ or Medicaid for services that were not provided or that were unnecessary, or grant recipients charging the Government for costs not related to the grant.[58]

The two elements of the current statute that are central to this article are the Original Source Exception to the Public Disclosure Bar and the "presentment" requirement.

A. Public Disclosure Bar and the Original Source Exception

The Public Disclosure Bar and the Original Source Exception work in tandem to establish federal court jurisdiction over a *qui tam* action. The Public Disclosure Bar provision, altered slightly by the 1986 Amendment, now reads:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[59]

The Public Disclosure Bar provision was intended achieve one of the twin goals of the False Claims Act- rejecting suits which the government is capable of pursuing itself.[60] "Where a public disclosure has occurred, that authority is already in a position to vindicate society's interests, and a *qui tam* action would serve no purpose. Where, on the other hand, a transaction or an allegation of fraud has not been publicly disclosed, society benefits by creating a monetary incentive for a knowledgeable person, called a relator, to identify the problem, present his information to the government."[61]

There are four essential elements to be considered in determining whether the Public Disclosure Bar applies are: 1) whether

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[58] *See* TAF *supra,* note 48.
[59] 31 U.S.C. § 3730(e)(4)(A) (2000).
[60] *See* United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (noting twin goals of the Act).
[61] United States ex rel. Feingold v. AdminaStar Federal, Inc., 324 F.3d 492 (7th Cir. 2003)

or not there has been "public disclosure," 2) whether it was from an appropriate source, 3) whether the action is "based upon" the disclosure, and, 4) whether the action is based on qualifying "allegations or transactions." If, and only if, the requirements of the Public Disclosure Bar are satisfied does a Court move on to the Original Source Exception. The Exception reads:

> For purposes of this paragraph, "original source" means 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 which is based on the information.[62]

The Exception is used to determine whether, if there has been public disclosure, the relator is the original source. The fundamental elements of the provision are: 1) whether there is "direct & independent knowledge" 2) of the "information on which the allegations are based." The Original Source Exception is aimed at achieving the other primary objective of the Act- promoting those actions which the government is not equipped to bring on its own.[63] If a qui tam plaintiff qualifies as an original source, the action may proceed; if not, it is barred.

Although far from pellucid, at first glance the statute may not seem exceptionally vague or complex, at least compared to other legislation. However, as evidenced by the degree to which the lower courts diverge with respect to the interpretation of some relatively simple the statutory terms and by the amount of litigation the Act has generated, the precise meaning of the statute is elusive. Presumably attracted by the potential for treble damages, litigants across the country have forced the District and Circuit Courts to interpret virtually every word of every passage of the Act, without much guidance from the Supreme Court. The consequence is a body of law that is inconsistent, contradictory, and confusing, and which fails to maximize its potential to prevent fraud.

B. Presentment Under the False Claims Act

A second provision of the False Claims Act has assumed particular significance as of late- the "presentment" requirement.[64]

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[62] 31 U.S.C. § 3730(e)(4)(B) (2000).
[63] *Quinn*, 14 F.3d at 651.
[64] *See* 31 U.S.C. § 3729(a)(1)–(a)(3) (2000).

There are three provisions under which *qui tam* plaintiffs generally file. The first renders liable any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval"[65]. The second creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[66] The third establishes liability for any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid."[67]

Though the differences between the three provisions may at least initially appear to be slight and their structure relatively uncomplicated, courts have again managed to muddy the waters, reading words into the statute that aren't there, disregarding obvious Congressional intent, and basically having their way with the law. For instance, though the word "present" appears nowhere in 31 U.S.C. § 3729(a)(2), some court have nonetheless read a presentment requirement into that section, eliminating an important basis for liability.[68]

IV. SUPREME COURT AVOIDANCE & LOWER COURT INCONSISTENCY

For the first decade after its passage, the lower courts struggled with the confusing and vague statutory language of the *qui tam* provisions of the 1986 Amendments to the False Claims Act, the modification of the Public Disclosure Bar, and the statute's "presentment" requirement. Courts have wrestled with the meanings of statutory terms like "public disclosure,"[69] "allegations and transactions,"[70] "direct and independent,"[71] and "to get a false claim paid"[72] within the context of the newly amended statute since it was

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[65] 31 U.S.C. § 3729(a)(1) (2000).
[66] 31 U.S.C. § 3729(a)(2) (2000).
[67] 31 U.S.C. § 3729(a)(3) (2000).
[68] United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004)
[69] *See, e.g.*, United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992).
[70] *See, e.g.*, Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992) (no public disclosure occurred where government obtained relator's memorandum during discovery in qui tam suit).
[71] *See, e.g.*, United States ex rel. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17 (1st Cir. 1990) (quality assurance specialist for the Federal Government could not be an original source).
[72] 31 U.S.C. § 3729(a)(2) (2000).

enacted. Unfortunately, due to the volume of case law that has arisen under the Act, a comprehensive analysis of each of the Circuit splits, or even just those dealing with the Public Disclosure Bar, is simply beyond the scope of this article. Courts have been asked to interpret virtually every word of every provision of the Act at some point. However, the following sample of cases interpreting various elements of the Public Disclosure Bar and the "presentment" requirement more than adequately demonstrate how the conflicting Circuit Court decisions interpretations have fashioned a confusing and ineffectual body of law in need of judicial, if not legislative, clarification.

A. Public Disclosure Bar

1. "...based upon public disclosure of allegations or transactions..."

The False Claims Act's Public Disclosure Bar precludes *qui tam* actions "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."[73] Courts in several jurisdictions have considered whether or not claims were "based upon" publicly disclosed allegations or transactions, and prior to 2007, had come to different conclusions. Certain Circuits took a "relator-friendly" view, while others took a position more favorable to the government. The majority view was articulated first by the second Circuit, which held that a *qui tam* suit was "based upon" a public disclosure whenever the allegations in the suit and in the disclosure are the same, "regardless of where the relator obtained his information."[74] The Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits also addressed the same issue and came to their own similar, albeit distinct, conclusions.[75]

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[73] 33 U.S.C. § 3730(e)(4)(A) (2000).

[74] United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir.1992).

[75] *Accord,* United States ex rel. Mistick PBT v. Housing Auth., 186 F.3d 376, 388 (3d Cir.1999) (qui tam suit based upon disclosure if the disclosure "sets out" allegations or all essential elements of qui tam claim), *cert. denied,* 529 U.S. 1018, (2000); United States ex rel. McKenzie v. BellSouth Telecom., Inc., 123 F.3d 935, 940 (6th Cir.1997) ("based upon" public disclosure means "supported by" disclosure); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1017 (7th Cir.1999) (relevant facts disclosed in media after relator filed administrative complaint and

The minority view was adopted by the Fourth Circuit (and one panel of the Seventh Circuit in conflict with another panel, which held that "based upon" should be given its ordinary meaning of "derived from," so that the qui tam allegation must have resulted from the disclosure in order to bar jurisdiction.[76] The disparity and incoherence of the divergent Circuit interpretations of the same False Claims Act provision finally prompted the Supreme Court to intervene in 2007 when it granted certiorari to hear a case primarily involving the meaning of the term "based upon."[77] That case is discussed in more depth below.

2. "...based upon the *public* disclosure of allegations or transactions..."

Similarly, Courts have developed various divergent interpretations of the term "public" in the context of the Public Disclosure Bar. The split among the Circuits with respect to the meaning of "public" in this context has revolved around the statute required actual public disclosure, a narrow interpretation favoring *qui tam* plaintiffs, or whether the information is need merely be accessible to the public, a broad interpretation favoring defendants. The majority view, shared by the Seventh, Ninth, Tenth, and D.C. Circuits, is that that statute requires actual disclosure.[78] For example, in one case a relator brought a *qui tam* suit against a Bank for an allegedly false claim made upon the former federal Farmers' Home Administration ("FHA").[79] Relator had guaranteed a loan made to her son by the Bank.

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before relator filed qui tam suit; therefore qui tam jurisdiction barred unless relator an original source); United States ex rel. Biddle v. Bd. of Trustees of the Leland Stanford, Jr., Univ., 161 F.3d 533, 538 (9th Cir.1998); United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552-53 (10th Cir.1992) ("As a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.' "); Cooper v. Blue Cross and Blue Shield, 19 F.3d 562, 567 (11th Cir.1994) (per curiam) ("based upon" means "supported by"); U.S. ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 683 (D.C.Cir.1997).

[76] United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir.1994); United States v. Bank of Farmington, 166 F.3d 853, 863 (7th Cir.1999).

[77] Rockwell Int'l Corp v. United States, 127 S. Ct. 1397, 549 U.S. ___ (2007).

[78] United States v. Bank of Farmington, 166 F.3d 853, 863 (7th Cir.1999); United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519 (9th Cir. 1995); United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1518 (10th Cir. 1996); United States ex re. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994).

[79] *See Farmington*, 166 F.3d at 863.

The Bank, however, failed to disclose this to the FHA, and when the son defaulted, the Bank both filed a claim for the loss with the FHA and sued the relator to enforce her guaranty.[80] The Bank's failure to disclose the existence of a guarantor on the loan in its FHA claim was disclosed during discovery, and relator brought a *qui tam* FCA action against the Bank. The Seventh Circuit held that discovery material which has not been filed with the court and is only theoretically available upon the public's request is not "publicly disclosed" within meaning of False Claims Act.[81]

On the other hand, the Second and Third Circuits have adopted a narrow interpretation of the term "public."[82] For example, in the Second Circuit, federal investigators, armed with a search warrant, raided a corporate office to seize data about alleged fraud the company had committed.[83] The investigators informed employees of the ongoing fraud investigation, and one employee subsequently filed an FCA *qui tam* action. The Second Circuit held that because there was no significant distinction between the corporation's employees and members of the general public, the disclosure was "public," and the action was barred.[84]

The Circuit Courts have also disagreed about whether certain public documents are nonetheless not necessarily publicly disclosed for the purposes of the False Claims Act. Most Circuits have held that administrative reports received in response to Freedom of Information Act ("FOIA") requests constitute public disclosure under the False Claims Act, so *qui tam* actions based on such reports are barred by the Public Disclosure Bar.[85] However, the Ninth Circuit held that a document received in response to a Freedom of Information Act Public Request, though arguably made public through the administrative process, did not necessarily constitute public disclosure, and thus the relator, an animal rights activist, was not prevented by the Public Disclosure Bar from filing a qui tam action against a researcher

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[80] *Id.*
[81] *Id.*
[82] United States ex rel. Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir.1992); United States ex rel. Mistick PBT v. Hous. Auth., 186 F.3d 376, 383 (3d Cir. 1999)
[83] *See Doe*, 960 F.2d at 320.
[84] *Id.*
[85] *See* United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 176 (5th Cir. 2004); U.S. ex rel. Mistick PBT v. Housing Authority, 186 F.3d 376, 383 (3d Cir. 1999); *See also* United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717, 723-25 (6th Cir. 1999).

receiving public funding.[86] Certiorari was denied by the Supreme Court, presumably because the Ninth Circuit was the sole jurisdiction not to find the action barred, but the split remains, nonetheless.

3. "...based upon the public disclosure of *allegations or transactions...*"

Again, without the help of the Supreme Court, lower courts have articulated similarly divergent positions with respect to the meaning of the statute's use of the phrase "allegations or transactions." Generally, the Courts that have examined this element of the Public Disclosure Bar have taken a "relator-friendly approach," but despite reaching similar conclusions, the Courts have employed very different reasoning.

The majority view, adopted by the Second, Ninth, and District of Columbia Circuits, is that the provision should be narrowly interpreted in favor of the relator. For example, the Second Circuit held that "the Act bars suits based on publicly disclosed 'allegations or transactions,' not information."[87] The Court explained its narrow interpretation of the provision as a matter of simple statutory interpretation, stating that "the language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain."[88]

The First Circuit, on the other hand, has taken a less straightforward approach, completely ignoring the phrase as ambiguous and instead focusing on the statute as a whole, and the circumstances the Public Disclosure Bar seeks to avoid.[89] The First Circuit is of the opinion that Courts should determine whether an action is properly viewed as parasitic in applying the Public Disclosure Bar, the minority position among the Circuit Courts.[90]

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[86] United States ex rel. Haight v. Catholic Healthcare West, 445 F.3d 1147 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 725, (U.S. 2006).
[87] United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 648 (D.C. Cir. 1994).
[88] *Id.* at 654.
[89] United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine, 24 F.3d 320, 326 (1st Cir. 1994).
[90] *Id.*

4. The Proper Source of the "*Information*"

Lastly, the proper source of the information has been problematic among the federal courts in different jurisdictions. The Act enumerates three categories of sources of public disclosure that can trigger the Public Disclosure Bar: (i) a "criminal, civil, or administrative hearing," (ii) "a congressional, administrative, or [GAO] report, hearing, audit, or investigation," or (iii) the news media.[91]

For example, the Third Circuit, in Dunleavy v. County of Delaware, examined the second category. A relator sued the county of Delaware, PA for the return of over $16 million in Department of Housing and Urban Development funds made available to the County.[92] The court held in the context of the second category of FCA public disclosures that a report prepared by the county and submitted to the federal government as a condition of its grant did not constitute an "administrative report" for the purposes of the Act.[93] The Court examined that language of the Act and determined that the list of possible sources was exhaustive, and that because the report did not originate with the federal government, it was not the type of source contemplated by the False Claims Act.[94] As such, the Court held that the suit was not barred by the Public Disclosure Bar.[95] Two circuits that have not yet ruled on the question presented, the Tenth and Sixth Circuits, have indicated support for the Third Circuit's position.[96]

On the other hand, the Eighth, Ninth, And Eleventh Circuits have interpreted §3730(e)(4)(A)'s second category in squarely in conflict with the Third Circuit's holding in Dunleavy.[97] Each of those Circuits has held that the second category *does* include "administrative" sources originating with state *and* local governments. For example, the Ninth Circuit has held that a California state auditor's report qualified as source of public disclosure under False Claims Act, barring a *qui tam* suit based on that report alleging that the California Department of

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[91] 31 U.S.C. § 3730(e)(4)(A) (2000).
[92] United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734 (3d Cir. 1997).
[93] *Id.* at 746.
[94] *Id.* at 745.
[95] *Id.*
[96] *See* United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1518 (10th Cir. 1996); *See also* United States ex rel. Burns v. A.D. Roe Co., 186 F.3d 717, 725 (6th Cir. 1999).
[97] *See* Hays v. Hoffman, 325 F.3d 982, 988 (8th Cir. 2003); Battle v. Bd. of Regents, 468 F.3d 755, 762 (11th Cir. 2006) (per curiam); United States ex rel. Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006).

Rehabilitation and its employees had defrauded federal government by forcing the state government to purchase unnecessary and duplicative services.[98] The court explained that "the purpose of requiring public disclosures to come from these sources is to deter opportunistic relators from filing *qui tam* suits based on information already known to the federal government."[99]

To further muddy the waters, individual Courts have been inconsistent in their overall approach to the Act. Simply because a Court has adopted a narrow, *qui tam* plaintiff- friendly interpretation of one provision does not necessarily mean that it can be expected to interpret other provisions with a similar ideological bent. For example, despite the Third Circuit's narrow interpretation of the term "public" in Mistick, above, the same Court broadly construed the term "hearing," which appears in the same statutory provision.[100]

Not surprisingly, the precise meaning of the statutory language of the Original Source Exception has similarly perplexed Courts, which have enjoyed little help from the Supreme Court until very recently. As mentioned above, the Original Source Provision restores jurisdiction to a Court that would otherwise have been barred by the Public Disclosure Bar, if the relator is the "original source" of the information. The Act defines an "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 [the False Claims Act] which is based on the information."[101] Despite the emergence of numerous splits among the Courts of Appeals, the Supreme Court avoided granting certiorari to resolve any of these issues until 1996. The practical implications of this refusal were enormous, given the resources, both public and private, spent on the prosecution of False Claims Act litigation, and the potential recoveries involved. Three main areas of contention can be gleaned from the case law with respect to the Exception: 1) when does a relator's knowledge qualify as "direct and independent," 2) when a relator's disclosure has been adequate to qualify as an "original source," and 3) when exactly are allegations are "based" on the correct information. However, a comprehensive examination of the various lower Court interpretations of this provision is beyond the scope of this

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[98] United States ex rel. Bly-Magee v. Premo, 470 F.3d 914, 919 (9th Cir. 2006).
[99] *Id.* at 918.
[100] United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir.1991).
[101] 31 U.S.C. §3730(e)(4)(B) (2000).

article, as it will suffice to say that the Circuit Courts' Original Source jurisprudence is no more coherent than that of the Public Disclosure Bar.

B. The Presentment Debate

At this point, it should come as no surprise that courts have interpreted other provisions of the False Claims Act to the point where the most trivial details assume extraordinary significance. One example is the "presentment" requirement, and nowhere was this more readily apparent than in the case of U.S. ex rel. Sanders v. Allison Engine Co.. Allison involved a government contractor who built ships for the Navy alleged to have submitted inflated invoices to subcontractors.[102] The legal question concerned the meaning of the "presentment" requirement of the Act.[103] The Act states that "any person who ... knowingly presents, or causes to be presented... a false or fraudulent claim for payment" to a government employee is liable to the U.S. government for civil penalties.[104] In that case, the District Court construed §3729(a)(2) to require a showing that a false claim had actually been presented" to the government.[105]
The Sixth Circuit reversed, finding that the Act contained no such presentment requirement.[106] This holding was directly in conflict with a ruling by the Court of Appeals for the District of Columbia, which had previously held that any claim brought under the FCA requires evidence that an actual claim was presented to the government before liability can attach.[107] The Court in Totten determined that the claims were not "presented" to a government employee, and accordingly barred government recovery of funds lost to fraud.[108] It was precisely this Circuit Split that prompted the Supreme Court to grant certiorari in Allison, but as will soon be demonstrated, the Court's questionable decision may have done more harm than good.

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[102] United States ex rel. Sanders v. Allison Engine Co., 471 F.3d 610 (6th Cir. 2006).
[103] 33. U.S.C § 3729 (2000).
[104] 33 U.S.C. § 3729 (2000).
[105] *Allison*, 471 F.3d, at 611.
[106] *Id.*
[107] United States ex rel. Totten v. Bombardier Corp, 380 F.3d 488, 502 (D.C. Cir. 2004).
[108] *Id.*

V. BETTER LATE THAN NEVER: THE SUPREME COURT AND THE FCA

The Court decided its first post-1986 amendment False Claims Act case in 1996 when it granted certiorari to hear a case involving the meaning of the newly added original source exception as applied to the Public Disclosure Bar. In Hughes, the relator, a former employee of the respondent aircraft company, claimed that his former company had knowingly mischarged a contractor, and through it the United States, for work on a radar system for the B-52 Bomber.[109] The defendant moved to dismiss the suit, arguing that because it was based on information that they had already disclosed to the government, precluding jurisdiction under the pre-1986 statute. The Ninth Circuit disagreed and held that the 1986 Amendment should apply retroactively.[110] The Supreme Court reversed.[111] Unfortunately, however, the Court avoided a substantive ruling on the merits, instead deciding that there was a presumption against retroactivity absent a clear statutory expression of Congressional intent.[112]

Just three years later, the Court took its next public disclosure bar case, this time involving a question of standing.[113] In Vermont Agency of Natural Resources, a relator alleged that the Vermont Agency of Natural Resources had submitted false claim to the Environmental Protection Agency.[114] Respondent argued that the relator lacked standing, and alternatively, that in any event, sovereign immunity protected it from liability.[115] The Court first decided the threshold issue of standing, ruling that the FCA conferred standing on relators. Again, though, the Court dodged interpreting the language of the statute, deciding the substantive issue of the case on Eleventh Amendment sovereign immunity grounds.[116] The court tackled yet another False Claims Act case three years later, in 2003, but again avoided interpreting the language of the 1986 Amendments.[117] In Chandler, the relator brought suit against his former employer, a

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[109] Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997).
[110] United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1517 (9th Cir. 1995).
[111] *Hughes,* 520 U.S. at 951.
[112] *Id.* at 952.
[113] Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000).
[114] *Id.* at 770.
[115] *Id.*
[116] *Id.* at 788.
[117] Cook County v United States ex rel. Chandler, 538 U.S. 119 (2003).

hospital, alleging that it had fraudulently obtained federal grants. This time, the Court merely clarified its initial analysis of the applicability of the Eleventh Amendment to the Act.[118] Next, in 2005, the court finally interpreted the language of a provision of the False Claims Act.[119] This decision, though, addressed the applicability of the statute of limitations provisions and again did not address any one of the more substantive issues troubling the lower courts concerning the application of the Jurisdictional Bar Provision.

Miraculously, in 2007, more than a decade after the 1986 Amendment to the False Claims Act, and just as long after the District and Circuit Courts began (mis)interpreting and (mis)applying the statute, the Supreme Court granted certiorari to consider for the first time just what is an "original source" in the context of the Public Disclosure Bar of the False Claims Act.[120] Many hoped the decision to hear Rockwell might mark a turning point in the Supreme Court's False Claims Act jurisprudence, and indeed, it may have signaled the court's willingness to finally address some of the issues that had remained unresolved in the lower courts since the Act was amended. On the other hand, the peculiar factual and procedural situation in Rockwell left observers wondering whether the case would have any real impact on *qui tam* litigation in the Circuits. Less than a year later, the Court revisited the Act when it granted *cert.* in Allison Engine to examine the whether various provisions of the Act require that the plaintiff/ relator establish that the false claims were indeed "presented" to the government.[121] These two decisions will be examined in turn.

VI. ROCKWELL INT'L CORP. V. UNITED STATES

On March 27, 2007 the Supreme Court handed down its decision in the case of Rockwell International Corp. v. United States.[122] The Court ostensibly took the case to resolve a Circuit Split regarding the Original Source Exception, namely whether a relator's allegations qualified as "direct and independent knowledge" or if they were merely

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[118] *Id.* at 129.

[119] Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 545 U.S. 409 (2005).

[120] Rockwell Int'l Corp v. United States, 127 S. Ct. 1397, 549 U.S. ___ (2007).

[121] Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008).

[122] *Rockwell*, 127 S. Ct. at 1397.

predictions.[123] Many would argue, however, that the court's decision had much greater implications.

James Stone was employed as an engineer by Rockwell International Corporation, a government contractor. Rockwell had devised a system for disposing of toxic pond sludge which Stone predicted was inadequate because of problems in the piping system.[124] Stone was laid off, and filed a *qui tam* action after Rockwell discovered that the system was indeed defective. However, it turned out that the defect Stone predicted had not led to the problem. The Government intervened in the action and filed an amended complaint which did not allege that the defect Stone had predicted had caused the problem, but rather alleged that Rockwell's billing the government when it knew about the actual defect amounted to a false claim. Following a trial, the jury found for the relator, Stone. Rockwell appealed, alleging that Stone was not the original source because he had merely predicted a defect which turned out to be incorrect. However, on appeal, the Tenth Circuit affirmed the District Court decision, finding that Stone was indeed the "original source" of the information.[125]

The Supreme Court granted certiorari to address several questions, including 1) whether the phrase "information in which the allegations are based" referred to the information on which the relator's allegations are based, or the information on which the publicly disclosed allegations that triggered the Public Disclosure Bar is based, and 2) which of the relator's allegations are relevant. The Court first found that the word "information" referred to the underlying allegations of the relator's action, rather than the publicly disclosed allegations.[126] Next, the Court found that the term "allegations" was not limited to the allegations of the original complaint, but also included the allegations of the amended complaint.

Based on their findings, the Court determined that Stone's knowledge was insufficient.[127] They noted that Stone's prediction ultimately proved to be incorrect- the defect on which the amended complaint was based was distinct from the piping system defect he had predicted. Because the ruling meant that the District Court lacked

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[123] *Id.*
[124] *Id.* at 1399.
[125] *Id.* at 1400.
[126] *Id.* at 1407.
[127] *Id.* at 1409.

jurisdiction to hear the case, the Court reversed the Tenth Circuit's ruling in his favor.[128]

The general consensus is that Rockwell was far more favorable to defendants than to plaintiffs, to the relief of corporations and the defense bar and to the chagrin of relators and the plaintiff bar. Commentators from the plaintiff's and defense bar have largely agreed that the ruling will make it more difficult for relators to meet the jurisdictional requirements of the False Claims Act.[129] Though its effects have yet to be seen, it is likely that Rockwell will come to be viewed as a lost opportunity for the Court to maximize the effectiveness of a powerful anti-fraud statute.

VII. ALLISON ENGINE V. UNITED STATES EX REL. SANDERS

The Court's most recent foray into the morass of lower court interpretations of the language of False Claims Act was the resulted in the (date of decision) in Allison Engine Co..[130] The court granted cert. to resolve a Circuit split between the Sixth and D.C. Courts of Appeals.[131] Allison involved government contracts to build Navy missile destroyer ships. The defendant, Allison, was a subcontractor who was to build the electrical power plants for the ships. The Navy's contract with the shipyards specified that every part of each destroyer be built in accordance with the Navy's baseline drawings and military standards. These requirements were incorporated into each of petitioners' subcontracts. In addition, the contracts required that each delivered Gen-Set be accompanied by a certificate of conformance (COC) certifying that the unit was manufactured in accordance with the Navy's requirements.

Relators brought suit alleging that that Allison Engine had submitted invoices submitted the contractors which fraudulently sought payment for work that had not been done in accordance with contract specifications. Specifically, they claimed that the gearboxes installed by Allison Engine were defective and leaked oil and that Allison Engine was aware of the defects. At trial the relators did not adduce evidence that Allison had intended to present any false claims. Holding

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[128] *Id* at 1412.

[129] *See, e.g.* "Group Meets to Discuss Impact of *Rockwell*", 49 No. 15 GOV'T CONTRACTOR Par. 154 (April 18, 2007).

[130] *Allison Engine Co.*, 128 S. Ct. at 2123.

[131] *Id.*

that the relators had failed to meet the False Claims Act's presentment requirement, the District Court found in favor of the defendant.[132]
On appeal, Sixth Circuit held that the District Court had erred in granting petitioners' motion for judgment as a matter of law with respect to respondents' §§ 3729(a)(2) and (3) claims. The Court of Appeals held that such claims do not require proof of an intent to cause a false claim to be paid by the Government. Rather, it determined that proof of an intent to cause a false claim to be paid by a private entity using Government funds was sufficient. In so holding, the Court of Appeals recognized that its decision conflicted with D.C. Circuit Court in a case called Totten.[133] Allison Engine appealed, and the Supreme Court granted cert to resolve the "presentment" debate- whether false claims for federal government money made by subcontractors are actionable under § 3729(a)(2) or § 3729(a)(3) of the FCA if the claims were not presented to the U.S. government.

In a rare unanimous opinion, written by then newly-appointed Justice Alito, the Supreme Court vacated the Sixth Circuit's decision. While the Court acknowledged that a false claim does not have to be presented to the government under § 3729(a)(2) or §3729(a)(3), the Court found that under § 3729(a)(2), a plaintiff "must prove that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim."[134] Similarly, the Court held that under § 3729(a)(3), a plaintiff must demonstrate that the conspirators agreed to make use of the false record or statement in an effort to defraud the government, and that the statement would have a material effect on the government's decision to pay the false or fraudulent claim.[135]

The Court found particularly significant the words " to get a false claim paid by the government," holding that the language of § 3729(a)(2) did not support the Sixth Circuit's
position that a relator can establish liability by simply showing that a false
statement resulted in the use of government money to pay a false or fraudulent claim. The Court attempted to explain itself by reasoning that "'[t]o get' denotes purpose, and thus a person must have the purpose of getting a false claim 'paid or approved by the Government'

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[132] *Id.* at 2127.
[133] United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (C.A.D.C. 2004), *cert. denied*, 544 U.S. 1032, 125 S. Ct. 2257, 161 L. Ed. 2d 1059 (2005).
[134] *Allison Engine Co.*, 128 S. Ct. at 2125 (2008).
[135] *Id.* at 2130.

in order to be liable under § 3729(a)(2)."[136] It justified its reading of an "intent" requirement by cautioning that without it, the reach of the FCA would expand beyond its intended role of "combating fraud against the government." The Court explained that "[r]ecognizing a cause of action under the FCA for fraud directed at private entities would threaten to transform the FCA into an all-purpose antifraud statute."[137] Essentially, the Court agreed with the Sixth Circuit's interpretation that §(a)(1) contains a presentment requirement. However, it held that while §(a)(2) does not similarly require presentment to the government, it does requires a plaintiff to prove that the defendant submitted the claim for the purpose of getting the claim paid by the government.[138]

The Court, however, did not stop there. Instead, it decided to address §(a)(3), even though the issue was not before it. The Court found that under § 3729(a)(3) does not require presentment, but that the plaintiff must show that the agreed that the false record or statement would have a "material" effect on the government's decision to pay the claim.[139] Just what this actually means in application has yet to be seen, as the court did not squarely address it. Although it would seem that the Court pulled the so-called "materiality" requirement out of thin air, a number of lower courts had already read such a requirement into the Act. Exactly where those courts found such a requirement is less clear, as the words simply do not appear in the text of the statute.

VIII. ON THE HORIZON

Just as the Hess and Dean decisions signaled to many that Courts had lost sight of Congress' legislative intent and that the False Claims Act was in need of revision, the Rockwell and Allison decisions have led commentators to believe that a legislative correction is again necessary. Indeed, there are currently proposed bills in the House and the Senate.[140] According to Senator Grassley, the sponsor of the Bill, the goal of the legislation is to override these misinterpretations of the FCA.[141] The law, knows as the False Claims Correction Act, passed the

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[136] *Id.* at 2128.
[137] *Id.* at 2130.
[138] *Id.*
[139] *Id.* at 2130-31.
[140] Senate Bill 2041, 110th Cong. (2007).
[141] Press Release, Sen. Chuck Grassley, *Grassley, Durbin, Leahy, Specter Sponsor Legislation to Fortify Taxpayers Against Fraud*, (Sept. 12, 2007), *available at*

Senate Judiciary Committee in April 2008. Similar Legislation passed the House Judiciary Committee in July of 2008.[142] Both bills received overwhelming bipartisan support, but neither were signed into law before Congress went out of session. However, with the Obama administration's emphasis on healthcare and their need to locate revenue to pay for the programs it plans to initiate, it would not be at all surprising to see the bills reintroduced.

Additionally, even if both the Supreme Court and the Congress are unwilling or unable to resolve the issues that are preventing the False Claims Act from realizing its potential, the states seem willing to address this important topic on their own. There are currently over a dozen states, as well as the District of Columbia, with their own False Claims Acts. [143]

IX. CONCLUSION

Qui Tam actions under the False Claims Act have resulted in the recovery of over billions of government dollars since the 1986 Amendment, according to data from the Civil Division of the United States Department of Justice.[144] In health care fraud cases (matters in which the Department of Health and Human Services is the primary client agency) alone, *qui tam* actions under the False Claims Act have resulted in the recovery of over $9.1 billion- over 72% of all *qui tam* recoveries- through settlements and judgments. Undeniably, the prospect of sharing in the amount recovery is the incentive that compels many, if not all, relators to come forward and report cases of fraud and abuse. If courts continue to limit the availability of this important statute to *qui tam* plaintiffs, the incidence of health care fraud against the government can only be expected to increase. The resulting increase in the cost of health care and related services will be passed on to a

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http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=fa770c04-1321-0e36-ba19-486c19da895e&Region_id=&Issue_id=

[142] H.R. 4854, 110th Cong. (2007).

[143] States with their own False Claims statutes include California, Delaware, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Mexico, Tennessee, Texas, Virginia and the District of Columbia. *See* J. Barger, Jr., P. Bucy, M. Eubanks, and M. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts,* 80 TUL. L. REV. 465, 478 (2005).

[144] U.S. Dep't of Justice, Fraud Statistics 1986 - 2008, *available at* http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm. *See* Appendix for a more complete summary.

public already struggling to pay some of the highest health care prices in the industrialized world. The Supreme Court should instead approach the Act with its primary goal of preventing fraud in mind. However, the Rockwell and Allison decisions may indicate that the Court is unwilling to interpret the statute in light of its original purpose. If that is the case, it may be necessary for Congress and the States to intervene. The False Claims Act is already on life support- it is crucial that no one pulls the plug on it.