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THE FALSE CLAIMS ACT'S PUBLIC DISCLOSURE BAR: DEFINING THE LINE BETWEEN PARASITIC AND BENEFICIAL

*J. Morgan Phelps**

Fraudulent claims against the federal government have become a growing problem in the United States,¹ accounting for enormous losses to the U.S. treasury.² It is estimated that every year these losses reach into the billions of dollars.³ In addition to the significant monetary losses, fraud also takes a toll on the public's trust.⁴ Rampant fraud erodes public confidence and raises questions about the government's ability to manage its programs.⁵

Originally passed during the Civil War in 1863, and amended most recently in 1986, the False Claims Act (FCA or the Act) is an important tool in the government's attempt to curb fraud.⁶ Although its original goal was to catch dishonest contractors cheating the Union Army,⁷ the

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1. See FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 99-345, at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5267 [hereinafter FCA AMENDMENTS; page numbers will refer to the corresponding page in the Senate Report]. Although the government does not have precise figures, judging by discoveries of fraud amongst the largest government contractors, the legislative history of the False Claims Act indicates that "the problem is severe." *Id.* at 1-2. In 1985, Department of Defense Inspector General Joseph Sherick testified before Congress that "45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses." *Id.* at 2 (footnote omitted).

2. See *id.* at 3 (noting that the General Accounting Office reports indicate losses into the billions).

3. See Tammy Hinshaw, Annotation, *Construction and Application of "Public Disclosure" and "Original Source" Jurisdictional Bars Under 31 USCS § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. FED. 263, 263 (1994). According to a General Accounting Office report, up to ten percent of the entire federal budget is lost due to fraud. See FCA AMENDMENTS, *supra* note 1, at 3.

4. See FCA AMENDMENTS, *supra* note 1, at 3 (noting that fraud damages the government monetarily as well as by an erosion of public confidence).

5. See *id.* Fraud against the government may also result in a loss of life or, in some instances, a threat to national security, such as where the contractor fraudulently certifies defective equipment as meeting quality control standards. See *id.*

6. See John T. Boese, *The Science and Art of Defending a Civil False Claims Act Case Brought by a Qui Tam Relator*, AM. BAR ASS'N CENTER FOR CONTINUING LEGAL EDUC. NAT'L INST. 1 (1997).

7. See *id.* One documented abuse involved Colt selling revolvers worth \$14.50 each

FCA is now used to weed out fraudulent claims in all federally funded programs,⁸ especially those involving health care.⁹

Because exposing fraud is usually very difficult without the help of persons close to the transaction,¹⁰ Congress included *qui tam*¹¹ provisions in the Act.¹² These provisions provide incentives for private citizens to “blow the whistle” when they become privy to unscrupulous conduct.¹³ Getting people to “turn” on their employers, co-workers, and partners, however, is no easy task.¹⁴ To overcome this natural reluctance, Congress has had to incorporate significant monetary rewards for successful *qui tam* plaintiffs.¹⁵ Although these rewards have the potential to make a significant dent in the government's own recovery, the government will

on the open market to the government for \$25.00 each. See *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 n.2 (N.D. Cal. 1989).

8. See Boese, *supra* note 6, at 1 (noting that the FCA has been used in a wide variety of white collar fraud cases, including areas such as healthcare, the environment, banking, food stamps, and flood relief).

9. See *id.* Currently, 70% to 80% of FCA claims are filed against government contractors and health care providers. See *id.* Since 1986, health care fraud cases brought by *qui tam* plaintiffs have yielded \$1.45 billion in recoveries. See Stuart M. Gerson, *Will New Federal Guidelines Arrest Overzealous Use of False Claims Act?*, LEGAL BACKGROUNDER (Washington Legal Foundation, Washington D.C.), October 2, 1998, at 2; see also Robert Salcido, *Mixing Oil and Water: The Government's Mistaken Use of the Medicare Anti-Kickback Statute in False Claims Act Prosecutions*, 6 ANNALS HEALTH L. 105, 105 (1997) (noting that the False Claims Act is the government's primary tool for litigating fraud in the health care industry).

10. See FCA AMENDMENTS, *supra* note 1, at 4. Justice Department attorneys have testified that the government has a difficult time gathering sufficient information to prosecute a successful civil fraud case. See *id.* at 5-6. The government's civil attorneys cannot compel the production of documents before filing a case, and information that is gathered by the government is often unavailable because it appears in a prior grand jury investigation (which is protected under Rule 6(e) of the *Federal Rules of Criminal Procedure*.) See *id.*

11. A *qui tam* provision allows an informer to bring an action against a third party on behalf of the government. See BLACKS LAW DICTIONARY 1251 (6th ed. 1990).

12. See 31 U.S.C. § 3730(b) (1994).

13. See FCA AMENDMENTS, *supra* note 1, at 2 (stating that one of the goals of the legislation is to encourage individuals with knowledge of fraud to step forward).

14. See *id.* at 4 (finding “a great unwillingness to expose illegalities”). A survey of approximately 5000 federal government employees reveals that 69% of them believe they have had direct knowledge of illegalities and failed to report them. See *id.* A defense contractor testified that although contractor employees would like to report fraud, there is no incentive to do so in the defense industry. See *id.* at 5. “[M]ost individuals just simply cannot and will not put their head on the chopping block.” *Id.*

15. See 31 U.S.C. § 3730(d) (1994). A successful *qui tam* plaintiff may be awarded up to 30% of the government's total recovery, which could result in a significant award considering the government is entitled to up to \$10,000 per false claim as well as treble damages. See *id.* §§ 3729(a), 3730(d).

gain in the long run.¹⁶ Without the help of whistleblowers, the government would not discover many fraudulent transactions in the first place and, thus, would never be able get any recovery at all.¹⁷

Qui tam provisions may provide a useful way for the government to draw assistance from the public, however, in the last six decades, many suits have been brought for less than noble reasons.¹⁸ In the 1930s and 1940s, for example, plaintiffs brought suits based on information gleaned from preexisting indictments and congressional investigations, effectively snatching away part of the government's recovery.¹⁹

In an attempt to thwart these opportunists, Congress incorporated a significant jurisdictional bar to filter out unwanted suits.²⁰ The bar prohibits courts from taking subject matter jurisdiction over suits where the plaintiff's complaint is based upon information already in the public domain and the plaintiff is not an original source.²¹ In practice, courts have subjected this jurisdictional bar, known as the public disclosure bar, to conflicting interpretations.²²

This Comment examines how the federal circuits have interpreted the public disclosure bar, focusing on the conflicts and their significance to *qui tam* litigation. First, this Comment explores the history of the public disclosure bar along with court interpretations that have energized Congressional reaction. Next, this Comment analyzes the circuits' differing interpretations of the public disclosure bar and the reasons for the divisions. Finally, this Comment concludes that courts should draw the jurisdictional line to maximize the appropriate use of the FCA.

16. See FCA AMENDMENTS, *supra* note 1, at 7-8 (finding that the government simply lacks the necessary resources to weed out fraud on its own). With the help of private citizens, however, allegations left unaddressed by the government can be explored in greater depth. See *id.*

17. See *id.* at 4 (discussing the difficulty of detecting fraud without the assistance of whistleblowers).

18. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (*qui tam* plaintiff copied a federal indictment and filed suit before the government).

19. See, e.g., *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 679-80 (D.C. Cir. 1997).

20. See 31 U.S.C. § 3730(b)-(e).

21. See *id.* § 3730(e)(4)(A)-(B).

22. See *Findley*, 105 F.3d at 681 (noting that the circuits have taken opposing views on how the public disclosure bar should be interpreted).

I. THE DEVELOPMENT OF THE *QUI TAM* PROVISIONS IN THE FALSE CLAIMS ACT

A. *The Enactment of the False Claims Act*

Qui tam is short for “*qui tam pro domino rege quam pro si ipso in hac parte sequitur*,” which translates into “who sues on behalf of the King as well as for himself.”²³ The concept originated in medieval England where it was used as a way of enhancing the state's inadequate law enforcement capabilities.²⁴ In the United States,²⁵ the federal government incorporated *qui tam* provisions into the FCA as a tool to help ferret out the rampant defrauding of the Union Army during the Civil War.²⁶

Reasoning that the best way to catch a rogue was with a rogue, Congress sought to encourage the co-conspirators of frauds to come forward and betray illegal activities and offending parties.²⁷ As the statute was

23. BLACK'S LAW DICTIONARY 1251 (6th ed. 1990).

24. See *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 647 n.1 (D.C. Cir. 1994). The use of private citizens to prosecute criminal and civil cases for the state can be traced back to at least the sixth century B.C. See CHRISTOPHER CAREY, TRIALS FROM CLASSICAL ATHENS 3 (1997). In the ancient city-state of Athens, Solon first introduced the “right of prosecution by any volunteer” into the Greek system of justice as an attempt to take the administration of the law out of the exclusive hands of the wealthy. *Id.* The modern *qui tam* provisions, however, derive from English common law which relied on victims to prosecute their own criminal actions. See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290-91 (1989). To help cover the victim's legal fees, the British Parliament allowed the victim to recover his expenses from the defendant after a successful trial. See *id.* at 291. The modern *qui tam* laws are a direct outgrowth of this common law approach. See *id.*

25. See Krent, *supra* note 24, at 292-93 (discussing the federal government's use of *qui tam* provisions during the country's inception). *Qui tam* provisions were not new to the United States. See *id.* at 291. Prior to the ratification of the Constitution in 1789, law enforcement was primarily in the hands of American citizens who initiated prosecutions directly or sued under *qui tam* provisions. See *id.* “[T]he First Congress authorized *qui tam* suits in at least 10 of the first 14 statutes imposing penalties.” *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989).

26. See FCA AMENDMENTS, *supra* note 1, at 8. Fraudulent activities were so out of control, one contemporaneous source states: “[F]or sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.” Hinshaw, *supra* note 3, at 274 (quoting 1 F. SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865 58 (1965)). The original FCA was signed into law by President Abraham Lincoln in 1863. See FCA AMENDMENTS, *supra* note 1, at 8.

27. See Findley, 105 F.3d at 679. Congress designed the *qui tam* provisions, at least in part, to bypass dishonest public officials and law enforcement officers who may have been intimately involved in the fraudulent conduct. See Robert Salcido, *Screening Out Unwor-*

originally conceived, anyone could bring a suit against anyone who knowingly submitted a false claim.²⁸ Thus, an action to redress a fraudulent claim against the federal government could be brought by an individual as easily as it could be brought by the government.²⁹ As an incentive to bring these suits, the government rewarded whistleblowers, called "relators," with one-half of the government's recovery against offending parties³⁰ as well as with costs.³¹ Moreover, once an individual brought a *qui tam* action, the government could not interfere with its prosecution.³²

Despite these generous provisions, litigants rarely used the *qui tam* provisions of the FCA during the next seventy years.³³ It was not until the federal government's drastic spending increases in the 1930s and 1940s that *qui tam* litigation began to boom.³⁴ The New Deal and World War II "opened up numerous opportunities for unscrupulous government contractors to defraud the government."³⁵

Along with "unscrupulous" contractors came "unscrupulous" relators.³⁶ By allowing anyone to bring a suit, the FCA encouraged "parasitic" lawsuits.³⁷ Seeking the rewards of successful *qui tam* litigation, private parties brought suits without having any independent knowledge of the fraud.³⁸ Parasitic suits were not only reducing the federal govern-

thy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act, 24 PUB. CONT. L.J. 237, 241 (1995).

28. See *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991). According to the 1863 statute, a suit "may be brought and carried on by any person, as well for himself as for the United States." FCA AMENDMENTS, *supra* note 1, at 10 (quoting the original False Claims Act). At the time, however, the *qui tam* plaintiff bore the entire cost of the suit. See *id.*

29. See *id.* (noting that suits may be brought by both private individuals and the government with equal ease).

30. See *Findley*, 105 F.3d at 679. For civil penalties, the government was entitled to double the amount that it suffered in damages due to the false claim, plus \$2000 per claim. See FCA AMENDMENTS, *supra* note 1, at 8.

31. See FCA AMENDMENTS, *supra* note 1, at 10.

32. See *id.* In *United States v. Griswold*, 30 Fed. Rep. 762, 763 (C.C.D. Or. 1887), the court found that a relator's interest in his suit was a property right that could not be divested.

33. See *Findley*, 105 F.3d at 679.

34. See *id.*; see also *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) (noting that *qui tam* litigation surged with the boom of government contracts during the New Deal and World War II).

35. *Findley*, 105 F.3d at 679.

36. See *id.* at 679-80 (discussing the surge of opportunistic relators who brought their suits based on copies of preexisting indictments).

37. See *id.*

38. See *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991); see also *Hinshaw*, *supra* note 3, at 275 (examining the flaw in the FCA that allowed relators to bring suits using information already uncov-

ment's recovery, but they also forced it to make rapid choices on whether or not to prosecute civil actions lest a *qui tam* plaintiff steal the case.³⁹ Thus, litigation under the FCA became “a race to the courthouse between the Government's civil lawyers and private parties,”⁴⁰ and impaired the ability of the Attorney General to control criminal and civil fraud actions.⁴¹

B. The 1943 Amendments

*United States ex rel. Marcus v. Hess*⁴² finally prompted Congressional action. This case involved a group of defendants criminally indicted for collusive bidding on government contracts.⁴³ After the defendants pleaded no contest and were fined \$54,000,⁴⁴ a *qui tam* plaintiff brought a civil case against them using the same information found in the defendant's indictment.⁴⁵ The Supreme Court permitted the suit, stating that the statute did not require a plaintiff to bring any new information to the table,⁴⁶ nor did it contemplate protecting the Attorney General's ability to control fraud litigation.⁴⁷

Determined to “put a stop to this unseemly and undignified scramble,”⁴⁸ both Houses of Congress proposed bills that would modify the

ered in government investigations).

39. See *Findley*, 105 F.3d at 680.

40. FCA AMENDMENTS, *supra* note 1, at 10-11 (observing that a civil action based on a criminal indictment, as in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), does not bring any new information to light).

41. See FCA AMENDMENTS, *supra* note 1, at 10-11.

42. 317 U.S. 537 (1943).

43. See *id.* at 539.

44. See *id.* at 545.

45. See *id.* at 539-40.

46. See *id.* at 545-46 (noting that neither the language of the FCA nor its history indicates that the plaintiff should be barred from bringing suit). The Court considered and rejected an amicus curiae brief filed by the Government asking the Court to disallow the complaint because the relator's information was not acquired through an independent investigation. See *id.* The Court noted that, under the current statute, even a district attorney who learned of a fraud in the exercise of his official duties might be allowed to bring a *qui tam* suit based on his official investigation. See *id.* at 546.

47. See *id.* at 546-47 (noting that the Government's argument—that the Attorney General's ability to control litigation would be impaired by allowing the plaintiff to bring the case—was misguided). It was focused at “what the government thinks Congress should have done rather than at what it did.” *Id.*; see also FCA AMENDMENTS, *supra* note 1, at 11 (noting that the FCA did not grant the Attorney General exclusive control over the federal fraud litigation).

48. Salcido, *supra* note 27, at 242 (quoting Letter from Attorney General Francis Biddle to Senator Van Nuys, March 22, 1943).

FCA.⁴⁹ The House of Representatives' proposed bill eliminated the *qui tam* provisions entirely.⁵⁰ The Senate bill, on the other hand, proposed to keep the *qui tam* provisions, but modified them to prevent parasitic, *Hess*-like suits by inserting a jurisdictional bar for suits based on information the government already possessed.⁵¹ Some congressmen, preferring the loose standards of the current statute, objected to any change in the Act.⁵² Senator Langer, for example, argued:

“[T]he present statute now on the books is a most desirable one. What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in digging up war frauds? In any case, the Attorney General can protect himself by filing a (civil) lawsuit at the time when he files the indictment.”⁵³

Eventually, the Senate version of the bill prevailed.⁵⁴

In addition to the jurisdictional bar limiting standing, the Senate bill made a number of refinements and other changes. For example, the original version of the bill had also incorporated a special provision exempting “original sources” of government information from the bar.⁵⁵ This provision was dropped from the bill without explanation in a conference committee compromise.⁵⁶ Other changes included a reduction in the amount a relator could claim in his suit.⁵⁷ The award for a successful *qui tam* suit dropped from a maximum of fifty percent of the total recovery to twenty-five percent.⁵⁸

49. See *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994) (analyzing the proposed House and Senate bills).

50. See *id.* Upset with “parasitic” suits, Representative Walter was prompted to state: “It has become a racket and it seems to me that the quicker we eliminate the possibility of harassing people by those who have not contributed one iota to the disclosures, the better off the Nation will be.” 89 CONG. REC. 2800 (1943).

51. See *Springfield*, 14 F.3d at 650.

52. See FCA AMENDMENTS, *supra* note 1, at 11 (noting Senator Langer of North Dakota's contention that the government's limited resources and the delays accompanying fraud cases argue for keeping the statute as it is).

53. *Id.* (quoting from 89 CONG. REC. 7607 (1943)).

54. See *id.* at 12.

55. See *id.*

56. See *Springfield*, 14 F.3d at 650. The legislative history of the 1986 amendments suggests that Congress may not have fully understood what the ramifications would be when it dropped the original source clause out of the Act. See FCA AMENDMENTS, *supra* note 1, at 12.

57. See FCA AMENDMENTS, *supra* note 1, at 10, 12 (discussing amount of award to which relator is entitled).

58. See *id.* If the government took over the suit, the relator could not collect more than 10% of the proceeds. See 31 U.S.C. § 232(E)(1)(1976) (superceded).

In 1943, within eleven months of the decision in *Hess*, President Roosevelt signed the Senate's amendment into law.⁵⁹ The new amendment was thought to have achieved the proper balance between protecting the honest informer and prohibiting parasitic litigation.⁶⁰

Over the next forty years, honest informers ended up having a harder time utilizing the legislation than the congressmen envisioned.⁶¹ As it turned out, courts construed the jurisdictional bar broadly.⁶² Whistleblowers who provided the government with evidence of a fraudulent claim before they brought suit were barred from recovery.⁶³ Additionally, once a *qui tam* litigant failed the jurisdictional bar, he was barred from any of the government's recovery.⁶⁴

Furthermore, a litigant who lacked standing under the bar was prevented from bringing a claim even if the government decided not to take any action of its own.⁶⁵ Noting that Congress specifically refused to include the "original source" provision, courts refused to make an exception for so-called honest informers.⁶⁶ Now, instead of too many parasitic suits, there were too few legitimate suits.⁶⁷ "[B]y restricting *qui tam* suits by individuals who brought fraudulent activity to the government's attention, Congress had killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government."⁶⁸

59. See FCA AMENDMENTS, *supra* note 1, at 10-11.

60. See *id.* According to Senator Van Nuys, chairman of the Senate Judiciary Committee that proposed the amendments, the 1943 amendments were designed to "protect[] the honest informer as nearly we can do it by statute (and) . . . [do] not prevent an honest informer from coming in." *Id.* (quoting 89 CONG. REC. 7609 (1943)). Likewise, Representative Kefauver stated, "If the average, good American citizen . . . has the information and he gives it to the Government, and the Government does not proceed in due course, provision is made here where he can get some compensation." *Id.* (quoting 89 CONG. REC. 10,846 (1943)).

61. See *id.* (explaining how courts applied the law broadly, effectively restricting whistleblowers from bringing suits).

62. See *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1153-54 (3d Cir. 1991).

63. See *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 680 (D.C. Cir. 1997).

64. See FCA AMENDMENTS, *supra* note 1, at 12 (reviewing court interpretations of the jurisdictional bar).

65. See *id.* Once a plaintiff was dismissed on jurisdictional grounds, he not only lost his right to challenge government inaction, but also his right to object to settlements or dismissals. See *id.*

66. See *id.*

67. See *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994) (noting that after the 1943 amendments, courts greeted *qui tam* suits with considerable caution).

68. *Findley*, 105 F.3d at 680; see also *Hinshaw*, *supra* note 3, at 275 (maintaining that

The 1943 amendments resulted in a dramatic decline in *qui tam* litigation.⁶⁹

This problem came to a head in the Seventh Circuit's opinion in *United States ex rel. Wisconsin (Department of Health and Social Services) v. Dean*.⁷⁰ In *Dean*, the State of Wisconsin uncovered fraudulent Medicaid claims and, as required by law, reported the fraud to the United States Department of Health and Human Services.⁷¹ The state then filed a *qui tam* action against the offending parties.⁷² The Seventh Circuit found that Wisconsin failed to overcome the jurisdictional bar in the FCA because the state already had provided information to the federal government.⁷³ To add insult to injury, the federal government declined to intervene in the case and filed a brief stating that Wisconsin should be the proper relator.⁷⁴ The court found that “[i]f the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption.”⁷⁵

C. The 1986 Amendments

In response to *Dean*, the National Association of Attorneys General adopted a resolution strongly urging Congress to amend the FCA to address the unfortunate result of this case.⁷⁶ Among other things, the resolution stated that prohibiting sovereign states from becoming *qui tam* plaintiffs impairs the federal government's ability to detect and prosecute

the new *qui tam* provisions worked at cross-purposes with the government knowledge bar).

69. See *Springfield*, 14 F.3d at 650 (“The new statutory barriers substantially decreased the use of *qui tam* provisions to enforce the FCA, . . . and courts greeted those *qui tam* suits that did arise with considerable caution.”); see also *Hinshaw*, *supra* note 3, at 275-76 (asserting that the new amendments rendered the FCA “a flaccid enforcement tool”).

70. 729 F.2d 1100 (7th Cir. 1984).

71. See *id.* at 1104.

72. See *id.* at 1102. Wisconsin's suit charged the defendant with 912 fraudulent claims and demanded over two million dollars in damages on behalf of the United States Government. See *id.* In criminal court, the state only was able to get \$13,285 in restitution. See *id.*

73. See *id.* at 1103.

74. See *id.* at 1102-03 n.2 (discussing the United States' brief, which stated that Wisconsin uncovered the fraud and was the proper party to pursue the action).

75. *Id.* at 1106. The court found that the plain language of the statute clearly prohibited the suit, and that the arguments presented by the State were “directed solely at what the [state] thinks Congress should have done rather than what it did.” *Id.* at 1107 (quoting *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47 (1943)).

76. See FCA AMENDMENTS, *supra* note 1, at 13 (discussing the resolution adopted by the National Association of Attorneys General in June of 1984).

fraud.⁷⁷ Again, Congress responded.⁷⁸ This time the goal was “[s]eeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own”⁷⁹ As in 1943, Congress adopted the Senate version to amend the FCA.⁸⁰

The stated purpose of the 1986 amendments was to enhance the federal government’s ability to recoup losses sustained due to fraud.⁸¹ Congress found that only a coordinated effort by the government and citizens would curb the severe effects of false claims on the federal government.⁸² To meet this end, Congress modified significantly the *qui tam* provisions in the Act.⁸³

Congress intended the revisions to correct the restrictive court interpretations on *qui tam* jurisdiction⁸⁴ and encourage would-be whistleblowers to come forward.⁸⁵ In order to effectively fight fraud, the *qui tam* provisions of the FCA had to invite private citizens to break the “conspiracy of silence” that permeated the government contract industry.⁸⁶ By rewarding individuals who took the significant personal risk of exposing fraud, Congress sought to make the FCA a more effective weapon for the government.⁸⁷

77. *See id.*

78. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994).

79. *Id.* at 649.

80. *See id.* at 650-51.

81. *See FCA AMENDMENTS*, *supra* note 1, at 1.

82. *See id.* at 2 (stating that the assistance of the people is needed in order to curb the widespread and sophisticated fraud).

83. *See generally id.* at 23-30 (explaining the modifications to 31 U.S.C. § 3730). Changes include, among other things, increased civil and criminal fines, increased recoverable damages, and clarification of the required mens rea. *See id.* at 2.

84. *See id.* at 4 (noting that restrictive court interpretations had thwarted the statute’s effectiveness).

85. *See id.* at 1-2.

86. *See id.* at 5. Hearings before Congress revealed that government auditors were severely hampered by employee silence. *See id.* at 5-6. “[N]otice of an impending audit normally travels through the contractor plant ‘like wildfire’ and ‘everybody straightens up their act.’” *Id.* at 6.

87. *See id.* at 14. Testimony before Congress disclosed that potential whistleblowers are inhibited from acting by fear of retaliation and a feeling that nothing will be done anyway. *See id.* at 5. One whistleblower testified that his “ethical principles” were challenged when he discovered his company was defrauding the government. *See id.* As a triple-amputee with a wife, five children, and a home mortgage, he was inhibited from reporting the fraud by employer harassment and fear that “no one inside or outside the company [would be] willing to act on the information.” *Id.* (quoting *Hearing on S. 1562*,

The amendments incorporated many new rights for relators. For example, under the 1986 amendments, if the government takes over the case, a relator can take a more active role in *qui tam* litigation and stay abreast of the government's efforts.⁸⁸ Furthermore, the relator may be entitled to a greater reward if the suit is successful.⁸⁹ Instead of twenty-five percent of the recovery offered by the 1943 amendments, the new amendments allow the *qui tam* plaintiff to recover up to thirty percent.⁹⁰ Additionally, if the government takes over the suit, the *qui tam* plaintiff is entitled to ten to twenty percent of the recovery, an increase from ten percent in the 1943 amendments.⁹¹

However, the 1986 amendments also place significant restrictions on *qui tam* plaintiffs.⁹² For example, a *qui tam* plaintiff must provide a complaint and all material evidence to the government before bringing the suit.⁹³ The government will keep the complaint under seal for sixty days while it evaluates whether the suit will interfere with an ongoing investigation and whether it wants to intervene.⁹⁴ Congress designed this sec-

the False Claims Reform Act, before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 99th Cong. 1985)).

88. *See* 31 U.S.C. § 3730(c) (1994). While the government has the primary responsibility for prosecuting a case, the *qui tam* plaintiff remains a party to the action. *See id.* The government may not dismiss the action without the relator's consent unless the relator has had the opportunity for a hearing on the motion. *See id.* § 3730(c)(2)(A). The relator's role in the litigation is limited, however, by certain restrictions. *See id.* § 3730(c)(2). For example, the government may settle the case after a hearing finds the settlement to be fair and reasonable. *See id.* § 3730(c)(2)(B). The government also retains the right to ask the court to limit the relator's role if it can show that the relator's actions would be repetitious, irrelevant, or would harass the defendant. *See id.* § 3730(c)(2)(C)-(D). Possible limitations that may be imposed include limiting the witnesses the relator may call, limiting the length of testimony, and limiting the relator's ability to cross-examine witnesses. *See id.*

89. *See id.* § 3730(d). This increase is even more significant in light of the fact that the government may recover treble damages (increased from double in past versions of the law) as well as \$5000 to \$10,000 per fraudulent claim (increased from \$2000). *See id.* § 3729(a).

90. *Compare id.* § 3730(d), with 31 U.S.C. § 232(E)(2) (1976) (superceded).

91. *Compare* 31 U.S.C. § 3730(d), with 31 U.S.C. § 232(E)(1) (1976) (superceded). The statute sets minimum recovery amounts of 10% or 25% depending on whether the government intervenes. *See* 31 U.S.C. § 3730(d)(1). This is a change (the old law did not have any minimums) incorporated to assure whistleblowers that they will be rewarded if they take the risk to come forward. *See* FCA AMENDMENTS, *supra* note 1, at 28. Although Congress acknowledged that such a rule may result in "inappropriate windfalls," it justified the reward on the grounds that, without the relator's assistance, the government may never have recovered any damages. *See id.*

92. *See* 31 U.S.C. § 3730(b), (e) (detailing requirements relators must meet to bring a suit).

93. *See id.* § 3730(b)(2).

94. *See id.*; *see also* FCA AMENDMENTS, *supra* note 1, at 23-24.

tion to, among other things, allay Justice Department fears that increased *qui tam* actions would cause interference with criminal investigations.⁹⁵

A second, and more important, restriction on *qui tam* litigation is the new public disclosure bar.⁹⁶ The public disclosure bar prohibits plaintiffs from bringing suits based on information already in the government's possession.⁹⁷ It 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.⁹⁸

Unlike the 1943 amendments, the 1986 amendments provide an exception to the jurisdictional bar if the relator is an "original source" of the information.⁹⁹ An original source is defined as: "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."¹⁰⁰

The public disclosure bar of the 1986 amendments has resulted in extensive litigation and splits in the circuit courts as they try to determine what Congress actually intended in creating the amendments.¹⁰¹ The overall analysis under the FCA is relatively simple: first, determine if the

95. See FCA AMENDMENTS, *supra* note 1, at 24 (reviewing Justice Department concerns that the public filing of a *qui tam* suit may "tip off" targets of a federal investigation).

96. See 31 U.S.C. § 3730(e)(4). Although the public disclosure bar has received the most attention in the courts, there are three other jurisdiction bars in the FCA. See 31 U.S.C. § 3730(e)(1)-(5); see also Salcido, *supra* note 27, at 239 (discussing measures incorporated in the Act to help screen out cases that do not substantially benefit the government). Other actions that are barred include suits brought by a service member against another member of the armed forces acting in his official duties, actions brought against members of Congress, the judiciary, or senior executive branch officials based on information already known to the government, and actions brought which mirror the allegations in suits in which the government is already a party. See 31 U.S.C. § 3730(e)(1)-(3).

97. See 31 U.S.C. § 3730(e)(4)(A) (barring jurisdiction when the government has already discovered the allegations or transactions in an official procedure, report, or investigation or through the news media).

98. *Id.* § 3730(e)(4)(A) (footnote omitted).

99. See *id.*

100. *Id.* § 3730(e)(4)(B).

101. See *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir. 1997).

allegations are based on publicly disclosed material;¹⁰² and if so, assess whether the plaintiff is an original source of the disclosure.¹⁰³ Defining the words in the statute, however, is not so simple. The circuits have come up with different and conflicting interpretations of various elements of the public disclosure bar including what the words “based upon,” “public disclosure,” “original source,” and “information” mean.¹⁰⁴

II. WHO IS ALLOWED TO BRING A *QUI TAM* SUIT: HOW THE COURTS HAVE INTERPRETED THE PUBLIC DISCLOSURE BAR

When interpreting the public disclosure bar, courts have relied heavily on the legislative history of the False Claims Act.¹⁰⁵ In doing so, judges have attempted to balance the Act's twin goals,¹⁰⁶ namely, discouraging what they perceive to be parasitic suits while encouraging legitimate whistleblowers to come forward.¹⁰⁷ Using these goals as a guide, the circuits have struggled to resolve several interpretive questions including

102. *See id.*

103. *See id.* If the answer to the first question is negative, then the public disclosure bar does not apply and there is no need to proceed to the question of whether or not the relator is an original source. *See id.*

104. *See id.*

105. *See generally* United States *ex rel.* McKenzie v. Bellsouth Telecomm. Inc., 123 F.3d 935 (6th Cir. 1997); *Findley*, 105 F.3d 675; United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512 (9th Cir. 1995); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir. 1994); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co., 944 F.2d 1149 (3d Cir. 1991).

106. *See* United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1519-20 (10th Cir. 1996) (noting that the twin goals of the FCA are to encourage whistleblowers to expose fraud and prevent opportunists from bringing suits based on information already in the public domain); *see also* McKenzie, 123 F.3d at 942-43 (stating that “[t]he purpose of the qui tam provisions of the FCA is to encourage private individuals who are aware of fraud . . . to bring such information forward” and to prevent parasitic suits based on information previously disclosed to the government); Siller, 21 F.3d at 1347 (observing that Congress intended the *qui tam* provisions to allow private citizens to help curtail fraud while, at the same time, prevent parasitic suits in which the relators bring no new information to the case); United States *ex rel.* Springfield Terminal Ry. Co., v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) (acknowledging that the twin goals of the *qui tam* provisions are rejecting suits the government could have brought on its own and promoting suits the government is incapable of bringing on its own); Doe, 960 F.2d at 321 (“The 1986 amendments attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud.”); Stinson, 944 F.2d at 1154 (concluding that the principal intent of the 1986 amendments was to limit parasitic suits like *Hess* while encouraging suits by persons with first hand knowledge of the wrongdoing).

107. *See supra* note 106 (listing cases analyzing the purpose of the *qui tam* provisions); *see also* Hinshaw, *supra* note 3, at 276 (discussing the purpose of the 1986 amendments).

what constitutes public disclosure;¹⁰⁸ when is information based upon a public disclosure;¹⁰⁹ and who qualifies as an original source.¹¹⁰

A. Actual Versus Theoretical Disclosure

According to the FCA, if allegations are revealed 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,” they are publicly disclosed.¹¹¹ Although courts broadly interpret what types of disclosures fall into these categories,¹¹² they dispute how accessible the information must be to the public in order to trigger the jurisdictional bar. This dispute is centered around whether information has to be actually revealed to the public or whether it need only be theoretically capable of being acquired by the public.¹¹³

In *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Pru-*

108. See discussion *infra* notes 111-42 and accompanying text (discussing whether actual or theoretical public disclosure is required). The circuits are also split on whether to include disclosure to an innocent employee of the company charged with fraud as a disclosure to the public. See *Schumer*, 63 F.3d at 1518 (stating that there is no principled distinction between disclosures made to government employees and those made to employees of defense contractors and subcontractors); *Doe*, 960 F.2d at 323 (stating that there is no principled reason not to treat government contractor employees as members of the public).

109. See discussion *infra* notes 143-69 and accompanying text (explaining judicial interpretations of the phrase “based upon”).

110. See discussion *infra* notes 170-214 (comparing various judicial interpretations of the original source provision).

111. See 31 U.S.C. § 3730(e)(4)(A) (1994) (footnote omitted). Courts have applied the *expressio unius* doctrine to conclude that this is an exhaustive list of the types of materials and hearings that can trigger the jurisdictional bar. See *Salcido*, *supra* note 27, at 266 (arguing that several courts have incorrectly applied the doctrine to limit the possible sources of public disclosure under the jurisdictional bar).

112. See *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1155 (3d Cir. 1991) (interpreting the word “hearing” to incorporate more than just formal proceedings; it includes any information disclosed in connection with criminal, civil, or administrative litigation); see also *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994). (“It is clear from the statutory context that the term ‘hearing’ was intended to apply in a broad context of legal proceedings under § 3730(e)(4)(A).”); *Hinshaw*, *supra* note 3, at 279 (noting that “civil hearing” has been read to include all proceedings in a civil lawsuit). *But see United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997) (narrowly construing the statute to rule out state administrative reports); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 (11th Cir. 1991) (narrowly construing the list of possible sources of public disclosure).

113. See *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996) (discussing split in the circuits over the sufficiency of actual versus theoretical disclosure).

dential Insurance Co.,¹¹⁴ the Third Circuit decided that incriminating memos acquired during the discovery process but not filed with the court constituted public disclosure.¹¹⁵ The court found that discovery material that was not subject to any relevant court-imposed limitation was publicly disclosed regardless of whether the parties filed the discovery material.¹¹⁶ The Third Circuit focused not on whether the documents were actually filed, but, rather, on whether they could be filed.¹¹⁷ The court rejected the argument that the public would not be able to inspect freely information not filed with the court, and, therefore, it was not publicly disclosed.¹¹⁸

The Third Circuit cited two reasons for its decision.¹¹⁹ First, although various district courts developed individualized rules pertaining to what should and should not be filed, most did not preclude access to the non-filed materials by interested parties.¹²⁰ Second, it is improper to apply the public disclosure bar differently depending on the form of discovery and the rules of the individual district.¹²¹ Thus, material is publicly disclosed as long as it theoretically could be disclosed.¹²²

This view has been rejected in other circuits.¹²³ In *United States ex rel.*

114. 944 F.2d 1149 (3d Cir. 1991).

115. *See id.* at 1158. These memos formed that basis for the plaintiff's *qui tam* suit. *See id.* at 1151-52.

116. *See id.* at 1157-58. The court reasoned that because discovery is part of a civil hearing, information gleaned from the discovery process was, therefore, publicly disclosed. *See id.* This logical progression is followed by most courts taking an expansive view of the word "hearing." *See generally* *United States ex rel. McKenzie v. Bellsouth Telecomm. Inc.*, 123 F.3d 935, 939 (6th Cir. 1997); *Federal Recovery Serv., Inc. v. United States*, 72 F.3d 447, 450 (5th Cir. 1995).

117. *See Stinson*, 944 F.2d at 1159.

118. *See id.*

119. *See id.* at 1158-59.

120. *See id.* at 1158. The court goes on to note that some districts have the authority to order the filing of discovery materials when any person with a genuine interest in reading the material makes a request. *See id.*

121. *See id.* at 1159. Currently, the *Federal Rules of Civil Procedure* require all discovery material to be filed unless the court grants an exception. *See id.*; *see also* FED. R. CIV. P. 5(d) (providing that all papers that are required to be served upon a party must be filed with the court unless the court has issued an order to the contrary). In 1978, the Advisory Committee considered changing the rule to reduce the amount of discovery material filed but decided that the information may be useful to the general public. *See Stinson*, 944 F.2d at 1159.

122. *See Stinson*, 944 F.2d at 1159 ("[W]e look not to whether the specific documents must be or have been filed but whether there is a recognition that they can be filed and hence available for public access.").

123. *See United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519 (10th Cir. 1996).

Ramseyer v. Century Healthcare Corp.,¹²⁴ the Tenth Circuit ruled that theoretical disclosure alone is insufficient to constitute public disclosure.¹²⁵ This case involved fraudulent Medicaid claims submitted by Century Healthcare Corporation (CHC).¹²⁶ The plaintiff, Ramseyer, and the Oklahoma Department of Human Services (DHS) both discovered the defendant's illegal activities in completely separate investigations.¹²⁷ Although the DHS issued a report detailing CHC's fraudulent claims, only three copies were made; DHS kept two copies and one went to CHC.¹²⁸ Nobody distributed any copies of the report to the public; however, the report was available upon written request and subsequent approval by DHS lawyers.¹²⁹ When Ramseyer brought her *qui tam* suit, the district court concluded that it did not have subject matter jurisdiction because the DHS report constituted public disclosure.¹³⁰

The Tenth Circuit found that the report was not publicly disclosed.¹³¹ Rejecting the approach used in *Stinson*,¹³² the court ruled that, for purposes of the FCA, information must be affirmatively disclosed to the public in order to be treated as in the public domain.¹³³ In coming to this conclusion, the court considered the twin goals of the *qui tam* provisions. First, the court said an "actual disclosure" requirement encourages legitimate suits by private citizens with first-hand knowledge.¹³⁴ By limiting

124. 90 F.3d 1514 (10th Cir. 1996).

125. *See id.* at 1519 (finding that "public disclosure" signifies more than the mere theoretical or potential availability of information).

126. *See id.* at 1517.

127. *See id.* The plaintiff became aware of the fraud in her capacity as a consultant and clinical director of a mental health facility operated by CHC. *See id.* The DHS, on the other hand, discovered the infractions through a routine audit and inspection. *See id.*

128. *See id.* The report contained essentially the same allegations as Mrs. Ramseyer's suit. *See id.*

129. *See id.*

130. *See id.* CHC argued that the report was publicly disclosed because 1) theoretically, the public could have access to it, and 2) the information was disclosed to a stranger of the fraud. *See id.* at 1521. At least one court has found that public disclosure happens whenever anyone who is not a potential witness or target of the fraud probe is told about the fraud. *See United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992). This interpretation is disputed in *Ramseyer*, which found that an independent investigation by an entity does not, itself, constitute public disclosure unless that information is affirmatively provided to another party. *See Ramseyer*, 90 F.3d at 1521.

131. *See Ramseyer*, 90 F.3d at 1521.

132. *See supra* text accompanying notes 114-22 (discussing the Third Circuit's view that theoretically disclosed material may be considered publicly disclosed for the purposes of the public disclosure bar).

133. *See Ramseyer*, 90 F.3d at 1519 ("[P]ublic disclosure' signifies more than the mere theoretical or potential availability of information.").

134. *See id.* at 1520 (noting that one of the purposes of the FCA is to encourage the

what is considered to be in the public domain, it is easier for a private party to bring a suit based on generally unknown information.¹³⁵ Thus, it encourages the exposure of fraudulent activities and prevents government inaction from “throw[ing] a cloak of secrecy” around the allegations.¹³⁶ Second, an “actual disclosure” requirement does not encourage parasitic suits.¹³⁷ According to the court, an opportunist *qui tam* plaintiff would have to know the material exists before he could take advantage of it.¹³⁸ Because the material in question is information that has not been widely distributed, it is unlikely that this rule would cause parasitic suits.¹³⁹

Most other circuits have employed the same reasoning as the Tenth Circuit when addressing this issue.¹⁴⁰ The Ninth Circuit concluded that information theoretically available under the Freedom of Information Act (FOIA) is not publicly disclosed until it is actually requested and received by a member of the public.¹⁴¹ The D.C. Circuit flatly rejected *Stin-*

exposure of fraud).

135. *See id.* The court also noted that the 1986 amendments shifted the focus from what the government had in its files to what was actually disclosed. *See id.* Employing a theoretical disclosure standard to bar a *qui tam* claim would effectively reinstate the pre-1986 “government knowledge” bar. *See id.* (citing *United States ex rel. Fine v. MK-Ferguson Co.*, 861 F. Supp. 1544, 1551 (D.N.M. 1994)).

136. *See id.* One reason given by Congress for revising the FCA in 1986 was “to prod the government into action, rather than allowing it to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government.” *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992); *see also* FCA AMENDMENTS, *supra* note 1, at 24-26 (finding that by enacting certain provisions, Congress intended that the government should not be able to delay or suppress fraud litigation).

137. *See Ramseyer*, 90 F.3d at 1520 (finding that information not yet in the public eye cannot be the basis for a parasitic suit because the relator must still do research in order to bring the facts out).

138. *See id.*

139. *See id.*

140. *See id.* at 1519 (comparing the circuit court cases that have dealt with actual versus theoretical distinctions). Of the four circuits that have addressed the issue, three have required actual disclosure: the Ninth, in *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995); the Tenth, in *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996); and the D.C. Circuit, in *United States ex rel. Springfield Terminal Railway Co.*, 14 F.3d 645 (D.C. Cir. 1994). Only one circuit has found theoretical disclosure to be sufficient: the Third Circuit, in *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991).

141. *See Schumer*, 63 F.3d at 1519-20. The *Schumer* court gave two reasons for its decision. First, the court looked to the Supreme Court's ruling in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980), finding that information is not publicly disclosed within the meaning of the Consumer Product Safety Act unless a specific FOIA request has been initiated and responded to. *See Schumer*, 63 F.3d at 1520. Second, the government reviews all FOIA requests and may not release information which requires continued protection. *See id.* Therefore, it is unknown whether particular

son by finding that discovery material must be filed with the court in order to be considered publicly disclosed.¹⁴²

B. When is Information "Based Upon" Publicly Disclosed Material?

The circuits are also split on interpreting the statutory phrase "based upon the public disclosure of allegations."¹⁴³ Here, the issue is whether "based upon" should mean "derived from" or "substantially similar to."

United States ex rel. Siller v. Becton Dickinson & Co.,¹⁴⁴ a Fourth Circuit decision, is the leading case holding that "based upon" means "derived from."¹⁴⁵ In *Siller*, Scientific Supply, Inc. (SSI) sued its supplier of medical device products, Becton Dickinson & Co. (BD), alleging BD wrongfully terminated their contract because it feared SSI would reveal that BD was overcharging the government.¹⁴⁶ Although the case eventually settled, David Siller, an employee of SSI and the brother of the president, filed a *qui tam* suit alleging essentially the same claims that were alleged in the SSI suit.¹⁴⁷ Siller asserted that he did not learn of BD's illicit activities through SSI's lawsuit; instead, he claimed that he learned of the activity through his employment.¹⁴⁸

The court reviewed the statute using a straightforward textual analysis.¹⁴⁹ Turning to Webster's Third New International Dictionary (1986), the court found "based upon" means to "use as a basis for."¹⁵⁰ Therefore, a *qui tam* action is only "based upon" a public disclosure when the relator actually derives his information straight from that disclosure.¹⁵¹ The

information may be available under the FOIA until a request has been made. *See id.*

142. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994). According to the court, discovery materials that are not filed are only potentially within the public eye. *See id.* at 653. The court stated that "[i]f they are not yet in the public eye, no rational purpose is served—and no 'parasitism' deterred—by preventing a *qui tam* plaintiff from bringing suit based on their contents." *Id.*

143. *Compare, e.g., United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339 (4th Cir. 1994), with *United States ex rel. Findley v. FPC-Boron Employee's Club*, 105 F.3d 675 (D.C. Cir. 1997).

144. 21 F.3d 1339 (4th Cir. 1994).

145. *See id.* at 1349; *see also* Salcido, *supra* note 27, at 275 (noting that *Siller* is the leading case interpreting "based upon" as "derived from").

146. *See Siller*, 21 F.3d at 1341.

147. *See id.* Although the settlement agreement bound Ruben Siller, the president of SSI, to confidentiality, it did not bind David Siller, the plaintiff. *See id.*

148. *See id.*

149. *See id.* at 1348 ("Section 3730(e)(4)(A)'s use of the phrase 'based upon' is, we believe, susceptible of a straightforward textual exegesis.").

150. *See id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 180 (1986)). The court could not find any common or dictionary interpretation of the phrase that would allow it to mean "supported by." *See id.* at 1349.

151. *See id.* at 1348. The court dismissed the conflicting interpretations in other cir-

Fourth Circuit found this reading of the statute consistent with Congress' intention of preventing parasitic claims.¹⁵² According to the court, "it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic."¹⁵³

The D.C. Circuit contended in *United States ex rel. Findley v. FPC-Boron Employees' Club*¹⁵⁴ that "based upon" means "substantially similar to." In *Findley*, the relator brought a suit which alleged fraudulent activity similar to what was already alleged in a 1952 Comptroller General Opinion and the legislative history of the Randolph-Sheppard Act.¹⁵⁵ The D.C. Circuit considered and explicitly rejected *Siller*.¹⁵⁶

Findley found the term "based upon" to be ambiguous and, thus, turned to the legislative history for guidance.¹⁵⁷ Consequently, the court found the Fourth Circuit's interpretation to be in error.¹⁵⁸ The D.C. Circuit reasoned that *Siller* misconstrued the intent of Congress when it stated that suits derived from information identical to publicly disclosed information are not parasitic.¹⁵⁹ Instead, the D.C. Circuit held that Congress intended to bar *qui tam* actions when the relator has not brought any significant independent information to the suit.¹⁶⁰ The *qui tam* provisions were an attempt to "'encourag[e] whistleblowing and discourag[e] opportunistic behavior."¹⁶¹

circuits. *See id.* at 1349. Finding that the other circuits either did not properly address the question yet or did not properly support their position, it stated:

Preferring the plain meaning of the words enacted by Congress over our sister Circuits' as-yet-unconsidered assumptions as to the meaning of those words, and over the Second Circuit's considered but unsupported interpretation, we hold that *Siller*'s action was only "based upon" the disclosures in the SSI lawsuit if *Siller* actually derived his allegations against BD from the SSI complaint.

Id.

152. *See id.*

153. *Id.* at 1348. Although no other circuit has adopted the Fourth Circuit's standard, a similar approach was taken in a district court in the First Circuit. *See United States ex rel. LaValley v. First Nat'l Bank*, 707 F. Supp. 1351, 1367 (D. Mass. 1988) (finding information in suit was not based upon a publicly disclosed source because it was acquired as the result of an independent investigation).

154. 105 F.3d 675 (D.C. Cir. 1997).

155. *See id.* at 685.

156. *See id.* at 682-85.

157. *See id.* at 682.

158. *See id.* at 682-83.

159. *See id.* at 683.

160. *See id.* at 684.

161. *Id.* at 683 (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994)).

The D.C. Circuit noted also that interpreting “based upon” to mean “derived from” renders the original source requirement of the *qui tam* provisions largely superfluous.¹⁶² The statute states that if a relator brings a suit based on publicly disclosed information, he must be an original source.¹⁶³ An original source must provide the information to the government and have obtained the information independently of the public disclosure.¹⁶⁴ Using the Fourth Circuit definition of “based upon,” an unscrupulous relator could read about a fraudulent transaction in the local newspaper and conduct his own investigation and then claim that, although the information was publicly disclosed, his allegations are not based upon that information.¹⁶⁵ Thus, he would not have to meet the original source requirements.¹⁶⁶ Such an erroneous result is avoided by “[u]sing 'based upon' as a proxy for whether the relator's complaint merely parrots what is already in the public domain.”¹⁶⁷ This test “leads logically to a subsidiary inquiry into whether the relator had obtained the information in the complaint independently prior to the disclosure and so is an 'original source.’”¹⁶⁸ The majority of other circuits have come to the same conclusion as *Findley*.¹⁶⁹

C. The Original Source Provision and Public Disclosure

Like the public disclosure provision of the False Claims Act, the original source provision has been the subject of conflicting court interpreta-

162. See *Findley*, 105 F.3d at 683.

163. See 31 U.S.C. § 3730(e)(4)(A) (1994).

164. See *id.* § 3730(e)(4)(B).

165. See *Findley*, 105 F.3d at 683.

166. See *id.* (recognizing that the Fourth Circuit's interpretation swallows the original source exception).

167. *Findley*, 105 F.3d at 683.

168. *Id.*

169. See *United States ex rel. Biddle v. Board of Trustees*, 147 F.3d 821, 827 (9th Cir. 1998) (believing that the Fourth Circuit's interpretation does not further either of the twin goals of the False Claims Act); *United States ex rel. McKenzie v. Bellsouth Telecomm., Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) (observing that interpreting “based upon” to mean “supported by” is consistent with the purpose of the False Claims Act); see also *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545 (10th Cir. 1996) (stating that when allegations are “substantially identical” to publicly disclosed information, the allegations are considered to be “based upon” the publicly disclosed information); *Federal Recovery Servs., Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995) (stating that a *qui tam* plaintiff may not avoid the jurisdictional bar by adding claims that are substantially similar to information that has been publicly disclosed); *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 567 (11th Cir. 1994) (finding that “based upon” is defined as “supported by”); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) (concluding that public disclosure of allegations divests courts of jurisdiction regardless of where a relator obtained his information).

tions.¹⁷⁰ At the heart of this issue is the original source's relationship with the publicly disclosed information.¹⁷¹ The courts are split three ways: some require the original source to be the source of the public disclosure;¹⁷² some state that it does not matter who discloses the information or when the original source brings the information to the government's attention;¹⁷³ and some require the original source to disclose the information before it is disclosed publicly.¹⁷⁴

In *United States ex rel. Dick v. Long Island Lighting Co.*,¹⁷⁵ the Second Circuit found that a *qui tam* plaintiff must be the source of the public disclosure.¹⁷⁶ To reach this conclusion, the court examined the meaning of the word "information" in 31 U.S.C. § 3730(e)(4)(A) in relationship to

170. Compare *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16-18 (2d Cir. 1990) (finding that an original source must be the source of the public disclosure), with *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1351-55 (4th Cir. 1994) (finding that it does not matter who discloses the information or when the original source brings the information to the government's attention), with *United States ex rel. Findley v. FPC-Boron Employee's Club*, 105 F.3d 675, 688-91 (D.C. Cir. 1997) (finding that an original source must disclose the information, before it is publicly disclosed).

171. See *infra* notes 172-77 and accompanying text (discussing differences among the circuits interpreting the original source provision).

172. See *Wang v. FMC Corp.*, 975 F.2d 1412, 1414 (9th Cir. 1992) (holding that a *qui tam* plaintiff must have played a role in disclosing the allegations); see also *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 17 (2d Cir. 1990) (stating that an original source must be the one that disclosed the allegations to the entity that disclosed the information to the public).

173. See *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1548 n.2 (10th Cir. 1996) (declining to adopt a requirement that the original source be a source to the disclosing entity); *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 568 n.13 (11th Cir. 1994) (stating that the added requirement found in *Long Island Lighting* imposes an undue burden on would-be relators); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1355 (4th Cir. 1994) ("[A] *qui tam* plaintiff need not be a source to the entity that publicly disclosed the allegations on which the *qui tam* action is based in order to be an original source . . .").

174. See *United States ex rel. McKenzie v. Bellsouth Telecomm., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) ("to be an original source, a relator must inform the government of the alleged fraud before the information has been publicly disclosed," but that one does not have to be a source to the "world at large"); see also *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997) (finding that there is no requirement that an original source be a source to the disclosing entity, however, he must provide the information to the government prior to any public disclosure).

175. 912 F.2d 13 (2d Cir. 1990).

176. See *id.* at 16. According to *Long Island Lighting*, there are three requirements that must be met in order to qualify as an original source: 1) the relator must have direct and independent knowledge of the allegations, 2) the relator must voluntarily provide the information to the government before filing suit, and 3) the relator must "have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." *Id.*

the word "information" in 31 U.S.C. § 3730(e)(4)(B).¹⁷⁷ In evaluating ¶ (4)(B), the court emphasized that the word "information" is modified by the phrase "on which the allegations are based" and, therefore, means the information used to bring a *qui tam* suit.¹⁷⁸ In ¶ (4)(A), however, the court found that the word "information" means the information that has been publicly disclosed.¹⁷⁹ Thus, an original source must comply with the two requirements of ¶ (4)(B), namely, the party must have direct and independent knowledge of the information on which the allegations are based, and must voluntarily provide the information to the government prior to filing his suit.¹⁸⁰ In addition, the original source must also meet a third requirement established in ¶ (4)(A): he must be the source to the entity that publicly disclosed the information.¹⁸¹

According to the Second Circuit, such a construction supports the goals of the False Claims Act.¹⁸² To support its position, the court cited portions of the *Congressional Record* indicating that legislators closely involved in the 1986 amendments intended *qui tam* plaintiffs to be the source of the public disclosure of fraudulent transactions.¹⁸³ The court also found that its interpretation would promote the Act's goal of encouraging whistleblowers to come forward.¹⁸⁴ Because the rule bars individuals from using information already in the public domain, potential

177. *See id.* The court found that "various facts cumulatively suggest . . . that the word 'information' is not intended to mean the same in § 3730(e)(4)(A) as it does in § 3730(e)(4)(B)." *Id.*

178. *See id.* at 16-17. The court supplied three reasons for this conclusion. *See id.* First, any other reading of ¶ (4)(A) would make its use of "information" superfluous. *See id.* at 16. Second, the court found that the modification in ¶ (4)(B) and the lack of modification in ¶ (4)(A) indicated that the word "information" must have different meanings in the different paragraphs. *See id.* at 16-17. Finally, the court found that the "most natural reading" of the word in ¶ (4)(A) indicated that it referred to the information that was publicly disclosed. *See id.* at 17.

179. *See id.* at 17.

180. *See id.* at 16.

181. *See id.*

182. *See id.* at 17-18 (discussing the legislative intent of the FCA and various statements by supporters of the 1986 amendments).

183. *See id.* at 17. The court noted that Representative Berman, a co-drafter of the 1986 amendments, stated that to qualify as an original source, one must have "had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed." *Id.* (quoting 132 CONG. REC. H9389 (daily ed. Oct. 7, 1986)). The court also referred to comments made by Senator Grassley, who introduced the legislation in the Senate. *Id.* He stated that a relator was barred from bringing a suit if he "had not been an original source to the entity that disclosed the allegations." *Id.* (quoting 132 CONG. REC. S20536 (daily ed. August 11, 1986)) (emphasis added by the court).

184. *See id.* at 18.

relators are encouraged to come forward as quickly as possible.¹⁸⁵

Agreeing with the Second Circuit, the Ninth Circuit, in *Wang v. FMC Corp.*,¹⁸⁶ also found that such an interpretation fits most logically into the history of the False Claims Act.¹⁸⁷ According to *Wang*, when Congress enacted the 1986 amendments, it wanted what it thought it had in 1943—“a law requiring that the relator be the original source of the *government's* information.”¹⁸⁸ Thus, the 1986 amendments were intended only to correct opinions like *Dean* so that the whistleblower would still be eligible to bring an action.¹⁸⁹ In the Ninth Circuit's view, the *qui tam* provisions are intended only to encourage insiders to blow the whistle; therefore, plaintiffs who are not the actual source of the public disclosure need not be rewarded.¹⁹⁰

The second school of thought is represented in *United States ex rel. Siller v. Becton Dickinson & Co.*¹⁹¹ Here, the Fourth Circuit found that a relator is not responsible for disclosing the information, nor is he responsible for bringing it to the Government's attention before it reaches the public domain.¹⁹² In *Siller*, the court found that ¶ (4)(B) establishes the exclusive criteria to qualify as an original source.¹⁹³ According to *Siller*, the proper way to read ¶ (4)(A) and ¶ (4)(B) together is:

[n]o court shall have jurisdiction over an action . . . based upon the public disclosure of allegations . . . in a . . . civil . . . hearing . . . unless . . . the person bringing the action . . . has direct and independent knowledge of the information on which the allega-

185. *See id.* (noting that the interpretation encourages whistleblowers to break the “conspiracy of silence”).

186. 975 F.2d 1412 (9th Cir. 1992).

187. *See id.* at 1418.

188. *Id.* at 1419 (emphasis in original). The court found that the 1986 amendments were remedial and not innovative. *See id.*

189. *See id.* (finding no evidence that Congress intended to do anything but correct *Dean*, and some evidence that it meant to do even less).

190. *See id.* (“[T]here is little point in rewarding a second toot.”).

191. 21 F.3d 1339 (4th Cir. 1994).

192. *See id.* at 1355 (discussing the original source provision).

193. *See id.* at 1351. The Fourth Circuit found that the Second Circuit attempted to glean support for its position by creating an ambiguity in an otherwise clear statute. *See id.* at 1352 & 1353 nn.12-13. It went on to note that the statements by Senator Grassley and Representative Berman relied upon by the Second Circuit were made prior to significant changes to the provisions. *See id.* at 1353. “The media” was dropped as a possible disclosing entity indicating that Congress did not intend for a plaintiff to provide information to this source. *See id.* In addition, the statute was changed to require an original source to provide information to the government before filing suit instead of before the government files suit. *See id.* This indicates that a relator can bring suit after the suit is publicly disclosed by a government action. *See id.*

tions are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.¹⁹⁴

Thus, the Fourth Circuit's interpretation does not include the Second Circuit's "additional, extra-textual requirement that was not intended by Congress."¹⁹⁵ Addressing the Second Circuit's contention that giving the same meaning to the word "information" in both ¶ (4)(A) and ¶ (4)(B) would make its use in ¶ (4)(A) superfluous, *Siller* states that the distinction is hyper-technical, and that it is unlikely Congress would even have noticed the repetition.¹⁹⁶ The court concluded that the redundancy is so minor that it does not warrant ascribing different meanings to the words.¹⁹⁷

Siller further states that the fact that Congress sought to correct *Dean* provides no support whatsoever for *Wang's* conclusion.¹⁹⁸ The 1943 amendments barred only suits based upon information already in the government's hands.¹⁹⁹ In order to remedy *Dean*-like cases, Congress merely had to ensure that the person bringing the information to the government would not be barred; according to the court, Congress accomplished this by the original source provisions.²⁰⁰ Thus, *Wang* wrongly assumed that to correct *Dean*, the plaintiff had to provide information, not just to the government, but also to the disclosing entity.²⁰¹

The third school of thought among the circuits is that, although an original source does not have to provide information to the disclosing entity, the person does have to come forward before the information is

194. *Id.* at 1351 (quoting 31 U.S.C. § 3730(e)(4) (1994)) (emphasis added by the court).

195. *Id.*

196. *See id.* at 1352.

197. *See id.* The court further stated that the modifying phrase, "on which the allegations are based," supports the conclusion that the word "information" has only one meaning in § 3730(e)(4). *See id.* Because the only allegations referenced in the section are those publicly disclosed, the modifying phrase indicates that the word "information" in ¶ (4)(B) means the information on which the publicly disclosed allegations are based. *See id.* This is the same conclusion reached by the Second Circuit interpreting the word "information" referred to in ¶ 4(A). *See id.*

198. *See id.* at 1354.

199. *See id.* The decision in *Dean* had nothing to do with barring suits based on information disclosed to the general public. *See id.* The 1943 amendments bar *qui tam* suits only if they are "based upon evidence or information in the possession of the United States." *Id.* (quoting 31 U.S.C. § 232(C) (1976) (superceded)) (emphasis added by the court).

200. *See id.* at 1354 (noting that the original source provision exempts relators from the jurisdictional bar if they voluntarily provided their information to the government before filing suit).

201. *See id.*

publicly disclosed.²⁰² The D.C. Circuit explained the rationale for this interpretation in *Findley*.²⁰³ Like *Siller*, the D.C. Circuit simply noted that § 3730(e)(4)(B) only contemplates an original source as a source to the government, not to any other entity.²⁰⁴ Therefore, there is no additional requirement that the relator provide the information to the disclosing entity.²⁰⁵

The *Findley* court's ruling differed, however, from the Fourth Circuit's because it found that an original source must provide the information before it is publicly disclosed.²⁰⁶ The *Findley* court asserted that such an interpretation fixes the holding in *Dean* by protecting informants who bring suits.²⁰⁷ This interpretation also serves the goal of limiting parasitic suits by barring claims based on old information that has already been disclosed.²⁰⁸ Once the information is in the public domain, the court found that the *qui tam* provisions were no longer necessary for the government to rely on private citizens to bring *qui tam* suits.²⁰⁹

The Sixth Circuit agreed with the D.C. Circuit in *United States ex rel. McKenzie v. Bellsouth Telecommunications, Inc.*²¹⁰ In *McKenzie*, the court based its decision largely on the twin goals of the False Claims Act.²¹¹ The *McKenzie* court approved of the D.C. Circuit's interpretation

202. See *supra* note 172 (listing cases finding that an original source must provide his information to the government before it is publicly disclosed).

203. See *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688-91 (D.C. Cir. 1997) (discussing judicial interpretations of the original source provision).

204. See *id.* at 690. Such a reading avoids a potentially unfair result in a case where a relator volunteers new, independently acquired information to the government but is barred from bringing his suit because the media subsequently discovers and reports the allegations. Cf. *id.*

205. See *id.*

206. See *id.* The court rejected the Fourth Circuit's analysis which merged the original source provision with the public disclosure provision. See *id.* at 691. According to *Findley*, the only reading of the statute that accounts for the requirement that an "original source" voluntarily provide information to the government before filing suit, and Congress' decision to use the term "original source" rather than simply incorporating [the original source provision] into [the public disclosure provision], is one that requires an original source to provide the information to the government prior to any public disclosure.

Id.

207. See *id.*

208. See *id.* (determining that there is no incentive to protect relators that bring information that has already been publicly disclosed).

209. See *id.*

210. 123 F.3d 935 (6th Cir. 1997).

211. See *id.* at 942-43 (asserting that the court's conclusion is based upon the plain meaning of the Act as well as Congress' purpose in amending the Act).

because it promotes legitimate *qui tam* litigation by encouraging plaintiffs to come forward as soon as possible and discouraging potential relators from sitting on the information.²¹² Furthermore, this approach helps discourage people from feeding off previously disclosed information and filing the parasitic lawsuits that prompted Congress to change the law in 1943.²¹³ The Sixth Circuit found that only a true whistleblower—someone who actually alerts the Government to fraud—should be rewarded.²¹⁴

III. DEFINING THE LINE BETWEEN THE TWIN GOALS

The *qui tam* provisions of the FCA represent Congress' attempt to balance conflicting interests,²¹⁵ and the statute should be interpreted with this goal in mind. Each of the circuit court splits identified above, shifts the balance one way or the other.²¹⁶ The goal of the courts, however, must be to take the jurisdictional bar as a whole and define the delicate line that rewards whistleblowers with valuable information and thwarts opportunists.

A. Limiting Application of the Bar Only to Information That is Actually Disclosed

The issue over theoretical versus actual disclosure is one of the essential hurdles that may confront a *qui tam* plaintiff.²¹⁷ By showing that the information was not in the public domain, the plaintiff can avoid the additional burdens of showing that the information was not based on the publicly disclosed information or demonstrating that s/he is an original source.²¹⁸

Although the Third Circuit purports to take a commonsense ap-

212. *See id.* at 943. The court found that this interpretation is more consistent with the Act's goal of alerting the government to fraud because it encourages the whistleblower to give the information to the government, as opposed to any other entity that might release it into the public domain. *See id.*

213. *See id.*

214. *See id.* (finding that it would be contrary to the purpose of the statute to allow "the individual who sits on the sidelines while others disclose the allegations" to reap any reward from a *qui tam* suit).

215. *See supra* note 106 (listing cases analyzing the purpose of the *qui tam* provisions).

216. *See supra* notes 111-214 and accompanying text (discussing how the circuits have balanced the twin goals of the FCA).

217. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

218. *See id.* The first step in the analysis of the jurisdictional bar is to determine if the information relied upon by the plaintiff has been disclosed to the public. *See id.* If it has not, then the test stops there and the jurisdictional bar is not applied. *See id.*

proach,²¹⁹ by barring actions based upon information that could potentially be disclosed,²²⁰ it erects a potentially significant obstacle to legitimate *qui tam* suits. The Third Circuit did not want public disclosure to turn on what form of discovery takes place and local district filing rules.²²¹ Although attempting to apply a universal standard not subject to the individual practices of local courts may be useful; in this instance, it is misguided.

The purpose of the public disclosure bar is to prevent parasitic suits and to stop the “race to the courthouse” once information has been released to the public.²²² If information has not yet reached the public eye, then there is no reason to prevent the litigation.²²³ As the D.C. Circuit stated in *United States ex rel. Springfield Terminal Railway v. Quinn*,²²⁴ a suit that is based upon information that has not actually been disclosed cannot be deemed parasitic because the government has an interest in bringing the case into the light.²²⁵ Until the government is given actual knowledge of a fraud, the fraud cannot be remedied and the purpose of the FCA will be frustrated.

The majority view that an affirmative action should be required in order for information to be publicly disclosed²²⁶ is the more sensible rule. The rule does not encourage parasitism because a relator basing a claim on information that is only theoretically disclosed must first have knowledge that the information exists, and then conduct an investigation to uncover it.²²⁷ As the Ninth Circuit noted in *United States ex rel. Schumer v.*

219. See *United States ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991) (opining that the court's interpretation is a “practical, commonsense” reading of the congressional intent behind the jurisdictional bar).

220. See *id.* at 1159 (noting that the court looks not to whether disclosure documents have been filed, but rather to whether they *can* be filed).

221. See *id.* at 1158-59.

222. See FCA AMENDMENTS, *supra* note 1, at 10-12 (articulating the government's concern with an FCA that contains no jurisdictional bar). The first jurisdictional bar was added in 1943 as a direct response to Attorney General Francis Biddle's concerns over these issues. See *id.*

223. See *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 653 (D.C. Cir. 1994).

224. 14 F.3d 645 (D.C. Cir. 1994).

225. See *id.* at 653. “To bar a *qui tam* suit under these circumstances would prevent the utilization for enforcement purposes of allegations or transactions that may not otherwise come to the attention of the authorities.” *Id.*

226. See *supra* note 140 (describing the various approaches that the circuits have taken on this issue).

227. See *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996). “If a specific report detailing instances of fraud is not affirmatively disclosed, but rather is simply ensconced in an obscure government file, an opportunist *qui*

Hughes Aircraft Co.,²²⁸ although some of the pieces of the puzzle may lurk in hidden government file cabinets and may be potentially available through FOIA requests, this should not be a bar to a relator exposing a fraud.²²⁹ Furthermore, the rule helps bring fraud to light by preventing government inaction that would allow the information to remain hidden.²³⁰ As the Tenth Circuit observed, it takes a positive act of disclosure to the public to prevent the government from obscuring the allegations in a “cloak of secrecy.”²³¹ In such situations, the *qui tam* provisions are at their best—uncovering fraud and forcing remedial action.

B. Interpreting “Based Upon”

How a court interprets the phrase “based upon” may have the single largest impact on the outcome of the FCA analysis.²³² Even if information has been publicly disclosed, anyone can still bring a *qui tam* action as long as it is not based on that information.²³³ The majority of the circuits have correctly given the phrase a broad interpretation to include information that is “substantially similar to” publicly disclosed allegations or transactions.²³⁴

Although the interpretation adopted by the Fourth Circuit in *Siller* may encourage more private citizens to file *qui tam* suits, it also invites parasitic claims.²³⁵ The *Siller* Court justified its holding by arguing that

tam plaintiff first would have to know of the report's existence in order to request access to it.” *Id.*

228. 63 F.3d 1512 (9th Cir. 1995).

229. *See id.* at 1519-20.

230. *See Ramseyer*, 90 F.3d at 1520; *see also supra* note 136 (explaining Congress's intent when enacting the 1986 amendments).

231. *See Ramseyer*, 90 F.3d at 1520 (holding that only when information has been “irretrievably released into the public domain” by a positive act of disclosure will the government no longer be able to suppress the allegations) (quoting *Doe*, 960 F.2d at 323).

232. *See United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347 (4th Cir. 1994) (explaining how an action may be dismissed under 31 U.S.C. § 3730(e)(4) (1994)). If a *qui tam* plaintiff can get a court to adopt a restrictive interpretation of the phrase “based upon,” then it is less likely that s/he will have to deal with trying to show the information was not publicly disclosed or that s/he is an original source. *See id.*

233. *See United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 683 (D.C. Cir. 1997) (ruling that a *qui tam* plaintiff only needs to be an original source if the suit is based on publicly disclosed information).

234. *See supra* note 169 (citing cases equating “based upon” with “substantially similar to”).

235. *See Doe*, 960 F.2d at 324 (stating that parasitic actions would flourish if courts did not interpret “based upon” to include allegations similar to those already disclosed); *see also United States ex rel. Biddle v. Board of Trustees*, 147 F.3d 821, 828 (9th Cir. 1998) (concluding that the approach in *Siller* works at cross-purposes with the twin goals of the FCA). *Biddle* maintains that persons who merely repeat information similar to that which

anything not actually derived from public disclosures cannot be considered parasitic.²³⁶ This assumption, however, is not well thought out. Such an interpretation allows an unscrupulous plaintiff to read about a fraudulent transaction in a local paper and then conduct his own "investigation" of the matter.²³⁷ If the person acts quickly, s/he can beat the government to the courthouse with a suit that incorporates nothing but information already known to the public.²³⁸ Such a suit is parasitic because the relator is bringing nothing new to the table; yet s/he stands to take a significant portion of the government's recovery.²³⁹ Such a suit also brings back the race to the courthouse problem that Congress thought it defeated in 1943.²⁴⁰

Once allegations of fraud have reached the public eye, the usefulness of the *qui tam* plaintiff is sharply decreased.²⁴¹ The majority approach more closely matches the intent of the False Claims Act. Interpreting "based upon" to mean "substantially similar to" limits parasitic suits by requiring the relator to bring new information to the table.²⁴² A plaintiff

is already in the public domain should not be rewarded unless they took "significant personal risks to bring such wrongdoing to light." *Id.*

236. See *Siller*, 21 F.3d at 1348.

237. See *Findley*, 105 F.3d at 683.

238. See *id.*

239. See *id.* (using this example to point out deficiencies in the Fourth Circuit's interpretation of "based upon"). A successful *qui tam* plaintiff may take up to 30% of the government's total recovery if the government does not intervene and 25% if the Government does intervene. See 31 U.S.C. § 3730(d) (1994).

240. See FCA AMENDMENTS, *supra* note 1, at 10-13 (evaluating the problems of allowing information readily available to the public to be used in *qui tam* litigation).

241. See *Findley*, 105 F.3d at 685 (noting that the government has less financial incentive to encourage individuals to expose fraud once the allegations are in the public domain); see also *United States ex rel. Biddle v. Board of Trustees*, 147 F.3d 821, 828 (9th Cir. 1998) (finding that a relator who merely repeats publicly disclosed information confers no additional benefit to the government). Encouraging *qui tam* litigation at this point only serves to pressure the government into action when it has reason not to act, or serves to reduce the government's recovery in a successful case. See *Findley*, 105 F.3d at 685. *But cf.* *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996) (reasoning that Congress intended for the *qui tam* provisions to be used to prod the Government into action when it was dragging its feet in prosecuting fraud); FCA AMENDMENTS, *supra* note 1, at 6 (noting that it is difficult for the government to collect all the pertinent information in a fraud case because it lacks the authority to compel depositions and the production of documents prior to filing a suit, and because the government may not be able to use information it has obtained due to grand jury secrecy rules).

242. See *United States ex rel. McKenzie v. Bellsouth Telecomm. Inc.*, 123 F.3d 935, 940 (6th Cir. 1997) (deciding that interpreting "based upon" to mean "supported by" restricts the number of cases that can overcome the jurisdictional bar and thus reduces parasitic suits); *Findley*, 105 F.3d at 683 ("our broader construction of the jurisdictional bar to encompass situations in which the relator's complaint repeats what the public already knows" and discourages the opportunistic behavior Congress sought to prevent).

who cannot bring new information does not provide a useful service to the government. Furthermore, a legitimate whistleblower whose allegations are similar to information in the public domain is still protected by the original source exception.²⁴³

C. The Original Source Provision

Interpretations of the original source provisions have split the circuits in three ways.²⁴⁴ The Second and Ninth Circuits have held, incorrectly, that an original source must also be the source to the entity that publicly disclosed the allegations.²⁴⁵ This conclusion is based on a trivial technicality.²⁴⁶ As the Fourth Circuit stated, the redundancy of the word "information" is of such slight consequence that it does not warrant ascribing different meanings to the same word in successive clauses.²⁴⁷ This interpretation adds a new requirement to the statute that Congress did not envision.²⁴⁸

While the Third, Fourth, Tenth, and Eleventh Circuits' interpretations have more merit than the Second and Ninth Circuits', they have also misconstrued the statute. These circuits found that the original source and the public disclosure provisions are unrelated and should be treated separately.²⁴⁹ Such an analysis meets the plain text requirements of the statute but fails to consider several important factors. First, this interpre-

243. See 31 U.S.C. § 3730(e)(4)(A)-(B) (providing that an original source can bring a suit based on publicly disclosed information); see also *Biddle*, 147 F.3d at 829 n.2 ("It must be remembered . . . that [a relator's] failure to satisfy the 'based upon public disclosure' requirement is not the end of the inquiry. If [the relator was] deemed an original source of the information, the . . . court could assert jurisdiction over his *qui tam* suit.").

244. See *supra* notes 172-74 and accompanying text (discussing the different court interpretations of what constitutes an "original source").

245. See *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992) (finding that a *qui tam* plaintiff must have played a role in bringing about the public disclosure of the allegations); see also *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990) ("[A] plaintiff . . . must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.").

246. See *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1352 (4th Cir. 1994) (declaring that the distinction employed by the Second and Ninth Circuits is of "the most hypertechnical" type).

247. See *id.* "If the language of law is to have any meaning at all, then surely it must prevail over the kind of speculation that is entailed in such an enterprise as [the Second and Ninth Circuits] have undertaken." *Id.* at 1355.

248. See *United States ex rel. McKenzie v. Bellsouth Telecomm. Inc.*, 123 F.3d 935, 941 (6th Cir. 1997); *Siller*, 21 F.3d at 1352; see also *Salcido*, *supra* note 27, at 286 (arguing that the FCA does not include the independent "source" requirement imposed by the Second and Ninth Circuits).

249. See *supra* note 173 (listing the cases finding that the original source does not have to be the first person to reveal the fraud to the disclosing entity or to the government).

tation ignores the requirement of an original source to provide information voluntarily to the government.²⁵⁰ It would be a curious anomaly if Congress intended for an original source to provide the government with information when the suit is based on information the government already knows.²⁵¹ Second, and as noted above, once allegations of fraud surface into the public realm, there is less need for private citizens to sue on behalf of the government.²⁵² Once allegations reach the public domain, the government has the responsibility to decide whether or not to prosecute the case.²⁵³ The FCA is intended to break the “conspiracy of silence,”²⁵⁴ not reward those who wait to speak out until after someone else has come forward.²⁵⁵

Thus, the only reasonable interpretation of the statute is that posited by the D.C. and Sixth Circuits.²⁵⁶ Under their analysis, a relator must provide information to the government before the information is publicly

250. See 31 U.S.C. § 3730(e)(4)(B) (1994) (“‘original source’ means an individual who has . . . voluntarily provided the information [on which the allegations are based] to the Government before filing an action”).

251. See *McKenzie*, 123 F.3d at 942 (charging that a relator must be a “true whistleblower,” and therefore, it is incomprehensible to call someone an original source if he is not responsible for alerting the government to the fraud in the first place). All *qui tam* plaintiffs are required under § 3730(b) to file their complaint with the government before their suit may be initiated. Thus, the requirement in § 3730(e)(4)(B) to provide information to the government must be intended to be more than just a procedural “heads-up” because § 3730(b) already provides for this. See 31 U.S.C. § 3730(b), (e).

252. See *supra* note 241 (discussing why *qui tam* litigation is not valuable once information has reached the public domain).

253. See *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 685 (D.C. Cir. 1997) (contending that when information reaches the public domain, the government should be allowed to exercise its prosecutorial discretion). Other parts of the Act also indicate Congress' concern for maintaining the government's prosecutorial discretion by retaining its ability to intervene and dismiss actions already begun. See *Salcido*, *supra* note 27, at 257-58 n.85 (examining the various ways Congress sought to insure the government's ability to control *qui tam* litigation).

254. See FCA AMENDMENTS, *supra* note 1, at 6 (noting that Congress changed the *qui tam* provisions in 1986 to allow “unwilling participants in fraudulent activity . . . an opportunity to speak up and take action . . . with some assurance their disclosures will lead to results”).

255. See *United States ex rel. McKenzie v. Bellsouth Telecomm. Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) (stating an original source should be a “true whistleblower”); *Wang v. FMC Corp.*, 975 F.2d 1412, 1419-20 (9th Cir. 1992) (“If there is to be a bounty for disclosing [allegations of fraud], it should go to one who in fact helped to bring them to light,” not to someone who “sat quietly in the shadows and breathed not a word about them until [after they were already disclosed].”).

256. See *Findley*, 105 F.3d at 691 (concluding that this interpretation is the only reading that both corrects the holding in *Dean* and accounts for Congress separating the original source provision from the public disclosure provision).

disclosed in order to be considered an original source.²⁵⁷ This reading of the statute prevents opportunists from being rewarded once the fraud is in the open while still protecting the party who initially exposes the fraud.²⁵⁸ This interpretation also fits within the twin goals of the FCA.²⁵⁹ First, it encourages persons privy to fraud to come forward because: 1) the statute will protect them, and 2) if they delay, they may lose their opportunity to sue.²⁶⁰ Second, it prevents parasitic suits by depriving those who do not take the significant personal risk of exposing fraud from reaping the reward.²⁶¹

IV. CONCLUSION

When courts interpret the *qui tam* provisions of the False Claims Act, they must consider the impact of their decisions on the Act's twin goals. By allowing theoretical public disclosure to bar suits, certain courts have tipped the scale too far in the direction of preventing parasitic suits at the expense of barring useful *qui tam* actions. When the information is not actually in the public domain, preventing people from using it to expose a fraud serves no purpose.

Interpreting the phrase "based upon" as "derived from," on the other hand, makes it too easy to file parasitic suits. Such a narrow definition allows anyone to take information in the public domain and, after some personal research, use it as the basis for a suit. This approach invites parasitic suits. If the information is in the public domain, the law should require an original source to bring the action. This prevents opportunists from being rewarded while encouraging legitimate whistleblowers to speak out.

Finally, courts should interpret the original source provision to encourage true whistleblowers to come forward while discouraging those who sit on their information. Requiring an original source to provide information before the allegations enter the public domain meets both of these ends.

257. See *McKenzie*, 123 F.3d at 942 (finding a relator must provide the government with the information before the allegations are publicly disclosed); *Findley*, 105 F.3d at 690 ("It is clear . . . that an 'original source' must provide the government with the information prior to any public disclosure").

258. See *Findley*, 105 F.3d at 691.

259. See *McKenzie*, 123 F.3d at 943 (deciding that both aims of the public disclosure bar are met by this interpretation).

260. See *id.* at 942-43 (noting that the interpretation serves to bring wrongdoing to light by encouraging persons with relevant information to speak out).

261. See *id.* at 942 (stating that the Act is not intended to reward those who sit on the sidelines).