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# The King and I?: An Examination of the Interest Qui Tam Relators Represent and the Implications for Future False Claims Act Litigation

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**THE KING AND I?: AN EXAMINATION OF THE INTEREST *QUI TAM* RELATORS REPRESENT AND THE IMPLICATIONS FOR FUTURE FALSE CLAIMS ACT LITIGATION**

I. INTRODUCTION

City Pharmacy is located on the Southside of Chicago. Though it was much smaller than the National Pharmacy down the street, business was fairly good.<sup>1</sup> In fact, things ran pretty smoothly until one day when Gayle—one of City Pharmacy’s pharmacists—noticed that something at the pharmacy was not quite right. While going about her daily routine, Gayle discovered some questionable business activities being conducted. Gayle found that the City Pharmacy was selling drug samples provided to the pharmacy at no cost by the manufacturers, selling drugs without valid prescriptions, and failing to credit back the accounts of the Illinois Department of Public Aid for nondispensed drugs. Gayle suspected that these actions violated several laws, and she dutifully reported her findings to City Pharmacy’s management. However, not long after her report, Gayle began to suffer discriminatory and retaliatory behavior.

Gayle was extremely perturbed by the situation, and she sought assistance from Peter Patrick, a savvy local plaintiff’s attorney. Gayle and Patrick initially filed a lawsuit alleging that City Pharmacy violated Title VII by discriminating against Gayle on the basis of her race. City Pharmacy quickly settled, however, and the court approved the settlement agreement between the parties before dismissing the case with prejudice.

Knowing that Gayle remained angry at City Pharmacy after entering into the settlement agreement, Patrick counseled Gayle that there were further steps within the law that she could take against City Pharmacy. Now that they had some financing (thanks to the settlement), Patrick explained that based on the activity that Gayle observed and the subsequent retaliation she suffered, they could now file a second suit against City Pharmacy under the Civil False Claims Act, which would allow them to bring an action on behalf of the United States Government but would reward them with a bounty out of what they recovered from the claim. Gayle liked the thought of keeping after City Pharmacy, so Patrick filed an action under seal.

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1. This fact pattern is loosely based on the facts of *Cole v. Bd. of Trs. of Univ. of Ill.*, 497 F.3d 770 (7th Cir. 2007).

Could Gayle succeed in bringing a *qui tam* action under the False Claims Act since she has already filed a private claim? Could City Pharmacy successfully argue that Gayle's *qui tam* action is barred by claim preclusion?

The False Claims Act (FCA), codified at 31 U.S.C. §§ 3729–33, “is one of the government’s primary weapons to fight fraud against the government.”<sup>2</sup> The FCA creates civil liability for any person who “knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment or approval” by the United States.<sup>3</sup> An FCA defendant may be liable for treble damages and a civil penalty of up to \$10,000 per claim.<sup>4</sup> An FCA action may be brought by the government itself,<sup>5</sup> or a private person (referred to as a relator) may bring a *qui tam* action “for the person and for the United States Government . . . in the name of the Government.”<sup>6</sup> A *qui tam* complaint is filed *in camera* and remains under seal for at least sixty days.<sup>7</sup> During this period, the relator must present all material evidence to the government, and the government investigates and decides whether to intervene and proceed with the action itself.<sup>8</sup> If the government takes over the case, the relator may receive between fifteen and twenty-five percent of the government’s recovery, depending on the extent to which the relator contributed to the prosecution of the action, plus reasonable expenses.<sup>9</sup> If the government declines to intervene, the relator may proceed with the action on his or her own.<sup>10</sup> If successful after the government has declined, the relator can receive between twenty-five and thirty percent of any recovery obtained, plus reasonable expenses.<sup>11</sup> The FCA also provides a private cause of action for retaliation against individuals.<sup>12</sup>

Today, the healthcare industry is in the FCA’s crosshairs; of the approximately \$3.2 billion recovered under the FCA in 2006, more than seventy percent of that amount was recovered from the healthcare industry.<sup>13</sup> While the overall number of FCA prosecutions continues to grow, no mistake

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2. Letter from Laurie E. Elstrand, Dir., Homeland Sec. and Justice, to the Honorable F. James Sensenbrenner, Jr., Chairman, Comm. on the Judiciary et al., Information on False Claims Act Litigation, (Jan. 31, 2006), available at <http://www.gao.gov/new.items/d06320r.pdf> [hereinafter Elstrand Letter]; S. REP. NO. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5266–67 [hereinafter SENATE REPORT].

3. 31 U.S.C. § 3729(a)(1) (2000).

4. § 3729(a)(7).

5. § 3730(a).

6. § 3730(b)(1).

7. § 3730(b)(2).

8. *Id.*

9. § 3730(d)(1).

10. § 3730(b)(4)(B).

11. § 3730(d)(2).

12. § 3730(h).

13. 1 JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS, Introduction (Aspen Publishers 3d ed. 2006 & Supp. 2007-2).

can be made about the significant role *qui tam* actions play in the government's enforcement strategy. Since Congress amended the FCA in 1986, the government has recovered more than \$15 billion between 1987 and 2005.<sup>14</sup> Sixty four percent of these recoveries, totaling \$9.6 billion, resulted from cases filed by relators under the FCA's *qui tam* provisions.<sup>15</sup> In fact, relators filed a record 546 *qui tam* cases in 1997 and 356 more cases were filed during fiscal year 2007.<sup>16</sup> These numbers are especially impressive considering that relators filed just thirty-one *qui tam* cases in 1987.<sup>17</sup>

It is doubtful that the wave of FCA and *qui tam* actions has crested—rather, all signs point toward a continued upward surge. Amendments effective January 1, 2007, instituted incentives for state governments to enact their own false claims legislation.<sup>18</sup> Further, if enacted into law, amendments to the FCA originally proposed in 2007 by Senator Grassley<sup>19</sup> will broaden the ability of private individuals to institute *qui tam* actions by altering the scope of the current public disclosure bar.<sup>20</sup> As at least one commentator has observed that these amendments “virtually and practically eliminate the public disclosure/original source jurisdictional defense.”<sup>21</sup>

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14. Elstrand Letter, *supra* note 2, at 1.

15. *Id.*

16. U.S. DEP'T OF JUSTICE, FRAUD STATISTICS-OVERVIEW (2007), <http://www.taf.org/STATS-FY-2007.pdf> [hereinafter FRAUD STATISTICS].

17. *Id.*

18. Connie A. Raffa, *New Enforcement Powers and Incentives Aimed at Medicaid Fraud Enacted by the DRNA*, 10 J. HEALTH CARE COMPLIANCE 5 (2008).

19. Senator Charles E. Grassley (R-Iowa) also co-sponsored the 1986 Amendments to the FCA. Senator Charles Grassley, *Senator Grassley at Work*, <http://grassley.senate.gov/about/More-About-Grassley.cfm> (last visited Dec. 19, 2008).

20. Press Release, Office of Senator Charles Grassley, Grassley, Durbin, Leahy, Specter Sponsor Legislation to Fortify Taxpayers Against Fraud (Sept. 12, 2007), available at [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=3258#](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=3258#). See *Grassley Proposes Significant Changes to FCA*, 49 GOV'T CONTRACTOR ¶ 359 (2007) [hereinafter *Significant Changes to FCA*]. See also S. 458, 111th Cong. (2009); H.R. 1788, 111th Cong. (2009); S. 2041, 110th Cong. (2007); H.R. 4854, 110th Cong. (2007). See also *Hearing on Proposals to Fight Fraud and Protect Taxpayers: False Claim Corrections Act of 2009 Before the H. Comm. on the Judiciary*, 111th Cong. 16–18 (2009) (statement of Joseph E.B. White, President & C.E.O., Taxpayers Against Fraud), available at <http://www.taf.org/TAF-testimony-Judiciary-White-4-1-09.pdf>. Note, however, that as of this writing the proposed amendments do not address the relator-government identity issues described in this Comment.

21. *Significant Changes to FCA*, *supra* note 20, ¶ 359. The public disclosure bar currently bars suits by individuals under the FCA *qui tam* provisions if the suits were based on information already in the possession of the government, unless the individual bringing suit was the “original source” of that information. See 31 U.S.C. § 3730(e)(4)(A) (2000). In some cases, courts have found a *qui tam* claim brought subsequent to a prior state law claim to have been barred by a public disclosure. See generally *U.S. ex rel. King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1282 (10th Cir. 2001) (affirming dismissal of *qui tam* action by the district court; court initially

In the face of the ever-growing wave of FCA and *qui tam* actions, defendants have seemingly few successful, non-substantive defenses.<sup>22</sup> Although the FCA currently provides a public disclosure jurisdictional bar<sup>23</sup> and a “first-to-file” bar,<sup>24</sup> other defenses have been far less accepted by courts.<sup>25</sup> In addition to the already limited arsenal of defenses available to an FCA defendant, a number of cases have arisen where a *qui tam* relator has filed an action under the FCA only after filing an earlier suit against the same defendant.<sup>26</sup> In the non-FCA context, the concepts of preclusion would

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dismissed on claim preclusion grounds, but on motion for reconsideration determined that relator’s prior retaliatory-discharge suit constituted public disclosure under Section 3730(e)(4) barring jurisdiction). *But see* U.S. *ex rel.* Kennard v. Comstock Res., Inc., 2009 WL 765002, at \*1 n.2, 9–13 (E.D. Tex. 2009) (where the court previously found the public disclosure bar inapplicable though it dismissed relator’s suit on claim preclusion grounds).

22. Thomas S. Crane et. al., *Stark Phase III Regulation—Analysis and Comment, in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES* 179, 189 (Linda A. Bauman ed., 2002).

23. *See* 31 U.S.C. § 3730(e)(4) (2000). While filing a private action in state court might qualify as a public disclosure within Section 3730(e)(4)(A), one may later become a relator by filing a *qui tam* claim based upon the same allegations if he qualified as an “original source of the information” upon which the allegations are based. *Hays v. Hoffman*, 325 F.3d 982, 989–90 (8th Cir. 2003); U.S. *ex rel.* *Green v. Northup Corp.*, 59 F.3d 953, 967 (9th Cir. 1995) (citing § 3730(e)(4)(A)). *See also* Robert Salcido, *Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 PUB. CONT. L.J. 237 (1995).

24. § 3730(e)(3). *See also* § 3730(b)(5) (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”) (emphasis added). In essence, the first-to-file bar precludes claims arising from events that are already the subject of an existing *qui tam* suit. *See* U.S. *ex rel.* *LaCorte v. Smithkline Beechham Clinical Labs., Inc.* 149 F.3d 227, 232 (3d Cir. 1998).

25. *Crane, supra* note 22, 189–90 n.234.

26. *See, e.g., See, e.g., Cole v. Bd. of Trs. of Univ. of Ill.*, 497 F.3d 770, 771 (7th Cir. 2007); U.S. *ex rel.* *Laird v. Lockheed Martin Eng’g & Sci. Servs. Co.*, 336 F.3d 346, 349 (5th Cir. 2003), *abrogated on other grounds by Rockwell Int’l Corp. v. United States*, 549 U.S. 457 (2007); U.S. *ex rel.* *Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 912 (8th Cir. 2001); U.S. *ex rel.* *King v. Hillcrest Health Ctr., Inc.*, 264 F.3d 1271, 1275 (10th Cir. 2001); U.S. *ex rel.* *Pentagen Tech. Indus. Int’l, Ltd. v. United States*, No. 00 CIV.6167, 2001 WL 770940 (S.D.N.Y. July 10, 2001); *Wilkins v. Jakeway*, 183 F.3d 528, 531 (6th Cir. 1999); U.S. *ex rel.* *Barajas v. Northup Corp.*, 147 F.3d 905, 908 (9th Cir. 1998); U.S. *ex rel.* *Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 232 (9th Cir. 1997); *Fauci v. Ebersman*, No. 06-10061-RGS, 2007 WL 3020191 (D. Mass. Oct. 12, 2007); U.S. *ex rel.* *Huangyan Imp. & Exp. Corp. v. Nature’s Farm Prods. Inc.*, 370 F. Supp. 2d 993 (N.D. Cal. 2005); U.S. *ex rel.* *Whitten v. Triad Hosps., Inc.*, No. CV202-189, 2005 WL 3741538 (S.D. Ga. Oct. 27, 2005); U.S. *ex rel.* *Bahrani v. Conagra, Inc.*, 183 F. Supp. 2d 1272, 1274 (D. Colo. 2002); U.S. *ex rel.* *Chandler v. Swords to Ploughshares*, No. C-96-0578 VRW, 1999 U.S. Dist. LEXIS 3007 (N.D. Cal. Mar. 11, 1999), *aff’d*, No. 99-15725 (9th Cir. Oct. 16, 2000); U.S. *ex rel.* *Chen v. Zygo Corp.*, No. Civ. 3:95-879(DJS), 1997 WL 762810 (D. Conn. March 27, 1997), *aff’d*, 162 F.3d 1147 (2d Cir. 1998); U.S. *ex rel.* *DeCarlo v. Kiewitt*, 937 F. Supp. 1039, 1041 (S.D.N.Y. 1996); U.S. *ex rel.* *Pogue v. Am. Healthcorp., Inc.*, No. 3-94-0515,

normally prevent duplicative litigation. Application of preclusion is muddled, however, by the distinction between the interests represented in a prior private cause of action and those represented in FCA litigation. As a result, the approaches taken by courts and parties alike have been confused and, in some cases, decisions have conflicted with the United States Supreme Court's articulation of the interest represented by a relator. Considering the pending amendments proposed to the FCA and the consistently high number of *qui tam* actions since enactment of the 1986 amendments, it is likely that such confusion over the relator-government relationship will persist.

Part II of this Comment will provide an overview of the history of *qui tam* actions while setting forth the government-relator relationship as articulated in cases upholding the constitutionality of the FCA's *qui tam* provisions. Specifically, it describes the relator's standing as a "partial assignee" of the government. Part III outlines current claim preclusion law and summarizes recent circuit court decisions applying this judicially-created concept to litigation either prior to or subsequent to a *qui tam* action.

The remainder of this Comment confronts the conflict between the "partial assignment" theory and the notion that most courts and parties have about who the parties in interest are for claim preclusion purposes. Accordingly, Part IV analyzes the FCA landscape and asserts that while alternative grounds might exist to provide a defense to repetitive claims, using claim preclusion to bar a claim such as that described in the hypothetical above cannot be done without altering the concept of partial assignment adopted by the United States Supreme Court. Part V concludes the Comment by proposing a method by which clarity can be gained for the sake of future cases. This proposal includes expanded utilization of the existing FCA text in order to prevent relators from bringing repetitious litigation against the same defendant.

## II. BACKGROUND OF THE FCA AND *QUI TAM* ACTIONS

### A. *Brief History of Qui Tam Actions*

*Qui tam* is an abbreviation for a Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who as well for the king as for himself sues in this matter."<sup>27</sup> The *qui tam* action arose in thirteenth

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1995 WL 626514 (M.D. Tenn. Sept. 14, 1995); U.S. *ex rel.* Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370, 372 (S.D. Tex. 1994), *aff'd without opinion*, 53 F.3d 1282 (5th Cir. 1995).

27. BOESE, *supra* note 13, at 1–7; BLACK'S LAW DICTIONARY 1282 (8th ed. 2004); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 951 (2007). See also BOESE, *supra* note 13, at 1–4 n.3 ("Qui tam is properly—although rarely, among practicing attorneys—pronounced with a soft 'q,' a long 'i,' and a short 'a': 'kwiya taem.'"); Drew v. Hilliker, 56 Vt. 641 (Vt. 1884) ("It is settled law that

century England as a result of the disparity between the ill-reputed local courts with jurisdiction over private matters and the royal courts that protected the interests of the king.<sup>28</sup> Predictably, once the royal courts opened up to all legal disputes, the demise of the common law *qui tam* action in England followed.<sup>29</sup> However, the *qui tam* action was first preserved by statute in 1400, and it remained popular in lieu of an effective police force for investigating public wrongs.<sup>30</sup> No evidence exists of a common law *qui tam* action in America's colonial period,<sup>31</sup> and of the few *qui tam* statutes remaining in the United States today,<sup>32</sup> the FCA generates the largest number of cases.<sup>33</sup>

### B. *The FCA Qui Tam Provisions*

Originally enacted in 1863, the FCA is “the government’s ‘primary litigative tool for combating fraud’ against the federal government.”<sup>34</sup> Within the FCA lies the most frequently used *qui tam* statute in modern time.<sup>35</sup> Under the FCA, a *qui tam* case may be filed by a relator on behalf of the federal government.<sup>36</sup> The *qui tam* provisions exist as part of the original 1863 FCA statute enacted to combat allegations of fraud perpetrated against the Union Army.<sup>37</sup> The original *qui tam* provision, however, provided no mechanisms of control for the government to exercise over a relator who chose to bring suit under the FCA.<sup>38</sup> At least one court that interpreted the *qui tam* provision from the 1863 statute viewed the relator’s interest in the action as a property right of

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an informer can in no case sue in his own name to recover a forfeiture, given in part to him, unless the right to sue is accorded by the statute raising the forfeiture.”).

28. BOESE, *supra* note 13, at 1–7.

29. *Id.* at 1–8.

30. *Id.*

31. *Id.* See, e.g., U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943) (“Qui tam suits have been frequently permitted by legislative action. . . .”); United Seniors Ass’n, Inc. v. Philip Morris USA, No. 06-2447, 2007 WL 2353170, at \*3 (1st Cir. Aug. 20, 2007); Drew v. Hilliker, 56 Vt. 641 (Vt. 1884) (“It is settled law that an informer can in no case sue in his own name to recover a forfeiture, given in part to him, unless the right to sue is accorded by the statute raising the forfeiture.”).

32. See Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 768–69 n.1 (2000) (listing the three other *qui tam* statutes besides the FCA remaining on the books today, all of which were enacted over 100 years ago).

33. See BOESE, *supra* note 13, at 1-3. See also Broderick, *supra* note 27, at 952.

34. U.S. *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 745 (9th Cir. 1993) (citing SENATE REPORT, *supra* note 2, at 2).

35. Stevens, 529 U.S. at 768–69 n.1.

36. 31 U.S.C. § 3730(b)(1) (2000). See also Elstrand Letter, *supra* note 2, at 1.

37. BOESE, *supra* note 13, at 1-3–1-4.

38. SENATE REPORT, *supra* note 2, at 10.

the relator as an individual; the government had no power to divest the relator's interest by settling the suit with the defendant.<sup>39</sup>

The FCA's *qui tam* provisions again came into use around the time of World War II in cases regarding defense procurement fraud.<sup>40</sup> The relationship between the relator and the government once again proved problematic, however, as was evidenced in *United States ex rel. Marcus v. Hess*, where a relator based his civil *qui tam* action solely on information revealed by a criminal indictment brought by the government.<sup>41</sup> In *Marcus*, United States Supreme Court held that the FCA contained no requirement that the relator base his suit on original information and, further, did not allow the government exclusive control over its own civil fraud claim.<sup>42</sup> The *Marcus* decision elicited a strongly adverse response from the government, and the House of Representatives even passed legislation to repeal the *qui tam* provisions.<sup>43</sup> The *qui tam* provisions were ultimately saved by the Senate, which proposed substantial amendments that effectively overturned *Marcus* as an alternative to repealing the provisions altogether.<sup>44</sup> Following the 1943 amendments, the *qui tam* provisions saw only limited use until 1986.<sup>45</sup>

In 1986, Congress passed amendments to the FCA giving relators a more significant role in the government's fraud detection.<sup>46</sup> In fact, the amendments spurred more use of the *qui tam* provisions than at any other time their history.<sup>47</sup> First, the 1986 Amendments increased a relator's ability to recover under the FCA by creating the "original source" exception to the public disclosure jurisdictional bar.<sup>48</sup> The amendment established that prior government knowledge of the allegations would not automatically prevent a relator from pursuing a *qui tam* action.<sup>49</sup> The 1986 amendment also increased the percentage of damages that a relator could retain while simultaneously increasing the potential liability of a defendant from double to treble damages.<sup>50</sup> Finally, the 1986 Amendments made it safer for an individual to

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39. *Id.* at 10 (citing *United States v. Griswold*, 30 Fed. Rep. 762 (Cir. Ct. D. Or. 1887)). This original understanding of the relator-government relationship becomes particularly significant when viewed in comparison to the ways in which the FCA has been amended.

40. *Id.* at 10–11.

41. *Id.* at 10 (citing *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943)).

42. *Id.* at 11 n.3 (citing *Marcus*, 317 U.S. at 541).

43. SENATE REPORT, *supra* note 2, at 11.

44. *Id.* at 11–12. These 1943 amendments included the public disclosure bar, albeit without an original source exception.

45. BOESE, *supra* note 13, at 1-3.

46. SENATE REPORT, *supra* note 2, at 13.

47. BOESE, *supra* note 13, at 1-4.

48. *See Broderick*, *supra* note 27, at 954.

49. *Id.*

50. *Id.*



bring a *qui tam* action by enacting Section 3730(h), which created a federal cause of action protecting relators from retaliatory actions by employers.<sup>51</sup>

Looking at statistics for the years after enactment, clearly the 1986 amendments achieved their intended effect of breathing life into the FCA. While relators brought only thirty-three *qui tam* cases in fiscal year 1987, the number of *qui tam* suits steadily increased to reach the record level of 533 in 1997, as mentioned above.<sup>52</sup> Despite the effectiveness of the 1986 amendments, significant ambiguity remains regarding a relator's relationship to the government.<sup>53</sup>

C. *The Constitutionality of the FCA's Qui Tam Provisions: Towards an Understanding of the Relator-Government Relationship?*

As a result of the skyrocketing numbers of *qui tam* claims after the 1986 amendments, some defendants sought cover from the FCA by challenging the constitutionality of the *qui tam* provisions.<sup>54</sup> The three most prominent arguments offered by litigants and commentators were that they violate the separation of powers doctrine, appointments clause, and Article III's standing requirement.<sup>55</sup> The *qui tam* provisions were also challenged on Fifth Amendment due process grounds.<sup>56</sup> Courts, however, have predominantly rejected such challenges to the FCA's constitutionality.<sup>57</sup>

1. *United States ex rel. Kelly v. Boeing Co.*

The Ninth Circuit provided a detailed explanation of how the relator-government relationship functioned when it addressed an Article III standing

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51. *Id.* See also 31 U.S.C. § 3730(h) (2000).

52. BOESE, *supra* note 13, at 1-4 (noting also that total bounties paid by the government to relators since 1986 reached more the \$1.799 billion by the end of fiscal year 2006).

53. See Jonathan H. Gold, Comment, *Legal Duties that Qui Tam Relators and Their Counsel Owe to the Government*, 20 GEO. J. LEGAL ETHICS 629, 649-50 (2007). See also Isaac B. Rosenberg, *Raising The Hue . . . And Crying: Do False Claims Act Qui Tam Relators Act Under Color of Federal Law?*, 37 PUB. CONT. L.J. 271 (2008).

54. See Gretchen L. Forney, Note, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator under the False Claims Act*, 82 MINN. L. REV. 1357, 1367-68 (1998).

55. *Id.* at 1368.

56. See, e.g., *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993).

57. See Forney, *supra* note 54, at 1368-69. One notable exception, however, occurred in *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514, 531 (5th Cir. 1999), *reh'g en banc granted, opinion vacated*, 196 F.3d 561, 563 (5th Cir. 1999), where the Fifth Circuit found that FCA *qui tam* actions in which the government did not intervene violated the constitutional doctrine of separation of powers. This panel decision was later reversed by an en banc hearing. *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 758 (5th Cir. 2001).

challenge in *United States ex rel. Kelly v. Boeing Co.*<sup>58</sup> In *Kelly*, the relator claimed that Boeing improperly charged the government for the lease costs of particular facilities.<sup>59</sup> After investigating for over three years, the government chose not to intervene in the case.<sup>60</sup> Amongst other proffered defenses, the defendant raised the Article III standing challenge.<sup>61</sup> Defendant first asserted that the relator did not have standing to assert a claim over an injury to the public fisc resulting from the submission of false claims to the United States, where the government, itself, did not intervene.<sup>62</sup> Therefore, the defendant argued, since the *qui tam* provisions purported to grant standing to private parties, the provision did not comport with Article III of the Constitution.<sup>63</sup>

Endorsing what it called the “assignment theory” of standing, the Ninth Circuit held that the FCA assigns part of the government’s fraud claim to the individual relator so that he may bring suit over the injury to the public fisc in cases where the government chooses not to pursue such claims.<sup>64</sup> The court explained that this theory equated the FCA’s *qui tam* provisions to an enforceable unilateral contract, the terms and conditions of which are accepted by the relator at the filing of an action.<sup>65</sup> Thus, the court found that where the government has standing,<sup>66</sup> so too will a relator who files a *qui tam* claim under the FCA.<sup>67</sup>

Substantiating its endorsement of the assignment theory, the Ninth Circuit observed that federal courts commonly find several other kinds of claims to be assignable, including common law fraud, medical and professional malpractice, SEC Rule 10b-5 claims, and RICO treble damage claims.<sup>68</sup> Addressing possible counter arguments to the partial assignment theory, the court observed that assignments can be conditional and limited; therefore, it

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58. *Kelly*, 9 F.3d at 747. See also U.S. *ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993) (upholding the constitutionality of the *qui tam* provision without providing a detailed explanation of how the assignment of standing to the relator functioned).

59. *Kelly*, 9 F.3d at 745.

60. *Id.*

61. *Id.* at 748.

62. *Id.*

63. *Id.*

64. *Kelly*, 9 F.3d at 748 (collecting the courts and commentators that have embraced the assignment theory).

65. *Id.* at 748.

66. Standing is dependent on three conditions: (1) the plaintiff must have suffered an “injury in fact;” (2) there must be a causal connection between the injury and the conduct serving as the basis of the lawsuit, i.e., the injury has to be traceable to the challenged action of the defendant; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

67. *Kelly*, 9 F.3d at 748.

68. *Id.*

expressed no concern that the statutory assignment was contingent on a relator filing suit or that the government retained a right to intervene for good cause.<sup>69</sup> Further, regarding the fact that Section 3730(d)(2) only allows a relator thirty percent of any recovery, the Ninth Circuit noted that an assignment of claims has not prevented assignors from benefiting from litigation.<sup>70</sup>

The Ninth Circuit reasoned that policy concerns related to Article III standing further supported its endorsement of the partial assignment theory.<sup>71</sup> Summarizing these policy concerns, the court explained that standing reinforces the idea of separation of powers<sup>72</sup> by ensuring that cases are presented in an adversarial context capable of judicial resolution<sup>73</sup> and involve concrete factual disputes.<sup>74</sup> The court determined that “[q]ui tam suits are presented in the traditional adversarial context.”<sup>75</sup> The Ninth Circuit also found that relators have the requisite personal stake in the outcome of the case, derived from the facts that:

- (1) the qui tam plaintiff must fund the prosecution of the FCA suit; (2) the qui tam plaintiff receives a sizable bounty if he prevails in the action; and (3) the qui tam plaintiff may be liable for costs if the suit is frivolous.<sup>76</sup>

The Ninth Circuit concluded that because federal courts commonly confront fraud cases, *qui tam* suits are suitable for judicial resolution, and the *qui tam* provisions reflect a congressional policy decision to allow relators to sue on behalf of the government for FCA violations.<sup>77</sup>

## 2. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

The United States Supreme Court embraced the partial assignment theory when it took up the question of whether a relator had requisite Article III standing to bring suit under the FCA’s *qui tam* provisions in 2000.<sup>78</sup> In

69. *Id.* at 748–49 (citing E. ALLAN FARNSWORTH, CONTRACTS § 11.3, at 789 (2d ed. 1990)).

70. *Id.* at 748 (citing *Klamath-Lake Pharm. Ass’n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983), *cert. denied*, 464 U.S. 822 (1983)).

71. *Id.* at 749.

72. *Kelly*, 9 F.3d at 749 (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984)).

73. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).

74. *Id.* (citing *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982)). *See also* *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”).

75. *Kelly*, 9 F.3d at 749.

76. *Id.* (citing *U.S. ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993)).

77. *Id.* *See also id.* at 749–57 for the court’s full discussion of the “separation of powers” challenge.

78. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 770–73 (2000) (noting also that the theory that a relator is a statutorily designated agent of the United States is precluded

*Stevens*, the relator brought his *qui tam* action against his former employer, the Vermont Agency of Natural Resources, claiming that it had provided false information to the Environmental Protection Agency in order to obtain more grant money.<sup>79</sup>

Beginning the majority's analysis, Justice Scalia noted that "[a] *qui tam* relator has suffered no such invasion [of a concrete private interest]—indeed, the 'right' he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails."<sup>80</sup> The Court's holding could not rest on this basis alone, however, since it held in other cases<sup>81</sup> that a cognizable injury in fact for Article III standing purposes is not found to exist where an interest is but a byproduct of the suit itself.<sup>82</sup>

In light of such precedent, the Court found that the partial assignment of the United States' injury in fact served as an adequate basis for the Court's holding that *qui tam* relators have Article III standing under the FCA.<sup>83</sup> Justice Scalia noted first that although the Court had "never expressly recognized 'representational standing' on the part of assignees, [it had] routinely entertained their suits."<sup>84</sup> Justice Scalia next considered the history of *qui tam* actions in England and America in order to confirm the Court's holding.<sup>85</sup>

Recounting the long history of *qui tam* actions,<sup>86</sup> Justice Scalia noted that of the two kinds of *qui tam* statutes enacted, "those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves" were the most relevant to the Court's

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by the fact that the statute gives the relator an interest in the lawsuit and not merely a right to retain a fee out of the recovery).

79. *Id.* at 770. The *Stevens* Court addressed whether a private relator could bring such a claim against a state (or state agency) and held that the relator could not. *Id.* at 780–87.

80. *Id.* at 773 n.3 ("Blackstone noted, with regard to English *qui tam* actions, that 'no particular person, A or B, has any right, claim or demand, in or upon [the bounty], till after action brought,' and that the bounty constituted an 'inchoate imperfect degree of property . . . [which] is not consummated till judgment.'" (citing WILLIAM BLACKSTONE, 2 COMMENTARIES 437). See also U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943) ("statutes providing for actions by the common informer, who himself has *no interest whatever . . . other than that given by statute*") (emphasis added) (quoting *Marvin v. Trout*, 199 U.S. 212, 225 (1905)).

81. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit.").

82. *Stevens*, 529 U.S. at 773.

83. *Id.* at 773–74.

84. *Id.* (collecting cases).

85. *Id.* at 774.

86. See *supra* Part II.A.

examination of the FCA *qui tam* provisions.<sup>87</sup> Such *qui tam* statutes expressly gave the informer a cause of action, and similar statutes were enacted in the American colonies as well as by the first Congress.<sup>88</sup> Justice Scalia concluded that this history—when combined with the justification of relator standing provided by the partial assignment theory—“[left] no room for doubt that a *qui tam* relator under the FCA has Article III standing.”<sup>89</sup>

After *Stevens*, the storm of litigation challenging the constitutionality of the *qui tam* provisions subsided. Yet, even after *Stevens*, the relator-government relationship was hardly clear. Additional confusion may actually have been promoted by *Stevens*, itself, holding on the second issue of the case that a state is not a “person” subject to *qui tam* liability under the FCA in the context of “unconsented private suit[s].”<sup>90</sup> Taken along with the *Stevens* decision, other cases addressing the FCA’s *qui tam* provisions are helpful in building a better-defined understanding of the relator-government relationship.

#### D. *Post-Stevens Cases Construing the Relator-Government Relationship*

The Ninth Circuit examined the relator-government relationship under the partial assignment theory in the context of a proffered claim preclusion defense *against the government*.<sup>91</sup> The *Schimmels* relators won partial summary judgment on the issue of liability under a *qui tam* action brought against the defendants.<sup>92</sup> Before the remaining issues were resolved, the defendants initiated Chapter 11 bankruptcy proceedings.<sup>93</sup> Both the government and the relators initiated separate adversary proceedings seeking to establish that the *qui tam* claims were not dischargeable by bankruptcy courts.<sup>94</sup> The bankruptcy court decided the relators’ action first and denied their motion to lift the stay on the *qui tam* action.<sup>95</sup> The bankruptcy court later denied the government’s

87. *Stevens*, 529 U.S. at 775 (discussing contrast between this type of *qui tam* suit for that solely vindicates the *public* interest and the type of *qui tam* suit that allowed “injured parties to sue in vindication of their *own interests* (as well as the Crown’s [interests])”) (emphasis added).

88. *Id.* at 775–77.

89. *Id.* at 777–78.

90. *Id.* at 780–82. One imagines, however, that the government could bring an action against a state by itself under the FCA.

91. *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997). Though this case pre-dated the *Stevens* decision, the court relied on the *Kelly* court’s endorsement of the partial assignment theory. One should note that some commentators view *qui tam* actions brought by a private relator on behalf of the government present a special case of citizen litigation that often should bind the government in subsequent litigation. 18A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4458.1 (2d ed. 2002).

92. *Schimmels*, 127 F.3d at 877.

93. *Id.* at 878.

94. *Id.* at 878–79. The government actually filed its adversary complaint three days *before* the relators. *Id.* at 879.

95. *Id.* at 879.

complaint on the same grounds.<sup>96</sup> On appeal to the Bankruptcy Appellate Panel for the Ninth Circuit, the court found that the prior summary judgment entered against the relators had actually precluded the government from bringing its own adversary proceeding.<sup>97</sup>

On appeal, the Ninth Circuit held that the privity relationship between the relators and the government arising out of the FCA claim extended to the bankruptcy proceeding.<sup>98</sup> While the government argued that, pragmatically, it proceeded as a distinct party from the relators,<sup>99</sup> the court rejected this bifurcation, focusing its analysis instead on the rights represented under the FCA.<sup>100</sup> The court noted that the relators' right to recovery under the FCA exists solely as a mechanism for deterring fraud and returning funds to the federal treasury; therefore, the rights of recovery created by the *qui tam* provisions of the FCA exist to compensate the government, not the relators.<sup>101</sup>

Citing *Kelly*, the government also argued that under well-settled rules of claim preclusion, a judgment entered against a partial assignee cannot bind the assignor.<sup>102</sup> On this point, the court found that despite the partial assignee relationship, the FCA does not support the notion that the government and relators could pursue fraud litigation separately.<sup>103</sup> Thus, the court concluded that the government's proceeding was precluded by the dismissal of the relators' claim, since both claims sought to enforce the same public right.<sup>104</sup> Subsequently, the unity of interests recognized by the court in *Schimmels* has also been found to flow in the other direction as well so as to preclude relators from bringing a *qui tam* action after some other related action by the government.<sup>105</sup>

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96. *Id.*

97. *Schimmels*, 127 F.3d at 879.

98. *Id.*

99. *Id.* The government contended that the district court erred by concluding that "the relators, in seeking to vindicate their own pecuniary interest in recovering a share of the *qui tam* judgment, also represented the government's separate and discrete financial interest in the outcome of the bankruptcy case," thereby implying that the relators had discrete, private interests at stake in the *qui tam* litigation. *Id.* at 882. Supporting the argument, the government observed the concrete facts that it brought its own proceedings in the bankruptcy court, it appeared through its own counsel, and it sought to litigate its own financial interests in the *qui tam* judgment. *Id.*

100. *Schimmels*, 127 F.3d at 883.

101. *Id.* (citing *United States v. Northrup Corp.*, 59 F.3d 953, 968 (9th Cir. 1995), *cert. denied*, 518 U.S. 1018 (1996)).

102. *Id.* at 884.

103. *Id.*

104. *Id.* See also *U.S. ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003); *U.S. ex rel. Schwartz v. TRW, Inc.*, 118 F. Supp. 2d 991, 996 (C.D. Cal. 2000).

105. See *U.S. ex rel. Barajas v. Northrup Corp.*, 147 F.3d 905, 909–10 (9th Cir. 1998) (finding that due to the government's settlement of all claims under the FCA, the relator "could not have a claim separate from the government's" and was therefore precluded from bringing a

A recent district court opinion from the Eastern District of Texas also provides an informative analysis of the relator-government relationship. In that case defendants responded to the relators' initial *qui tam* action by filing a suit seeking declaratory judgment against the United States Department of the Interior (DOI).<sup>106</sup> The *Kennard* relators' initial action alleged that defendant had violated the FCA by submitting fraudulent royalty payments, which were required by lease and by DOI regulations, to the Alabama and Coushatta Indian Tribe's Mineral Management Service (MMS).<sup>107</sup> Significantly, MMS was an agency under the DOI.<sup>108</sup> The defendant-initiated action sought declaratory judgment that it had performed all obligations under its lease.<sup>109</sup> Ultimately, the defendant settled its declaratory action against the DOI, agreeing that defendant's leases were valid, dismissing all prior demands for royalty payment from defendant, and filing a joint stipulation with the court that yielded a "Final Order of Dismissal With Prejudice."<sup>110</sup> After settling and having its declaratory action dismissed with prejudice, the *Kennard* defendant sought to dismiss relators' *qui tam* suit on claim preclusion grounds.<sup>111</sup>

Evaluating whether DOI's stipulated dismissal with prejudice in the declaratory action precluded relators' *qui tam* claim, the *Kennard* court rightly focused its analysis on the identity of the parties element of claim preclusion.<sup>112</sup> Considering the recent *Taylor v. Sturgell* opinion,<sup>113</sup> the

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second *qui tam* claim); U.S. *ex rel.* Sarafoglou v. Weill Med. Coll. of Cornell Univ., 451 F. Supp. 2d 613, 619 (S.D.N.Y. 2006) (finding relator in privity with the government in the *qui tam* context such that if claim preclusion is deemed applicable against government, then relator's claims under FCA are foreclosed as well); U.S. *ex rel.* Finney v. NextWave Telecom, Inc., 337 B.R. 479, 489 (S.D.N.Y. 2006) (finding that relator's FCA claim was precluded by the government's earlier litigation against defendant since the relator's interest under the FCA is identical to government's public interest). See also *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 478 (2007) (supporting the notion that the interest represented in an FCA claim is the government's public interest, not an individual's private interest, though it may be initiated by a private relator: "the elimination of [relator from the suit] leaves in place an action pursued only by the Attorney General, that can reasonably be regarded as being 'brought' by him for purposes of § 3730(e)(4)(A)").

106. U.S. *ex rel.* *Kennard v. Comstock Res., Inc.*, No. 9:98-CV-266, 2009 WL 765002, at \*2 (E.D. Tex. 2009).

107. *Id.* at \*1-2.

108. *Id.* at \*1.

109. *Id.* at \*2. As the *Kennard* court observed, defendant's declaratory action and relators' *qui tam* action were "two sides of the same coin." *Id.*

110. *Id.* at \*2-3. The joint stipulation filed by the *Kennard* defendant and DOI stipulated to dismissal with prejudice "of all claims and causes of action that have been asserted or that could have been asserted in [the Declaratory Action]." *Id.* at \*3.

111. *Kennard*, 2009 WL 765002, at \*3.

112. See *id.* at \*5-11. See *infra* Part III.D as well.

113. *Taylor v. Sturgell*, 128 S. Ct. 2161 (2008).

*Kennard* court considered whether relators' relationship with the government was close enough to trigger "nonparty preclusion."<sup>114</sup>

The *Kennard* court narrowed its discussion to the second and fifth *Taylor* exceptions.<sup>115</sup> Finding the second *Taylor* exception satisfied in that a "substantive legal relationship" existed between the *Kennard* relators and the government, the court reasoned that under the partial assignment effectuated by the FCA, "the Government can still give away a relators' interest after making the partial assignment."<sup>116</sup> Alternatively, since the FCA *qui tam* provision allowed the government to "retain a tremendous amount of control over a *qui tam* suit even when it chooses not to intervene," the *Kennard* court held that the representative relationship between the relators and the government satisfied the fifth *Taylor* exception.<sup>117</sup> Thus, the *Kennard* court—

114. *Kennard*, 2009 WL 765002, at \*6–8 (noting that the Supreme Court avoided the term "privity" in its *Taylor* opinion). See *Taylor*, 128 S. Ct. at 2172 n.8.

115. *Kennard*, 2009 WL 765002, at \*8–9. Writing for the Court in *Taylor*, Justice Ginsberg grouped exceptions to the rule against nonparty preclusion into six categories. See *Taylor*, 128 S. Ct. at 2172 & n.6 (One should note, however, that the Court specifically meant "only to provide a framework for its consideration of virtual representation, not to establish a definitive taxonomy."). Accordingly, nonparties will be bound where: (1) a person agrees to be bound by the determination of issues in an action between others, (2) a pre-existing substantive legal relationships exists between the person to be bound and a party to the judgment, (3) the nonparty was adequately represented by someone with the same interest who was a party to the suit, (4) the nonparty assumed control over the litigation in which the binding judgment was rendered, (5) a nonparty who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication, and (6) a special statutory scheme expressly forecloses successive litigation by nonlitigants if the scheme is otherwise consistent with due process. *Id.* at 2172–73.

116. *Kennard*, 2009 WL 765002, at \*9. Oddly, while addressing the *Kennard* relators' assertion that "once the Government assigns its interest to relators, it can no longer give that interest away," the *Kennard* court overlooks parts of the *Stevens* Court's explanation of the partial assignment, stating that "partial assignment is effective no later than the time when the relator brings the FCA action." Compare *Kennard*, 2009 WL 765002, at \*8 with *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 n.3 (2000) ("A *qui tam* relator has suffered no such invasion [of a concrete private interest]—indeed, the 'right' he seeks to vindicate *does not even fully materialize until the litigation is completed and the relator prevails.*") (emphasis added).

Further, the *Kennard* court reasons that if the relator-government relationship "provides a basis for concluding that the Government may be bound by a relator's actions, it follows that the relationship is sufficiently close for the Government's actions to likewise bind the relator." *Kennard*, 2009 WL 765002, at \*9 (citing *Chi., Rock Island & Pac. R.R. Co. v. Schendel*, 270 U.S. 611, 618 (1926)). While this may have been true in the specific context addressed in *Kennard*, such a categorical statement (and reliance on a non-FCA case to support that statement) does not properly account for the intricate relator-government relationship the FCA *qui tam* provisions create.

117. *Kennard*, 2009 WL 765002, at \*11 (quoting *U.S. ex rel. Laid v. Lockheed Martin Eng'g & Sci. Servs.*, 336 F.3d 346, 357–58 (5th Cir. 2003)).



after finding the other claim preclusion elements satisfied as well— found that the relationship between the relators and the government was sufficiently close to allow the relators' *qui tam* claim to be precluded by the dismissal of defendant's declaratory judgment action.<sup>118</sup>

Another Ninth Circuit case recently examined the relator-government relationship within the partial assignment scheme while deciding whether a relator could proceed *pro se* in a *qui tam* action.<sup>119</sup> The Ninth Circuit observed that, while an individual may prosecute his own actions *in propria persona*, the individual has no authority to represent another's interest *pro se* in federal court without some other statutory authority.<sup>120</sup> Addressing this issue, the Ninth Circuit reasoned that "[a]lthough the partial assignment allows the relator asserting the government's injury to satisfy the requirements of Article III standing, it does not transform a *qui tam* action into the relator's 'own case. . . .'"<sup>121</sup> Even though the government did not intervene in the case,<sup>122</sup> the Ninth Circuit held that the case prosecuted by the *qui tam* relator belonged solely to the government. Therefore, the relator could not proceed *pro se* in an action where he represented the rights of others in federal court.<sup>123</sup>

The FCA's *qui tam* provisions have weathered the storm of litigation challenging its constitutionality that resulted as a backlash against the enactment of the 1986 amendments. Though several subsequent cases have addressed issues arising from the relationship between the relator and the government, clarity has not yet been achieved over the full contours of the

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118. *Id.* at \*11–14.

119. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126–27 (9th Cir. 2007). *See also* U.S. *ex rel.* Mergent v. Flaherty, 540 F.3d 89, 93–94 (2d Cir. 2008); *Timson v. Sampson*, 518 F.3d 870, 873–74 (11th Cir. 2008) (per curiam); U.S. *ex rel.* Lu v. Ou, 368 F.3d 773, 775–76 (7th Cir. 2004); *Safir v. Blackwell*, 579 F.2d 742, 745 n.4 (2d Cir. 1978); *United States v. Onan*, 190 F.2d 1, 6 (8th Cir. 1951).

120. *Stoner*, 502 F.3d at 1126 ("It has long been established that an individual wanting to prosecute or defend an action in federal court must be represented by a lawyer admitted to practice before that court, unless such individual is permitted to proceed *pro se* under [federal law, and] . . . [t]he general *pro se* provision set forth in 28 U.S.C. § 1654 provides that '[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel. . . .'").

121. *Id.*

122. *See* *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 757 (5th Cir. 2001) (holding that the government maintains sufficient control over a *qui tam* action—even where it does not intervene—to avoid violating the constitutional doctrine of separation of powers). *See also id.* at 756 n.10 (collecting cases from other circuits citing the control maintained by the government under the FCA or agreeing with the Fifth Circuit's holding); U.S. *ex rel.* *Smith v. Gilbert Realty Co., Inc.*, 840 F. Supp. 71, 74 (E.D. Mich. 1993) (noting that if *qui tam* cases are to avoid constitutional problems under the appointments and separation of powers clauses, they must be understood as cases brought by the government).

123. *Stoner*, 502 F.3d at 1126–28.

relationship.<sup>124</sup> As a result of such lingering confusion, the relator-government relationship has spawned problematic decisions on issues such as the assertion of claim preclusion against a *qui tam* relator who has filed a prior state law claim against the same defendant.

### III. CLAIM PRECLUSION

#### A. Background

Claim preclusion, sometimes referred to as *res judicata*,<sup>125</sup> prohibits the litigation of a claim that has previously been litigated.<sup>126</sup> Application of claim preclusion “protects [litigants] from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”<sup>127</sup> Claim preclusion is an affirmative defense, and the burden of proof is on the defendant to demonstrate that all of the elements are present.<sup>128</sup> The preclusive

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124. The Supreme Court is currently reviewing yet another case that will further the analysis of the relator-government relationship. See U.S. *ex rel.* Eisenstein v. City of New York, 540 F.3d 94 (2d Cir. 2008), *cert. granted*, 77 U.S.L.W. 4411 (U.S. Jan. 16, 2009) (No. 08-660). The *Eisenstein* case presents the issue of whether Federal Rule of Appellate Procedure 4(a)(1)(A) or the Rule 4 (a)(1)(B) applies to a *qui tam* relator where the government has previously declined intervention. Rule 4(a)(1)(A) creates a 30-day time limit for individual to file an appeal; Rule 4(a)(1)(B) creates a 60-day time limit for the government to file appeal. It remains to be seen whether the Court’s guidance will be limited strictly to the relator-government relationship in the appeals context (as some contend that the Court’s second holding in *Stevens* was limited to instances where relators brought *qui tam* actions against a state) or whether the Court’s reasoning may offer more broadly-applicable guidance.

125. The terminology of preclusion law can be confusing and may be employed differently by different sources. In *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984), the United States Supreme Court explained that some commentators broadly refer to the general preclusive effects of a judgment as “*res judicata*,” encompassing both “issue preclusion” (also know as “collateral estoppel” or “direct estoppel”) and “claim preclusion.” See also Taylor v. Sturgell, 128 S. Ct. 2161, 2171 n.5 (2008). “Issue preclusion” refers to the “effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided.” *Id.* “Claim preclusion” refers to the “effect a judgment in foreclosing litigation of a matter that never has been litigated.” *Id.* This Comment uses the term “claim preclusion” as a synonym for “*res judicata*” in its narrow sense.

Further, this Comment focuses its discussion on claim preclusion in order to narrow its focus, considering that claim preclusion is the issue most commonly raised in instances where a relator brings a *qui tam* action after bringing a prior private claim. Discussion of the “identical parties” element found in this comment may apply similarly in the issue preclusion context.

126. *Montana v. United States*, 440 U.S. 147, 153 (1979). See also RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

127. *Montana*, 440 U.S. at 153–54.

128. FED. R. CIV. P. 8(c)(1). See also 18 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 131.50 (Daniel R. Coquillette et al. eds., 3d ed. 2008).

effect of a diversity judgment is determined by federal common law, which ordinarily adopts the claim preclusion law of the state in which the federal court sits.<sup>129</sup> The preclusive effect of federal-question judgments depends upon the “uniform federal rule[s]” of *res judicata* developed by federal courts.<sup>130</sup>

To determine whether claim preclusion bars a particular claim, most courts examine whether the earlier suit (1) involved the same “claim” or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies.<sup>131</sup> Claim preclusion bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action,<sup>132</sup> and all the elements must be satisfied.<sup>133</sup>

### B. *Same Claim*

Courts employ various tests<sup>134</sup> in determining whether two suits involve the same claim or cause of action, including: (1) whether the two suits arise out of the same transactional nucleus of fact;<sup>135</sup> (2) whether the two suits are based on the “same or nearly the same factual allegations,” taking into consideration whether they form a “convenient trial unit”;<sup>136</sup> (3) whether the two suits involve infringement of the same right;<sup>137</sup> or (4) whether substantially the same evidence is presented in the two actions.<sup>138</sup> Whether two events are part of the same claim could also depend on whether they are related to the same set of facts and whether they could conveniently be tried together.<sup>139</sup>

### C. *Final Judgment*

The second element of claim preclusion requires that a valid final judgment be rendered “on the merits.”<sup>140</sup> A judgment will ordinarily be considered final for claim preclusion purposes “if it is not tentative, provisional, or contingent and represents the completion of all steps in the

129. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

130. *Taylor*, 128 S. Ct. at 2171 (citing *Semtek*, 531 U.S. at 508).

131. *Montana*, 440 U.S. at 153. See also MOORE, *supra* note 128, §§ 131.20–40.

132. MOORE, *supra* note 128, § 131.20[1]. See also *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

133. See MOORE, *supra* note 128, § 131.20[1]–[4].

134. *Id.* § 131.20[1] (“There is no test of universal applicability used to determine if such preclusion is appropriate.”).

135. *Id.* § 131.20[2]. See also RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982).

136. MOORE, *supra* note 128, § 131.20[3].

137. *Id.* § 131.20[4].

138. *Id.*

139. *Id.* § 131.20[3].

140. *Id.* § 131.30[1][a]. See also RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. a (1982).

adjudication of the claim by the court.”<sup>141</sup> Further, the Supreme Court has characterized a final judgment as “one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>142</sup> Though this element of the claim preclusion test is claim-specific, generally, a final judgment on the merits is synonymous with “dismissal with prejudice.”<sup>143</sup> A summary judgment decision also typically satisfies this element.<sup>144</sup> Further, “an involuntary dismissal generally acts as a judgment on the merits for the purposes of [claim preclusion], regardless of whether the dismissal results from procedural error or from the court’s considered examination of the plaintiff’s substantive claims.”<sup>145</sup> Moreover, the Supreme Court has stated that “‘consent judgments ordinarily support claim preclusion.’”<sup>146</sup>

#### D. *Identical Parties or Privities*

A prior judgment on the merits bars a later action on an identical claim only between the same parties or those in privity.<sup>147</sup> One may qualify as a party to an action if the person “is named as a party to an action and subjected to the jurisdiction of the court. . . .”<sup>148</sup> Claim preclusion generally will not be applied to an action by one who was not a party to the earlier adjudication.<sup>149</sup>

Situations exist, however, where claim preclusion may not be applied against an individual who was a party to prior litigation.<sup>150</sup> In determining the persons who may be subject to preclusive effect of an earlier judgment, “[i]t is the interests represented rather than the names appearing in the pleadings or on the judgment that control.”<sup>151</sup> For example, a party participating in one action as the legal representative of another—such as a trustee or receiver—may later sue or be sued in his individual capacity as part of a distinct action involving

141. RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. b (1982).

142. MOORE, *supra* note 128, § 131.30[2][a] (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)).

143. *See, e.g., Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 686 (9th Cir. 2005).

144. *See, e.g., Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 988 (9th Cir. 2005).

145. *In re Schimmels*, 127 F.3d 875, 884 (9th Cir. 1997). *See also* MOORE, *supra* note 128, § 131.30[3][a].

146. *Arizona v. California*, 530 U.S. 392, 414 (2000). *See also Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999) (finding a settlement agreement had preclusive effect via claim preclusion); *U.S. ex rel. Kennard v. Comstock Res., Inc.*, 2009 WL 765002, at \*12 (E.D. Tex. 2009) (noting that a stipulation of dismissal with prejudice qualifies as a final judgment).

147. MOORE, *supra* note 128, § 131.40[1].

148. *Id.* § 131.40[2][a] (quoting the RESTATEMENT (SECOND) OF JUDGMENTS § 34(1) (1982) (internal quotation omitted)).

149. *Id.* § 131.40[1] (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

150. *Id.* § 131.40[2][a].

151. *Id.* § 131.40[2][a] (citing *Chicago, Rock Island & Pac. Ry. Co. v. Schendel*, 270 U.S. 611 (1926)).

the same transaction or series of transactions.<sup>152</sup> Yet, if a person appearing in a representative capacity has a “personal interest” in the outcome of the representative action, his status as a representative of others will not make him a distinct party for claim preclusion purposes.<sup>153</sup>

Claim preclusion may sometimes also be applied to preclude an action by a non-party to the original claim.<sup>154</sup> Courts have held that parties are considered “identical” when two parties are so closely aligned in interest that one is the “virtual representative” of the other.<sup>155</sup> A claim by or against one will serve to bar the same claim by or against the other.<sup>156</sup> “[T]he doctrine of privity extends the conclusive effect of a judgment to nonparties who are ‘in privity’ with parties in an earlier action.”<sup>157</sup> The interests are likewise implicated:

[W]hen nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved. . . . [T]he person for whose benefit and at whose direction a cause of action is litigated cannot be said to be “strangers to the cause” . . . . [O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record.<sup>158</sup>

Federal courts have deemed some relationships “sufficiently close” to justify a finding of privity as preclusive under the doctrine of claim preclusion.<sup>159</sup>

152. MOORE, *supra* note 128, § 131.40[2][a]. See, e.g., *Montana v. United States*, 440 U.S. 147, 154–55 (1979) (holding that an action brought by an individual as a representative does not involve the same parties for claim preclusion purposes where another action was brought by the same individual in his individual capacity); *Andrews v. Daw*, 201 F.3d 521, 525–26 (4th Cir. 2000) (holding dismissal of civil rights suit brought against public official in official capacity does not preclude subsequent suit on same claim against that official in individual capacity).

153. MOORE, *supra* note 128, § 131.40[2][a]. In *Meagher* “when beneficiary of ERISA benefit plan sued employer in his individual capacity and lost, claim preclusion barred his subsequent suit as a representative of the pension plan because he was an ultimate beneficiary of the relief sought in both actions.” *Id.* § 131.40[2][a] n.17 (citing *Meagher v. Bd. of Trs. of Pension Plan of Cement and Concrete Workers Dist. Pension Fund*, 921 F. Supp. 161, 165–66 (S.D.N.Y. 1995), *aff’d*, 79 F.3d 256 (1996)). See also RESTATEMENT (SECOND) OF JUDGMENTS § 36 cmt. c (1982).

154. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171–73 (2008); MOORE, *supra* note 128, § 131.40[1].

155. See *Taylor*, 128 S. Ct. at 2173.

156. MOORE, *supra* note 128, § 131.40[3][e][i][B].

157. See, e.g., *In re Schimmels*, 127 F.3d 875, 881 (9th Cir. 1997).

158. *Montana*, 440 U.S. at 154.

159. *Id.* See, e.g., *Schimmels*, 127 F.3d at 881, 885 (holding that the government was in privity with an FCA relator to an action the relator brought to enforce its judgment under an earlier FCA claim).

To the extent that a later government action seeks to represent essentially private interests, however, prior private litigation by a person the government seeks to protect may preclude that part of the government action.<sup>160</sup> Yet, defeat of an individual discrimination suit, for example, does not preclude a public action against the same defendant, although it may limit the individual relief that can be made on behalf of the defeated litigant.<sup>161</sup>

*E. Claim Preclusion Cases Considering Relator's Subsequent Qui Tam Action*

1. Confusion Among the Parties

In some cases where claim preclusion might have been at issue as a defense, a sense for the confusion over the identity of the parties involved in the litigation under the *qui tam* provisions may result from examining the contradicting ways that parties, themselves, have approached the claim preclusion defense and the “identical parties” element.

In both *Hindo v. University of Health Sciences/The Chicago Medical School*<sup>162</sup> and *United States ex rel. Chen v. Zygo Corp.*,<sup>163</sup> relators brought Section 3729(a) *qui tam* claims as well as Section 3730(h) claims under the FCA after prior retaliation claims made in state court.<sup>164</sup> While the respective defendants in each case asserted a claim preclusion defense against the relators' respective Section 3730(h) claims, neither the *Hindo* nor the *Chen* defendant claimed such a defense against the Section 3729(a) claims.<sup>165</sup> By foregoing a prospective claim preclusion defense to the Section 3729(a) claim—especially when that same defense was successfully employed for the Section 3730(h) claim—both the *Hindo* and *Chen* defendants each implicitly supported the notion that they could not satisfy the “identical parties” element as to the Section 3729(a) claim.<sup>166</sup>

160. See *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 301–05 (7th Cir. 1985).

161. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818 (8th Cir. 2000), *cert. denied*, 531 U.S. 958, *abrogated by* *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

162. U.S. *ex rel. Hindo v. Univ. of Health Scis./The Chicago Med. Sch.*, No. 91 C 1432, 1993 WL 512609, at \*1 (N.D. Ill. Dec. 8, 1993), *aff'd sub nom. Hindo v. Univ. of Health Scis./Chicago Med. Sch.*, 65 F.3d 608, 614–15 (7th Cir. 1995).

163. See generally U.S. *ex rel. Chen v. Zygo Corp.*, No. Civ. 3:95-879(DJS), 1997 WL 762810 (D. Conn. March 27, 1997), *aff'd sub nom. Chen v. Zygo Corp.*, 162 F.3d 1147, 1998 WL 640431 (2d Cir. Mar. 13, 1998) (unpublished opinion).

164. *Hindo*, 65 F.3d at 610; *Chen*, 1998 WL 640431, at \*1–2.

165. *Hindo*, 65 F.3d at 614; *Chen*, 1998 WL 640431, at \*1–2.

166. While sorting through the implications of how the *Hindo* and *Chen* defendants proceeded in defending themselves, one may question if their actions might also support the notion that the defendants did not believe that they could satisfy the “identical claims” element of

While the *Hindo* and *Chen* defendants did not even assert a claim preclusion defense against the Section 3729(a) claims they faced, the parties' approach reached the opposite side of the spectrum in *Cole*.<sup>167</sup> In *Cole*, the relator worked in a pharmacy run by the University of Illinois at Chicago.<sup>168</sup> The relator asserted that the pharmacy submitted false claims for compensation to both the federal and state governments.<sup>169</sup> The relator claimed to have suffered discrimination and retaliatory actions after bringing her suspicion of the false claims to the pharmacy's attention.<sup>170</sup> She brought an initial suit in federal court alleging racial harassment under Title VII of the Civil Rights Act of 1964 (*Cole I*).<sup>171</sup>

In her complaint, the relator claimed that unlawful employment and retaliatory practices began after she made her report of the suspected false claims to the pharmacy. The relator asserted that "the effect of the practices complained of . . . has been to deprive Gayle D. Cole of equal employment opportunities and otherwise adversely affect her status as an employee, because of her race and act of Whistle Blowing."<sup>172</sup> The parties settled *Cole I*, and the district court dismissed the case with prejudice.<sup>173</sup>

In July 2003, the relator filed a second suit in federal court asserting claims under the FCA and the Illinois Whistleblower Reward and Protection Act, (*Cole II*).<sup>174</sup> The United States declined to intervene in *Cole II*.<sup>175</sup> Asserting a Section 3729(a) claim in Counts I, II, III, and IV of her complaint, the relator alleged that the defendant submitted false information and fraudulent claims to the state and federal government in order to obtain payment.<sup>176</sup> In Counts V and VI, the relator cited threats, harassment, and discrimination against her as a result of her act of whistleblowing in support of a Section 3730(h) claim.<sup>177</sup>

The defendant, the Board of Trustees of the University of Illinois (hereafter the Board), moved to dismiss both of relator's claims on claim

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a claim preclusion defense proffered against the respective Section 3729(a) claims they faced. However, since claim preclusion aims at barring any claim that has been made in prior litigation or that *could have been made*, it is doubtful that the defendants' decision not to assert claim preclusion was based on the "identical claims" element. See MOORE, *supra* note 128, § 131.20[1].

167. See *Cole v. Bd. of Trs. of Univ. of Ill.*, 497 F.3d 770, 771 (7th Cir. 2007).

168. *Id.*

169. *Id.* at 774.

170. *Id.*

171. *Id.* at 771.

172. *Cole*, 497 F.3d. at 771–72.

173. *Id.* at 771.

174. *Id.*

175. *Id.* at 772 n. 2.

176. *Id.*

177. *Cole*, 487 F.3d at 772 n.2..

preclusion grounds.<sup>178</sup> The district court dismissed *Cole II* with prejudice as to the relator and without prejudice as to the United States.<sup>179</sup>

After considering the relator's appeal, the Seventh Circuit affirmed the lower court's dismissal on the grounds that the "identical claims" element was satisfied as to *Cole I* and *Cole II*.<sup>180</sup> Significantly, the relator not only stipulated the "final judgment" element, but she actually stipulated the "identical parties" element of claim preclusion as well.<sup>181</sup> Though no explicit learning can be derived from this case, the situation in *Cole* indicates an underappreciation on the part of some parties for the complexity of the relator-government relationship under the FCA regime. While other dynamics in the course of litigation could have led the relator to stipulate this element, one reading of this case could be that relator's counsel simply misunderstood the *qui tam* provisions and their effect on the identity of the parties.<sup>182</sup> While the "final judgment" element likely presents a more straightforward question that will depend, in each future case, on how the district court disposed of the case, the "identity of the parties" element appears to present a more complex consideration than the *Cole II* decision indicates.

Though the "identical parties" element was stipulated by the parties, insights into the Seventh Circuit's approach to the problem may be gleaned from the *Cole II* decision. The court referenced the statutory text, noting that a relator may file suit "for the person and for the United States."<sup>183</sup> Since "[n]either the FCA nor its legislative history evince a clear understanding of the relator's relationship to the government,"<sup>184</sup> the court looked to Supreme Court precedent, noting that the "[FCA] gives the relator himself an interest in *the lawsuit*, and not merely in the right to retain a fee out of the recovery."<sup>185</sup>

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178. *Id.*; cf. *Hindo v. Univ. of Health Scis./Chicago Med. Sch.*, 65 F.3d 608, 614–15 (7th Cir. 1995) (where defendant only claimed that a § 3730(h) claim was barred by prior private retaliation claim).

179. *Cole*, 497 F.3d at 772 n.2.

180. *Id.* at 771–73.

181. *Id.* at 773.

182. Of greater interest may be the inferences that can be drawn about the Seventh Circuit's understanding of the relator-government relationship. *See id.* at 772 n.2. The Seventh Circuit purports to "address[ ] only Cole's ability to raise these false claims act claims, and not the government's ability to bring such a suit." *Id.* Though the parties stipulated the "identical parties" issue, this sentence appears to be dicta indicating the Seventh Circuit's agreement that a distinction existed between the interests of the relator and that of the government—specifically, that only the relator's private interests were at stake in a *qui tam* action where the government does not intervene. *Id.*

183. *Id.* at 772 n.2 (quoting 31 U.S.C. § 3730 (2000)).

184. Gold, *supra* note 53, at 649.

185. *Cole*, 497 F.3d at 772 n.2 (citing *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000)).



## 2. Limited Analysis by the Courts

While the parties have exhibited confusion over the “identical parties” claim preclusion element when a relator brings a *qui tam* suit after bringing a prior state law claim against the same defendant, the courts have generally failed to give the issue adequate attention.

### i. *Ragsdale v. Rubbermaid, Inc.*

In *Ragsdale v. Rubbermaid, Inc.*, the relator filed an initial Section 3729(a) action (*Rubbermaid I*) alleging fraudulent billing practices ten months after being fired by defendant.<sup>186</sup> The government intervened in the suit and later settled.<sup>187</sup> After the *Rubbermaid I* settlement, the relator filed a retaliation action under Section 3730(h) of the FCA (*Rubbermaid II*) against the same defendant.<sup>188</sup>

Addressing the defendant’s claim preclusion defense, the Eleventh Circuit based its decision primarily on its finding that *Rubbermaid I* and *Rubbermaid II* were both based on the same nucleus of operative fact, and therefore, each claim was “in existence” at the time of the original complaint.<sup>189</sup> The Eleventh Circuit also found it significant that both claims arose out of the FCA, thereby making the claims convenient to try together.<sup>190</sup>

Though the relator disputed the “identical parties” element, the Eleventh Circuit’s consideration of this question was not extensive: “[t]hird, the parties are identical.”<sup>191</sup> In a footnote, the Eleventh Circuit explained how this relator’s status would differ from later relators confronting claim preclusion defenses.<sup>192</sup> The relator contended that, though he was clearly a party to *Rubbermaid II*, since the government intervened in *Rubbermaid I*, it displaced him as the sole party in interest in that first suit.<sup>193</sup> In so holding, the Eleventh Circuit refused to find a distinction between the parties involved in a *qui tam* action where the government intervenes versus one where the government does not intervene.<sup>194</sup>

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186. *Ragsdale v. Rubbermaid*, 193 F.3d 1235, 1237 (11th Cir. 1999).

187. *Id.*

188. *Id.*

189. *Id.* at 1240.

190. *Id.*

191. *Ragsdale*, 193 F.3d at 1238.

192. *Id.* at 1238 n.7.

193. *Id.*

194. *Id.* at 1238; *cf.* *Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 479 (7th Cir. 2004) (finding that a plaintiff may proceed with a claim for retaliatory discharge under Section 3730(h) independently of a *qui tam* action); *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1050 (N.D. Ill. 1998) (“A § 3730(h) retaliatory discharge claim can clearly still proceed even if neither governmental action is taken nor any *qui tam* action is contemplated, threatened, filed, or ultimately successful.”), *aff’d*, 183 F.3d 730 (7th Cir. 1999).

ii. *Wilkins v. Jakeway*

In *Wilkins v. Jakeway*, the Sixth Circuit considered a claim preclusion defense based on a previously-decided *qui tam* action, and it held that the defendant failed to successfully bar a separate action decided subsequent to the relator's *qui tam* action only because it did not satisfy the "final judgment" element of claim preclusion.<sup>195</sup> Before bringing an action under the FCA, the *Wilkins* relator first filed a suit under 42 U.S.C. § 1983 and the First and Fourteenth Amendments (*Wilkins I*), claiming that he suffered retaliation because he criticized the misuse of federal funds.<sup>196</sup> He filed a separate *qui tam* suit under the FCA shortly thereafter in which similar allegations were raised (*Wilkins II*).<sup>197</sup> Ruling that the plaintiff's claims were not in furtherance of the FCA, the *Wilkins II qui tam* action was dismissed in February of 1997.<sup>198</sup> In January 1998, the district court in *Wilkins I* also dismissed that suit on the basis that claim preclusion barred it due to the disposition of the FCA suit.<sup>199</sup>

Along with the other two elements of claim preclusion, the *Wilkins I* court found the "identical parties" element satisfied.<sup>200</sup> The relator argued that the parties involved in the two suits were not identical due to the capacity in which he sued the defendants.<sup>201</sup> However, instead of using this argument to compare the capacities of a relator bringing suit to rectify a public injury under the FCA versus an individual pursuing his own interest under a private cause of action, the *Wilkins* relator based his argument on the capacities of the defendants.<sup>202</sup> The relator claimed that while he had sued each of the defendants in both their individual capacities as well as their "official" capacities as employees of relator's employer, the *Wilkins II* court had only dismissed relator's claims as to the defendants' individual capacities.<sup>203</sup> The *Wilkins I* court reasoned that the relator's pleadings were decisive, and since he sued the defendants in their individual and official capacities in both *Wilkins I* and *Wilkins II*, the same interests were represented in both lawsuits and, thus, the "identical parties" element satisfied.<sup>204</sup>

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195. *Wilkins v. Jakeway*, 183 F.3d 528, 534–35 (6th Cir. 1999).

196. *Id.* at 531.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Wilkins v. Jakeway*, 993 F. Supp. 635, 646 (S.D. Ohio 1998), *rev'd in part, aff'd in part*, *Wilkins v. Jakeway*, 183 F.3d 528 (6th Cir. 1999).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

Though the Sixth Circuit ultimately held that the First Amendment claim in *Wilkins I* was not barred on claim preclusion grounds, the court based its decision solely on failure of meeting the “final judgment” element and without adequately considering the “identical parties” element.<sup>205</sup> While the court purported to take up the issue of “identical parties,” its discussion amounted to little more than four sentences summarizing the district court’s finding<sup>206</sup> and the conclusion that a valid, final judgment must exist in order for there to be identical parties.<sup>207</sup>

iii. *United States ex rel. Laird v. Lockheed Martin Engineering and Science Services*

In *United States ex rel. Laird v. Lockheed Martin Engineering and Science Services*, while the “identical parties doctrine” was squarely at issue, neither the district court nor the Fifth Circuit heeded the FCA’s language or Supreme Court precedent in their analysis of the element.<sup>208</sup> The district court held that claim preclusion barred both the relator’s Section 3730(h) claim as well as his Section 3729(a) *qui tam* claim.<sup>209</sup> The *Laird* relator’s employer terminated him after the relator reported to his management that fictitious cost information was being submitted to NASA.<sup>210</sup> In response, the relator initially filed a wrongful discharge suit in Texas state court (*Mayfield I*).<sup>211</sup> After losing that suit on summary judgment, however, the relator brought suit under the FCA (*Mayfield II*) in federal district court.<sup>212</sup>

Though the relator contested the “identical parties” element, the *Mayfield II* court’s holding rested primarily on the “identical claims” element, finding that both of relator’s claims were based on identical operative facts.<sup>213</sup> The

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205. *Wilkins*, 183 F.3d at 531–35.

206. *Id.* at 534 (“Since the same parties were represented in both lawsuits, the court determined that there was an identity of parties.”).

207. *Id.* at 534–35. In dictum, the Sixth Circuit also stated that plaintiff “lucked out” that no final decision existed since the court viewed plaintiff’s multiple suits as the very type of claim splitting that claim preclusion normally operates to prevent. *Id.* at 535. One can infer from this that, had the Sixth Circuit found the “final judgment” element to be satisfied, it likely would have affirmed the district court’s decision. *See id.*

208. *See U.S. ex rel. Laird v. Lockheed Martin Eng’g and Sci. Srvs.*, 336 F.3d 357–58 (5th Cir. 2003).

209. *See U.S. ex rel. Mayfield v. Lockheed Martin Eng’g & Sci. Co.*, 186 F. Supp. 2d 711 (S.D. Tex. 2002), *vacated sub nom. U.S. ex rel. Laird v. Lockheed Martin Eng’g & Sci. Srvs.*, 336 F.3d (5th Cir. 2003). *See also BOESE*, *supra* note 13, § 2.07[E].

210. *Mayfield*, 186 F. Supp. 2d at 713.

211. *Id.*

212. *Id.*

213. *Id.* at 714–15. Applying Texas law, the court utilized the transactional approach to claim preclusion. *Id.* at 714. The court enumerated “factors” that it considered in determining the identity of claims element, including: “(1) whether the facts are related in time, space, origin or

court also reasoned that the FCA claims were appropriately precluded because, in its view, both the Section 3730(h) claim and the Section 3729(a) claim “could have formed a ‘convenient trial unit’” with *Mayfield I*.<sup>214</sup>

The *Mayfield II* court relegated analysis of the “identical parties” issue to a footnote.<sup>215</sup> The relator claimed that, based on the FCA’s text,<sup>216</sup> the parties in *Mayfield I* and *Mayfield II* could not be identical.<sup>217</sup> The *Mayfield II* court took note that the government had declined to intervene in the relator’s case.<sup>218</sup> Without further analysis, the court found that the relator—as an individual—and the defendant were the only two parties remaining in the suit.<sup>219</sup> Thus, the court concluded that parties in *Mayfield II* were identical to those in *Mayfield I*.<sup>220</sup>

On appeal, the Fifth Circuit held that claim preclusion did not apply to the relator.<sup>221</sup> In arriving at its decision, the Fifth Circuit relied only on a finding that the claims of *Mayfield I* and *Mayfield II* were not identical.<sup>222</sup>

Though the Fifth Circuit’s consideration of the “identical parties” issue went beyond a mere footnote, its revision of the district court’s analysis was superficial and equally flawed. Based on precedent finding the government to be “a real party in interest” even when it has not intervened, the Fifth Circuit held that the *Mayfield II* court had incorrectly concluded that the United States was not a party in interest in the declined *qui tam* litigation.<sup>223</sup>

After recognizing the splinter in the district court’s proverbial eye, the Fifth Circuit overlooked the plank in its own eye. As the Fifth Circuit professed to conduct its own analysis of the “identical parties” element, it acknowledged the Supreme Court’s determination in *Stevens* that the FCA’s *qui tam* provisions begot a partial assignment of the government’s right upon the relator.<sup>224</sup> The Fifth Circuit proceeded to quote the Supreme Court’s

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motivation; (2) whether the facts form a convenient trial unit; and (3) whether their treatment as a trial unit conforms to the parties’ expectations or business understandings or usage.” *Id.*

214. *Id.* at 714.

215. *Mayfield*, 186 F. Supp. 2d at 714 n.1.

216. See 31 U.S.C. § 3730(b)(1) (2000) (“A person may bring a civil [*qui tam*] action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.”).

217. *Mayfield*, 186 F. Supp. 2d at 714 n.1.

218. *Id.*

219. *Id.* (“Although [relator] is bringing this lawsuit on behalf of the United States, the United States is *not* a party to this action.”). *But cf.* § 3730(c)(3)–(5) (allowing the government to retain various rights even where it does not intervene).

220. *Mayfield*, 186 F. Supp. 2d at 714 n.1.

221. *Laird*, 336 F.3d at 360.

222. *Id.* at 359–60.

223. *Id.* at 357–58. See also BOESE, *supra* note 13, § 2.07[E].

224. *Laird*, 336 F.3d at 358. In fact, in *United States ex rel. Gebert v. Transport Admin. Svcs.*, 260 F.3d 909, 918 (8th Cir. 2001), the court held that a bankruptcy settlement agreement

opinion: “the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery. . . .”<sup>225</sup> Again, without further analysis, the Fifth Circuit compared the language quoted from *Stevens* to the *Gebert* case.<sup>226</sup> In order to derive the Fifth Circuit’s holding from this comparison, one would have to arrive at the inscrutable conclusion that simply because a relator could be prevented from receiving the public right partially assigned to him through the FCA in *Gebert*, a relator could also lose the public right that had already been assigned to him in *Laird*.<sup>227</sup> Then, as if conclusive, the Fifth Circuit summarized that the relator in the case before it had brought the action by way of partial assignment, on behalf of the government, and at his own expense per Section 3730(f).<sup>228</sup> The Fifth Circuit summarily concluded that “[the relator’s] interests were sufficiently represented in *Mayfield I* to satisfy the ‘ident[ical] . . . parties’ element.”<sup>229</sup>

#### IV. ANALYSIS OF THE CONFLICT AND CONFUSION OVER THE IDENTITY OF THE *QUI TAM* RELATOR

The review of cases in Part III considering claim preclusion in a context where a relator has brought a subsequent *qui tam* action after a prior private claim shows that neither the courts nor the parties have taken a uniform approach in addressing the identity of the parties involved in the various lawsuits. Some might dismiss this confusion as merely having resulted from ignorance by some of the parties as to the unique relationship created by the FCA between the relator and the government. However, even parties well-steeped in the statutory text and case law may take issue with the legally-fictitious distinction between private and public interests enacted by the FCA. Yet, the distinction between the private interests held by a relator, as an individual, and the public interest that the relator receives in assignment upon filing a *qui tam* suit cannot simply be set aside in the analysis of a proffered claim preclusion defense.

Much of the confusion and conflict over the private-public interest distinction plays itself out within the ambiguity of the meaning of “partial assignment.” The *Laird* court’s implicit definition of the “partial assignment”

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and release between putative relators, co-shareholders, and a corporation precluded subsequent *qui tam* claims by the relators against the co-shareholder and corporation because the FCA effectuates a partial assignment of an interest that should have been listed as a potential claim in Schedule B.

225. *Laird*, 336 F.3d at 358 (quoting *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000)) (emphasis in original).

226. *Id.*

227. *See id.*

228. *Id.*

229. *Id.*

effected by the FCA's *qui tam* provisions<sup>230</sup> draws into relief the ambiguity of the concept of a "partial assignment."<sup>231</sup> First, "partial assignment" could imply that the relator is acting partially upon the public right of the government and partially on his own private right.<sup>232</sup> Second, "partial assignment" could mean that the government assigns only part of its public right to a relator, and it retains another part for itself.<sup>233</sup> Finally, "partial assignment" could also be interpreted to include a combination of each of the two previous understandings—meaning that the relator could bring suit partially based on the public right of the government and partially based on his own private right, while the government may assign only part of its public right to the relator while retaining part of that right.

#### A. *The FCA's Text*

While sorting through the mental obstacles that this exercise requires, one should look first to FCA's text for direction. The text of Section 3730(b)(1), which principally creates the *qui tam* action, is perhaps equally as ambiguous as the term "partial assignment," establishing that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government."<sup>234</sup>

Other parts of Section 3730, however, expressly support the second meaning noted above—that the government assigns part of its right to the relator and retains part—since it allows the government to exercise various forms of control over a relator's *qui tam* suit.<sup>235</sup> The rights retained by the government include the right to be served with copies of pleadings and deposition transcripts,<sup>236</sup> the right to dismiss or settle the action,<sup>237</sup> as well as the right to intervene in the action at a later date.<sup>238</sup> Therefore, one considering

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230. See *infra* pp. 30–31.

231. Such ambiguity exists since "[n]either the FCA nor its legislative history evince a clear [comprehensive] understanding of the relator's relationship to the government." Gold, *supra* note 53, at 649.

232. But see *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775 (2000) (noting the first kind of *qui tam* action traditionally recognized, which is distinguishable from the FCA's *qui tam* provision, where an injured party is allowed to sue in his own interest as well as for the sovereign's interest).

233. This understanding of "partial assignment" is well supported by the various sections of the FCA enumerating the control the government retains over a relator even where it does not intervene. See 31 U.S.C. § 3730(c) (2000).

234. § 3730(b)(1).

235. See § 3730(c).

236. § 3730(c)(3).

237. § 3730(c)(2)(A)–(B).

238. § 3730(c)(3).

the identity of the parties in *qui tam* claim may have no doubt that such a claim originates solely from the government's public interest.

### B. History

Though the legislative history offers little clarification about the relator-government relationship,<sup>239</sup> one may look to both the evolution of the FCA's *qui tam* provisions, as well as to the general history of *qui tam* actions for a better understanding of this relationship. First, as discussed in *Stevens*, two types of *qui tam* claims that have traditionally been recognized are (1) "those that allowed injured parties to sue in vindication of their *own interests* (as well as the Crown's)"<sup>240</sup> and (2) "those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves."<sup>241</sup> In the *Stevens* majority opinion, Justice Scalia decidedly found the second category, which only seeks to vindicate the Crown's interest (i.e., the public interest), "more relevant" to the FCA's *qui tam* provisions.<sup>242</sup> The Supreme Court's categorization of the FCA *qui tam* actions as matching with this second category decisively points out not only that the public interest is the primary interest represented under the FCA—it is the only interest represented under the FCA.

Second, if the traditional understanding of the relator's interest adopted by the Supreme Court had ever been contradicted in the United States,<sup>243</sup> the historical evolution of the FCA also largely supports the understanding that the only interest represented under the FCA stems from the government interest. By enacting the public disclosure bar, the 1943 Amendments dismissed any doubt that the FCA sought to vindicate any interest other than the government's public injury in fact. Cases decided shortly before *Stevens*, such as *Hindo* and *Chen* where the defendant did not even assert claim preclusion on Section 3729(a) claims, implicitly support the conceptualization that a relator's interest is not his own private interest. The *Schimmels* and *Stoner* cases affirmatively support such an understanding of a relator's interest, as each of them contemplate (and *Schimmels* actually finds) an instance where a relator representing the public interest could preclude the government, itself. Taken together, the long tradition of *qui tam* actions, the history of the FCA,

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239. Gold, *supra* note 53, at 649. See generally SENATE REPORT, *supra* note 2.

240. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775 (2000) (emphasis added).

241. *Id.*

242. *Id.*

243. SENATE REPORT, *supra* note 2, at 10 (citing *United States v. Griswold*, 30 Fed. Reg. 762 (Cir. Ct. D. Or. 1887)); cf. *Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("statutes providing for actions by the common informer, who himself has *no interest whatever . . . other than that given by statute*") (emphasis added).

and the case law examining the relator-government relationship—including the Supreme Court’s own decision in *Stevens*—confirm the conclusion that an FCA relator’s interest in a *qui tam* action is based only on the government’s interest.

C. *Cases Upholding the FCA’s Constitutionality*

Neither *Stevens* nor *Kelly* support the first or third interpretations of “partial assignment” discussed at the beginning of Part IV. As mentioned in the previous section, the Supreme Court based its definition in *Stevens* of the relator-government relationship resulting from the FCA’s partial assignment upon the relevant history.<sup>244</sup> Though helpful in an analysis of the identities for claim preclusion purposes, the *Stevens* definition does not fill in all of the blanks.

Though it may only be persuasive authority, detail of the relator-government relationship under the partial assignment theory may be gained from the Ninth Circuit’s decision in *Kelly*, especially considering that this decision was the last significant opinion to explain the partial assignment theory before the Supreme Court took up *Stevens*. In *Kelly*, the Ninth Circuit acknowledged that relators *did* have a personal stake in the suit’s outcome.<sup>245</sup> According to the Ninth Circuit, however, that interest included only the costs incurred in prosecuting the FCA suit, the bounty recovered as a result of the suit, and any liability incurred for bringing a frivolous suit.<sup>246</sup> None of these interests pre-date a relator’s filing of a *qui tam* action. Further, none of the interests are based on the relator’s private injury in fact; they can only be seen as arising out of the standing created from the public injury in fact that the government suffered and partially assigned to the relator. In fact, later in its opinion, the Ninth Circuit agrees with this notion, finding “the only private interest at stake in a *qui tam* action is the interest which Congress has created in a reward for successful prosecution.”<sup>247</sup> Thus, strong support for the definition of “partial assignment” as being no more than the government’s assignment of part of its interest to the relator exists within the very cases that embraced the partial assignment theory of relator standing. The inverse of this definition remains that the relator’s *entire* interest, after filing suit under the FCA, is based upon or “on behalf” of the government interest.

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244. *Stevens*, 529 U.S. at 775 (noting the first kind of *qui tam* action traditionally recognized, which is distinguishable from the FCA’s *qui tam* provision, where an injured party is allowed to sue in his own interest as well as for the sovereign’s interest).

245. U.S. *ex rel.* *Kelly v. Boeing Co.*, 9 F.3d 743, 749 (9th Cir. 1993) (citing U.S. *ex rel.* *Kreindler & Kreidler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993)).

246. *See supra* p. 12 and note 77.

247. *Kelly*, 9 F.3d at 760.



*D. Connection Between a Party's Standing and a Party's Interest in a Suit*

Before progressing further in this analysis, one must examine a relationship seemingly overlooked by many of the aforementioned *qui tam* parties and courts. In order for the *Stevens* holding to have significance in an analysis of claim preclusion, the connection between a party's standing and a party's status as a "real party in interest" in a suit must be fleshed out.

Plaintiffs in a lawsuit are required to have constitutional standing,<sup>248</sup> as well as to be a real party in interest in the suit.<sup>249</sup> The concept of a real party in interest is aimed at assessing whether a litigant is the holder of the right or interest to be vindicated in a particular case,<sup>250</sup> and this concept applies directly to an analysis of the "identical parties" element of claim preclusion.<sup>251</sup> Rule 17 expressly recognizes that real parties in interest may sue on behalf of another.<sup>252</sup> Simply stated, "standing" requires that a party have a legally defendable and tangible interest at stake in the litigation.<sup>253</sup>

Thus, "a real party in interest is akin to the concept of standing, in that both address a party's right to pursue an action as claimant."<sup>254</sup> Further, since the typical effect of an assignment of a right or interest from one party to another is that the assignee becomes the real party in interest for the claim,<sup>255</sup> in a partial assignment of an interest, both the assignor and assignee are considered real parties in interest with respect to its portion of the claim.<sup>256</sup>

It is well-accepted that a relator is a party in interest in a *qui tam* action.<sup>257</sup> In the case of an FCA *qui tam* action, since the relator stands as a partial assignee of the government, the relator must be understood to receive a new interest distinct from that relator's private, previously-litigated interest. As the government's partial assignee, the relator becomes a real party in interest to the right arising from the government's public injury in fact. It would be anomalous for the government to assign its standing to the relator but not its

248. *See supra* p. 12.

249. FED. R. CIV. P. 17(a).

250. 4 JAMES WM. MOORE'S FEDERAL PRACTICE § 17.10[1] (Daniel R. Coquillette et. al. eds., 3d ed. 2008) (collecting cases). *See also* FED. R. CIV. P. 17(a).

251. *See* 4 MOORE, *supra* note 250, § 17.10[2].

252. *See* FED. R. CIV. P. 17(a)(1)–(2) ("(A) an executor; (B) an administrator; (C) a guardian; (D) a bailee; (E) a trustee of an express trust; (F) a party with whom or in whose name a contract has been made for another's benefit; [or] (G) or a party authorized by statute [may sue, and] . . . when a federal statute so provides, an action for another's use or benefit must be brought in the name of the United States.").

253. 4 MOORE, *supra* note 250, § 17.20[2].

254. *Id.* § 17.10[1].

255. *Id.* § 17.11[1][a].

256. *Id.* § 17.11[1][b].

257. *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000) ("the [FCA] gives the relator himself an interest") (emphasis added).

status as a real party in interest, because without the status as a real party in interest, no relator could prosecute the FCA action he initiates. Further anomaly would result if the relator's status as a real party in interest was only partially based on the assignment from the government (and, thus partially based also on the relator's private interest) because, with the exception of Section 3730(h)'s retaliation cause of action, the FCA does not offer a private cause of action under which an individual relator could vindicate a private right.

#### V. PROPOSAL FOR FUTURE DECISIONS

In a case where neither the public disclosure bar nor claim preclusion can defeat a relator's *qui tam* action brought subsequent to his successfully litigated private claim, one may suspect that a loophole in the FCA allowing opportunistic, repetitive claims has been created. Surely a number of suggestions could be concocted—such as a proposal of a statutory amendment addressing the matter, pursuit of clarification by the Supreme Court of the contours of the relator-government relationship, or a judicially-created exception to claim preclusion—to plug any gap open to the prospective tide of relators who would be allowed to get a second bite at the apple. A statutory amendment, however, would take much time and political effort, and the courts have yet to carve an exception into the “identical parties” element of claim preclusion sufficient to remedy this loophole. Yet, perhaps one need look no further than an overlooked portion of the FCA's existing text for a solution.

Protection from repetitive law suits in situations where a *qui tam* action brought subsequent to an individual relator's private claim against a defendant may be found in Section 3730(c)(2)(C), which provides:

Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would . . . be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—(i) limiting the number of witnesses the person may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting the person's cross-examination of witnesses; or (iv) *otherwise limiting the participation by the person in the litigation.*<sup>258</sup>

Limiting a relator's repetitious suit by employing Section 3730(c)(2)(C)<sup>259</sup> not only provides an immediate protection for defendants, but the Sections'

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258. 31 U.S.C. § 3730(c)(2)(C) (2000) (emphasis added).

259. It bears mention that in order to limit the relator under Section 3730(c)(2)(C), the government must intervene in the action according to Section 3730(c)(1). § 3730(c)(1). Otherwise, in a case where the government has already chosen not to intervene, it may intervene at a later date under Section 3730(c)(3) in order to assert its power to limit a relator. § 3730(c)(3).

existence concomitantly supports the proposition that courts need not stretch or heedlessly apply the “identical parties” element of claim preclusion in order to prevent what they perceive in practical terms to be repetitious claims brought by an identical party.

Escaping the realm of claim preclusion, parties will not be bound to prove the interests represented in each suit (and therefore conflict with *Stevens*) when analyzing the identities of the parties. Instead, the text of Section 3730(c)(2)(C) simply looks to whether “participation . . . by the person initiating the action . . . would be repetitious.”<sup>260</sup> Such broad statutory language would prove sufficient to include such scenarios as that presented in this Comment’s Introduction. Further, while focusing on the “person,” Section 3730(c)(2)(C)’s language may traverse the legally-fictitious boundary of partial assignment by expressly addressing the practical reality of the individual who becomes the relator under the FCA.

Utilization of Section 3730(c)(2)(C) against a relator would not operate as an affirmative defense as would claim preclusion. Instead, it would shift control over this defensive mechanism to the government; but such a shift of control in the litigation actually supports the existence of the government as the assignor, the holder of the primary right in the action. Utilizing Section 3730(c)(2)(C) would also continue to support the FCA’s purpose of enhancing the government’s ability to recover losses sustained as a result of fraud<sup>261</sup> while also allowing the court, upon a showing from the government,<sup>262</sup> to prohibit an unworthy relator from violating the same policy goals protected by claim preclusion. Further, use of Section 3730(c)(2)(C) runs consistent with both Senator Grassley’s proposed 2007 Amendments<sup>263</sup> as well as with the cases upholding the FCA’s constitutionality.<sup>264</sup>

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260. § 3730(c)(2)(C).

261. SENATE REPORT, *supra* note 2, at 1.

262. The weakness of this approach, of course, is that it assumes that the defendant could persuade the government to intervene and employ its Section 3730(c)(2)(C) power on its behalf. While problematic, the potential of such an approach may ultimately incentivize a defendant to communicate and cooperate with the government upon receiving notification of the *qui tam* action—thus, increasing the odds that the defendant can negotiate a resolution of the matter with the government in the most expedient, efficient manner possible.

263. See *Significant Changes to FCA*, *supra* note 20. The proposed amendments to the public disclosure bar, for example, increase the government’s control over the relator, providing that “qui tam claims based ‘exclusively’ on public disclosure are to be dismissed ‘upon timely motion of the Attorney General.’” *Id.* ¶ 359.

264. U.S. *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 757–59 (9th Cir. 1993) (holding that the FCA does not violate the principle of separation of powers because the FCA permits the executive branch to retain sufficient control over the prosecutorial functions and, likewise, the FCA does not violate the Appointments Clause because a relator does not exercise authority so significant that the Constitution only permits an officer of the United States to exercise it).

## VI. CONCLUSION

In the instance where an FCA *qui tam* claim is brought after a prior private claim was decided, close analysis of the relator-government relationship under the FCA indicates that, without employing some new approach, the individual's suit under the FCA ought not to be precluded. The *Stevens* partial assignment theory of relator standing provides an individual a portion of the government's interest upon which he bases his FCA claim.

Since the interest held by a relator who sues under the FCA is distinct from any private interest that he may have previously litigated, the "identical parties" element of claim preclusion cannot be met under current law. Some may worry that this revelation could open the flood gates of repetitious suits by individuals—first under their private interests and subsequently as FCA relators representing the government's interests. The FCA's text, however, allows the government discretion to prevent such repetitious litigation by giving the government sufficient control to temper any such efforts while also furthering Congress' stated goal of encouraging private individuals to expose and prosecute those who defraud the government.

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