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ARTICLE: The Last Privateers Encounter Sloppy Seas: Inconsistent Original-Source Jurisprudence Under the Federal False Claims Act

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TEXT:
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The 11 years since the False Claims Act was modernized to expand the circumstances under which private citizens can sue government contractors who make false claims against the United States have seen a sharp rise in qui tam cases. As the number of filings continues to increase year by year, nearly \$ 2 billion already has been restored to the Treasury as a result from contractors. As a consequence of these high stakes, False Claims Act cases have, in the authors' experience, become as a class among the most complex and hotly contested cases in the federal system. Government contractors are often large companies with the ability to hire large law firms and the willingness to devote substantial resources to the defeat of cases under the Act. Not surprisingly, every nook and cranny of the statutory

language is the subject of intense scrutiny, and every avenue of attack against False Claims Act plaintiffs is pursued.

This article, written by attorneys whose practice centers on the representation of qui tam plaintiffs, provides an abbreviated overview of both the current incarnation and the historical antecedents of the False Claims Act, thus setting the stage to discuss one of the most nettlesome issues which has arisen under the 1986 Amendments—the deep and recent-ly-widened schism among the courts of appeal regarding when a qui tam plaintiff is an "original source" entitled to bring a lawsuit based upon "publicly disclosed" information.

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A. The Oft-Repeated, Never-Completed History of the False Claims Act. n1

The qui tam provisions of the Federal False Claims Act (FCA) allow a private citizen who has knowledge of the submission of false claims by a government contractor to bring a lawsuit "for the person and for the United States Government" in order to recover treble damages and civil penalties. The False Claims Act has, in one form or another, been on the books for more than 130 years. The concept of "deputizing" private citizens to enforce debts owed a sovereign or a state predates the Magna Carta and was routinely used by early American Congresses. The advantages of paying a bounty to private citizens who petition the courts to recover money improperly claimed and received by government contractors have long been recognized; judges have for more than a century likened the qui tam plain-tiff, (who in the parlance of the False Claims Act is called a "relator") [*165] to an "enterprising privateer" able, in many cases, to out-manuever the "slow-going public vessel" of public-sector civil enforcement methods. n12

Despite its venerable lineage, the False Claims Act's qui tam provisions were largely ignored by putative relators for more than 120 years. However, the mid-1980s saw an overwhelming increase in substandard performance and outright fraud by government contractors. n13 Recognizing that the government's traditional enforcement resources were insufficient to remedy this problem n14 and recognizing also that the False Claims Act, as it then existed, did not adequately encourage persons knowing of fraud or false claims to come forward, n15 Congress enacted extensive revisions to the FCA in 1986. The 1986 Amendments defined the types of conduct which constitute "false claims;"

n16 codified the concept of "reverse false [*166] claims;" n17 made clear that there is no requirement of specific intent to defraud; n18 clarified that the burden of proof is a mere preponderance of the evidence; n19 increased damages from double to treble the government's actual loss; n20 increased civil penalties from \$ 2,000 per false claim to \$ 5,000-\$ 10,000 per false claim; n21 substantially enhanced the role of the relator in cases taken over by the government; n22 and added an anti-retaliation provision which grants a distinct cause of action to a relator who alleges adverse employment consequences resulting from his participation in a False Claims Act case. n23 Based on both the plain language of the Amendments and extensive legislative history, courts regularly have concluded that "Congressional intent was clear: [Congress] sought to expand the qui tam provisions to 'encourage more private enforcement suits.'" n24

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Recoveries under the 1986 Amendments have restored more than \$ 1.8 billion to the Treasury, n25 and relators have shared recoveries ranging as high as \$ 180,000,000 n26 against a veritable who's who of government contracting-large successful companies n27 represented by the nation's ablest law firms.

The potential rewards to relators under the 1986 Amendments are enormous, and the potential detriment to government contractors includes and extends beyond substantial monetary damages, n28 civil penalties, n29 and relators' attorneys fees and expenses. n30 More than 700 published and electronically-published opinions have been issued by United States District Courts, and more than 300 by United States Courts of Appeal. The 1986

Amendments have withstood a variety of constitutional challenges; n31 the Supreme Court recently granted a petition for writ of certiorari in a qui tam case, but declined to consider constitutional issues litigated below, n32 a fact which an incautious observer might think indicates that the constitutional issues are reasonably well-settled. n33

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This article focuses on the issue of when a relator is or is not an "original source" under the 1986 Amendments. n34 This question has been the subject of dozens of court opinions, and there are now three completely different interpretations by the several courts of appeal. We canvass these conflicting positions and advocate a resolution in harmony with the language and history of the Act.

B. Appellate Views of the Original-Source Bar to Qui Tam Jurisdiction: Still Hazy After All These Years

The 1986 Amendments sought to resolve historical distaste for "parasitical" actions by sharply limiting lawsuits based on publicly available information. Congress defined specific types of dissemination as constituting "public disclosure," n35 and decreed that cases "based upon" n36 information which was "publicly disclosed" could be brought only by an "original source" of the information—a person "who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government [*169] before filing an action . . . which is based on the information." n37

In order to best understand the public disclosure/original source clauses, it is necessary to more closely examine the Act's history. Before the 1943

Amendments, the False Claims Act permitted "parasitic" actions. n38 In such cases, the relator learned of contract fraud solely through disclosures in the media or through court proceedings and then brought a qui tam case based on that information. Such actions were, in point of fact, quite successful in recovering substantial sums for the government. n39 However, opposition to such cases nonetheless formed a rallying point for opponents of the Act in 1943; n40 they unsuccessfully sought the outright abolition of the qui tam provisions. n41

On the other hand, some in Congress believed the "parasitic" qui tam case to be wholly salutary. n42 However, neither their view nor the view that qui tam rights should be abolished carried the day. The 1943 Amendments did not do away with qui tam cases, but did include drastic steps against "parasitic" lawsuits. The new Amendments couched congressional rejection of parasitic suits in jurisdictional terms, providing that if the government possessed any knowledge of the fraud when the action was filed, the qui tam action was to be dismissed for want of jurisdiction. n43 Thus, knowledge of the fraud by any government employee was sufficient to bar a qui tam action.

This language produced a "flaccid enforcement tool." n44 Whether or not it was Congress' intent to ring the death knell for qui tam cases, judicial decisions interpreting the 1943 Amendments compounded the anti-qui tam [*170] bias of the 1943 Amendments n45 by barring qui tam suits even where the relator himself informed the government of a contractor's false claims before he filed his lawsuit. n46 As a result of the 1943 Amendments and the cases interpreting them, the False Claims Act fell into near-

dormancy until Congress undertook to rehabilitate it in the mid-1980s. n47

The primary purpose of the 1986 Amendments was to encourage relators to file qui tam suits. n48 The "any government knowledge" bar, which was the hallmark of the 1943 Amendments, was eliminated. In keeping with this purpose, neither the original Senate bill nor the original House bill required a relator to be a source to the government at all; rather, any plaintiff was permitted to bring a case based upon publicly disclosed information on which the government did not act. n49

Continuing concern regarding the "parasitic" suits which antedated the 1943 Amendments prevented Congress from returning to the days of unfettered "parasitism." The "original source" provision of the 1986 Amendments, which has been described as an attempt to create a "golden mean," n50 was included as a means of "assur[ing] that a qui tam action based solely on public disclosures cannot be brought by an individual with no direct or independent knowledge of the information or who had not been an original source to the entity that disclosed the allegations." n51

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As originally proposed, the original source clause defined an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Govern-ment." n52 The version of the bill which emerged from conference and was signed into law, however, defined an "original source" as one who "has direct and independent knowledge of the information on which the allega-tions are based and has voluntarily provided

the information to the Government before filing an action . . . which is based on the information." n53

Judges differ substantially regarding whether the original-source clause is clear or cloudy. The Court of Appeals for the Tenth Circuit has found its terms "plain, unambiguous and requir[ing] no further scrutiny," n54 while the Court of Appeals for the District of Columbia Circuit has found "the language of the statute [to be] not so plain as to clearly describe which cases Congress intended to bar." n55

Given this level of disagreement regarding the very "understandability" of Congress' words, it is perhaps unsurprising that the original-source issue has proven to be about the most nettlesome aspect of the Act. Divergent views regarding the clarity of the language are compounded by the fact that the original-source provision is "jurisdictional." n56 Although at least one court has expressed "doubt that

3730(e)(4)(A) uses the word 'jurisdiction' in the sense of adjudicatory power," n57 other courts have not hesitated to refer to the public disclosure/original source provisions as a "jurisdictional bar" n58 and reject a "sanguine view of the federal courts' limited subject matter jurisdiction." n59 Whatever Congress' reasons for making the public- disclosure/original source issues jurisdictional, courts apply the general principle that "'statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.'" n60

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Whether one agrees with the Tenth Circuit's view of the original-source clause as being "plain" and "unambiguous," or with the D.C. Circuit's view that it is "not

so clear" as to demonstrate congressional intent, the fact is that there are, at this writing, no fewer than three completely different interpretations of the meaning of the original-source clause among the federal courts of appeals. n61 The Supreme Court has denied petitions for writs of certiorari on several original-source cases; it is, however, obvious that until the Court resolves this question, whether a relator is or is not an original source in cases where a qui tam case is based upon publicly-disclosed information will depend in no small measure upon where the case is brought. n62

In the pages which follow, we explore the parameters of these several positions. n63

1. Plain-Meaning Original Source: Keeping It Simple.

The majority of appellate courts to reach the original-source issue-the Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits-have adopted a straightforward approach to the question of whether a relator is an original source. As the Tenth Circuit stated the requirements of the original source clause, n64

(1) a qui tam plaintiff must have direct and independent knowledge of the information on which the allegations are based; and (2) a qui tam plaintiff must have voluntarily provided such information to the government prior to filing suit.

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The Fourth Circuit found the statutory language equally clear, holding that a relator is an original source if "[i]n addition to having direct and independent knowledge of the information on which the allegations in the public disclosure is based, he . . . provide[s] his information to

the government before instituting his qui tam action, as the [statute] unambiguously states." n65 The Fifth n66 and Tenth n67 Circuits concluded that a relator need only have "direct and independent knowledge" coupled with pre-filing disclosure to the United States. The Seventh Circuit, while concluding that the relator's information was not "independent" but instead resulted from knowledge of the public disclosure, found no ambiguity in the statute. n68 And the Third Circuit, holding that original sources included both the "paradigmatic 'original source' [who] is a whistleblowing insider" and "relators [whose] information results from their own investigations," n69 observed that a relator need only "possess substantive information about the particular fraud" in order to satisfy the original-source requirement. n70

The plain-language approach adopted by these five courts of appeals has obvious virtues. First, it honors the cardinal rule of statutory construction-that where a reasonable interpretation of the plain language of a statute leads to a rational result, the judicial role is to apply, rather than interpret, that language. n71 Interpreting the original source provision to mean neither more nor less than its words convey is consistent with the overarching purpose of the 1986 Amendments-to encourage private citizens to become relators, exposing government fraud. n72

Despite these seemingly compelling arguments, four other circuit courts have adopted two divergent approaches to the original-source issue, each of which raise the relator's bar substantially higher than Congress intended.

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2. The First "Third Prong": Obviously Wrong.

In *United States ex rel. Dick v. Long Island Lighting Co.*,ⁿ⁷³ the Court of Appeals for the Second Circuit held, that in order for a relator to be an original source, he not only had to "have direct and independent knowledge" of the defendant's conduct, but had to have "directly or indirectly" disclosed the information to "the entity that publicly disclosed the allegations."ⁿ⁷⁴ The court recognized that a "straightforward reading" of the statute included only the requirements of "direct and independent knowledge" disclosed to the government.ⁿ⁷⁵ However, it felt "constrained"ⁿ⁷⁶ to add an "additional requirement" to reflect the "most natural reading" of the statutory provision,ⁿ⁷⁷ asserting that the statutory language meant that a qui tam suit was barred unless it was "based on information not then publicly disclosed, unless disclosed, directly or indirectly, by the person bringing the suit."ⁿ⁷⁸

In *Wang ex rel. United States v. FMC Corp.*, the Ninth Circuit court based its opinion, in part, the Second Circuit's interpretation of the legislative history and reached the same conclusion as the Second Circuit.ⁿ⁷⁹ However, the court explicitly rejected the determination that the third prong reflected a "natural reading" of the statute. Instead, it based its analysis upon the contradicting beliefs that only persons instrumental in a public disclosure should be permitted to invoke the False Claims Act,ⁿ⁸⁰ and that the policies underlying the 1986 Amendments encouraged persons with knowledge of fraud to come forward.

The Wang court coined an oft-repeated catch phrase that "[a] whistleblower sounds the alarm; he does not echo it."ⁿ⁸¹ While the Dick panel was not so picturesque in its prose, it appears also to have been motivated by a concern that qui tam cases be brought only by

"true whistleblowers,"ⁿ⁸² [*175] speaking in terms of "ending the conspiracy of silence" by "requiring the reporting of information before public disclosure."ⁿ⁸³

In so holding, both courts dismissed, for want of jurisdiction, qui tam cases which presumably would have survived jurisdictional scrutiny in the circuits which apply the plain language of the original-source statute.ⁿ⁸⁴ While this is not an especially unusual situation in the federal system, it is worth noting that both courts (including the Dick court, which asserted that its holding was based on the plain language of the statute) purported to base their decisions upon detailed analysis of legislative history.ⁿ⁸⁵ In so doing, these courts disregarded the *raison d'etre* of the 1986 Amendments to increase the ability of private citizens to bring qui tam cases. These decisions did not quite effectuate a return to the 1943 Amendments, but, by holding that the only proper relators in a public-disclosure situation were those who disclosed to a public-discloser, they needlessly eliminated a substantial class of potential relatorsⁿ⁸⁶ without regard to whether there was any reasonable expectation of enforcement action being taken by either the government or a "proper" relator. By focusing more on the relator than on the likelihood that, without a qui tam case, the defendant contractor would be brought to justice and made to repay the Treasury if defalcation was proved, these decisions did substantial violence to the fundamentals of the 1986 Amendments.

Careful parsing of the many variations of the draft bills circulating throughout Congress during the last half of 1986 demonstrates, too, that the legislative-history analyses in both cases are highly suspect. The Dick court relied upon a comment by Senator Grassley that the

original source provisions bar a relator "who had not been an original source to the entity that disclosed the allegations." n87 However, the version of the original source clause upon which Grassley was commenting, identified an original source as one who "voluntarily informed the Government or the news media prior to an action filed by the Government" n88 - language substantially [*176] different from that signed into law. n89 Senator Grassley later made clear his view of the original source provision as being that which "a party with knowledge of fraud against the government should be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure." n90 So, too, the Wang court reached the remarkable conclusion that "Congress wanted in 1986 what it apparently thought it had in 1943: A law requiring that the relator be the original source of the government's information." n91

Congressional proceedings in 1990, 1992, and 1993 support the proposition that the "third prong" cases diverge from what Congress intended. In 1990, the House conducted an "implementation hearing" from which the just-quoted comments of Senator Grassley emanated. n92

The House and Senate sponsors of the 1986 Amendments sought, in 1992 n93 and 1993 n94 respectively, to amend the False Claims Act yet again. A central focus of the proposed amendments was to set aright several judicial interpretations of the jurisdictional bar, including legislative reversal of Dick. n95 These bills did not reach final votes; however, a final report on the bill passed by the House stated that the public disclosure/original source provisions in the 1986 Act were intended only to preclude cases which the [*177]

government was actively investigating. n96 The House Report states that "[d]espite the clarity of this limited exception, several courts have applied the language to bar qui tam claims that Congress did not intend to be barred." n97 The Second Circuit has observed that "while post-enactment legislative history is not by any means conclusive, it cannot merely be ignored." n98 This is especially true where one chamber of Congress actually passed a bill, based upon hearings and a committee report, designed to express congressional disapproval of judicial interpretations of the Act.

Although the Court of Appeals for the Eighth Circuit n99 has declined to rule on the question of whether to engraft the disclosed-to-the-discloser requirement of Dick and Wang, there is reason to believe that these cases will not take hold in other jurisdictions. We say this in part because of the criticism of them in the 1992 and 1993 congressional proceedings, in part because at least two of the appellate courts applying the plain language of the original-source provision have expressly rejected them; n100 and in part because the two courts which have recently developed the third (and most regressive) line of cases also have rejected them. n101

C. The Second Third Prong: Out of the Frying Pan

1997 brought the confusion over when a relator qualifies as an original source to its nadir, and-for public-disclosure cases in the affected cir-cuits-brought the attempt to reform the False Claims Act by passing the 1986 Amendments to its knees.

In January 1997, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in

United States ex rel. Findley v. FPC- [*178] Boron Employees' Club. n102 The relator in Findley, in the course of gathering information relative to deciding whether to bid on a contract to service vending machines located at a federal prison camp ("FPC-Boron"), learned that the Bureau of Prisons was being charged for utility services used to operate vending machines which profited the FPC-Boron Employees' Club. n103 Findley bid for, but was not awarded, the vending-service contract. He then filed a qui tam case against those federal employees who earned revenue from the provision of vending services on government property, alleging that those revenues were used to fund "social events and recreational junkets" for the employees. n104

The district court dismissed the case based on the public disclosure/ original source provision. n105 It found that there had been "public disclosure" of the scheme based upon: (1) a 1952 Comptroller General Opinion questioning the legality of postal employees' clubs retaining vending revenue; (2) the legislative history of a statute which afforded blind vendors priority in operating vending machines on federal property; and (3) a federal circuit court case n106 analyzing the blind- vendor statute in the context of the historic practice of allowing federal employee organizations to profit from vending operations. n107 The trial court concluded that because "the information that relators bring has been a subject of discussion . . . over the past forty years, as well as appearing in publicly available [Bureau of Prison] documents, relators cannot be considered to possess the 'independent knowledge' necessary to be an original source." n108

The Court of Appeals recognized that the district court erred in "confusing" the public disclosure and original source inquiries, n109 but affirmed dismissal of the complaint. First concluding that there had been a public disclosure, n110 the court next determined that although Findley had [*179] no prior knowledge of those decades-earlier disclosures and the 1986 lawsuit, his qui tam claims were nonetheless "based upon" those disclosures n111 because there was "enough information in the public domain to identify the employees groups' allegedly fraudulent practices." n112 That is, because the publicly disclosed information supported Findley's claims, those claims were "based upon" the public disclosures- whether Findley had any knowledge of them or not.

Having found that Findley's claims were based upon public disclosure, the court turned to the question whether Findley was an original source. While recognizing that the original source provision "standing on its own" requires only "direct and independent knowledge," n113 the court rejected the majority view of the statute n114 as failing to take sufficient notice of the interaction between public disclosure and original-source analysis. The court also rejected the "additional requirement that the 'original source' be responsible for providing the information to the entity that publicly disclosed the allegations of fraud." n115

Rejecting to its satisfaction both the majority and the third-prong definitions of "original source," the court was left to fashion its own test. Fashion it did, with these words: "It is clear to us that an 'original source' must provide the government with the information [underlying his qui tam claim] prior to any public disclosure." n116 Reasoning that

"once the information has been publicly disclosed . . . there is little need for the incentive provided by a qui tam action," the court held:

[T]he 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 subparagraph (B)'s description into subparagraph (A), is one that requires an original source to provide the information to [*180] the government prior to any public disclosure. n117

Applying this new test to Mr. Findley, the Court of Appeals reasoned that because he asserted that he did not know of the prior public disclosures before he filed his lawsuit, he a fortiori had not informed the government thereof before the public disclosure occurred-and the jurisdictional bar was therefore triggered. n118

The Findley holding has since been adopted by the United States Court of Appeals for the Sixth Circuit. In *United States ex rel. McKenzie v. Bell-south Telecommunications, Inc.*, n119 the court followed the "true whistle-blower" thread of the Dick/Wang cases n120 to its extreme: "We find it difficult to understand how one can be a 'true whistleblower' unless she is responsible for alerting the government to the alleged fraud before such information is in the public domain." n121 The court asserted that its holding was "based on Congress's purpose in amending the Act and the plain meaning of the Act":

'The purpose of the qui tam provisions of the FCA is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.' H. Rep.

No. 660, 99th Cong., 2d Sess. 22 (1986). The interpretation of 'original source' adopted by this Court today is consistent with this goal and "is most likely to bring 'wrongdoing to light' since, by barring those who come forward only after public disclosure of possible False Claims Act violations from acting as qui tam plaintiffs, it discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time." n122

Findley and McKenzie change substantially the scope of the public disclosure source provisions, injecting into the mix-without recognizing that the primary purpose of the 1986 Amendments was to increase the number of private enforcement actions, n123 and without noting the 1992 and 1993 statements of the House and Senate sponsors of the 1986 Amendments n124 -the requirement that in order to be an original source in connection with publicly-disclosed information, the relator himself had to [*181] have disclosed the information to the government before any public disclosure occurred. n125

Findley/McKenzie go far beyond the Dick/Wang holdings, dramatically limiting the class of potential relators and, with respect to the issue of "parasitic" cases, limiting the impact of the 1986 Amendments to correction of a single line of case law-those holdings that held that a relator was barred from pursuing a qui tam case when the relator herself had disclosed the information underlying the lawsuit to the United States. n126 Otherwise, the 1943 ban on "parasitic" cases which Congress sought to bury in 1986 has been exhumed and found living, if weakened: Where there has been a public disclosure, it does not matter whether or not the relator has complete

and explicit knowledge of the fraud; unless he or she told the government about it before the public disclosure, no qui tam case can be filed.

In order to understand this point, the reader need only consider these hypotheticals:

(1) Two employees of a government contractor learn on the same day that their employer is cheating on a government contract. That morning, one consults with counsel, who begins researching what to do. The other talks to a reporter, who causes a public disclosure on the noon news. After lunch, the second employee's counsel contacts the FBI and schedules an interview with his client.

Under the majority view, both persons are assuming they followed the relatively mechanical requirement that they inform the government before filing suit n127 - proper relators: Each has "direct and independent" know- [*182] ledge of the false claims.

Under Dick and Wang, the employee who went to the press "disclosed to the discloser" and so can be a proper relator, but the one who consulted counsel cannot be a proper relator, no matter the level of her diligence.

Under Findley and McKenzie, neither person can be a proper relator, because neither one of them disclosed their information to the government before the public disclosure occurred.

(2) An employee's allegation of contracting fraud is broadcast on a local radio station (or published in a small newspaper). Nothing is done. Five years later, a new employee of the same company files a qui tam complaint regarding the same conduct, of which she

learned only after becoming employed by the contractor.

Under the majority rule, the new employee's knowledge is "direct and independent." She is a proper relator so long as she discloses her knowledge to the government before filing suit.

Under both "third prong" analyses, she is an improper relator (even though there is no indication the government either knew of, or took any action regarding, violations of the False Claims Act) because she neither "disclosed to the discloser" (Dick/Wang) nor disclosed to the government before the radio broadcast (Findley/McKenzie).

We suggest that neither result is consistent with the congressional goal of increasing the number of qui tam cases filed against government contractors who make false claims against the United States. In the first case, both employees are "true whistleblowers"-they simply went about their whistle-blowing in different ways. In the second case, the employee who learns of fraud and promptly reports it is also a "true whistleblower." As the Fourth Circuit has said, "a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but which were not actually derived from those public disclosures, simply is not, in any sense, parasitic." n128

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Another serious problem with these decisions is that they blur together the public disclosure and original-source clauses. There is no reason to believe that Congress posited that a relator could not obtain "direct and independent" knowledge of publicly-disclosed contractor misconduct, notably by coming into contact therewith through means other than the public disclosure. Yet, the

Findley court found that even where public disclosure occurred decades before the relator encountered the alleged fraud, a relator who gains first-hand knowledge of it is prejudiced by a 40- year-old disclosure, and so can never be an original source. n129 This holding reduces to the proposition that a fraudulent scheme once "publicly disclosed" can never be the subject of a qui tam action-even if the government has failed to act for many years-unless the relator is also someone who, before there was public disclosure, informed the government about the scheme.

Indeed, another provision of the False Claims Act demonstrates that Congress could not have intended what the Findley and McKenzie courts decided. Congress determined that a relator could maintain an action, and recover a share of the proceeds, where:

[T]he action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to 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[.] n130

This provision demonstrates that Congress intended that a court could enter judgment-and therefore a fortiori defeat the "jurisdictional bar"-when the case was based primarily upon "public disclosures" n131 made by a person "other than . . . the person bringing the action." n132 Congress could not have provided that a relator can recover even where the case is "primarily" [*184] based on disclosures by third persons unless it believed that such relators could

satisfy the original-source provision. n133

At bottom, all four third-prong courts engaged in not-too-subtle judicial legislating. If Congress wished the original-source clause to require that information be provided to the government "before filing an action under this section which is based on the information and before any public disclosure occurs," then it obviously could have done so. Congress not having so said, the courts should interpret its words as written. n134

In sum, Findley and McKenzie are inconsistent not only with the fundamental purpose of the 1986 Amendments-encouraging more private citizens to bring qui tam cases-but with the provisions of the False Claims Act itself. By insisting that there must be linkage between the public-disclosure clause and the original-source clause, these decisions fail to note the need to reconcile the public-disclosure provision of Section 3730(d)(1) with the public-disclosure provision of Section 3730(e)(4)(A).

D. Choice of Forum Issues Created by the Division Among the Circuits

Whether a relator is or is not an "original source"-and therefore whether or not federal subject matter jurisdiction exists-now depends upon where she brings her lawsuit. In at least five circuits, a relator need only have "direct and independent knowledge" which is disclosed to the government before suit is filed. In two circuits, a relator must have "disclosed to the discloser" in order to maintain a case where there is public disclosure. And in two circuits, the relator must have told the government about the defendant's conduct before the public disclosure occurred, even if she has

direct and independent knowledge of the defendant's conduct. n135

[*185] [SEE TABLE IN ORIGINAL] [*186]

Because resolution of the original-source question actually controls the question of subject matter jurisdiction, practitioners must, until the question of what constitutes an original source is resolved, carefully consider where to file a qui tam complaint. The False Claims Act provides for venue "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, [or] transacts business." n136 It also provides for worldwide service of summons, n137 and nationwide service of subpoenas for trial. n138

Defendants can be expected to argue that cases should be transferred to districts under 28 U.S.C.

1404(a), n139 which provides for transfer to serve the convenience of the parties and witnesses. Cases under the transfer statute establish that the "[p]laintiff's choice of forum is paramount," n140 giving a relator a strong argument in support of her chosen forum. A relator confronted with a Section 1404 motion which, if granted, could affect subject matter jurisdiction also should be aware of a significant body of case law holding that cases transferred pursuant to Section 1404 will be decided under the law of the transferor forum. n141 Not surprisingly, these cases do not pertain to subject matter jurisdiction; it is hardly common that subject matter jurisdiction varies from judicial district to judicial district. Any lawyer even suspecting that a potential qui tam case will be affected by the minority rule original-source cases should surely attempt to file in a majority rule circuit. n142

E. Conclusion

Much has been accomplished under the 1986 Amendments to the False [*187] Claims Act. Billions have been returned to the Treasury; businesses have, surely, been encouraged to take greater care in their performance on public contracts; and private citizens, who before were able only to watch helplessly as the public trust was abused, have a real tool for change.

The principal blemish on this encouraging landscape is that there is no law of the land with respect to the issues of public disclosure and original source under the 1986 Amendments to the False Claims Act. Unless the Supreme Court resolves this issue in the near future, then the Congress should once again take the inability of the courts properly to apply the False Claims Act as a call to legislative action. n143

Legal Topics:

For related research and practice materials, see the following legal topics: Labor & Employment LawEmployer LiabilityFalse Claims ActBurdens of ProofLabor & Employment LawEmployer LiabilityFalse Claims ActCoverage & DefinitionsOriginal SourceCivil ProcedureJurisdictionJurisdictional SourcesStatutory Sources

FOOTNOTES:

n1 Virtually every case and comment regarding the False Claims Act focuses intently on its history. This is true because it is perhaps the oldest American statute still in active use; in part because the history is itself fascinating in terms of the legislative and judicial

processes; in part because the legislative and judicial materials regarding the Act are, to say the least, voluminous; and, primarily, because it is impossible to evaluate questions arising under the 1986 amendments without delving into their antecedents. Despite the fact that the history of the Act has been recited dozens of times, new subtleties, particularly in the legislative history, emerge each time a close look is taken.

n2 The phrase "qui tam" denotes the phrase "qui tam pro domine rege quam pro si ipso in hac parte sequitur . . . Who sues on behalf of the King as well as for himself." Black's Law Dictionary 1251 (6th ed. 1990).

n3 31 U.S.C. 3729-3731 (1994).

n4 31 U.S.C. 3729, 3730(b) (1994).

n5 31 U.S.C. 3730, 3729(a) (1994).

n6 *Id.*

n7 Act of March 2, 1863, ch. 67, 12 Stat. 696. The False Claims Act was reenacted as Rev. Stat. 3490-3494, 5438 (1874); later codified as 31 U.S.C. 231-235; and finally recodified in 1982 as 31 U.S.C. 3729-3731 (1994).

n8 Extended discussion of the historical antecedents of the False Claims Act is found in an earlier article in this Journal by our colleagues, James B. Helmer, Jr. & Robert Clark Neff, Jr., War Stories: A History of the Qui Tam Provisions of the False Claims Act, The 1986 Amendments to the False Claims Act and Their Application in United States ex rel. Gravitt v. General Electric Co. Litigation, 18 Ohio N.U. L. Rev. 35 (1991).

n9 "Of the fourteen statutes imposing penalties enacted by the First Congress, between ten and twelve authorized qui tam suits." United States ex rel. Stillwell v. Hughes Helicopters, Inc., 714 F. Supp. 1084, 1086 n.2 (C.D. Cal. 1989).

n10 The term "relator" means, literally, "narrator," but at least since the early 19th century has referred specifically to one whom the attorney general "at the relation of," brings an action. Shorter Oxford English Dictionary (1993 ed.). These concepts are reflected in modern practice under the False Claims Act, lawsuits pursuant to which are uniformly styled "United States ex rel. John Doe v. XYZ Corp."

n11 Hughes Aircraft Co. v. United States ex rel. Schumer, 117 S. Ct. 1871, 1876 (1997) (quoting United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943)), (quoting United States v.

Griswold, 24 F. 361, 366 (D. Ore. 1885)).

n12 A "privateer" was a privately-owned ship which, together with its crew (the members of which also were called privateers), was hired to advance the military interests of a sovereign in times of war. Privateers sailed "on account," receiving a percentage of any spoils captured in the name of their employer. The United States authorized President Lincoln to commission privateers in 1864, but he did not do so; the practice was formally renounced by the United States during the Spanish-American War of 1898. Microsoft Encarta 98 (1997).

n13 In 1985, four of the largest defense contractors (General Electric, GTE, Rockwell and Gould) had been convicted of criminal fraud offenses within the past year. Another of the largest defense contractors, General Dynamics, had been indicted in a massive fraud scheme. And 45 of the largest 100 defense contractors remain-ed under investigation for multiple fraud offenses. In the 1980s, fraud against the Government was on a steady rise. Department of Defense fraud investigations rose 30% between 1982 and 1984. Furthermore, the fraud was not limited to defense contractors. During the years 1983 through 1986, the Department of Health and Human Services tripled its prosecution referrals for fraud. Also, during a two-and-a-half-year period, the United States General

Accounting Office (GAO) identified over 77,000 fraud cases in 21 different agencies. James B. Helmer et al., False Claims Act: Whistleblower Litigation 34-35 (Michie 1994) (footnotes omitted).

n14 As a sponsor of the 1986 Amendments to the FCA said: Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain. I do not say this to impugn [sic] the ability or character of Government attorneys, but only to reflect the harsh reality of today's funding limitations of Government activities in all areas which include the budgets of the government's prosecuting agencies. 132 Cong. Rec. 29,315, 29,322 (1986) (Remarks of Cong. Berman).

n15 The principal problem with the Act as it was amended in 1943 was that relators were prohibited from bringing an action based on information in the possession of the government, even when the government did nothing with it. See infra notes 39-47 and accompanying text.

n16 The Act sets out seven categories of conduct which give rise to liability. 31 U.S.C. 3729(a)(1)-(7) (1994). These are largely self-explanatory, save the "reverse false claims" or "(a)(7)" provision contained in 3729(a)(7).

An (a)(7) claim is based upon allegations that a person makes, or uses a false record to "conceal, avoid, or decrease an obligation to pay or transmit money or property" to the United States.

n17 31 U.S.C. 3729(a)(7) provides for liability on the part of a person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

n18 31 U.S.C. 3729(b). The Court of Appeals for the District of Columbia Circuit has characterized requisite the state of mind under the 1986 Amendments to be "gross negligence plus" an "extreme version of ordinary negligence." *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997).

n19 31 U.S.C. 3731(c) (1994). Prior cases had covered the whole burden-of-proof waterfront, requiring proof beyond a reasonable doubt, *United States v. Shapleigh*, 54 F. 126, 128-29 (8th Cir. 1893); by "clear, unequivocal and convincing evidence," *United States v. Ueber*, 299 F.2d 310, 314 (6th Cir. 1962); by "clear and convincing evidence," *Hageny v. United States*, 570 F.2d 924, 933 (Ct.Cl. 1978); *United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979); *United States v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 101 (2d Cir. 1971); and by a

preponderance of the evidence, *Federal Crop Ins. Corp. v. Hester* 765 F.2d 723, 727 (8th Cir. 1985).

n20 31 U.S.C. 3729(a).

n21 *Id.*

n22 31 U.S.C. 3730(c)(1), (3)-(4) provides that when the government intervenes in a case brought by a relator, the government "shall have the primary responsibility for prosecuting the action," and that the relator "shall have the right to continue as a party to the action" unless the court specifically finds that the relator's conduct is inappropriate and should be limited.

n23 Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. 31 U.S.C. 3730(h) (1994).

n24 *United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 917 (E.D. Va. 1989) (quoting S. Rep. No. 345, at 23-24 (1986),

reprinted in 1986 U.S.C.C.A.N. 5266, 5288-89).

n25 Whistleblower Actions on Rise, Government Recovers \$ 1.8 Billion; Billions More Saved Through Deterrent Effect (July 1, 1997) < <http://www.taf.org/taf/docs/recover.html>>.

n26 United States ex rel. Zuccolo v. National Health LabCorp of America, No. 96-67-M (E.D. Va.).

n27 By way of example, defendants in reported cases include the State of Alaska; Ashland Oil Co.; Bell Helicopter Textron, Inc.; The Boeing Co.; Emerson Electric Co.; General Dynamics Corp.; The General Electric Co.; Health Corp. of America; Honeywell, Inc.; Hughes Aircraft Co.; Howard Univ.; Lockheed Missile and Space Co.; Martin Marietta Corp.; NEC Corp.; the State of Ohio; Philips Electronic North America; Rockwell International Corp.; Texas Instruments Corp.; and Westinghouse.

n28 Although the 1986 Amendments make clear that the Act is not a traditional "fraud statute"-specific intent is not required, 31 U.S.C. 3729(b) (1994), leading courts to view the statute as requiring proof only of "super negligence" Krizek, 111 F.3d at 941-the government has discretion to "debar" contractors (preclude them from bidding on government

contracts) who are found liable under the Act.

n29 Each claim for payment which is found to be "false" within the meaning of the Act, or each reverse false claim under 31 U.S.C. 3729(a)(7), exposes the defendant to a civil penalty of between \$ 5,000 and \$ 10,000. In cases where contractors submit many claims for payment-for example, a Medicare provider, or a weapons system supplier-civil penalty exposure regularly runs into the millions of dollars.

n30 31 U.S.C. 3730(d)(1)-(2) (1994).

n31 E.g., United States ex rel. Pedicone v. Mazak Corp., 807 F. Supp. 1350 (S.D. Ohio 1992) (Amendments have repeatedly been found consistent with separation of powers principles); United States ex rel. Milam v. University of Tex. M.D. Anderson Cancer Center, 961 F.2d 46, 49 (4th Cir. 1992) (Article III case-or-controversy standing requirements); United States ex rel. Berge v. Trustees of Univ. of Alabama, 104 F.3d 1453 (4th Cir. 1997)(Article III case-or-controversy standing requirements); United States ex rel. Kelly v. The Boeing Co., 9 F.3d 743 (9th Cir. 1993), cert. denied, 127 L. Ed.2d 433 (1994) (delegation of executive authority (Appointments Clause) principles and the Due Process Clause of the Fifth Amendment).

n32 Hughes Aircraft Corp. v. United States ex rel. Schumer, 117 S. Ct. 1871 (1997).

n33 As this article was in preparation, the authors learned of a recent decision of the United States District Court for the Southern District of Texas holding the qui tam provisions of the Act unconstitutional, reasoning that they purported to confer jurisdiction in violation of the case-or-controversy requirements of the Constitution. United States ex rel. Riley v. St. Luke's Episcopal Hosp., No. H-94-3996 (S.D. Tex. Oct. 24, 1997). This position has been advocated by a handful of commentators, for example, James T. Blanch, *The Constitutionality of the False Claims Act's Qui tam Provision*, 16 Harv. J. L. & Pub. Pol. 701, 736-67 (1993), but, with the exception of Riley, has been rejected by every court to consider it. E.g., Milam, 961 F.2d at 49; Kelly, 9 F.3d at 747-48; United States ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148 (2d Cir.), cert. denied, 113 S. Ct. 2692 (1993); United States ex rel. Robinson v. Northrop Corp., 824 F. Supp. 830 (N.D. Ill. 1993); United States ex rel. Burch v. Piqua Engineering, Inc., 803 F. Supp. 115 (S.D. Ohio 1992); United States ex rel. Givler v. Smith, 775 F. Supp. 172 (E.D. Pa. 1991); United States ex rel. Lindenthal v. General Dynamics, Civ. S-89-1411 L.K.K. (E.D. Cal. Nov. 9, 1990); United States ex rel. Stillwell v. Hughes Helicopters, 714 F. Supp. 1084 (C.D. Cal. 1989) petition for permission to appeal denied, No. 89-80201 (9th Cir. July 31, 1989);

United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989); United States ex rel. Truong v. Northrop, 728 F. Supp. 615 (C.D. Cal. 1989), pet. for permission to appeal denied, No. 89-80301 (9th Cir. Nov. 1, 1989); United States ex rel. Hyatt v. Northrop Corp., No. C-87-6892 K.N. (C.D. Cal. Dec. 27, 1989). While constitutional adjudications cannot be lightly disregarded, it seems safe to predict that the future vitality of Riley is doubtful.

n34 31 U.S.C. 3730(e)(4)(A)-(B) (1994).

n35 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 person bringing the action is an original source of the information. 31 U.S.C. 3730(e)(4)(A) (1994).

n36 *Id.*

n37 31 U.S.C. 3730(e)(4)(B) (1994).

n38 "Parasitic" qui tam cases were perceived by Congress and the Department of Justice as a problem in the 1940s, when relators

found that the False Claims Act as then written permitted a citizen to learn about government-contract fraud from the newspaper or from the filing of an indictment, and file a civil action against the contractor based only upon that information.

n39 E.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 539-40 (1943).

n40 E.g., 89 Cong. Rec. 2801 (daily ed. Apr. 1, 1943) (remarks of Rep. Kefauver).

n41 H.R. 1203, identified as a "bill to eliminate private suits for penalties and damages arising out of fraud in the United States," was proposed in the House on January 18, 1943. 89 Cong. Rec. 194 (daily ed. Jan. 18, 1943).

n42 One senator, speaking in floor debate, said "that if a fraud has been perpetrated, and the evidence exists in the office of the Attorney General, and the Attorney General is failing to take advantage of it, any private citizen in the United States should be entitled . . . to institute suit regardless of where he finds the proof." 89 Cong. Rec. 7575 (daily ed. Sept. 15, 1943) (remarks of Sen. Murray). Another "submit[ted] that the 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?" *Id.* at 7607 (daily ed. Sept. 17, 1943) (remarks of Sen. Langer).

n43 Act of Dec. 23, 1943, Pub. L. No. 78-213, C, 57 Stat. 608 (codified as amended at 31 U.S.C. 232 (1976)).

n44 *United States ex rel. Doe v. Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992).

n45 One court has observed that "it soon became apparent [after the 1943 Amendments] that by restricting qui tam suits to 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." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 680 (D.C. Cir.), cert. denied, 118 S. Ct. 172 (1997).

n46 E.g., *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984); *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980); *Safir v. Blackwell*, 579 F.2d 742, 746 (2d Cir. 1978), cert. denied, 441 U.S. 943 (1979); *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 670 (9th Cir. 1978); *United States v. Aster*, 275 F.2d 281, 283 (3d Cir.), cert. denied, 364 U.S. 894 (1960).

n47 The Senate Report accompanying the 1986 Amendments reports congressional concern that fraud "permeates

generally all Government programs ranging from welfare and food stamps benefits, to multibillion dollar defense procurements, to crop subsidies and disaster relief programs." S. Rep. No. 345, 99th Cong., 2nd Sess. 2 (1986) reprinted in 1986 U.S.C.C.A.N. 5266, 5267.

n48 See supra note 23 and accompanying text.

n49 S. 1562, 99th Cong. 2 (1985) (Bill introduced on Aug. 1, 1985); H.R. 4827, 99th Cong., reprinted in H.R. Rep. No. 99-660 (1986).

n50 One court has characterized Congress as "seeking 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." United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

n51 132 Cong. Rec. S11244 (daily ed. Aug. 11, 1986) (Comments of Senator Grassley).

n52 132 Cong. Rec. S11238 (daily ed. Aug. 11, 1986). Senator Dole offered Grassley Amendment # 2701, amending the bill (S. 1562) to include the quoted language.

n53 31 U.S.C. 3730(e)(4)(B) (1994).

n54 United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 553 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993).

n55 United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 680 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 172 (1997).

n56 31 U.S.C. 3730(e)(4)(A)(1994).

n57 United States ex rel. Fallon v. Accudyne Corp., 97 F.3d 937, 941 (7th Cir. 1996).

n58 United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994).

n59 Federal Recovery Servs., Inc. v. United States, 72 F.3d 447, 453 (5th Cir. 1996).

n60 United States ex rel. McKenzie v. Bellsouth Telecomms., Inc., 123 F.3d 935, 940 (6th Cir. 1997) (quoting United States ex rel. Precision Co. v. Koch Indus., 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993)).

n61 A table summarizing the positions of the various appellate circuits is set out infra at note 135.

n62 This is actually true in two ways, for there are substantial differences in the way the courts of appeal have approached the question of when a qui tam complaint is "based upon" public disclosures. One line of cases holds that "based upon" means "actually derived from." E.g., *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1347-48 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1995). Another holds that "based upon" means "supported by"-i.e., that the statutory definition is met when a qui tam case is "even partly based upon publicly disclosed allegations." E.g., *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993). A third finds a claim "based on" public disclosure only when allegations of fraud or the elements of a fraudulent transaction have been disclosed. E.g., *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1409 (9th Cir. 1995), cert. denied, 116 S.Ct. 1319 (1996). Complete discussion of the "based upon" issue is beyond the scope of this article. However, the summary table, see *infra* note 135, includes circuit-by-circuit holdings regarding when a case is "based upon" public disclosure.

n63 It cannot be overemphasized that although resolution of the original-source issue is of critical importance for those relators who bring qui tam cases where there has been a "public disclosure" as that term is

defined in the statute, original-source analysis simply has no place in cases where there has not been a public disclosure. While defendants will inevitably seek to develop evidence of public disclosure, the original-source issue arises only in a significant minority of cases.

n64 *Precision*, 971 F.2d at 553.

n65 *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1355 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1995).

n66 *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447, 451 (5th Cir. 1995).

n67 *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006-07 (10th Cir. 1996).

n68 *Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504-05 (7th Cir. 1989), cert. denied, 494 U.S. 1025 (1990).

n69 *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991).

n70 *Id.* at 1160.

n71 E.g., *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

n72 S. Rep. No. 345 99th Cong., 2nd Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273; *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1497 (11th Cir. 1991).

n73 912 F.2d 13 (2d Cir. 1990).

n74 *Id.* at 16.

n75 *Id.*

n76 *Id.* at 17.

n77 *Id.* at 16. The Court's conclusion is based on a complicated analysis of the statute's use of the word "information" in both the public-disclosure and original-source provisions.

n78 *Id.* at 17-18.

n79 975 F.2d 1412, 1419 (9th Cir. 1992).

n80 *Id.* at 1418.

n81 *Id.* at 1419.

n82 The "true whistleblower" concept finds its ultimate expression

in the cases of the Sixth Circuit, which hold that a "relator must be a true whistleblower." *United States ex rel. McKenzie v. Bellsouth Telecomms., Inc.*, 123 F.3d 935, 942 (6th Cir. 1997) (quoting *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994)).

n83 *Dick*, 912 F.2d at 18.

n84 In *Wang*, the court of appeals specifically found that Mr. Wang did indeed have "direct and independent knowledge" of the fraud of which he complained. *Wang*, 975 F.2d at 1417. Whether this was true in *Dick* is less clear.

n85 *Dick*, 912 F.2d at 16; *Wang*, 975 F.2d at 1417-19.

n86 For example, those potential relators who had direct and independent knowledge of the facts and disclosed those facts to the government before filing suit-but who had no hand in the public disclosure.

n87 *Dick*, 912 F.2d at 17 (emphasis supplied by the court) (quoting 132 Cong. Rec. S20536 (daily ed. Aug. 11, 1986)).

n88 See *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951 (1993).

n89 The Fourth Circuit characterized the Dick court's "misreading" of the legislative history as being "a classic example of the use of legislative history to create an ambiguity in the statute where none exists in order to justify use of that history as dispositive evidence of congressional intent." *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 139, 132 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1995).

n90 False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law and Gov't. Relations of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 3 (1990).

n91 *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) (emphasis added).

n92 At least one appellate court has found Grassley's comments at the implementation hearing to be worthy of consideration in *para materia* with the contemporaneous legislative history of the 1986 amendments. *Cooper v. Blue Cross Blue Shield*, 19 F.3d 562, 565 & n.3 (11th Cir. 1994).

n93 In 1992, Representative Howard Berman proposed, and the House passed and sent to the Senate, a bill intended to respond to "a number of incorrect interpretations of the parasitic suit ban in the current Act." H.R. Rep.

No. 102-837, at 12 (1992) (reporting on H.R. 4563).

n94 In 1993, Sen. Charles Grassley proposed Senate Bill 841, which would have removed the public disclosure/original source provision entirely, and replaced it with a provision which would permit the government to seek exclusion of the relator when the government could show that it mirrored an "open and active" federal fraud investigation. S. 841, 103d Cong. 1st Sess. (1993).

n95 Extended discussion of the 1992 House bill, as well as a Senate bill proposed by Senator Strom Thurmond for the limited purpose of preventing government employees from succeeding as relators under any circumstances, may be found in Francis E. Purcell, Jr., *Qui Tam Suits Under The False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 *Cath. U.L. Rev.* 935, 971-76 (1993).

n96 H.R. Rep. No. 837, at 12.

n97 H.R. Rep. No. 837, at 12.

n98 *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 490 (2d Cir. 1984); see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1982).

n99 United States ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 704 (8th Cir. 1995).

n100 United States ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir. 1996); United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1351-52 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1995). The Siller court characterized Dick's holding that an original source must disclose to the discloser as "not merely unpersuasive, but implausible" and as being "wholly indefensible" in light of the plain language of the statute. Siller, 21 F.3d at 1353.

n101 The Ninth Circuit, while consistently following Wang, has used other parts of the jurisdictional bar to minimize the impact of Wang's third-prong on the Circuit's False Claims Act jurisprudence. For example, in United States ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1409 (9th Cir. 1995), cert. denied, 116 S.Ct. 1319 (1996), the court held that there had been no public disclosure of information when the alleged disclosure includes neither allegations of fraud nor allegations of a fraudulent transaction. By narrowly interpreting the public-disclosure statute, the court avoided reaching the original-source question.

n102 105 F.3d 675 (D.C. Cir. 1997), cert. denied, 118 S. Ct. 172 (1997).

n103 Id. at 678.

n104 Id.

n105 United States ex rel. Findley v. FPC-Boron Employees' Club, No. 94-1477, 1995 WL 914416 (D.D.C. June 30, 1995).

n106 Texas State Comm'n for the Blind v. United States, 796 F.2d 400, 402-03 (Fed. Cir. 1986) (en banc), cert. denied, 479 U.S. 1030 (1987).

n107 Findley, 105 F.3d at 679, 686.

n108 Id. at 679.

n109 Id. at 688.

n110 The court of appeals' detailed analysis of the public disclosures which had taken place decades before Mr. Findley gained knowledge of the vending-machine scheme, Findley, 105 F.3d at 685-88, is not outside the mine run of public-disclosure cases. In particular, the fact that the practice of permitting employee organizations to profit from vending operations was discussed in a published court of appeals opinion supports the court's analysis. The authors do note that the courts are reaching general agreement that the listing of public-disclosure methods set out in 31 U.S.C.

3730(e)(4)(A) is exhaustive for example, *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1495 (11th Cir. 1991), thereby truncating defense arguments that, for example, a potential relator vitiates his rights under the Act by telling a friend about his employer's fraud. Accord, *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997) (newspaper articles and other sources of information did not disclose facts demonstrating all elements of alleged fraud); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990).

n111 Recall that the jurisdictional bar precludes cases "based upon the public disclosure of allegations or transactions . . ." 31 U.S.C. 3730(e)(4)(A) (1994) (emphasis added).

n112 *Findley*, 105 F.3d at 687.

n113 *Id.* at 690.

n114 See supra notes 64-72 and accompanying text.

n115 *Findley*, 105 F.3d at 690.

n116 *Id.*

n117 *Id.* at 691.

n118 *Id.*

n119 123 F.3d 935, 938 (6th Cir. 1997).

n120 See supra notes 73-86 and accompanying text.

n121 *McKenzie*, 123 F.3d at 942.

n122 *Id.* at 942-43, quoting *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990).

n123 See supra note 23 and accompanying text.

n124 See supra notes 91-96 and accompanying text.

n125 *McKenzie* also adopted the onerous "based in any part upon" concatenation of the public-disclosure rule. *McKenzie*, 123 F.3d at 945.

n126 See supra note 46 and accompanying text. The court of appeals expressly acknowledged that the "overarching purpose of the 1986 amendments was to encourage more private enforcement suits" but noted that a "specific element" of the Amendments was to legislatively reverse *United States ex rel.*

Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984).

n127 One unusual case warrants mention in the context of pre-filing notification to the government. *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699 (8th Cir. 1995). In *Barth*, a construction contractor required relator Barth to prepare false time cards in 1986 in order to evade prevailing-wage liabilities. In 1989, Barth was approached by a HUD investigator, to whom he confirmed his actions. Three years later, allegations regarding Ridgedale's conduct were published in the newspaper; six months after that, in July 1992, Barth filed a qui tam action. The court of appeals affirmed the district court's conclusion that Barth had "direct and independent knowledge of the alleged fraud," but found that because Barth did not "voluntarily provide" the information to the government prior to filing suit, he was not an original source. *Id.* at 704. We suggest that the court was wrong to exclude Barth on original source grounds. He was under no compulsion to disclose his knowledge to the government when he was interviewed by HUD's investigator. In the definition of "original source," the requirement that the individual "voluntarily" informed [sic] the Government or news media is meant to preclude the ability of an individual to sue under the qui tam section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations only because the

individual was subpoenaed to come forward. However, those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information which later led to a public disclosure would be considered to have "voluntarily" informed the Government or media and therefore considered eligible qui tam relators. 132 Cong. Rec. S11238, S11244 (daily ed. Aug. 11, 1986) (Sen. Grassley). The case, although incorrect, certainly highlights the importance of acting as quickly as possible with respect to knowledge of fraud or contract abuse, and even more so demonstrates the importance of ensuring that there is a complete disclosure of all the relator's knowledge prior to filing a complaint.

n128 *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1361 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1995).

n129 *Findley*, 105 F.3d at 691.

n130 31 U.S.C. 3730(d)(1) (1994).

n131 There is complete identity between the litany of public-disclosure methods set out in 3730(d)(1), and the language of the public disclosure section, 3730(e)(4)(A).

n132 Senator Grassley addressed this provision: When the

qui tam plaintiff brings an action based on public information, meaning he is an "original source" within the definition under the act, but the action is based primarily on public information not originally provided by the qui tam plaintiff, he is limited to a recovery of not more than 10 percent. In other words a 10-percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from that original source. 132 Cong. Rec. S15515 (daily ed., Oct. 6, 1986) (remarks of Sen. Grassley).

n133 The only possible argument against this conclusion would posit that the relator has the right to recover a relator's share from the government even after he has been dismissed, on jurisdictional grounds, from the qui tam case. We recognize that this result is not flatly foreclosed by the language of 3730(d)(1). However, a relator once dismissed is prevented by statute from intervening in the case, 31 U.S.C. 3730(b)(5), and a relator who was dismissed because a third person had publicly disclosed information which the relator had not disclosed would have no way of recovering against the government. The proposition that Congress intended that a jurisdictionally-barred relator could recover a 3730(d)(1) relator's share in a case from which he had been dismissed as a non-original source has been rejected by three appellate courts. *Federal Recovery Servs., Inc. ex rel. United States v.*

Crescent City E.M.S., Inc., 72 F.3d 447 (5th Cir. 1996); *LeBlanc v. United States*, 50 F.3d 1025, 1030-31 (Fed. Cir. 1995); *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1044 (6th Cir. 1994).

n134 *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive").

n135 The following table, intended as an aid to practitioners, identifies the position of the twelve federal circuits on the original-source issue.

n136 31 U.S.C. 3732(a) (1994).

n137 31 U.S.C. 3732(b) (1994).

n138 31 U.S.C. 3731(a) (1994).

n139 Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a District Court may transfer any civil action to any other district or division where it might have been brought." The statute was enacted in 1948 "as a 'federal housekeeping measure,' allowing easy change of venue within a unified federal system." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 613 (1964)).

accompanied by clear guidance regarding the issues addressed.

n140 *Hobson v. Princeton-New York Investors, Inc.*, 799 F. Supp. 802, 805 (S.D. Ohio 1992); *United States ex rel. Grand v. Northrop Corp.*, 811 F. Supp. 330, 332 (S.D. Ohio 1992).

n141 E.g., *Ferens v. John Deere Co.*, 494 U.S. 516 (1990); *Bott v. American Hydrocarbon Corp.*, 441 F.2d 896, 899 (5th Cir. 1971) (transferee court bound to apply choice of law rules of transferor court).

n142 Whether a case could be filed against a nationwide company in, for example, the Fourth Circuit and then transferred pursuant to section 1404 to a third-prong circuit without defeating the subject-matter jurisdiction resulting from the majority-rule circuit is, to say the least, an open question. However, if a case obviously is barred by *Wang*, *Dick*, *Findley*, or *McKenzie*, then taking advantage of any opportunities created by the nationwide venue provisions of the Act seems only to make good sense.

n143 The courts do not, of course, bear all the blame for the current, difficult situation. The legislative history of the 1986 Amendments is confusing. There is virtually no legislative comment on the final bill, which was the result of informal conferences between House and Senate Members. It is respectfully hoped that any further legislative action will be