

SHARING IS CARING: PROTECTING THE ABILITY OF
QUI TAM RELATORS AND THE GOVERNMENT TO
SHARE INFORMATION UNDER THE FALSE CLAIMS
ACT

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INTRODUCTION

False Claims Act cases have become big business. From 2008 to 2014, the Civil Fraud Section of the Department of Justice (“DOJ”) hauled in at least \$1.3 billion each year from corporations and individuals accused of defrauding the federal government.¹ In 2014, that amount increased to \$5.69 billion, the highest amount for any fiscal year to date, and the first time that the DOJ has cleared more than \$5 billion from False Claims Act (“FCA”) litigation.² Additionally, the \$22.75 billion the DOJ has recovered from FCA cases in the five-year period from 2009 to 2014 constitutes more than half of the total money brought in during the twenty-eight years since the law was amended in 1986.³

A large part of the success of the FCA after the passage of the 1986 amendments is the rise in number of *qui tam* relator suits.⁴ A *qui tam* relator is a private citizen who brings an action against another party for committing fraud against the government.⁵ One of the purposes of the 1986 amendments to the FCA was to encourage more private citizens to bring *qui tam* suits on behalf of the government.⁶ The 1986 amendments sought the “golden mean”

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¹ *Fraud Statistics*, U.S. DEP’T OF JUSTICE, CIV. DIV., (May 8, 2015), <https://www.justice.gov/file/fcastatspdf/download>, [hereinafter *Fraud Statistics*].

² Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 Press Release, OFFICE OF PUB. AFFAIRS, U.S. DEP’T OF JUSTICE, *Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014), <https://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014> [hereinafter *DOJ Press Release*].

³ *Id.*

⁴ Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 954–55 (2007).

⁵ *Id.* at 951. “*Qui tam*” is short for “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which is Latin for “who as well for the king as for himself sues in this matter.” *Id.* (quoting Black’s Law Dictionary 1282 (8th ed. 2004)).

⁶ *United States ex rel. LaCorte v. SmithKline Beecham Clinical Lab., Inc.*, 149 F.3d 227, 233–34 (3d Cir. 1998) (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994)).

of balancing the proper incentives to encourage *qui tam* relators to come forward.⁷ The incentives worked, and the number of *qui tam* suits rose dramatically over the years, from 30 in 1987 to 547 ten years later to over 700 in fiscal years 2013 and 2014.⁸

The most significant of the incentives placed in the 1986 Amendments to encourage *qui tam* relators to file suits were monetary in nature. Because the fraud is committed against the federal government and not against the relator, a *qui tam* relator only receives a percentage of any recovery arising from an allegation of fraudulent claims.⁹ The 1986 amendments raised those percentages for *qui tam* relators while also raising the overall damage amount at the same time by increasing the damages awards for violators of the Act from double to treble damages.¹⁰ Of the \$5.67 billion brought in under the FCA last year, nearly \$3 billion resulted from *qui tam* suits, and the total paid out to relators was \$435 million.¹¹ The government paid *qui tam* relators \$2.47 billion from the end of January 2009 to the end of the 2014 fiscal year.¹² Clearly, this is big business.

Because of the high stakes, large damage awards and policy considerations involved in FCA cases, the exact legal relationship between a *qui tam* relator and the government is incredibly important. This is because the legal relationship dictates whether the parties are protected from discovery when they share information or communicate with each other.¹³ If *qui tam* relators and the government share a “common interest” or “joint prosecution” privilege, then communication and information passed between the parties will be shielded because of the recognition of a shared legal interest.¹⁴ Neither the Supreme Court, nor any of the appellate circuit courts have weighed in on whether a joint-prosecutorial or common-interest privilege exists between *qui tam* relators and the government. Further, federal district courts have been inconsistent in their rulings on the matter since the passage of the 1986 amendments to the FCA.¹⁵ Some courts have denied any privilege,¹⁶ some

⁷ *Id.* at 234.

⁸ *Fraud Statistics*, *supra* note 1; *DOJ Press Release*, *supra* note 2.

⁹ 31 U.S.C. § 3730(d) (2006).

¹⁰ *See* Broderick, *supra* note 4, at 954.

¹¹ *DOJ Press Release*, *supra* note 2.

¹² *Id.*

¹³ *See generally* George S. Mahaffey Jr., *Taking Aim at the Hydra: Why the “Allied-Party Doctrine” Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 *REV. LITIG.* 629 (2004).

¹⁴ *Id.* at 661, 671 (citations omitted).

¹⁵ *See* *Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007) (“For every case construing the common interest narrowly, there seems to be a corresponding one reaching the opposite conclusion.”).

¹⁶ *E.g.*, *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 838–39 (N.D. Ill. 1993) (holding that relator’s disclosure statement was not protected by attorney-client privilege or work-product privilege because it contained only facts and not opinion, and because it was shared with the government, a third party).

have recognized that a privilege exists when the government decides to intervene;¹⁷ and some have held that the privilege should exist regardless of whether the government decides to intervene in the case or not.¹⁸

One area where the lack of clarity regarding the relationship between *qui tam* relators and the government raises an issue is whether the relator's initial disclosure statement is discoverable by the defendant. The FCA requires *qui tam* relators to file a disclosure statement listing all of the material evidence and information of the alleged fraud before the government can decide if it wants to intervene in the case.¹⁹ This disclosure statement is extremely valuable to the defendant and he or she will often seek to compel its discovery as well as other information and documents passed between the government and *qui tam* relators on the theory that both parties are sharing information with a third party and therefore lose any work-product privilege they may otherwise have.²⁰ The government counters that disclosure statements are opinion work-product according to the Federal Rules of Civil Procedure and that work-product and other communications between *qui tam* relators and the government should be shielded by joint-prosecutorial or common-interest privilege.²¹ Some courts have compelled discovery of all or part of this disclosure statement,²² while other courts have protected the disclosure statement by recognizing some sort of common-interest privilege between the parties.²³ "An uncertain privilege . . . is little better than no privilege at all," and the inconsistency in granting privilege to the disclosure statement, the filing of which is a relator's first step in a *qui tam* case, shows that uncertainty of privilege is bred into the relationship between relators and the government from the very start.²⁴ This uncertainty can continue through the litigation process, potentially leading to confusion or mistrust between parties due to lack of communication. It also increases the time and expense of the litigation that would otherwise be avoided because defendants try to compel

¹⁷ *E.g.*, *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26–27 (D.D.C. 2002) (finding a "unique relationship" between the government and relator that required privilege to share information unless the government chose not to intervene).

¹⁸ *E.g.*, *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 n.3 (S.D. Cal. 1996) (stating that a common-interest privilege would exist between *qui tam* relators and the government even if the government chose not to intervene).

¹⁹ 31 U.S.C. § 3730(b)(2) (2006).

²⁰ *See, e.g., Robinson*, 824 F. Supp. at 838–39.

²¹ *See, e.g., United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 398 (D. Colo. 1992).

²² *E.g., United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1346 (E.D. Mo. 1996); *United States ex rel. Burns v. A.D. Roe Co.*, 904 F. Supp. 592, 594–95 (W.D. Ky. 1995); *Stone*, 144 F.R.D. at 402.

²³ *See, e.g., United States ex rel. Yannacopoulos v. Gen. Dynamics*, 231 F.R.D. 378, 384–86 (N.D. Ill. 2005) (protecting disclosure statement in part, and ordering discovery in part); *United States ex rel. Cericola v. Ben Franklin Bank*, No. 99 C 6311, 2003 WL 22071484, at *2–3 (N.D. Ill. Sept. 4, 2003); *Burroughs*, 167 F.R.D. at 686.

²⁴ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

discovery of information that the parties shared with each other, including the disclosure statement mandated by the FCA.

Because the *qui tam* provision has the potential to be such a powerful weapon against those who would defraud the federal government, it is of extreme importance that this significant legal issue be definitively decided. Considering the legal relationship between the government and *qui tam* relators as well as the policy goals of the FCA, Congress should amend the FCA to address these discovery issues. Congress should add language to the FCA to protect the mandatory disclosure statement from discovery. Congress should also change the statute to grant the joint-prosecutorial privilege to *qui tam* relators and the government so any attorney-client privilege or work-product immunity is not waived when those two parties share any materials or information.

Part I of this comment traces the history of the FCA and the *qui tam* provisions from its inception during the Civil War up through modern times. Part II focuses on the treatment of the discoverability of the disclosure statement and the granting of joint-prosecution privilege in FCA cases since the passage of the 1986 amendments to the statute. Part III makes the case that Congress should amend the FCA to protect disclosure statements from being discoverable and to grant the joint-prosecutorial privilege to *qui tam* relators and the government.

I. BACKGROUND—THE HISTORY OF THE FALSE CLAIMS ACT AND THE *QUI TAM* ACTION

The history of the False Claims Act shows that from its inception, it has been an important tool to protect our government from those who would seek to unfairly profit from some of the most trying times in our nation's history. The history also shows that from the beginning it was important that private citizens take an active part in the process of rooting out fraud against the federal government. The ups and downs of the FCA over the past one hundred and fifty years also show that the system works best when the government incentivizes *qui tam* relators to bring FCA actions, and when the government and relators work together as a team rather than trying to go it alone.²⁵

²⁵ For a more complete history of the FCA, see James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites, and Patriots*, 81 U. CIN. L. REV. 1261 (2013).

A. *The False Claims Act and the Civil War*

The FCA originated as a war-time necessity to prevent profiteering during one of the most critical times in our nation's history.²⁶ The original Act was put forward in 1863 to battle, as one Senator put it, “one of the crying evils of the period . . . that our Treasury is plundered from day to day by bands of conspirators, who are knotted together in this city and other large cities for the purpose of defrauding and plundering the Government.”²⁷ *Qui tam* actions, however, can be traced back even further—to English law as far back as 1335.²⁸ *Qui tam* actions were common in England and reflected the belief that private citizens had the right to share in recovery from wrongdoers against the Crown.²⁹ The American colonists adopted *qui tam* provisions in several statutes and *McCulloch v. Maryland*,³⁰ one of the first landmark decisions in the history of the Supreme Court, was itself a *qui tam* action.³¹ Many early statutes adopted *qui tam* provisions, however, most *qui tam* provisions were repealed by the time of the Civil War.³²

While the Union Army was struggling in the war against the Confederate Army, Congress became aware of a number of misappropriations of funds that were supposed to be used in the war effort.³³ Congress decided that it had to act, as Senator Henry Wilson from Massachusetts proclaimed:

[T]hese [h]alls have rung with denunciations of the frauds of contractors upon the Government of the United States The Government finds, however, that it has no law adequate to punish them [T]he War Department says there is now no law adequate to meet these cases of fraud upon the Government. This bill is reported for the purpose of ferreting out and punishing these enormous frauds upon our Government; and, for one, my sympathies are with the Government, and not with the men who are committing these frauds. We have all of us seen enough, since this rebellion broke out, of frauds perpetrated upon the Government, and above all, and more than all, perpetrated upon our soldiers in the field; and I trust that the Senate will pass this bill, or some bill that will put fraudulent contractors in a position where they may be punished for their frauds.³⁴

Congress decided that the best way to incentivize the reporting of fraud against the government was to include a provision allowing an informer to

²⁶ *Id.* at 1264–67.

²⁷ CONG. GLOBE, 37th Cong., 3d Sess. 955 (1863) (statement of Sen. Howard).

²⁸ Helmer, *supra* note 25, at 1262.

²⁹ *Id.*

³⁰ 17 U.S. 316 (1819).

³¹ Helmer, *supra* note 25, at 1263.

³² *Id.* at 1264.

³³ Some examples of misappropriation included “[t]he same mules being sold over and over again to Army quartermasters[;] [r]otted ship hulls freshly painted to appear new then sold as new vessels to the N[avy][;] [i]nfantry boots made of cardboard which wore out after a mile of marching[;] [u]niform cloth made from recycled rags, which disintegrated when it became wet[;] [g]unpowder barrels that when opened contained sawdust.” *Id.* at 1264–65.

³⁴ CONG. GLOBE, *supra* note 27, at 956 (statement of Sen. Wilson).

earn half of any recovery received from litigation.³⁵ Members of Congress took to the floor to support the *qui tam* provision of the act. In the words of one Senator:

The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the person committing the act. In short, sir, I have based the fourth, fifth, sixth, and seventh sections upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.³⁶

President Lincoln signed the eventual False Claims Act that passed through Congress; it contained the *qui tam* provision awarding a 50 percent share of any recovery with a relator who brought an action on behalf of the United States against a government contractor who knowingly defrauded the government, and if found liable, the contractor had to pay double damages and a \$2000 penalty per false claim.³⁷ The government's intent in including the large damage awards and *qui tam* provisions in the original False Claim Act was to incentivize relators to come forward and to ensure that the United States was made whole even after splitting the recovery.³⁸

B. *The 1943 Amendments Gut the Qui Tam Provisions*

During World War II, war profiteering was again a serious government problem. However, the Attorney General at the time, Francis Biddle, elected to pursue fraud actions criminally and not bring civil action under the FCA.³⁹ This led to parasitic lawsuits as potential *qui tam* relators would hang around the courtroom, wait for a criminal indictment, and then immediately bring a *qui tam* action in civil action and collect the reward.⁴⁰ These relators could then seek one-half of the recovery when they had added nothing to the investigation and may have just copied federal indictments or used information from public disclosures of ongoing investigations.⁴¹ These civil lawsuits infuriated Biddle, who believed the Justice Department needed to have control

³⁵ Helmer, *supra* note 25, at 1265–66.

³⁶ CONG. GLOBE, *supra* note 27, at 955–56 (statement of Sen. Howard).

³⁷ Helmer, *supra* note 25, at 1266.

³⁸ *Id.*

³⁹ *Id.* at 1267.

⁴⁰ *Id.*

⁴¹ Beverly Cohen, *KABOOM! The Explosion of Qui Tam False Claims Under the Health Reform Law*, 116 PENN. ST. L. REV. 77, 82–83 (2011).

of false claims litigation, and even claimed that *qui tam* suits might be hurting the war effort instead of helping.⁴²

When one FCA case made it to the Supreme Court,⁴³ Biddle filed an amicus curiae brief arguing that the Court should strike the *qui tam* provisions from the FCA and leave the litigation of false claims to the government.⁴⁴ When the Supreme Court denied his arguments, Biddle took his case to Congress, and eventually the FCA was amended.⁴⁵ While Congress did not eliminate the *qui tam* provision as Biddle wanted, they did pass amendments which were meant to discourage private litigants from bringing FCA cases.⁴⁶

In an effort to eliminate “parasitic lawsuits,” *qui tam* actions were barred for any suits based on actions the government had any knowledge of.⁴⁷ However, a government contractor could usually be found somewhere with at least some knowledge of the claim, and thus the number of possible *qui tam* actions reduced dramatically.⁴⁸ The 1943 amendments also struck at the relationship between the relator and the government. A relator was required to provide all relevant information about the claim, and then the government had sixty days to choose whether to intervene.⁴⁹ If the government chose to intervene, the DOJ took exclusive control of the case and the relator watched from the sidelines.⁵⁰ If the government declined to intervene, the relator could continue alone, however, it was at the relator’s own expense.⁵¹ The 1943 amendments also reduced the monetary compensation to *qui tam* relators, getting rid of the mandatory 50 percent recovery.⁵² Instead, *qui tam* relators received 10 percent of any recovery if the government chose to intervene and no more than 25 percent if the relator litigated the case alone.⁵³

The 1943 amendments succeeded admirably in their attempts to quell *qui tam* suits under the FCA.⁵⁴ The diminished recovery for *qui tam* relators

⁴² See *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545–47 (1943) (responding to Biddle’s amicus curiae brief criticizing the *qui tam* provisions of the FCA).

⁴³ *Id.* at 539–40.

⁴⁴ See *id.* at 546–47.

⁴⁵ See S. REP. NO. 99-345, at 10–12 (1986).

⁴⁶ See James B. Helmer Jr. & Robert Clark Neff Jr., *War Stories: A History of the Qui Tam Provision of the False Claims Act, The 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 OHIO N.U. L. REV. 35, 38–39 (1991).

⁴⁷ See 31 U.S.C. § 232(c) (1946); see also Helmer & Neff, *supra* note 46, at 38; Patricia Meador & Elizabeth S. Warren, *The False Claims Act: A Civil War Relic Evolves into a Modern Weapon*, 65 TENN. L. REV. 455, 459–60 (1998).

⁴⁸ Helmer & Neff, *supra* note 46, at 40.

⁴⁹ 31 U.S.C. § 232(c) (1946).

⁵⁰ *Id.* (“If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States.”).

⁵¹ 31 U.S.C. § 232(E)(2) (1946).

⁵² Helmer & Neff, *supra* note 46, at 39.

⁵³ 31 U.S.C. § 232(E) (1946).

⁵⁴ Helmer, *supra* note 25, at 1271.

and change in the nature of the relationship between relators and the government effectively eliminated the *qui tam* provision for the next forty years.⁵⁵

C. *The 1986 Amendments to the Law Revive the Qui Tam Action*

While the war in the 1980s may have been a cold one, profit gouging by defense contractors was hot. High profile examples such as the “\$435 hammer, the \$640 toilet seat cover, and the \$7622 coffee-maker” put pressure on Congress to do something to rein in fraud against the government.⁵⁶ Seeking to combat fraud committed against the government, Congress came to the realization that the Department of Justice was overmatched in fighting the widespread abuses being committed by defense contractors.⁵⁷ Eventually, Congress passed amendments to the FCA that sought to incentivize *qui tam* relators to bring action against fraudsters and to solidify the relationship between the government and *qui tam* relators.⁵⁸

First, the 1986 amendments did away with the “government knowledge” bar that had severely limited the number of *qui tam* suits following the 1943 amendments.⁵⁹ To prevent a resurgence of the parasitic lawsuits that led to the 1943 amendments, the 1986 amendments contained a series of restrictions barring actions when a relator’s claims had already been publicly revealed.⁶⁰ In addition to making it easier for a *qui tam* relator to bring a claim, the 1986 amendments also sought to improve the relationship between a relator and the government. Instead of being swept aside if the government chose to intervene, the FCA now specifically states that the relator has “the right to continue as a party to the action.”⁶¹ The 1986 amendments also added protections against retaliation for *qui tam* relators for the first time, including provisions for the right to reinstatement, back pay and special damages.⁶² Finally, the 1986 amendments increased the monetary incentives for *qui tam* relators by increasing the total amount of recovery for false claims

⁵⁵ Helmer & Neff, *supra* note 46, at 39 (“The 1943 amendments virtually eliminated the *qui tam* suit as an effective weapon in combating fraud upon the United States Government.”).

⁵⁶ J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 561 (2000) (citation omitted).

⁵⁷ See Helmer, *supra* note 25, at 1272.

⁵⁸ See *id.* at 1273–74.

⁵⁹ Cohen, *supra* note 41, at 85–86 (citation omitted).

⁶⁰ See False Claims Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3157 (codified as amended at 31 U.S.C. § 3730(e) (2006)); see also Cohen, *supra* note 41, at 86–88.

⁶¹ See False Claims Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3155 (codified as amended at 31 U.S.C. § 3730(c)(1) (2006)).

⁶² See False Claims Act of 1986, Pub. L. No. 99-562, § 4, 100 Stat. 3153, 3157–58 (codified as amended at 31 U.S.C. § 3730 (h) (2006)); see also Justin P. Tschoepe, Comment, *A Fraud Against One is Apparently a Fraud Against All: The Fraud Enforcement and Recovery Act’s Unprecedented Expansion of Liability Under the False Claims Act*, 47 HOUS. L. REV. 741, 752 (2010).

and the percentage that a *qui tam* relator would recover.⁶³ The \$2,000 fine for each violation increased to up to \$10,000 per violation and the amendments increased the government's recovery from double to treble damages.⁶⁴ Under the 1986 amendments, when the government chooses to intervene in a case, the *qui tam* relator now gets 10 to 25 percent of any government recovery as well as costs, expenses and lawyers' fees.⁶⁵ If the government chooses not to intervene, the relator will receive 25 to 30 percent of any total recovery.⁶⁶

The incentives for relators found in the 1986 amendments revitalized the *qui tam* provision of the FCA.⁶⁷ The number of *qui tam* suits rose dramatically in the ensuing years, from 30 in 1987 to more than 700 for fiscal years 2013 and 2014,⁶⁸ and while the entire DOJ recovered \$54 million under the FCA in 1985, the recovery from *qui tam* cases alone was \$3 billion.⁶⁹

D. *The False Claims Act Today*

Since the 1986 amendments, Congress has continued to recognize the importance of the FCA and the *qui tam* provisions to combat fraud against the United States government. Congress has amended the FCA several times, and each amendment is aimed at broadening the reach of the FCA and *qui tam* relator suits.

When Congress passed the Deficit Reduction Act of 2005, § 6032 of the bill required any entity that handles Medicaid payments of more than \$500 million a year to include a detailed breakdown of the provisions of the FCA, including the rights of *qui tam* relators, in their employee handbook.⁷⁰ Law enforcement officials believed a lack of understanding or awareness of *qui tam* provisions was holding back relator suits and hoped § 6032 would increase the number of *qui tam* relators to bring suit for the government.⁷¹

The FCA was amended again in 2009 as part of the Fraud Enforcement and Recovery Act ("FERA").⁷² The FERA provisions expand the potential

⁶³ Ni Qian, Note, *Necessary Evils: How to Stop Worrying and Love Qui Tam*, 2013 COLUM. BUS. L. REV. 594, 607 (2013).

⁶⁴ See False Claims Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153 (codified as amended at 31 U.S.C. § 3729(a) (2006)).

⁶⁵ See False Claims Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156 (codified as amended at 31 U.S.C. § 3730(d)(1) (2006)).

⁶⁶ See False Claims Act of 1986, Pub. L. No. 99-562, § 3, 100 Stat. 3153, 3156–57 (codified as amended at 31 U.S.C. § 3730(d)(2) (2006)).

⁶⁷ Helmer, *supra* note 25, at 1275.

⁶⁸ DOJ Press Release, *supra* note 2.

⁶⁹ Helmer, *supra* note 25, at 1275–76; DOJ Press Release, *supra* note 2.

⁷⁰ Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6032 120 Stat. 4, 73–74 (2006); *see also* Broderick, *supra* note 4, at 955.

⁷¹ See Broderick, *supra* note 4, at 955.

⁷² Fraud Enforcement and Recovery Act, Pub. L. No. 111-21 § 4, 123 Stat. 1617, 1621–25 (2009); *see also* Helmer, *supra* note 25, at 1279.

liability under the FCA to those advancing a government interest as well as those dealing directly with the government.⁷³ The 2009 amendments also offered further protections from retaliation for *qui tam* relators.⁷⁴ The FERA amendments indicate the amendments' impetus was the government's surge in spending for the Troubled Asset Relief Program and accompanying stimulus bill related to Wall Street's bad behavior, and that the government was willing to wield the FCA to combat fraud in new areas of government spending.⁷⁵

When the government sought to overhaul the healthcare system in the Patient Protection and Affordable Care Act ("ACA"), it again turned to the FCA to reduce fraud.⁷⁶ To encourage private citizens to detect and report healthcare fraud, Congress included amendments to the *qui tam* provisions of the FCA in the ACA.⁷⁷ Congress altered the public disclosure and original source rules of the FCA, making it easier for a *qui tam* relator to bring a suit.⁷⁸ The ACA amendments to the FCA "signal a new age of extremely broad *qui tam* authority."⁷⁹

Qui tam actions are more numerous than ever, and the amount of money awards being paid out to *qui tam* relators is in the hundreds of millions.⁸⁰ The FERA and ACA amendments show the Obama administration's willingness to use the FCA as a weapon to fight fraud wherever the government may be at risk.⁸¹ Considering the massive amounts of money, as well as positive press from reigning in fraud against the government, it would be surprising if future presidents do not continue to wield the FCA at a broad level. In light of the ever-growing expansion of *qui tam* actions under the FCA, it is important to clarify the status of the relationship between a relator and the government.

II. CASES ADDRESSING THE JOINT-PROSECUTION OR COMMON-INTEREST PRIVILEGE IN *QUI TAM* ACTIONS BROUGHT UNDER THE FCA

Because of the unique nature of the relationship between relators and the government in *qui tam* action, issues often arise surrounding discovery and what a defendant can compel the government or relators to hand over. One document that is often at the center of the discovery controversy is the disclosure statement. The disclosure statement is of particular interest because the statute mandates that a *qui tam* relator disclose all material facts of

⁷³ Tschoepe, *supra* note 62, at 761–62.

⁷⁴ Helmer, *supra* note 25, at 1279.

⁷⁵ Qian, *supra* note 63, at 609.

⁷⁶ *Id.* at 610.

⁷⁷ Cohen, *supra* note 41, at 89.

⁷⁸ *See id.*, at 89–90.

⁷⁹ *Id.* at 78.

⁸⁰ *See* Broderick, *supra* note 4, at 955; DOJ Press Release, *supra* note 2.

⁸¹ Cohen, *supra* note 41, at 78–79; Tschoepe, *supra* note 62, at 744.

the fraud claim and file it with the government before a suit can commence.⁸² Defendants seek to compel production of the mandatory disclosure statement claiming it is factual work-product and claiming the document loses any work-product privilege once the *qui tam* relator shares it with the government.⁸³ Defendants also seek to compel any other communications or documents shared between *qui tam* relators and the government on the same theory that work-product immunity is waived once information is shared with a third party.⁸⁴ Relators and the government argue that the discovery should be blocked for the disclosure statement and other shared information, as they are protected by privilege under the FCA, attorney-client privilege, or work-product doctrine.⁸⁵ Relators and the government also maintain they should not lose that protection when sharing documents with each other because they share a joint-prosecutorial or common-interest privilege.⁸⁶

Neither the Supreme Court nor any circuit appellate courts have addressed the issue of what level of protection to afford a disclosure statement or whether the government and *qui tam* relators share a joint-prosecutorial privilege. At the federal district court level, the treatment of the subject has been inconsistent.⁸⁷ However, when reviewing the cases over the last thirty years—those decided after the 1986 amendments to the FCA—the trend appears to be moving towards recognizing a disclosure statement as opinion work-product while also recognizing some form of privilege between relators and the government. However, what exactly that privilege is and when it ceases remains an undecided matter.⁸⁸

A. *Early Cases Rejected Work-Product Immunity and Did Not Recognize the Joint-Prosecutorial Privilege of Qui Tam Relators and the Government*

*United States ex rel. Stone v. Rockwell Int'l Corp.*⁸⁹ was one of the earliest cases to address this issue of discoverability of shared documents after the 1986 amendments to the FCA.⁹⁰ *Stone* centered on whether the defendant

⁸² 31 U.S.C. § 3730(b)(2) (2012).

⁸³ *See, e.g., United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 398 (D. Colo. 1992).

⁸⁴ *See, e.g., id.* at 400.

⁸⁵ *See, e.g., id.* at 399–401.

⁸⁶ *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 683–85 (S.D. Cal. 1996).

⁸⁷ The United States District Court for the District of Columbia pointed out that “commentators bemoan the absence of any uniformity in the case law as to when parties share a common interest and how that interest is to be defined.” *Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007).

⁸⁸ *See id.* at 240 (“[F]or every case construing the common interest narrowly, there seems to be a corresponding one reaching the opposite conclusion.”).

⁸⁹ 144 F.R.D. 396 (D. Colo. 1992).

⁹⁰ *United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 398–99 (D. Colo. 1992).

in a *qui tam* case could compel discovery of the disclosure statement that the relator had to file with the government.⁹¹ The court held that there was no privilege and that the disclosure statement must be produced.⁹² The court rejected the government's position that the FCA itself provided for any privilege between the relator and the government, stating that the statute was silent on the matter.⁹³

The court also rejected the government's claims that the disclosure statement was protected by attorney-client privilege, stressing that attorney-client privilege must be construed strictly and the disclosure statement did not fall within those strict limits for several reasons.⁹⁴ First, the disclosure statement was not prepared for the purpose of soliciting legal advice; it was prepared only to be a recitation of facts in the case.⁹⁵ Second, there was no requirement that the disclosure statement be prepared by an attorney at all, and if the relator had prepared the statement himself, the privilege would certainly not apply.⁹⁶ Finally, the disclosure statement was not intended to remain confidential; the relator knew that his attorney would be passing along the document to the government, who would be considered a third party.⁹⁷

After rejecting privilege under the statutory language and attorney-client privilege, the court turned to whether work-product immunity would afford any protection to the disclosure statement. After an *in camera* review of the document, the court again denied any protection for the disclosure statement, stating that the work-product doctrine in Rule 26(b)(3) of the Federal Rules of Civil Procedure would not apply.⁹⁸ The court stated the disclosure statement contained only facts and therefore did not reflect the mental processes of the attorney who made the document, and the necessity of protection from this sort of factual work-product is "weak, at best."⁹⁹ Defendants are able to overcome this low protective bar for factual (or ordinary) work-product by showing a "substantial need" for factual allegations, and the court noted that in *qui tam* cases defendants could generally claim a "substantial need" for a disclosure statement because it contains all the material facts of the allegation in one document.¹⁰⁰

Through the first half of the 1990's, when this issue of discoverability came up in *qui tam* actions, the district courts across the country generally

⁹¹ *Id.* at 398.

⁹² *Id.* at 398–99.

⁹³ *Id.* at 398.

⁹⁴ *Id.* at 399–400.

⁹⁵ *Stone*, 144 F.R.D. at 399.

⁹⁶ *Id.* at 399–400.

⁹⁷ *Id.* at 400.

⁹⁸ *Id.* at 401.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

followed *Stone*'s lead. In *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*,¹⁰¹ the U.S. District Court for the Eastern District of Missouri granted the defendant's request to compel discovery of the disclosure statement after finding that the text of the FCA did not offer any statutory protection and declared that the disclosure statement was only ordinary work product containing only facts and no mental impressions.¹⁰² Similar to *Stone*, in *United States ex rel. Burns v. A.D. Roe Co.*,¹⁰³ the U.S. District Court for the Western District of Kentucky found that the disclosure statement was not subject to attorney-client privilege because it was not prepared for the purpose of seeking legal aid and because the relator knew it would be shared with a third party, even if that party was the government.¹⁰⁴ The court in *Burns* also agreed with *Stone* that the disclosure statement contained no mental impressions of the attorney and therefore was afforded ordinary work-product immunity, which defendants were easily able to overcome.¹⁰⁵ In *United States ex rel. Robinson v. Northrop Corp.*,¹⁰⁶ the District Court for the Northern District of Illinois followed suit and found no attorney-client privilege or work-product immunity to protect the disclosure statement from being compelled in discovery because it contained only facts and no mental impressions of the attorney, and because it was created with the intent to be shared with the government, a third party.¹⁰⁷

While courts were initially skeptical of offering any protection to the disclosure statement prepared by the relator or willing to recognize any privilege between relators and the government, courts started to change their outlook on the matter in the mid-1990s.

B. *Expansion of Protection*

In the mid-1990's district courts began to move away from the strict construction of privilege that denied documents relators shared with the government protection from discovery.¹⁰⁸ Courts began to recognize that disclosure statements and other communications between relators and the government were privileged under the much more protective "opinion work-product" categorization of FRCP 26(b)(3)(B) and began to recognize a joint-prosecution privilege or common-interest waiver in the relationship between relators and the government which would allow the documents to be shared

¹⁰¹ 918 F. Supp. 1338 (E.D. Mo. 1996).

¹⁰² *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1345-46 (E.D. Mo. 1996).

¹⁰³ 904 F. Supp. 592 (W.D. Ky. 1995).

¹⁰⁴ *United States ex rel. Burns v. A.D. Roe Co.*, 904 F. Supp. 592, 594 (W.D. Ky. 1995).

¹⁰⁵ *Id.* (citing *Stone*, 144 F.R.D. 396).

¹⁰⁶ 824 F. Supp. 830 (N.D. Ill. 1993).

¹⁰⁷ *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 838-39 (N.D. Ill. 1993).

¹⁰⁸ *See, e.g., United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 687 (S.D. Cal. 1996).

without giving up protection from discovery under the opinion work-product doctrine.¹⁰⁹

1. Recognition of Opinion Work-Product Categorization

In earlier cases, defendants seeking production of documents in *qui tam* cases were successful in categorizing the communications and documents shared between relators and the government as factual work product, which required only a “substantial need” by the defendant to be recoverable, and courts were likely to find that substantial need existed.¹¹⁰ One of the earlier cases to recognize that disclosure statements should be protected under the stricter opinion work-product immunity was *United States ex rel. Burroughs v. DeNardi Corp.*¹¹¹ In *Burroughs*, the U.S. District Court for the Southern District of California was persuaded by the plaintiff’s argument that the documents, including the disclosure statement sought by defendants, “reveal the facts and evidence his attorneys felt were important to prove his claims. . . . [and] that the organization and characterization of the facts and evidence presented reveal the attorneys’ assessment of the strength of such facts and evidence.”¹¹² The *Burroughs* court asked for an *in camera* review of the documents before definitively characterizing them as opinion work-product but stated it “would be difficult for the court to see how the documents could be characterized as anything other than ‘opinion-work product,’ specifically protected from disclosure to opposing counsel, because the disclosure would potentially reveal plaintiff’s counsel’s mental impressions, opinions and theories about the case.”¹¹³

After *Burroughs*, other courts similarly began to recognize that the disclosure statement and other documents shared between *qui tam* relators and the government were subject to opinion work-product protection.¹¹⁴ Also similar to *Burroughs*, many, though not all, of these courts subjected the documents to an *in camera* review before granting that protection.¹¹⁵ In *United States ex rel. Cericola v. Ben Franklin Bank*,¹¹⁶ the district court found portions of the relator’s disclosure statement as well as two other memoranda

¹⁰⁹ See, e.g., *id.* at 687–88.

¹¹⁰ See, e.g., *United States ex rel. Stone v. Rockwell Int’l Corp.*, 144 F.R.D. 396, 400 (D. Colo. 1992).

¹¹¹ 167 F.R.D. 680 (S.D. Cal. 1996).

¹¹² *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 684 (S.D. Cal. 1996).

¹¹³ *Id.* (citing *Connolly Data Sys., Inc. v. Victor Techs., Inc.*, 114 F.R.D. 89, 96 (S.D. Cal. 1987)).

¹¹⁴ See, e.g., *United States ex rel. Cericola v. Ben Franklin Bank*, No. 99 C 6311, 2003 WL 22071484, at *3 (N.D. Ill. Sept. 4, 2003).

¹¹⁵ See, e.g., *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 231 F.R.D. 378, 381 (N.D. Ill. 2005); see also *Cericola*, 2003 WL 22071484, at *4.

¹¹⁶ No. 99 C 6311, 2003 WL 22071484 (N.D. Ill. Sept. 4, 2003).

prepared by the relator's counsel to be opinion work-product after an *in camera* review.¹¹⁷ In *United States ex rel. Yannacopoulos v. General Dynamics*,¹¹⁸ the same court similarly found portions of communications between relators and the government to contain mental impressions and therefore protected by opinion work-product immunity after looking at the documents *in camera*.¹¹⁹

At least one court has gone further and declared that documents prepared by relator's counsel and shared with the government are entirely opinion work-product and protected from discovery except in extraordinary circumstances.¹²⁰ The court in *United States ex rel. Bagley v. TRW, Inc.*¹²¹ agreed with the *Burroughs* court that the selection, organization, and characterization of facts in a disclosure statement reveals the theories, opinions, or mental impressions of the relator or the relator's counsel and that material qualifies as opinion work-product.¹²² However, the *Bagley* court was willing to grant this privilege without asking for an *in camera* review.¹²³ In addition to finding that the selection of facts would likely show the mental impressions of counsel in documents prepared in anticipation of litigation, the court also stated several policy reasons for why documents shared by the relator with the government should be privileged as opinion work product and not discoverable except in rare and compelling circumstances:

[C]lassifying disclosure statements as opinion work product—which means they almost never will have to be turned over to the defendant—encourages relators to include everything that might help the government in evaluating the case, secure in the knowledge that whatever is written will not be seen by the defendant. It also spares the parties the burden and expense of litigating the discoverability of disclosure statements (or portions thereof), and eliminates the need for judicial *in camera* review of proposed redactions. Classifying disclosure statements as opinion work product therefore furthers the purposes of section 3730(b)(2).¹²⁴

The court in *Bagley* suggests that a “bright-line rule” precluding discovery of any portion of a disclosure statement would best serve the statutory purpose of the disclosure statement under the FCA.¹²⁵ The courts in both *Yannacopoulos* and *Cericola* specifically mentioned *Bagley* in their analysis, but

¹¹⁷ *United States ex rel. Cericola v. Ben Franklin Bank*, No. 99 C 6311, 2003 WL 22071484, at *4 (N.D. Ill. Sept. 4, 2003).

¹¹⁸ 231 F.R.D. 378 (N.D. Ill. 2005).

¹¹⁹ *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 231 F.R.D. 378, 386 (N.D. Ill. 2005).

¹²⁰ *See United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 559 (C.D. Cal. 2003).

¹²¹ 212 F.R.D. 554 (C.D. Cal. 2003).

¹²² *Bagley*, 212 F.R.D. at 563 (citing *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 684 (S.D. Cal. 1996)).

¹²³ *Id.* at 565.

¹²⁴ *Id.* (footnote omitted).

¹²⁵ *Id.* at 558.

were unwilling to extend opinion work-product protection without first submitting documents to an *in camera* review.¹²⁶

In addition to disclosure statements and other documents, some courts have also found that oral communications between *qui tam* relators and the government can be protected by opinion work-product immunity as well. The U.S. District Court for the District of Utah found that meetings and oral discussions between government and relators were opinion work-product in anticipation of litigation and therefore not discoverable.¹²⁷

*United States ex rel. Minge v. TECT Aerospace, Inc.*¹²⁸ addressed the issue of emails between *qui tam* relators and their counsel that were subsequently handed over to the government in an FCA suit.¹²⁹ In *Minge*, the federal district court held that emails between the relator and counsel that were handed over to the government were covered by opinion work-product immunity.¹³⁰ However, in the same case the court did not recognize emails directly from relators to the government or directly from the government to relators to have heightened protection under the opinion work-product doctrine, as that protection could only be applied to *qui tam* relators' attorneys.¹³¹

While the trend has generally been one of expansion of protection, some recent district court decisions have compelled discovery of a disclosure statements and other information shared between relators and the government based on reasoning reminiscent of *Stone*. In a 2005 decision, *United States ex rel. Bannon v. Edgewater Hospital Inc.*,¹³² the court stated that the FCA was silent on the matter of privilege for disclosure statements and compelled discovery of the entire disclosure statement save for the last paragraph on the reasoning that it was factual work product.¹³³ In a 2012 decision, *United States ex rel. Mallavarapu v. Acadiana Cardiology, LLC*,¹³⁴ the court stated that no privilege existed to protect notes or other information about interviews the FBI conducted with the relator in the case.¹³⁵ In *United States ex*

¹²⁶ *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 231 F.R.D. 378, 383 (N.D. Ill. 2005) (citing *Bagley*, 212 F.R.D. at 564–65); *United States ex rel. Cericola v. Ben Franklin Bank*, No. 99 C 6311, 2003 WL 22071484, at *3 (N.D. Ill. Sept. 4, 2003) (citing *Bagley*, 212 F.R.D. at 564–65).

¹²⁷ *United States ex rel. [Redacted] v. [Redacted]*, 209 F.R.D. 475, 478–79 (D. Utah 2001).

¹²⁸ No. 07-1212-MLB, 2011 WL 1885934 (D. Kan. May 18, 2011).

¹²⁹ *United States ex rel. Minge v. TECT Aerospace, Inc.*, No. 07-1212-MLB, 2011 WL 1885934, at *2 (D. Kan. May 18, 2011).

¹³⁰ *Id.* at *8.

¹³¹ *Id.*

¹³² No. 00 C 7036, 2005 WL 6783450 (N.D. Ill. Apr. 15, 2005).

¹³³ *United States ex rel. Bannon v. Edgewater Hospital Inc.*, No. 00 C 7036, 2005 WL 6783450, at *1 (N.D. Ill. Apr. 15, 2005).

¹³⁴ No. 4-CV-732, 2012 WL 1413161 (W.D. La. Apr. 23, 2012).

¹³⁵ *United States ex rel. Mallavarapu v. Acadiana Cardiology, LLC*, No. 4-CV-732, 2012 WL 1413161, at *1 (W.D. La. Apr. 23, 2012).

rel. Schweizer v. Oce, N.V.,¹³⁶ the court unsealed a realtor's disclosure statement once the government chose not to intervene because the relator was only required to file the disclosure statement with the government and not with the court and it therefore waived its privilege by sharing the statement with a third party.¹³⁷ These cases indicate that while many courts are categorizing disclosure statements and other information as opinion work-product protected from discovery by the defendants, some inconsistency remains about the exact nature of the relationship between relators and the government as well as information shared between the parties.

While the categorization of opinion work-product immunity under Rule 26(b)(3)(B) of the Federal Rules of Civil Procedure significantly raises the difficulty for defendants who seek to compel discovery of disclosure statements and other documents or communications between *qui tam* relators and the government, it will all be for naught if that protection is lost because courts do not recognize that relators and the government need to share that information. Fortunately, along with the expansion of recognition of opinion work-product protection, some courts now also recognize a joint-prosecutorial or common-interest privilege, which allows the government and relators to share information without sacrificing any work-product immunity.

2. Recognition of Joint-Prosecutorial or Common Interest Privilege

In addition to increased willingness to recognize documents and communications between relators and the government as opinion work-product subject to heightened protection from discovery, courts are also more willing to recognize a joint-prosecution or common interest privilege that allows the relators and government to share information without waiving work product protections. Courts in earlier cases that compelled production of disclosure statements and other documents relators shared with the government often found any privilege the documents may have had was lost when it was shared with the government, a third party.¹³⁸ However, later decisions began to recognize the common interest or joint-prosecutorial privilege between the government and the relator in *qui tam* cases allowing the parties to share information without waiving work-product protection.

¹³⁶ 577 F. Supp. 2d 169 (D.D.C. 2008).

¹³⁷ *United States ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 176 (D.D.C. 2008).

¹³⁸ *See, e.g., United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 399–400 (D. Colo. 1992).

Ten years after the 1986 amendments to the FCA, as the number of *qui tam* cases began to increase, courts began to recognize that a joint-prosecution privilege may be appropriate between relators and the government.¹³⁹ In *Burroughs*, the court states:

[W]hether the jointly interested persons are defendants or plaintiffs . . . the rationale for the privilege is clear: Persons who share a common interest in litigation should be able to communicate confidentially with their respective attorneys, and with each other, to more effectively prosecute or defend their claims.¹⁴⁰

The court found that the text of the FCA itself set up the joint interest between the relator and the government, suggesting they “stand in the same shoes,” and that the FCA sets forth a scheme where the relator and the government prosecute the action together.¹⁴¹ The court also noted that the FCA requires the government’s continuing interest in *qui tam* cases in that it can request copies of any pleadings and decide to intervene at any point in the lawsuit even if it initially declines to do so.¹⁴² For these reasons, the court stated that the joint-prosecution privilege exists even if the government decides not to intervene in the case.¹⁴³ The *Burroughs* court found the defendant’s position that the joint-prosecution privilege only applied when the government chose to intervene in a case to be “equally unavailing.”¹⁴⁴

While the *Burroughs* court’s full-throated support of the joint-prosecution privilege even in cases where the government chose not to intervene was a promising start, not many courts have fully supported the decision. Other than one recent case where a district court recognized that the communications between *qui tam* relators and the government were protected by opinion work-product immunity and a joint-prosecution privilege despite the government’s decision not to intervene,¹⁴⁵ many courts have backtracked some from the full extent of protection put forward in *Burroughs*.¹⁴⁶

While *Burroughs* explicitly stated it would grant the joint-prosecution privilege to *qui tam* relators and the government in all cases, other courts have granted the joint-prosecutorial privilege in cases where the government decides to intervene but have not indicated one way or the other whether the privilege should be extended to *qui tam* cases where the government declines

¹³⁹ See, e.g., *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685–86 (S.D. Cal. 1996).

¹⁴⁰ *Id.* at 686 (citing *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at n.3.

¹⁴⁴ *Id.*

¹⁴⁵ *United States ex rel. Simms v. Austin Radiological Ass’n*, No. A–10–CV–914–AWA, 2013 WL 1136668, at *13 (W.D. Tex. Mar. 18, 2013).

¹⁴⁶ See *infra*, notes 148–151 and accompanying text.

to intervene.¹⁴⁷ The U.S. District Court for the Eastern District of California recently stated that in a *qui tam* action, the government and relators “are not adverse” and that they “possess similar interests” such that attorney-client privileges are not waived when the relator produces documents to the government.¹⁴⁸ The *Minge* court also found a “clear common interest” between the government and relators and granted a common-interest waiver to share work product without losing protection from discovery after government intervention in the case.¹⁴⁹ Similarly, in *Cericola* the court found that the opinion work-product protection for memoranda prepared by relator’s counsel was not waived when the relator shared them with the government.¹⁵⁰ The U.S. District Court for the Northern District of Texas has also recognized that the joint-prosecution privilege allows the government and relators to share documents and communications without sacrificing work-product immunity.¹⁵¹ With *Burroughs* granting joint-prosecution privilege to *qui tam* relators and the government in all cases, and these other recent decisions all granting the privilege in cases where the government intervenes, it might appear as if courts do indeed “universally agree” that the privilege exists, as one court stated.¹⁵² However, that is not the case. In addition to the vast number of jurisdictions that have not weighed in on the matter at all, a number of courts have limited the joint-prosecutorial privilege to cases only where the government chooses to intervene.

3. Limitation on the Joint-Prosecutorial Privilege

In *U.S. ex rel. Purcell v. MWI Corp.*,¹⁵³ while the court recognized that joint-prosecutorial privilege applies between relators and the government when the government decides to intervene, it was unwilling to extend that privilege to *qui tam* cases that the government declines.¹⁵⁴ The *Purcell* court looked at the weight of limited authority on the matter at that time and suggested that some joint-prosecutorial privilege would exist: “[T]he unique relationship of the government and the relator in *qui tam* cases requires the sharing of the work product generated between the relator and his attorney

¹⁴⁷ *Id.*

¹⁴⁸ *In re Uehling*, No. 1:14-MC-00009-LJO-BAM, 2014 WL 1577459, at *5 (E.D. Cal. Apr. 17, 2014).

¹⁴⁹ *United States ex rel. Minge v. TECT Aerospace*, No. 07-1212-MLB, 2011 WL 1885934, at *5 (D. Kan. May 18, 2011).

¹⁵⁰ *United States ex rel. Cericola v. Ben Franklin Bank*, No. 99 C 6311, 2003 WL 22071484, at *4 (N.D. Ill. Sept. 4, 2003).

¹⁵¹ *United States v. Medica-Rents Co.*, No. CIV.A. 4:00-CV-483-Y, 2002 WL 1483085, at *2 (N.D. Tex. June 21, 2002).

¹⁵² *In re Uehling*, 2011 WL 1577459, at *5.

¹⁵³ 209 F.R.D. 21 (D.D.C. 2002).

¹⁵⁴ *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 27 (D.D.C. 2002).

with the government in order for the case to proceed.¹⁵⁵ While it did not definitively say that the privilege could only exist when the government chose to intervene, it specifically limited its holding to only those cases.¹⁵⁶

Other courts have specifically held that *qui tam* relators and the government can lose the joint-prosecutorial privilege if their interests diverge. In *Bagley*, the court recognized the joint-prosecutorial privilege at the time that the disclosure statement was filed but noted that the relator's and the government's interest may diverge later, at which point they would lose the privilege.¹⁵⁷ Because the disclosure statement is filed before the government can even decide whether to intervene, the court believed the privilege exists at that time.¹⁵⁸ However, the court pointed out that the government may decline to intervene or take other action adverse to the interest of the relator, at which point the common-interest privilege would no longer be in effect.¹⁵⁹ The court was also skeptical of a universal recognition of a common-interest privilege because "the court has no way of knowing precisely how frequently the government makes use of disclosure statements in a manner adverse to the relator, or, perhaps more to the point, how often such adverse use results in their disclosure to a defendant before liability has been determined."¹⁶⁰ Similarly, the court in *U.S. ex rel. [Redacted]* granted that the government and *qui tam* relator shared a common-interest privilege "at this point in the litigation," but noted "[t]his is not to say, however, that the Relators and the United States will always share this community of interest. . . . [T]he interests of the government and the Relators may diverge."¹⁶¹

While the trend in cases over the past thirty years has been towards more protection from discovery for disclosure statements and other materials shared between *qui tam* relators and the government, the issue has not been definitively decided. Most courts seem to recognize that at least some level of work-product protection should be afforded to disclosure statements, but that protection is not guaranteed. Similarly, there is ambiguity about whether any work-product protection that is provided is waived when relators and the government share information. For some courts the joint-prosecutorial privilege always exists, for some it exists when the government intervenes, and some courts imply that it is situational and would likely have to be decided on a case by case basis. This uncertainty is not good for incentivizing *qui tam* relators to come forward, or for the efficiency of *qui tam* litigation in general,

¹⁵⁵ *Id.* (citing *United States v. AT&T, Co.* 642 F.2d 1285, 1300 (D.C. Cir. 1980)).

¹⁵⁶ *Id.* at n.6 ("The court's holding does not address cases in which the government declines to intervene.").

¹⁵⁷ *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 561 (C.D. Cal. 2003).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (Noting some adverse actions the government may take towards the relators such as "(a) to justify the government's position in a dispute over the relator's share of a recovery, (b) to demonstrate that the relator is not the 'original source' of the information alleged in the complaint, and (c) to demonstrate that the relator's complaint should be dismissed for failure to state a claim").

¹⁶⁰ *Id.*

¹⁶¹ *United States ex rel. [Redacted] v. [Redacted]*, 209 F.R.D. 475, 479 n.3 (D. Utah 2001).

which, as we have seen, has been the driving force of the resurgence of the FCA as a powerful tool against fraud committed on the United States government.

III. CONGRESS SHOULD AMEND THE FCA TO MAKE DISCLOSURE STATEMENTS NON-DISCOVERABLE AND GRANT THE JOINT-PROSECUTION PRIVILEGE BETWEEN *QUI TAM* RELATORS AND THE GOVERNMENT IN CASES BROUGHT UNDER THE FCA

While district courts trend toward recognizing the joint-prosecution privilege in FCA cases, there is still no definitive ruling by the Supreme Court or any circuit appellate courts on the matter. Additionally, even among the district courts that agree on recognizing the privilege, there is little agreement about what happens if the government decides not to intervene. The best solution is for Congress to amend the FCA to include language that protects the disclosure statement from discovery as well as language granting *qui tam* relators and the government joint-prosecutorial privilege to share materials and information without waiving attorney-client privilege or work-product immunity. These changes to the FCA will incentivize more *qui tam* relators to come forward as well as make *qui tam* litigation run more efficiently by cutting out time consuming and expensive litigation over these discovery issues.

A. *The FCA Should be Amended to Protect the Disclosure Statement from Discovery*

The fact that the FCA mandates a disclosure statement be filed combined with the uncertainty surrounding the potential discoverability of that disclosure statement leaves a potential *qui tam* relator “in a bind.”¹⁶² The text of the statute requires that the relator include “substantially all material evidence and information the person possesses” about the alleged fraud.¹⁶³ Because the disclosure statement may not be protected from being compelled in discovery, *qui tam* relators struggle with just how thoroughly they should complete their disclosure statements.

On the one hand, it is in the relator’s interest to include as much specific detail as possible in the disclosure statement. If the relator fails to file a complete and persuasive disclosure statement, the government may decline to intervene. While relators can still proceed with the litigation on their own, it is an expensive and lengthy project to undertake without the government’s assistance, and *qui tam* cases where the government has chosen not to intervene

¹⁶² *Bagley*, 212 F.R.D at 557.

¹⁶³ 31 U.S.C. § 3730(b)(2) (2006).

have traditionally not done well.¹⁶⁴ Not only might a poor disclosure statement lead the government to not intervene, but it may also bar the action from proceeding for one of the listed reasons in 31 U.S.C. §3730(e) (for example an incomplete disclosure statement may not be able to differentiate itself from allegations that were publicly disclosed in some way or from allegations to which the government is already a party).¹⁶⁵ There are clear incentives for the relator to write a thorough and persuasive disclosure statement, and indeed the goal of the disclosure provision is to “to place in the hands of the government information from which it can promptly and efficiently make a sound determination about whether to intervene”¹⁶⁶

On the other hand, there are some incentives pulling the *qui tam* relator in the other direction as well. Because the relator cannot be certain if the disclosure statement will fall into the hands of defendants during discovery, the relator may decide that it makes more sense to be less thorough in listing evidence, which would lead the government to inaccurately assess the strengths and weaknesses of their case.¹⁶⁷ The lack of protection from discovery for the mandated disclosure statement “[f]orc[es] the relator to navigate unerringly at his or her peril the narrow passage between the Scylla of too little disclosure and the Charybdis of too much disclosure [and] may be unfair and probably makes little sense.”¹⁶⁸

Nothing resembling a bright-line rule exists when it comes to the discoverability of a disclosure statement. The early court decisions correctly state that the issue is not directly addressed in the statute and therefore must be decided by the courts.¹⁶⁹ Many jurisdictions have not addressed the issue at all, and others still have cases on the books that deny any protection beyond factual work-product which was almost always overcome.¹⁷⁰ Most of the courts that have afforded the more stringent opinion work-product immunity only do so after an *in camera* review, and declaring some parts discoverable and others not.¹⁷¹ The upshot is that relators have no idea going in what parts

¹⁶⁴ Only 6 percent of cases where the government chose not to intervene were settled or decided in the solo *qui tam* relator’s favor, as opposed to the 94 percent of *qui tam* cases that were settled or decided in the relator’s favor when the government did decide to intervene. Broderick, *supra* note 4, at 975. There is an interesting discussion to be had about whether these cases fail because the government is good at recognizing a dud case or if courts are biased when they know the government has chosen not to intervene, but that is beyond the scope of this comment.

¹⁶⁵ See 31 U.S.C. § 3730(e) (2006).

¹⁶⁶ Bagley, 212 F.R.D at 558

¹⁶⁷ While a discussion on how the government chooses which *qui tam* suits to intervene in is beyond the scope of this comment, a thorough assessment of the strengths and weaknesses of the case by a relator or their counsel would be quite beneficial for the government when sifting through potential *qui tam* cases.

¹⁶⁸ Bagley, 212 F.R.D at 558.

¹⁶⁹ United States *ex rel.* O’Keefe v. McDonnell Douglas Corp., 918 F. Supp. 1338, 1345–46 (E.D. Mo. 1996).

¹⁷⁰ United States *ex rel.* Burns v. A.D. Roe Co., 904 F. Supp. 592, 593–94 (W.D. Ky. 1995).

¹⁷¹ E.g., United States *ex rel.* Cericola v. Ben Franklin Bank, No. 99 C 6311, 2003 WL 22071484, at *4 (N.D. Ill. Sept. 4, 2003).

of a disclosure statement may end up in the defendant's hands, and courts have to waste time and energy to go over these documents on a case by case basis. As the court in *Bagley* pointed out, this sort of *ex post* test approach to deciding discoverability is undesirable.¹⁷²

The entire point of the FCA's 1986 amendments was to re-insert language that would strengthen the act's *qui tam* provisions. It is therefore illogical to place this huge roadblock in front of *qui tam* relators right from the outset. The FCA should incentivize relators to write complete, thorough, and timely disclosure statements that will promptly notify the government of fraud so that it may take swift action to wipe it out. The current system is not commensurate with those incentives. The uncertainty of what may be discovered by defendants (who often are relators' employers) leads to delay in the reporting of fraud as potential *qui tam* relators struggle to decide how much information to include in a disclosure statement or whether they should file one at all. A clear rule preventing disclosure statements filed by *qui tam* relators from discovery would be an easy fix to this problem. Congress should take action and amend the FCA to reflect this common sense adjustment to the law.

B. *Congress Should Amend the FCA to Grant the Joint-Prosecutorial Privilege to Qui Tam Relators and the Government*

As the Supreme Court has noted: "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."¹⁷³ The privilege afforded to *qui tam* relators and the government to communicate and share information without waiving attorney-client privilege or work-product immunity is one such uncertain privilege subject to varying applications by the courts at the moment. Any sort of common-interest privilege works to encourage two goals: to increase the flow of information between parties and to enhance the overall quality of litigation by both parties.¹⁷⁴ The current uncertainty about the status of the privilege between relators and the government is thwarting these twin aims. To prevent this uncertainty and to promote efficient FCA litigation, Congress should amend the FCA to recognize joint-prosecutorial privilege between *qui tam* relators and the government.

¹⁷² *Bagley*, 212 F.R.D at 557 ("An *ex post* test, the outcome of which cannot be predicted with a high level of confidence *ex ante*, is undesirable because if there is uncertainty about the matter, then relators' may skimp on the contents of disclosure statements, thereby lessening their value as a screening tool for the government.").

¹⁷³ *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

¹⁷⁴ Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 49 (2005).

1. The Statutory Language Sets Up a System Where the Government and Relators Share a Common Interest

The term *qui tam* itself is shorthand for “he who sues for the king as well as for himself.”¹⁷⁵ The FCA has several aspects that suggest the government and relators “stand in the same shoes.”¹⁷⁶ Part of the purpose of the 1986 amendments to the FCA was to repair and strengthen the relationship of *qui tam* relators and the government moving forward. Congress should recognize that the statutory language supports the notion that *qui tam* relators and the government are meant to be working closely together and should amend the FCA to recognize this common interest.

As the *Burroughs* court stated, when two parties share a common interest in litigation they should “be able to communicate confidentially with their respective attorneys, and with each other, to more effectively prosecute or defend their claims.”¹⁷⁷ That a relator and the government share in a common interest, whether the government chooses to intervene or not, is clear from the FCA itself. First, the government and relators share any money recovered from fraudulent activity.¹⁷⁸ The 1986 amendments guaranteed that a relator would receive at least some portion of the recovery, as opposed to the 1943 amendments which left any potential recovery up to judicial discretion.¹⁷⁹ Guaranteeing a portion of the recovery solidifies that the relator will always maintain an interest in the litigation. The 1986 amendments also changed the nature of the relationship between relators and the government in such a way that strengthened the appearance of a common interest. As where the 1943 amendments scuttled the relator to the side when the government chose to intervene and gave the DOJ exclusive control of the case, the FCA today has specific provisions stating that although the DOJ will take a primary role in the litigation, the relator has the right to remain a part of the suit.¹⁸⁰

The mandatory filing of the disclosure statement similarly evidences a common interest or “team” relationship between the government and *qui tam* relators.¹⁸¹ As discussed in the previous section, a disclosure statement contains valuable and sensitive information related to a potentially lucrative civil suit; it is the sort of document one would only expect to see from co-parties in an action as no litigator would ever willingly give up protection of that document.¹⁸² The structure of the FCA creates a common interest between

¹⁷⁵ *Supra* note 5 and accompanying text.

¹⁷⁶ *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996).

¹⁷⁷ *Id.* at 686 (citing *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)).

¹⁷⁸ *See* 31 U.S.C. § 3730(d) (2006).

¹⁷⁹ Qian, *supra* note 63, at 606, 608.

¹⁸⁰ 31 U.S.C. § 3730(c)(1) (2006).

¹⁸¹ *See* 31 U.S.C. § 3730(b) (2006).

¹⁸² *See* 31 U.S.C. § 3730(d)(2) (2006); *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 558 (C.D. Cal. 2003).

parties by requiring the relators to share sensitive information with the government, by mandating that the *qui tam* relators and the government share at least some percentage of any recovery, and by establishing that relators continue to be a party to suit even if the government intervenes.

While the common interest is clearer when the government chooses to intervene in a case, the structure of the FCA still evidences a common interest when the government declines to do so. First, even if a relator pursues litigation alone and eventually wins, the government still recovers the bulk of the money.¹⁸³ The most a relator can recover under the FCA is 30 percent of total damages, leaving the government at least 70 percent of any damages.¹⁸⁴ It seems odd to suggest that the government would have less of an interest in the litigation when it stands to collect a much higher percentage of any recovery even when it declines to intervene.

In addition to the shared monetary reward, additional aspects of the FCA indicate that the government maintains an interest even when it declines to intervene in a *qui tam* action.¹⁸⁵ First, the action may only be dismissed if the government gives written consent to the dismissal.¹⁸⁶ The government may also dismiss the action or settle with the defendant over the objections of the relator.¹⁸⁷ Even if the government declines to intervene, it can require that it be served with all pleadings and deposition transcripts for the case.¹⁸⁸ Finally, if the government declines to intervene, but changes its mind later, it can “intervene at a later date upon a showing of good cause.”¹⁸⁹ These statutory provisions all strongly indicate that the common interest between a relator and the government does not disappear if the government chooses not to intervene in a *qui tam* suit and therefore the common-interest privilege should be recognized regardless of the government’s decision to intervene. As the court in *Burroughs* stated so succinctly: “In short, the government has a substantial interest in seeing that the litigation is successful against the defendants, whether or not it elects to intervene in the action. For all practical purposes, plaintiff and the government are essentially the same party.”¹⁹⁰

Because the language of the statute clearly indicates that the *qui tam* relator and the government are working together to bring litigation, they should be allowed to communicate and share materials without fear of losing their protections from discovery. If the two parties are unable to share materials or communicate, it leads to an inefficient system where the two parties who are on the same side may both be doing the same work, or may even

¹⁸³ 31 U.S.C. § 3730(d)(2) (2006).

¹⁸⁴ *Id.*

¹⁸⁵ *See United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996).

¹⁸⁶ 31 U.S.C. § 3730(b)(1) (2006).

¹⁸⁷ 31 U.S.C. § 3730(c)(2)(A)–(B) (2006).

¹⁸⁸ 31 U.S.C. § 3730(c)(3) (2006).

¹⁸⁹ *Id.*

¹⁹⁰ *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996).

unknowingly be working at cross-purposes. The 1986 amendments re-established and strengthened this common interest between relators and the government, and Congress should make explicit what is already implied in the FCA by granting the joint-prosecutorial privilege to relators and the government.

In addition to the statutory language indicating that a common interest exists between the government and relators that should grant the parties the joint-prosecution privilege, there are several policy reasons why Congress should amend the statute to reflect this common interest as well.

2. Recognizing the Privilege Furthers the Policy Goals of the FCA

The FCA has emerged as the government's primary weapon to combat fraud against the federal government.¹⁹¹ *Qui tam* suits are an important part of this effort. As the number of *qui tam* suits rise, it is important that they are afforded the best chances of successfully rooting out fraud. The legislative purpose of the 1986 and later amendments to the FCA were to incentivize private citizens to bring *qui tam* actions to assist the government in fighting fraud.¹⁹² As the system currently stands, the relationship between relators and the government is potentially fraught due to an inability to properly communicate for fear of discoverability by the defendants. An amendment to the FCA granting the joint-prosecutorial privilege to relators and the government would ease tensions between the two parties and incentivize more *qui tam* relators to come forward.

One policy goal of the FCA is to act as a deterrent to those who would attempt to defraud the federal government.¹⁹³ While deterrence is difficult to determine statistically and should be looked at skeptically, one study indicates that the deterrent effect of *qui tam* actions is substantial.¹⁹⁴ The study estimated *qui tam* provisions deterred between \$35.6 billion and \$71.3 billion dollars between 1986 and 1996 and between \$105.1 billion and \$210.1 billion between 1996 and 2006.¹⁹⁵ While the study relies on the assumption that these recoveries would not have occurred if the DOJ had pursued these cases without *qui tam* relators, it does indicate that increased *qui tam* participation could be linked to increased deterrence.¹⁹⁶ Because deterrence depends on the fear of those who would commit fraud knowing that potential *qui tam* relators could be anywhere, widening the net of potential *qui tam* relators can only

¹⁹¹ DOJ Press Release, *supra* note 2.

¹⁹² Broderick, *supra* note 4, at 954–55.

¹⁹³ Meador & Warren, *supra* note 47, at 459–60.

¹⁹⁴ See Broderick, *supra* note 4, at 980 (citing WILLIAM L. STRINGER, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT 32, 35–36 (1996)).

¹⁹⁵ *Id.* at 980–81.

¹⁹⁶ *Id.* at 981.

further this goal. When Congress passed the Deficit Reduction Act of 2005, it required companies that handle large amounts of Medicaid claims to explain how the *qui tam* process works in their employee handbooks because it felt that some employees did not bring *qui tam* suits because they did not understand the process.¹⁹⁷ The current confusion about discoverability of disclosure statements and the privilege that exists between relators and the government will have the opposite effect on potential *qui tam* relators. Amending the FCA to clarify these two issues will make the *qui tam* provision more comprehensible to employees and will make them more likely to bring *qui tam* suits, which in turn will increase the deterrent value of the *qui tam* provision.

Another of the FCA's policy goals that can be strengthened by amending the FCA to clarify the disclosure and privilege rules is the attempt to fix the incentive problem in enforcing government fraud.¹⁹⁸ The incentives of enforcers do not always match those of the person who would commit a misdeed, and this misalignment of incentives is especially pronounced in cases like government fraud "where the perpetrators are repeat players with a significant amount of money on the line and the victim is the government."¹⁹⁹ One of the reasons for this misalignment is that the victim in this case, the government, does not have enough stake in apprehending the fraudster because the harm is diffused throughout the entire country, not localized.²⁰⁰ The *qui tam* provision of the FCA balances out the misalignment by providing an individual who has a personal stake in recovering a civil suit. Amending the statute to clarify the rules on disclosure statements and the joint-prosecution privilege will only encourage more *qui tam* relators to come forward and will help to balance out the incentives between those committing the fraud and those who have a stake in preventing it.

The DOJ's recent focus on using the FCA to combat healthcare fraud may especially benefit from an incentive to attract as many *qui tam* relators as possible.²⁰¹ Unlike spotting contract fraud, which the DOJ may be effective in doing by itself, spotting healthcare fraud often requires a certain level of medical expertise which the DOJ simply does not have.²⁰² Due to the specialized nature of many sources of healthcare fraud, the DOJ will not likely be able to make a determination about when these practices are fraudulent without the assistance of a *qui tam* relator.²⁰³ Additionally, because investigating healthcare fraud would raise privacy issues as the DOJ comes into contact with personal medical histories and financial records, *qui tam* relators in

¹⁹⁷ See *id.* at 955.

¹⁹⁸ See Qian, *supra* note 63, at 600.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 601.

²⁰¹ See Broderick, *supra* note 4, at 982; Cohen, *supra* note 41, at 89.

²⁰² Broderick, *supra* note 4, at 982.

²⁰³ *Id.* at 982-83.

healthcare fraud cases can help the DOJ get around these privacy concerns that are acute in the healthcare field.²⁰⁴ The sheer number of Medicaid claims prevents the Department of Health and Human Services from being able to adequately identify fraud on their own, and *qui tam* relators help to make sure fraudsters do not slip through the system unnoticed.²⁰⁵

If the ultimate goal of the FCA is to prevent fraud and to recover money that was fraudulently taken from the government, then FCA litigation needs to run as efficiently as possible. The current uncertainty about whether disclosure statements will be compelled in discovery or what privilege exists between relators and the government prevents the parties in a *qui tam* suit from moving ahead as efficiently as possible. When a party cannot be sure that any information they share will be protected, they will choose to share only the most innocuous of information.²⁰⁶ The lack of certainty over the privilege afforded will prevent the free-flow of information between parties that should be working towards a common interest.²⁰⁷ When uncertainty stems the flow of information in this way, the joint prosecution of the case will suffer. Parties may not share crucial information or may even unknowingly work at cross-purposes. The 1986 amendments were meant to strengthen the relationship between *qui tam* relators and the government. The lack of a recognized joint prosecution privilege threatens that relationship. Another inefficiency that can be avoided by amending the FCA is time consuming and costly litigation over the discoverability of the disclosure statement and other information shared between the government and relators. The current uncertainty requires litigation to sort out these discovery issues and has led to an inefficient case by case analysis of these issues by the courts.²⁰⁸ Congress can strengthen the goal of litigating FCA suits as efficiently as possible by removing the uncertainty between *qui tam* relators and the government and amending the statute to recognize the joint-prosecution privilege.

By amending the FCA to recognize the joint-prosecution privilege, Congress would encourage more *qui tam* relators to come forward which would enhance the deterrent effect of the FCA and also help to even out the misalignment of incentives inherent in enforcing fraud against the government. More *qui tam* relators would be especially effective in furthering the fight against healthcare fraud that has been a focus of the DOJ since the passage of the ACA. The recognition of the joint-prosecution privilege would also aid in the effective litigation of *qui tam* cases under the FCA by encouraging the sharing of information between the government and relators as well as cutting out costly and time-consuming litigation over certain discovery issues.

²⁰⁴ *Id.* at 983–84.

²⁰⁵ *Id.* at 984.

²⁰⁶ See Schaffzin, *supra* note 174, at 54.

²⁰⁷ *Id.*

²⁰⁸ See *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D 554, 558 (C.D. Cal. 2003).

CONCLUSION

The FCA was brought into existence to fight those who sought to unfairly profit from one of the most trying times in our nation's history. The FCA has continued to be a tool for the government to protect itself from those who would seek to defraud the United States for over 150 years. The *qui tam* provisions of the FCA have played a significant role in the enforcement of the FCA over the years. The rise of profiteering that was allowed to continue after the 1943 amendments and that culminated in the price gouging that led Congress to reinstate and reinvigorate the *qui tam* provision in 1986 shows that the FCA works much better when there are strong incentives for *qui tam* relators to come forward and work with the government. Since the 1986 amendments, Congress has supported and expanded the scope of the FCA and the *qui tam* provisions to encourage the continued success of the FCA in recovering false claims damages. However, one area that Congress has failed to address is the discovery issues related to disclosure statements and whether a joint-prosecution privilege exists between *qui tam* relators and the government.

Courts have not been able to definitively decide whether the mandatory disclosure statement a *qui tam* relator files can be compelled in discovery. Some have afforded it no protection, some have granted work-product immunity after an *in camera* review, and some courts are willing to grant protection without any review. Courts are similarly divided on the issue of what, if any, privilege exists between a *qui tam* relator and the government and whether the privilege granted should be contingent on the government's decision to intervene in a case. This uncertainty does not serve the purpose of the *qui tam* provisions of the FCA, which is to encourage *qui tam* relators to come forward as promptly as possible to notify the government of any fraud being committed.²⁰⁹ The lack of clear rules about whether relators and the government can share documents also inhibits the parties from proceeding in litigation in the most efficient way possible.

Because of the FCA's importance in fighting fraud, whether that entails preventing war profiteering or President Obama's attempt to rein in national health care costs under the Affordable Care Act, it is necessary to support the *qui tam* provisions of the FCA. The uncertainty surrounding the discoverability of the disclosure statement as well as the lack of consensus on whether or not the joint-prosecution privilege exists between relators and the government cannot continue. Congress should support the brave people who seek to bring suit on behalf of our government for frauds committed on the state and amend the FCA to protect the disclosure statement from being discoverable and grant *qui tam* relators and the government the joint-prosecution privilege so that they can more efficiently proceed in *qui tam* litigation.

²⁰⁹ See *United States ex rel. Duxbury v. Ortho Biotech Prod.*, 579 F.3d 13, 32 (1st Cir. 2009) (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001)).