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THE FEDERAL FALSE CLAIMS ACT: CAN WHISTLE BLOWERS REACH STATE AND LOCAL TAX DOLLARS?

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I. INTRODUCTION

The increasing use of the False Claims Act ("FCA" or "Act")[1] by both whistle blowers and federal officials extracts hundreds of millions of dollars from health care providers owned by states and local governments.[2] In most instances, these cases cost health care providers many times what they collected through Medicare and Medicaid billings.[3] These "recoveries" can

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1. 31 U.S.C. §§ 3729-3733 (1994).

2. The anecdotal evidence suggests that some institutions now forego Federal payments from Medicare, Medicaid and Civil Health and Medical Program for the Uniformed Services ("CHAMPUS") for some health services because the complexity of billing and documentation requirements pose a significant risk of exposure to extreme liability under the FCA.

3. During a recent initiative, the United States Attorney's Office for the Middle District of Pennsylvania contacted a majority of Pennsylvania hospitals concerning alleged improper Medicare billings of outpatient hospital services provided within seventy-two hours of an admission. The government contended that such outpatient services were not separately billable because of the subsequent inpatient stay. One small Pennsylvania hospital was advised that if it chose to litigate the alleged false claims violation, it could be liable for almost $5 million in damage multiples and penalties, but that it could avoid such devastating consequences by paying multiple damages in the amount of $50,000. While this is an extreme example of the initiative, ultimately over 4,600 hospitals were the target of that effort and fines and penalties, if calculated under the FCA, in many instances were in excess of ten times actual damages. *See, e.g.*, Jeff McGaw, *Hospitals Bemoan the Use of False Claims Act*, PATRIOT NEWS-HARRISBURG, Oct. 4, 1998 at D03, *available in* 1998 WL 6481692; Jack Sherzer, *Crackdown on Hospital Overbilling is City-based: Feds Here Orchestrate $130 Million Effort*, PATRIOT NEWS-HARRISBURG, Dec. 8,

seriously jeopardize the funding of state and local government programs.[4] The Circuits have split on two questions critical to the enforcement of the False Claims Act against state government entities: 1) whether states are "persons" subject to liability under the Federal False Claims Act; and 2) whether a *qui tam* relator, or "whistle blower," is barred from suing a state by the Eleventh Amendment.[5] The Supreme Court is set to decide these questions this term in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*.[6] Because even the statutory construction is colored by constitutional concerns of sovereign immunity, states should be comforted by the fact that their liability under the FCA will be decided by the same Court that decided *Alden v. Maine*,[7] *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[8] and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[9] This Article examines the considerations the Court should address in deciding whether Congress intended the FCA to extend liability to the states and, if so, whether suits maintained by a *qui tam* relator, without government intervention, violate Eleventh Amendment sovereign immunity concerns.

Shortly before oral argument in *Stevens*, the Fifth Circuit issued its opinion in *United States ex rel. Riley v. St. Luke's Episcopal Hospital*.[10] In *Riley*, the Fifth Circuit held that a relator action under the FCA violated the Take Care Clause of Article II of the Constitution and the separation of powers doctrine.[11] Additionally, the majority rejected the dissent's argument that "*qui tam* actions in which the government does not intervene are constitutionally acceptable as valid delegations of executive authority."[12] The majority explained that "there is no real delegation of executive authority in such cases. Congress cannot be

1996, at B1, *available in* 1996 WL 5712712; *Pa. Hospitals Overbilling for Medicare*, YORK DAILY REC., Jan. 13, 1995, at 2, *available in* 1995 WL 4892385.

4. For example, a recent government audit into allegations that teaching hospitals were submitting false Medicare billing statements for services provided by teaching physicians resulted in hefty settlements. The University of Pennsylvania settled with the government for $30 million, but did not admit any wrongdoing, Thomas Jefferson University settled for $12 million, the University of Virginia settled for $8.6 million, and the University of Pittsburgh settled for $17 million. *See* GENERAL ACCOUNTING OFFICE, REP. NO. HEHS-98-174, MEDICARE: CONCERNS WITH PHYSICIANS AT TEACHING HOSPITALS (PATH) AUDITS (1998) 2.

5. The Eleventh Amendment bans the commencement or prosecution of an action by a private party against a state. *See* U.S. CONST. amend. XI; *see also* discussion *infra* Part VI.

6. *See* United States *ex rel*. Stevens v. State of Vt. Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

7. 119 S. Ct. 2240 (1999).

8. 119 S. Ct. 2219 (1999).

9. 119 S. Ct. 2199 (1999).

10. 196 F.3d 514 (5th Cir. 1999) (en banc review pending).

11. *Id.* at 531.

12. *Id*. at 530.

delegating to relators the President's power and duty to take care that the laws be faithfully executed, for Congress may not delegate purely executive power without the acquiescence of the executive."[13] Finally, the court declined to decide whether relators could demonstrate Article III standing. The declination to review standing was premised on the Fifth Circuit's recent decision in *United States ex rel. Foulds v. Texas Tech University*,[14] where the court assumed Article III justiciability for relator actions, thereafter binding other panels of the Fifth Circuit on that issue until considered en banc or decided by the Supreme Court. In light of the Fifth Circuit's decision in *Riley*, the Supreme Court in *Stevens* took the unprecedented step of requesting additional briefing on the Article III standing issue, due one day after oral argument, on November 30, 1999.[15] However, the Fifth Circuit in *Riley* will be addressing both the Article III standing and Article II separation of powers issues en banc, unless the Supreme Court addresses the standing issue first in *Stevens*. The Court may feel compelled to at least address the Article III standing issue in light of its decision in *Calderon v. Ashmus*,[16] wherein the Court held that Article III justiciability must be addressed before Eleventh Amendment issues.[17]

II. THE SUPREME COURT'S RECENT EFFORTS TO INSULATE STATES FROM PRIVATE LITIGATION

The import of state sovereignty in our constitutional system was reaffirmed in 1999 by the Court's decisions in *Alden*, *College Savings*, and *Florida Prepaid*. In *Alden*, the Court made clear that Congress cannot abrogate a state's sovereign immunity from suit by private parties brought in either federal or state court without the state's consent, unless attempting to remedy or prevent constitutional violations.[18] Noting that "[t]here are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state court," the Court either explained away such statements as dicta, or characterized a state's participation in the subject matter of a Federal cause of action as a waiver of sovereign immunity by the state.[19] After a review of the "history, practice, precedent and the structure of the

13. *Id.*

14. 171 F.3d 279 (5th Cir. 1999). *See infra* notes 174-78 and accompanying text.

15. *See False Claims Act: High Court Hears Argument on Right of Qui Tam Whistleblowers to Sue States*, 8 Health L. Rep. (BNA) at 1874 (Dec. 2, 1999).

16. 523 U.S. 740 (1998).

17. *Id.* at 745 n.2. Because the Article II issues addressed in *Riley* are akin to the Constitutional Conventions' concerns with Eleventh Amendment sovereign immunity, those issues will be noted in the discussion of Eleventh Amendment immunity, *see infra* Part VI. Article III standing issues are addressed in Part VIII.

18. *Alden*, 119 S. Ct. at 2243-44.

19. *See* 119 S. Ct. at 2257-60.

Constitution,"[20] the Court found no "'compelling evidence' that this derogation of the States' sovereignty is 'inherent in the constitutional compact.'"[21]

In *College Savings*, the Court considered whether Congress, through the Trademark Remedy Clarification Act ("TRCA"), could create a private right of action for false or misleading advertising and specifically impose liability on the states.[22] The private party argued (1) that the State had damaged its property rights through false and misleading advertising in support of the State's own product in the prepaid tuition market,[23] and (2) that the State constructively waived its sovereign immunity by engaging in such marketing efforts knowing that its conduct was subject to suit under the TRCA.[24] The Court held there is no constitutionally protected property right to fair competition within the ambit of the Fourteenth Amendment that provides a linchpin for Congress to abrogate a state's Eleventh Amendment immunity from suit.[25] The majority also adopted an approach precluding constructive waivers of state sovereign immunity by Congress except in situations where the waiver is a condition of a federal grant or gift:

> In any event, we think where the constitutionally guaranteed protection of the State's sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of the waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.[26]

Accordingly, the Court "drop[ped] the other shoe" and expressly overruled the "constructive waiver" doctrine applied in *Parden v. Terminal Railway of Alabama Docks Department*.[27]

The *Florida Prepaid* Court considered whether the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act"), which extended liability to the states for patent infringement, could be sustained as

20. *Id*. at 2266.

21. *Id*. at 2260 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 781 (1991)).

22. The Trademark Remedy Clarification Act, *see* 106 Stat. 3567, subjects states to suits brought under § 43(a) of the Lanham Act.

23. *College Savings*, 119 S. Ct. at 2224.

24. *Id*. at 2227-28.

25. *Id*. at 2225.

26. *Id*. at 2231.

27. 377 U.S. 184 (1964). *Parden* involved Alabama citizens bringing a Federal Employers' Liability Act ("FELA") claim against an Alabama owned railroad. The Court observed that "a State's operation of a railroad in interstate commerce" subjected it to suit because allowing employees the ability to sue under FELA but not to extend that right to employees of State owned railroads left the employees without "any effective means of enforcing that liability." Accordingly, the Court was "unwilling to conclude that Congress intended so pointless and frustrating a result." *Id.* at 190. The *College Savings* Court found that "*Parden* stands as an anomaly in the jurisprudence of sovereign immunity, and indeed in the jurisprudence of constitutional law." *College Savings*, 119 S. Ct. at 2228.

legislation enacted to enforce the guarantee of the Fourteenth Amendment's due process clause.[28] The plaintiff in *Florida Prepaid* was a patentee who alleged that the State damaged the patentee's property rights through patent infringement.[29] The court explained that the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, *without due process* of law"[30] and also grants Congress the right to abrogate state sovereign immunity, through Section 5 of the Fourteenth Amendment by giving Congress "the power to enforce, by *appropriate legislation*, the provisions of [the Fourteenth Amendment]."[31] Accordingly, the Court addressed whether the Patent Remedy Act could be justified as appropriate enforcement legislation under Section 5 of the Fourteenth Amendment.[32] The Court concluded that Congress had not examined whether adequate remedies existed under state law to remedy patent infringement violations by the state; therefore, the Patent Remedy Act could not be characterized as appropriate under Section 5.[33]

This limited review of the 1999 Court's jurisprudence on states' sovereign immunity evidences an expansionist view of the states' immunity from suit. The outcome of *Stevens*, however, may signal whether the Court is reaching the limits of the sovereign immunity doctrine or still exploring its boundaries.

III. A SYNOPSIS OF THE QUESTIONS THAT THE SUPREME COURT SHOULD ADDRESS IN *STEVENS*

Whether a state, local government, municipality, or one of their agencies ("government entities"), is liable under the FCA for submitting false claims to the federal government requires resolution of several issues. The False Claims Act provides that "*any person* who knowingly presents, or causes to be presented, . . . a false or fraudulent claim for payment or approval . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 per false claim" plus two to three times the government's actual damages and attorneys' fees.[34] The FCA authorizes private persons to bring *qui tam* suits for violations of the Act.[35] Several issues

28. 119 S. Ct. at 2199. *See also* Patent Remedy Act, 35 U.S.C. §§ 271-296 (1994 & Supp. III 1997).

29. *Id.* at 2203.

30. U.S. CONST. amend. XIV, § 1 (emphasis added).

31. U.S. CONST. amend. XIV, § 5 (emphasis added).

32. *Florida Prepaid*, 119 S. Ct. at 2207.

33. 119 S. Ct. at 2209. The Court found that because the Patent Remedy Act swept too broadly, it subjected states to "expansive liability" without limiting its coverage to cases with arguable constitutional violations "such as where a State refuses to offer any State-court remedy for patent owners whose patents it had infringed." *Id.* at 2210.

34. 31 U.S.C. § 3729(a) (1994).

35. 31 U.S.C. § 3730(b)(1).

are unique to the application of the FCA to government entities. The first such issue that must be addressed is whether Congress intended the term "person" to include other government entities. General rules of statutory construction are complicated by the requirement that Congress be "unmistakably clear" in its intention that new legislative burdens will be imposed on states, when doing so would disturb the "constitutional balance between the States and the Federal Government."[36] This is sometimes referred to as the Clear or Plain Statement Rule.[37]

Second, even if the Court decides that government entities are "persons" under the FCA (thus raising the possibility that these entities are subject to liability under the Act), the Eleventh Amendment may still bar suit against some government defendants. While the Eleventh Amendment presents no bar to suits commenced or prosecuted by the federal government,[38] a *qui tam* relator is merely a private plaintiff who has been authorized by statute to sue for injuries sustained by the federal government. The Eleventh Amendment bars suits commenced or prosecuted against states by private plaintiffs in both federal and state courts.[39] The Supreme Court believes that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."[40] Therefore, it is necessary to determine whether the *qui tam* relator sues for his or her own interests or stands in the shoes of the United States government, the real party in interest.

While the Eleventh Amendment shields states and the arms of state government from suit by private plaintiffs, lesser government entities such as counties and cities may not be entitled to assert that jurisdictional bar. This is not an issue in *Stevens*, but some lower courts have developed a common law concept protecting these other government entities from punitive damages, fines and penalties. The current trend, however, does not favor that concept.

36. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

37. The Court noted that the Plain Statement Rule "is nothing more than an acknowledgement that that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id*. at 461. For purposes of uniformity, this Article will refer to the rule as the "Plain Statement Rule."

38. *See, e.g*., United States v. Texas, 143 U.S. 621 (1892); United States v. Mississippi, 380 U.S. 128 (1965); West Virginia v. United States, 479 U.S. 305 (1987).

39. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (barring suits brought in federal court) and Alden v. Main, 119 S. Ct. 2240 (1999) (barring suits brought in state court). "In light of the history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation." *Alden*, 119 S. Ct. at 2266.

40. *Alden*, 119 S. Ct. at 2246-47.

How the Court will handle this decision may profoundly impact these government entities when they enter the health care industry.

Finally, and an issue common to any FCA suit initiated by a *qui tam* relator, is whether Article III standing is satisfied when a private party, who has suffered no personal injury in fact, seeks to redress a public wrong. While the relator receives a bounty in a successful suit, he does not receive damages. Damages are the property of the federal government in such suits.

IV. THE HISTORY AND PURPOSE OF THE FALSE CLAIMS ACT

A. The Act of 1863

One year prior to the original enactment of the FCA, a House Committee published a report which, in discussing various frauds committed during the Civil War, referred to certain state officials that had used war contracts for their personal advantage.[41] The report specifically stated that these examples of fraud were not committed against the United States government.[42] This 1862 report, however, is a rather tenuous link to the Act Congress passed one year later.

The False Claims Act originated in a statute entitled "An Act to prevent and punish Frauds upon the Government of the United States."[43] The Act was adopted in 1863 and signed into law by President Abraham Lincoln as a measure to combat rampant fraud perpetrated by military contractors during the Civil War.[44] The original Act distinguished between fraudulent acts committed by "any person in the land or naval forces of the United States"[45] and "any person not in the military or naval forces of the United States."[46] States or political subdivisions thereof would clearly not have fallen within the first category, but ostensibly could fall within the second classification. The Act was later codified as part of Title 31 of the United States Code in 1943,[47] and recodified in 1982.[48] However, the main portions of the Act had not been

41. *See* United States *ex rel*. Long v. SCS Bus. and Tech. Inst., Inc., 173 F.3d 870, 876 (citing H.R. REP. NO. 2, 37th Cong., at xxxviii-xxxix (2d Sess. 1862)).

42. *See id.* (citing H.R. REP. NO. 2, 37th Cong., at xxxviii).

43. Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696 (1863) (amended and codified at 31 U.S.C. §§ 3929-3733 (1994)).

44. *See* SEN. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N 5266, 5273; *see also* CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863) (statement by Senator Howard) (noting that "[t]he country . . . has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present [Civil War]").

45. *See* § 1, 12 Stat. at 696.

46. *See* § 3, 12 Stat. at 698.

47. *See* 31 U.S.C. § 232 (Supp. V 1945).

48. *See* S. REP. NO. 99-345, at 11-12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276-77. The FCA is currently codified at 31 U.S.C. §§ 3729-3733 (1994).

amended in any substantial respect until the False Claims Amendments Act of 1986 ("Amendments Act") was adopted.[49]

B. The False Claims Amendments Act of 1986

The Amendments Act was intended to modernize the FCA "to enhance the Government's ability to recover losses sustained as a result of fraud against [it] . . . in Federal programs and procurement."[50] The legislative history of the Amendments Act noted that the False Claims Act targeted all those who submitted false claims to the federal government and specifically used "[t]he term 'person' . . . to include partnerships, associations and corporations . . . as well as State and political subdivisions thereof."[51]

Only three changes in the Amendments Act relate to whether states or political subdivisions are included in the definition of "person" when determining who may be sued under the Act. First, Congress changed those who could be held liable under the Act from "[a] person not a member of an armed force of the United States," to simply "[a]ny person."[52] Congress made this change because at the time the FCA was first enacted in 1863, the government had more severe military remedies at its disposal than in 1986.[53] In 1986, the government could not seek monetary recovery from members of the armed forces and had to rely on less effective common law remedies. The legislative history does not indicate that this change was intended to broaden the class of persons who could be held liable under the FCA, except to include members of the armed forces.[54]

Second, the Amendments Act increased the FCA's civil remedies from two to three times the amount of damages sustained by the government, and increased the penalties from $2,000 per claim to a range of $5,000 to $10,000 per claim.[55] A Congressional Budget Office report, included as part of the Amendments Act's legislative history, noted the proposed increased penalties and damages under the Amendments Act, but concluded that the increases

49. S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

50. S. REP. NO. 99-345, at 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67.

51. S. REP. NO. 99-345, at 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273-74. This Senate Report cites three cases as authority sufficiently analogous to the proposition that the term "person" includes states and political subdivisions: Monell v. Department of Social Servs., 436 U.S. 658 (1978); Georgia v. Evens, 316 U.S. 159 (1942); and Ohio v. Helvering, 292 U.S. 360 (1934). *See id*. None of those decisions, however, concerned liability under the FCA.

52. *See Stevens*, 162 F.3d at 206; S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

53. *See* S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280. Under the FCA, as it was originally enacted in 1863, members of the armed forces who violated the FCA could be court-martialed, fined, and/or imprisoned. *See* 12 Stat. at 697.

54. *See Stevens*, 162 F.3d at 206-07.

55. *See* S. REP. NO. 99-345, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5282; 31 U.S.C. § 3729(a)(7) (1986).

would "involve no significant costs to the federal government or to state or local governments."[56]

Third, the Amendments Act authorized the Department of Justice to issue Civil Investigative Demands ("CID") for documents or testimony in a False Claims Act investigation.[57] Under the CID provisions, "the term 'false claims law investigation' means any inquiry conducted . . . for the purposes of ascertaining whether any *person* is engaged in any violation of a false claims law."[58] Further, the provision defines "the term 'person' [to] include any State or political subdivision of a State."[59]

V. DID CONGRESS INTEND FOR THE FCA TO IMPOSE LIABILITY ON GOVERNMENT ENTITIES AS "PERSONS" IN EITHER 1863 OR 1986?

A. Does the Term "Person" as Used in the FCA Include States and the Arms of State Government?

As already noted, the FCA imposes civil liability on any "person" who makes a false monetary claim to the United States government, but unfortunately does not define the term "person." To determine whether this language creates a cause of action against states and their subdivisions, it is therefore necessary to ascertain whether Congress intended an expansive or narrow reading of the term "person." A narrow reading of the term should not subject state government entities to suit or liability—either by a *qui tam* relator or the federal government.

1. A Survey Of Recent Decisions

The courts are divided on the issue of whether states are "persons" under the FCA. In 1998, both the Second Circuit in *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*,[60] and the Eighth Circuit in *United States ex rel. Zissler v. Regents of University of Minnesota*,[61] held that states *are* "persons" subject to liability under the Act. In that same year, while the Second Circuit decision in *Stevens* was still pending, the Southern District of New York, in *United States ex rel. Graber v. City of New York*,[62] held that states *are not* "persons" for purposes of liability under the Act. In 1999, the

56. S. REP. NO. 99-345, at 37 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5302 (letter from Rudolph G. Panner, Director, Congressional Budget Office, to Senator Strom Thurmond, Chairman, Committee on the Judiciary, June 12, 1986).

57. S. REP. NO. 99-345, at 33 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5298; 31 U.S.C. § 3733(a)(1) (1986).

58. *See* 31 U.S.C. § 3733(s)(2) (1986) (emphasis added).

59. *Id.* § 3733(s)(4) (1986).

60. 162 F.3d 195 (2nd Cir. 1998).

61. 154 F.3d 870 (8th Cir. 1998).

62. 8 F. Supp.2d 343 (S.D.N.Y. 1998).

D.C. Circuit in *United States ex rel. Long v. SCS Business and Technical Institute, Inc.*[63] similarly held that states *are not* "persons" under the Act.

In *Stevens*, a Vermont agency appealed a district court's order denying its motion to dismiss a FCA *qui tam* action.[64] The private plaintiff alleged that the agency, which received federal funds to pay for salary expenses incurred in connection with certain federal grants, submitted false claims to the United States government by instructing its employees working on the grant projects to complete timesheets matching previously calculated estimates, regardless of the amount of time actually worked.[65] The Vermont agency argued that the case should be dismissed because a state agency was not a "person" under the Act.[66] The Second Circuit affirmed the district court's denial of the agency's motion, holding that a state *is* a "person" within the meaning of the Act.[67] In reaching its conclusion, the court reasoned that states bring suits as plaintiffs under the Act, which uses the same term "person" to describe both those who may be sued and those who may sue; thus, since a state is a "person" for purposes of suing under the Act, it is also a "person" subject to liability under the Act.[68]

Although the Second Circuit considered the application of the Plain Statement Rule to the term "person" under the FCA, it refused to apply that rule. As understood by the Second Circuit, the Plain Statement Rule provides "that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[69] The court concluded that the Plain Statement Rule applies only when the statute being interpreted alters the constitutional balance between the states and the federal government and does not apply to "legislation that does not interfere with traditional State authority."[70] Since the Act prohibits acquisition of federal funds through fraud and "[t]he States have no right or authority, traditional or otherwise, to engage in such conduct,"[71] the court reasoned that the Act did not interfere with traditional state authority and therefore found the Plain Statement Rule was inapplicable.[72]

63. 173 F.3d 870 (D.C. Cir. 1999).

64. *Stevens*, 162 F.3d at 198.

65. *Id*.

66. *Id*. at 199.

67. *Id*. at 208.

68. *Id*. at 205.

69. Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting *Atascadero*, 473 U.S. at 242).

70. *Stevens*, 162 F.3d at 204.

71. *Id*.

72. *Id*. at 203-04. *See also Zissler*, 154 F.3d 870 (holding that a false claims action against a state does not fall outside the usual constitutional balance between the states and the federal government).

In holding that states could be sued by *qui tam* relators under the Act, the *Stevens* court also rejected the argument that such suits are barred by the Eleventh Amendment. The court noted that even when the United States government does not intervene in a *qui tam* action: (1) it retains the ability to impose substantial control over the action; (2) it receives the largest portion of any recovery; (3) it is the federal government's injury which provides the measure for damages; and (4) it is the federal government's name in which the suit is brought.[73] Therefore, the court held, the United States government remains the real party in interest, and suit is not barred by the Eleventh Amendment.[74]

In *Zissler*, an employee brought a *qui tam* action, in which the United States intervened, against a State university claiming the university made false and incomplete statements regarding federal research grants.[75] The district court dismissed the action, holding that the State, and therefore the State-owned university, was not a "person" for purposes of liability under the FCA because the statute did not contain clear language indicating congressional intent that states be included in the definition of "person."[76] However, the Eighth Circuit reversed the district court's ruling.[77] The appeals court reasoned that the Plain Statement Rule only applies to instances where the statute alters the constitutional balance between the states and the federal government; however, the court concluded that imposition of liability under the Act does not alter that balance.[78]

Contrary to *Stevens* and *Zissler*, the Southern District of New York decision in *Graber* and the D.C. Circuit in *Long* found that a state is not a "person" under the False Claims Act. The plaintiff in *Graber* accused New York and New York City, as well as various agencies, of falsifying compliance information in order to receive federal funding and reimbursement for foster care expenditures.[79] The district court dismissed the claims by holding that states and their municipalities are not "persons" under the FCA because "neither the text of the [Act] nor the legislative history demonstrates that Congress has ever actively considered whether to subject states and local governments to False Claims Act liability, [much less that Congress clearly and] unequivocally decided to do so."[80] The court also relied on the doctrine of municipal immunity from punitive or exemplary damages and argued that

73. *Id*. at 202.

74. *Id*. at 203.

75. *See Zissler*, 154 F.3d at 871 (explaining the case history prior to appeal). The United States chose to intervene in the action. *Id*.

76. *See id*.

77. *Id*. at 873-75.

78. *Id*. at 874-75.

79. *See Graber*, 8 F. Supp.2d at 345.

80. *Id*. at 355.

the treble damages and penalties authorized by the Act were punitive in nature and, therefore, could not be imposed upon a state or municipality.[81] Although *Graber* supports the position that states are not persons under the Act, it was impliedly overturned by the Second Circuit decision in *Stevens*.[82] *Graber* is also undermined by the fact that it relied heavily on the lower court's decision in *Zissler*, which was expressly overruled by the Eighth Circuit.[83]

The remaining case holding that states are not "persons" under the liability section of the FCA is the D.C. Circuit's decision in *Long*. The *qui tam* relator in *Long* was an employee of a State school auditing company.[84] The relator claimed that during an audit he discovered that the SCS Business and Technical Institute had made false claims to receive federal funding for students attending its school.[85] He also alleged that his State employer was aware of these false claims and conspired with the institute to conceal the fraud.[86] The D.C. Circuit court noted that the conventional reading of the word "person" in the FCA does not include states, and observed that there was no affirmative showing by Congress that it intended to include states within the meaning of the word "person."[87] Accordingly, the court concluded that states could not be held liable under the Act.[88] The court asserted that the Second Circuit's analysis in *Stevens*, which categorized the state function at issue as merely the filing of fraudulent claims, was too narrow an interpretation.[89] The D.C. Circuit applied the Plain Statement Rule and held that, even if states were liable under the Act, the states' Eleventh Amendment immunity would bar the *qui tam* suit brought by the private plaintiff, who, the court noted, was a real party in interest along with the United States.[90]

2. The Application Of Traditional Tools Of Statutory Construction

Courts construe the meaning of a statutory term such as "person" either by reviewing the term's plain meaning and the Act's legislative history and purpose, or by examining the definition and interpretation of the term in other congressional acts. One court has even posited that a definition may be

81. *Id*. at 348-49. *See also* discussion under municipal liability in Part V.B.

82. The Second Circuit in *Stevens* did not expressly overrule the lower *Graber* court because that decision was issued immediately before *Graber* was published.

83. *See generally Zissler*, 154 F.3d 870.

84. *Long*, 173 F.3d at 872.

85. *Id*.

86. *Id*.

87. *Id*. at 874.

88. *Id*. at 889-90.

89. *Long*, 173 F.3d at 887.

90. *Id.* at 889-90.

inferred from how other entities, such as the states themselves, have interpreted the term.[91]

Arguments against including states within the meaning of the term "person" for purposes of the Act usually focus on the plain meaning of the term "person." For example, the *Graber* court asserted that "[t]he Supreme Court has repeatedly held that 'in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'"[92] Ruling that the plain meaning of the term "person" does not include states, the court further explained that the "literal text of the statute, in short, does not plainly subject states and municipalities to False Claims Act liability."[93] However, even courts holding that the plain meaning or common usage of the word "person" does not include states or their agencies have subsequently gone on to review the legislative history and purpose of the Act in an effort to ascertain congressional intent. Even when the common usage of the term "person" does not include states, the Supreme Court has noted:

> [T]here is no hard and fast rule of exclusion" of the sovereign . . . and our conventional reading of "person" may therefore be disregarded if "[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring state or nation within the scope of the law.[94]

While it has been argued that the legislative history supports the position that Congress intended states to be included among those liable for False Claims Act violations, both *Graber* and *Long*, relying on the Plain Statement Rule, posit that this legislative evidence was not strong enough on its own to subject states to liability under the Act when Congress had not clearly and expressly stated its intent to do so.

As already noted, the legislative history accompanying the Amendments Act indicated that the term "person" should be "used in its broadest sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof[,]"[95] and stated that the Amendments Act was intended to increase the government's ability to recover losses and make the Act "a more useful tool against fraud in modern times."[96] The *Zissler* court noted that "modern times" have brought about a significant increase in federal

91. *See Stevens*, 119 S. Ct. at 204.

92. *Graber*, 8 F. Supp.2d at 347-48 (S.D.N.Y. 1998) (quoting Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1979)).

93. *Id*. at 352.

94. International Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 83 (1991) (quoting United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941)).

95. *See supra* note 51 and accompanying text.

96. S. REP. NO. 99-345, at 1, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

grants to both state and local governments.[97] Since the Act was enacted to prevent fraud that would result in a financial loss to the United States government,[98] the court reasoned that it would seem illogical for Congress to have amended the Act in an effort to increase its usefulness while at the same time restricting its applicability by foreclosing *qui tam* actions against those entities that receive such a large proportion of the federal funds granted.[99]

The *Graber* court argued that the Amendments Act's legislative history "should be accorded little, if any, weight in the interpretation of [the FCA]" because it was based on an incorrect interpretation of the Act as it stood before being amended in 1986.[100] The court explained that the Amendments Act itself did not manifest an intent to hold states liable, but rather the legislative history simply misconstrued the law as it stood at the time as holding states liable as "persons" under the Act. [101] Additionally, the Congressional Budget Office report included in the legislative history indicates that while damages and penalties were being increased through the Amendments Act, no "significant" additional costs were being imposed on the state or local governments.[102] The *Graber* court concluded that this evidence strongly suggests that Congress as a whole did not contemplate that state and local governments would be liable under the FCA.[103]

Both *Stevens* and *Zissler* compared the FCA's liability provision's use of the term "person" to its use in the FCA's Civil Investigation Demand provision,[104] which defines "person" to include "any State or political subdivision of a State," thereby authorizing discovery demands on states.[105] However, the *Graber* court argued that since "the very language of the [Civil Investigation Demand] provision, . . . plainly states that the definitions contained in [the FCA's Civil Investigation Demand provision] apply '[f]or purposes of this section,'" the definition of "person" does not apply to other sections of the FCA.[106] The *Zissler* court found *Graber*'s point was not a strong enough argument "to carry the day in the context of all the other

97. *Zissler*, 154 F.3d at 874.

98. *See id*. (quoting United States v. Neifert-White Co., 390 U.S. 228, 232 (1968)).

99. *See id*.

100. *Graber*, 8 F. Supp.2d at 353.

101. *Id*. at 353-54.

102. *Id*. at 354. *See also* SEN. REP. NO. 99-345, at 37 (1986), *reprinted in* 1986 U.S.C.C.A.N 5266, 5302.

103. *Id*. at 354-55.

104. *Zissler*, 154 F.3d at 875; *Stevens*, 162 F.3d at 207. *See also supra* notes 58-60 and accompanying text. Codified at 31 U.S.C. § 3733 (1994), the Civil Investigation Demand provision is based upon a similar provision available to the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. *See* SEN. REP. NO. 99-345, at 33 (1986), *reprinted in* 1986 U.S.C.C.A.N 5266, 5298.

105. *See* 31 U.S.C. § 3733(l)(4) (1994).

106. *Graber*, 8 F. Supp.2d at 351 (S.D.N.Y. 1998) (citing 31 U.S.C. § 3733(l) (1994)).

considerations."[107] *Zissler* found little point in *Graber*'s argument that it "makes perfect sense" for the Civil Investigation Demand provisions to apply to states as "persons" because those provisions apply not only to "targets" of investigations, but also to any "non-target" third parties who may have information relevant to an investigation.[108] Obviously, the *Graber* court found, it is far less burdensome to allow discovery from a state than to allow suit against a state.

In holding that a state is a "person" subject to liability under the Act, the Second Circuit in *Stevens* observed that the Act uses the same term "person" to refer to those who can be sued as well as those who can sue under its provisions.[109] The Second Circuit found support for its holding in cases where states "brought suits under the Act as *qui tam* plaintiffs, clearly indicating that they viewed themselves as 'person[s]' within the meaning of [the FCA *qui tam* provision]."[110]

3. The Plain Statement Rule

The Supreme Court has styled the Plain Statement Rule as an "ordinary rule of statutory construction [which provides] that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[111] Although *Will v. Michigan Department of State Police*[112] and *Atascadero State Hospital v. Scanlon*[113] were cases involving the issue of sovereign immunity under the Eleventh Amendment, the Court noted that the concept has been applied in other contexts.[114] For example, "Congress must make its intention 'clear and manifest' if it intends to pre-empt the

107. *Zissler*, 154 F.3d at 875.

108. *See Graber*, 8 F. Supp.2d at 355 (citing H. REP. NO. 94-1343, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2596, 2597).

109. *Stevens*, 162 F.3d at 204 (citing 31 U.S.C. §§ 3729, 3730).

110. *Id.* (citing, for example, United States *ex rel.* Woodard v. Country View Care Ctr., Inc., 797 F.2d 888 (10th Cir. 1986), United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984), United States *ex rel.* Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624 (N.D. Ill. 1992)). While analyzing the issue using the FCA provisions, the *Stevens* court ignores the entirely different considerations involved in whether states are plaintiffs or defendants under the Act. As plaintiffs, states can vindicate the same concerns as other plaintiffs under the FCA. As defendants, however, a substantial portion of state tax revenues are diverted to a private individual, the whistle blower, and the state's status as a sovereign is denigrated. It is, moreover, irrelevant to the issue of congressional intent that some states construed the term "person" to allow them to initiate suit under a different section of the FCA.

111. Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

112. 491 U.S. 58 (1989).

113. 473 U.S. 234 (1985).

114. *See Will*, 491 U.S. at 65.

historic powers of the States" or if it desires "to impose a condition on the grant of federal moneys" to the states.[115] In *United States v. Bass*, the Supreme Court indicated that in traditionally sensitive areas, legislation affecting the balance between the federal government and the states requires a "clear statement" to ensure that Congress has in fact faced, and intends to bring into issue, the critical matters involved in that relationship.[116]

In the case of the FCA, both prongs of the Plain Statement Rule are brought to bear. If by enacting the FCA, Congress is creating a private right of action against the states, then Eleventh Amendment issues arise, and it is quite evident that Congress did not clearly indicate that it intended the FCA to impose liability on the states. On the other hand, if the Eleventh Amendment is not implicated, then the Plain Statement Rule should still apply under *Pennhurst* and *Bass*, because conditions on the grant of federal monies impose new burdens on states, and this treads on the sensitive relationship between state and federal governments.

Both the D.C. Circuit in *Long* and the Southern District of New York in *Graber* agreed that the Plain Statement Rule applied.[117] The *Graber* court found that the punitive nature of the treble damages and penalties altered the traditional balance between the states, municipalities and the federal government.[118] In *Long*, the D.C. Circuit found the linchpin for application of the Plain Statement Rule in *Will*. Therein, the Court found the Plain Statement Rule "particularly applicable" in cases where "it is claimed that Congress has subjected the States to liability to which they had not been subject before."[119]

However, in *Zissler*, the court took the stance that subjecting states to punitive damages and penalties under the FCA did not disrupt the balance of power revered by the courts in *Graber* or *Long*. The Zissler court stated:

> Nor does the application of the False Claims Act to States constitute coercion, thereby disrupting the usual balance of power between the United States and the States. There is no coercion in subjecting States to the same conditions for federal funding as other grantees: States may avoid these requirements simply by declining to apply for and to accept these funds. But if they take the King's schilling, they take it *cum onere*.[120]

While the *Zissler* court may have correctly stated the facts as applied in the context of federal grant programs, its reasoning does not apply to the majority

115. *Id*. (quoting Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 230 (1947); Pennhurst State Sch. and Hosp. v. Halderman, 452 U.S. 1, 16 (1987)).

116. 404 U.S. 336, 339 (1971).

117. *Long*, 173 F.3d at 874, 887-89; *Graber*, 8 F. Supp.2d 355-56.

118. *See Graber*, 8 F. Supp.2d 355-56.

119. *Long*, 173 F.3d at 874 (quoting *Will*, 491 U.S. at 64).

120. 154 F.3d at 873 (emphasis added).

of false claims actions filed in the federal health care context.[121] Most such cases involve federal reimbursement under Medicare and Medicaid programs for services provided. These are not grant programs, but rather reimbursement programs for services provided to federal or state/federal program beneficiaries.[122] Federal health care reimbursement is the type of commercial activity that the Court in *College Savings* found beyond the pale of permissible coercion because prohibiting the funding would not be denying a "gift or gratuity" under Congress' Spending Clause power, but rather would be excluding a state from otherwise lawful activity.[123]

Because the FCA is not tailored to a specific program or activity, perhaps application of the Plain Statement Rule should not be dependent on the facts of particular cases, for presumably congressional intent would be uniform as to the application of the FCA to any frederal program. Accordingly, if the statute reaches any state conduct that would be protected by application of the Plain Statement Rule, and it is evident that Congress did not consider the impact on states, then that should determine whether states are "persons" under the Act.

It is reasonably clear in the case of the FCA that Congress failed to consider those important questions. For example, the Congressional Budget Office report included in the legislative history of the Amendments Act noted that the proposed amendments increased penalties and damages under the Act, but still concluded that the Amendments Act would "involve no significant costs to the federal government or to State or local governments."[124] Given that budget impact statement and the FCA's lack of clear language of congressional intent to affect the rights of states, application of the Plain Statement Rule favors avoiding state liability under the FCA.

B. Does the Term "Person" in the FCA include Counties and Municipalities?

The courts are also divided on the question of whether counties and municipalities ("local governments) are "persons" under the FCA. In 1999, an Illinois federal court in *United States ex rel. Chandler v. Hektoen Institute for*

121. The Supreme Court has generally applied the permissible coercion analysis as part of its Eleventh Amendment analysis, rather than as a part of the Plain Statement Rule. In *Will*, however, the Court noted that the two considerations are similar. *See generally Will*, 491 U.S. 58. The *Zissler* court also did not have the advantage of the Court's analysis in *College Savings* concerning the substantial limitations that the Court placed on the types of coercion Congress could impose on states to abrogate their sovereign immunity, although in the context of federal grants it appears the court would agree with *Zissler*.

122. For a concise educational review of Medicare and Medicaid, see generally BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 838-83 (3d ed. 1997 & Supp. 1999).

123. *See College Savings*, 119 S. Ct. at 2231.

124. S. REP. NO. 99-345, at 37, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5302.

Medical Research[125] held that a county is a "person" for purposes of liability under the Act. In *Chandler*, a *qui tam* relator brought an action against the Hektoen Institute ("Institute") and the county, alleging that the Institute misrepresented the progress of a study funded by federal grants.[126] The relator also alleged that the Institute was noncompliant with the federal regulations governing the research project and the grant of funds therefor.[127] In holding that counties are "persons" under the Act, the court relied on both the legislative history of the Act, in particular the previously mentioned 1986 Senate Report and the FCA's Civil Investigation Demand provisions, and other court decisions holding states were "persons" under the Act.[128] This case was later appealed and the decision affirmed.[129]

In 1998, the Court of Appeals for the Second District of California in *LeVine v. Weis*[130] held that a county is a "person" under California's False Claims Act.[131] In *LeVine*, a fired teacher who complained about his classrooms being unlawfully understaffed brought a wrongful termination action against a county school district.[132] The court held that California's False Claims Act applied to governmental entities, including the county.[133] The court reasoned that the California legislature enacted the false claims act to protect the public fisc, and in light of that purpose "[t]here is no reason to conclude the Legislature intended that the protection afforded to the public treasury by [California's False Claims Act] be denied merely because the entity raiding the treasury is a governmental entity."[134] While this case was concerned only with California's False Claims Act, the same argument is relevant to the Federal False Claims Act.

Contrary to the holdings in *Chandler* and *LeVine*, the *Graber* court, in keeping with its position that the term "person" does not include states, held that the term also does not include municipalities.[135] In reaching its decision, the *Graber* court argued that while "municipalities typically are presumed to be persons at common law," the presumption falls when punitive or exemplary damages may be imposed.[136] The court noted that the common law doctrine of municipal immunity from exemplary or punitive damages was "well

125. 35 F. Supp.2d 1078 (N.D. Ill. 1999).
126. *Id*. at 1079-80.
127. *Id*.
128. *Id*. at 1083-84.
129. The Supreme Court recently denied the case certiorari. *See* 120 S. Ct. 329 (1999).
130. 68 Cal. App. 4th 758 (Cal. Ct. App. 1998).
131. *See* CALIF. GOV'T CODE §§ 12650-12655 (West 1992 & Supp. 1999).
132. *LeVine*, 68 Cal. App. 4th at 760-63.
133. *Id*. at 765-66.
134. *Id.* at 765.
135. *Graber*, 8 F. Supp.2d at 354.
136. *Id.* at 348-49.

recognized when the False Claims Act was first enacted in 1863"[137] as acknowledged by the Supreme Court in 1981:

> It was generally understood by 1871 that a municipality, like a private corporation, was to be treated as a natural person subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages. Indeed, the courts that had considered the issue prior to 1871 were virtually unanimous in denying such [punitive] damages against a municipal corporation.[138]

The reasoning behind prohibiting exemplary or punitive awards against municipalities for their wrongdoing is set forth in some detail by the Court in *City of Newport v. Fact Concerts, Inc*. The *Fact Concerts* rationale rests on the notion that forcing the municipality to pay awards of this nature would burden the very same taxpayers for whose benefit the suit had been brought, and would not enhance the deterrent effect on the governmental bad actor.[139]

This reasoning holds true irrespective of whether the plaintiff is a private party or the federal government. Therefore, whether the term "person" includes municipalities may depend on whether courts find the mandatory penalties and treble damages authorized by the Act to be punitive or remedial. If the authorized damages are considered punitive, and the term "person" is read to include municipalities, the result would create a cause of action against an entity that could never be utilized due to the common law doctrine barring punitive damages against municipalities. The logical solution would be to allow suits against municipalities under the Act but allow only actual damages to be imposed. However, since the FCA expressly provides that if liability is established the courts must award at least double damages and a fine of at least $5000 per claim,[140] the court would have to re-write the Act—an action obviously beyond the power of the courts.

The courts have not given a definitive answer as to whether the FCA and the damages which it imposes are punitive or remedial. Prior to the Amendments Act, the FCA provided for double damages and, in a *qui tam* suit, awarded the relator one half of those damages.[141] In finding that the double damages provision was remedial in nature, the Supreme Court argued that "it can not be said that there is any recovery in excess of actual loss for the government, since in the nature of the *qui tam* action the government's half of the double damages is the amount of actual damages proved."[142] However, with the addition of the Amendments Act in 1986, the FCA currently provides

137. *Id*. at 348.
138. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259-60 (1981).
139. *Id*. at 266-71 (1981).
140. 31 U.S.C. § 3729 (a) (1994).
141. Act of Mar. 2, 1863, ch. 67, §§ 6-7, 12 Stat. at 698.
142. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 550 (1943).

for recovery of treble damages, plus penalties of between $5,000 and $10,000 per false claim.[143] The *Graber* court concluded that these treble damages under the FCA were punitive "because they are not limited to, but rather substantially exceed, the actual damages suffered by the United States."[144]

In contrast to the district court decision in *Graber*, the Eighth Circuit in *United States v. Brekke*[145] held that treble damages are not punitive.[146] The United States government accused the *Brekke* defendants of submitting false real estate loan applications to the Small Business Administration.[147] The Small Business Administration brought a civil suit against the defendants to recover its losses; however, it reached a settlement agreement with the defendants.[148] The government brought a subsequent and separate criminal action under the FCA.[149] The defendants argued that their earlier settlement of the civil action barred any subsequent criminal prosecutions, a position with which the district court agreed.[150] On appeal, the Eighth Circuit held that a civil action under the Act is not punitive and, therefore, does not bar a subsequent criminal prosecution for the same conduct.[151] The court held that the purpose of the Act was to help the government become whole through recovery of losses incurred.[152] Quoting the Supreme Court in *United States v. Halper*,[153] the Eighth Circuit argued that even a multiple recovery is compensatory, "unless the amount sought by the government 'bears no rational relation to the goal of compensating the Government for its loss.'"[154] The court further noted that the *Halper* court acknowledged that "in the ordinary case fixed-penalty-plus-double-damages . . . [did] no more than make the Government whole[]" because the damage to the Government includes costs that would be difficult, if not impossible, to determine, in addition to the actual losses resulting from a false claim.[155] The *Brekke* court similarly categorized the FCA's treble damages.[156]

143. 31 U.S.C. § 3729(a). The relator receives between twenty-five to thirty percent of these damages if the government chooses not to intervene. *See id*. § 3730 (d)(2).

144. *Graber*, 8 F. Supp.2d at 349.

145. 97 F.3d 1043 (8th Cir. 1996).

146. *Graber*, 8 F. Supp.2d at 349. *See also Chandler*, 35 F. Supp.2d at 1086 (finding "the [Act's] treble damages provision is more compensatory than punitive").

147. *See Brekke*, 97 F.3d at 1046.

148. *See id*.

149. *See id*.

150. *Id*. at 1046.

151. *Id*. at 1048-49.

152. *Brekke*, 97 F.3d at 1048-49.

153. 490 U.S. 435, 449 (1989) (analyzing the remedial/punitive distinction for double jeopardy purposes), *abrogated by* Hudson v. United States, 522 U.S. 93 (1997).

154. *Brekke*, 97 F.3d at 1048 (quoting *Halper*, 490 U.S. at 449).

155. *Id*.

156. *Id*. at 1048.

The Supreme Court in *Halper*, however, went on to find that the excessive damages imposed on this particular defendant for violations of the FCA were punishment for purposes of double jeopardy.[157] Therefore, it follows from *Halper* that if double damages can be considered punishment for double jeopardy purposes, they may also be considered punitive, thereby lending support to the argument that municipalities are not "persons" under the Act. *Halper*, however, was distinguished by the district court in *United States v. Peters*.[158] The *Peters* court noted that *Halper* involved a defendant who submitted sixty-five separate Medicare false claims; thus, the defendant was liable for sixty-five separate penalties amounting to two hundred and thirty times the actual damages suffered by the government.[159] Thus, the Court in *Halper* concluded that the damages incurred by the defendant were "so extreme and so divorced" as to inflict punishment rather than merely compensating the government for its losses.[160] In *Peters*, however, even after trebling the government's losses and deducting the investigative expenses, the defendant was liable for only twice the government's actual proven damages.[161] The *Peters* court concluded that, unlike the damages in *Halper*, the treble damages borne by the defendant in *Peters* were rationally related to compensating the government for its losses.[162]

The reasoning of the courts indicates that the issue of whether the FCA's treble damages and authorized penalties are punitive versus remedial remains open. The trend seems to favor finding local governments liable under the FCA. The Supreme Court has declined review of the one case that has reached the Courts of Appeals;[163] consequently, inconsistent treatment will likely continue until another Court of Appeals' decision creates a split among the Circuits to prompt certiorari.

VI. DOES THE ELEVENTH AMENDMENT BAR SUIT?

In *Hans v. Louisiana*,[164] the Supreme Court held that states are immune from suit by individuals based on the Eleventh Amendment and the inherent nature of sovereignty.[165] The Eleventh Amendment provides that states are immune from suits "commenced or prosecuted against one of the United States

157. *Halper*, 490 U.S. at 448-49.
158. 927 F. Supp. 363 (D. Neb. 1996).
159. *Id.* at 369-70; *see also Halper*, 490 U.S. at 437-38.
160. *Halper*, 490 U.S. at 446-47.
161. *See Peters*, 927 F. Supp. at 369-70.
162. *Id.*
163. *See* Cook County, Ill. v. Chandler, 120 S. Ct. 329 (1999).
164. 134 U.S. 1 (1890).
165. *Id.* at 18-19.

by Citizens of another State."[166] In *Alden*, the Court explained the basis for the states' retention of sovereign immunity from private suits:

> A suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to "take Care that the Laws be faithfully executed," . . . differs in kind from the suit of an individual: While the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures, the fear of private suits against nonconsenting States was the central reason given by the founders who chose to preserve the States' sovereign immunity. Suits brought by *the United States itself require the exercise of political responsibility for each suit* prosecuted against a State, a control which is *absent from a broad delegation to private persons to sue* nonconsenting States.[167]

Thus, the issue appears to involve whether a suit brought or prosecuted by a private person against a state under the FCA, partially and perhaps primarily to benefit the federal government, fits within the safeguards that prompted states to consent to suits against them by the federal government as part of the Constitutional Convention. The resolution of this issue requires some review of the involvement of the relator in a whistle blower action, especially when the government does not intervene. The FCA provides that "[a] person may bring a civil action for a [FCA] violation . . . for the person and for the United States Government."[168] The statute clearly states, therefore, that the private person brings the action in part, on his or her own behalf. The government has limited time to choose to intervene in the action.[169] If the government intervenes, it is responsible for conduct of the action, but the private person remains a party to the action.[170] If the government does not intervene, the private party is responsible for the conduct of the action.[171]

According to the *Alden* majority, the founding fathers clearly contemplated that a suit on behalf of the federal government would be both "commenced *and* prosecuted" by those who can "exercise the political responsibility for each suit prosecuted."[172] All suits brought under the FCA's *qui tam* provision are commenced by citizens and, if the federal government does not intervene, they are prosecuted by citizens. Accordingly, no person entrusted with *Alden*'s "exercise of political responsibilities" is involved with the commencement or prosecution of the suits. Unless Congress has authority to delegate federal power to commence suits against states to private citizens, FCA suits would not appear to survive constitutional muster under the Eleventh Amendment.

166. U.S. CONST. amend. XI.
167. *Alden*, 119 S. Ct. at 2267 (emphasis added).
168. 31 U.S.C. § 3730(b)(1) (1994).
169. 31 U.S.C. § 3730(b)(2).
170. 31 U.S.C. § 3730(b)(4)(A), (c)(1) (1994).
171. 31 U.S.C. § 3730(b)(4)(B).
172. *Alden*, 119 S. Ct. at 2267.

As evident from this analysis, the issue may turn on whether courts find that the federal government, not the relator, is the real party in interest. While one court has held that the *qui tam* relator is the real party in interest,[173] the weight of authority is that the United States government is the real party in interest, even when the government does not intervene.

In 1999, the Fifth Circuit in *United States ex rel. Foulds v. Texas Tech University*[174] avoided the question of whether a state is a "person" by first deciding the jurisdictional issue of whether the Eleventh Amendment bars a *qui tam* action brought against a state or state agency.[175] In *Foulds*, a medical resident brought a *qui tam* action against a State university alleging that "staff physicians routinely signed patient charts and Medicare/Medicaid billing forms certifying that the services were personally performed by the staff physicians or by the staff physicians' employees under their personal direction," even though the services had actually been performed by medical residents with no supervision.[176] First, the court assumed "person" included states.[177] The court then held that the Eleventh Amendment barred the private plaintiff, who is the real party in interest, from bringing a *qui tam* suit against a state; therefore, the court lacked authority to decide whether the FCA created a cause of action against the states by including states within the meaning of "person."[178]

The D.C. Circuit court in *Long* took the opposite approach from *Foulds* because, not only did the State fail to raise Eleventh Amendment immunity as a defense, but it also specifically requested that the court decide the statutory question first.[179] The court initially decided that a state was not a "person" within the meaning of the FCA, thereby avoiding "the serious constitutional question of whether the Eleventh Amendment bars *qui tam* suits against the State in Federal court."[180] In a supplemental opinion, the concurrence argued that "the Eleventh Amendment bar on suits against the states in Federal court is not a garden variety jurisdictional issue" because states can waive immunity, giving federal courts the power to hear a case.[181]

The Second Circuit in *Stevens* held that the federal government is the real party in interest in a *qui tam* suit under the Act, even when it chooses not to intervene. The *Stevens* court noted:

173. *See infra* notes 174-78 and accompanying text.

174. 171 F.3d 279 (5th Cir. 1999).

175. *See id*. at 281.

176. *Foulds*, 171 F.3d at 282.

177. *Id*. at 288.

178. *Id*. at 294.

179. *See Long*, 173 F.3d at 892. (supplemental decision) (Silbermann, J., concurring).

180. *Id.* at 889-90.

181. *Id*. at 892. "[W]here a court lacks power only if a state claims that it does, it is arguable that [the court has] no obligation to decide the Eleventh Amendment issue first if the state does not demand that [it] do so." *Id*. at 893.

> In light of the fact that *qui tam* claims are designed to remedy only wrongs done to the United States, and in light of the substantial control that the government is entitled to exercise over such suits, we conclude that such a suit is in essence a suit by the United States and hence is not barred by the Eleventh Amendment.[182]

The *Stevens* court, however, ignored the fact the FCA expressly provides that the suit is also brought on behalf of the individual, who is therefore a party to the suit who has complete control over the conduct of the suit if the federal government chooses not to intervene.

The same conclusion was reached by the district court in *United States v. Rockwell International Corp*.[183] The *qui tam* relators in *Rockwell* brought an action against the defendants for allegedly fraudulently charging the federal government for the costs associated with unauthorized production of personal items that were not covered under a federal defense contract.[184] The defendants argued that the Eleventh Amendment barred the suit against them.[185] The court disagreed, finding that the United States' decision not to intervene "does not change the suit's character." [186] Finding the United States to be the real party in interest, the court concluded that Eleventh Amendment immunity is not an available defense. [187]

In *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*,[188] the Fourth Circuit similarly found the United States to be the real party in interest in FCA actions.[189] The *qui tam* relator in *Milam* brought suit against a State university for submitting false research data to obtain federal grant monies.[190] The university argued that it was immune from suit under Eleventh Amendment, and moved for dismissal.[191] The district court denied the motion. On appeal, the Fourth Circuit framed the primary issue as "whether the inapplicability of the Eleventh Amendment to suits brought by the United States extends to actions brought on the United States' behalf by *qui tam* relators."[192] The Fourth Circuit affirmed the district court's denial of the university's motion and ruled that the United States remains the real party in

182. *See Stevens*, 162 F.3d at 203; *see also* United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865 (8th Cir. 1998); United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); United States *ex rel.* Milam v. University of Tex., 961 F.2d 46 (4th Cir. 1992); Minotti v. Lensink, 895 F.2d 100 (2nd Cir. 1990).

183. 730 F. Supp. 1031 (D. Co. 1990).

184. *Id*. at 1032-33.

185. *Id*. at 1033.

186. *Id*. at 1035.

187. *Id*.

188. 961 F.2d 46 (4th Cir. 1992).

189. *Milam*, 961 F.2d at 48 (citing *Minotti*, 895 F.2d at 104).

190. *Id*. at 47-48.

191. *See id.*

192. *Id.* at 47.

interest, even when it chooses not to intervene.[193] Accordingly, the court found the Eleventh Amendment inapplicable to *qui tam* actions.[194]

In *United States ex rel. Hall v. Tribal Development Corp.*,[195] the Seventh Circuit added itself to the growing list of courts finding that the United States is the real party in interest in FCA *qui tam* actions. The defendant in *Hall* argued that the relator did not have standing to bring the suit because the relator had not suffered an injury-in-fact.[196] The court found "challenges to the standing of the government's representative [to be] beside the point" because a *qui tam* relator sues on behalf of the United States.[197] Thus, the court focused on the "the only [remaining] issue . . . [of] whether the United States, as the real plaintiff, has suffered a sufficient injury for purposes of [standing under] Article III."[198] The *Milam* court similarly noted that the government's injury, and not the relator's injury, confers standing; thus, it "could not lightly conclude that the party upon whose standing the justiciability of the case depends is not the real party in interest."[199]

In 1998, the Eighth Circuit in *United States ex rel. Rodgers v. Arkansas*[200] held that a *qui tam* action brought under the Act is a suit by the United States; therefore, the state may not assert Eleventh Amendment immunity.[201] In *Rodgers*, the *qui tam* relators alleged that the State and its department of education falsely stated they were in compliance with the federal civil rights laws in order to obtain federal education funding.[202] The court explained that even though the United States declined to intervene, "the structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation" supported the conclusion that the United States remains the real party in interest.[203] Moreover, the court pointed out that FCA provisions allowing *qui tam* relators to bring suit further the FCA's purpose of preventing frauds on the federal government and increase the likelihood of recovery for losses.[204]

193. *Id*. at 50.

194. *Milam*, 961 F.2d at 50.

195. 49 F.3d 1208 (7th Cir. 1994).

196. *Id*. at 1211.

197. *Id*. at 1213.

198. *Id*. at 1214.

199. *Milam*, 961 F.2d at 49.

200. United States *ex rel.* Rodgers v. Arkansas, 154 F.3d 865 (8th Cir. 1999).

201. *See id*. at 866.

202. *Id*. at 867.

203. *Id*. at 868 (quoting *Milam*, 961 F.2d 46, at 49 (4th Cir. 1992)). *See also* Searcy v. Philips Elec. N. Am. Corp., 117 F.3d 154 (5th Cir. 1997); United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208 (7th Cir. 1995); United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); Minnotti v. Lensink, 895 F.2d 100 (2d Cir. 1990); United States *ex rel.* Long v. SCS Bus. & Tech. Inst., 999 F. Supp. 78 (D.D.C. 1998).

204. *Rodgers*, 154 F.3d at 868.

Accordingly, the court held that the FCA's *qui tam* provisions "do not alter the underlying character of the action as one for the aggrieved party as defined by the statute,"[205] and that the aggrieved party is the federal government.[206] The Ninth Circuit in *United States ex rel. Hyatt v. Northrop Corp.*,[207] similarly relied upon the *Milam* decision in agreeing that "[*q*]*ui tam* relators cannot and do not sue for [False Claims Act] violations on their own behalf . . . [but r]ather sue on behalf of the government as agents of the government, which is always the real party in interest."[208]

Courts have relied on four major factors in coming to the decision that the United States is the real party in interest in FCA *qui tam* actions:

1. The federal government receives the majority of all monies recovered;

2. The FCA governs false claims submitted solely to the federal government;

3. The federal government has significant rights of control over a *qui tam* action even if it does not intervene; and

4. Private individuals can only sue in the name of the federal government.

The Federal Rules of Civil Procedure appear to support the courts' conclusion. Federal Rule of Civil Procedure 17(a) commands that "[e]very action shall be prosecuted in the name of the real party in interest,"[209] and the Act requires *qui tam* actions "be brought in the name of the [federal g]overnment."[210] For these provisions to remain consistent, the United States must be the real party in interest. But because the Federal Rules of Civil Procedure also state that the "real party in interest" is anyone authorized by substantive law to sue,[211] and the FCA authorizes the *qui tam* relator to sue, it may also be argued that Rule 17(a) supports the position that the *qui tam* relator is the real party in interest.

The district court in *United States ex rel. Moore v. University of Michigan*[212] took an interesting approach to this issue. The court held that the United States is the real party in interest in actions brought under the FCA provision authorizing *qui tam* actions in the name of the federal government,[213]

205. *Id*.
206. *Id*.
207. 91 F.3d 1211 (9th Cir. 1996).
208. *Id*. at 1218 n.8 (citing *Killingsworth*, 25 F.3d 715, 720 (9th Cir. 1994)).
209. FED. R. CIV. P. 17(a).
210. 31 U.S.C. § 3730(b) (1994).
211. FED. R. CIV. P. 17(a).
212. 860 F. Supp. 400 (E.D. Mich. 1994).
213. *See* 31 U.S.C. § 3730(b) (1994).

but that the private *qui tam* relator is the real party in interest in actions brought under the FCA's anti-retaliation provision authorizing suits involving unlawful retaliatory employee terminations.[214] Accordingly, the court ruled that the state and state agencies were entitled to assert Eleventh Amendment immunity in wrongful termination suits brought by *qui tam* relators, but were not entitled to such a defense in false claim actions brought by *qui tam* relators.[215]

As the above decisions indicate, it is apparent that the majority of courts to address the issue have held that the government is the real party in interest in a *qui tam* action. However, not every court subscribes to that view. Unfortunately, none of these decisions focus on the underlying purposes of the Eleventh Amendment and the state sovereign immunity that were so prominent in the Court's analysis in *Alden*, and will likely be of concern to the Court in *Stevens*.

Those issues were clearly a concern of the Fifth Circuit in *Foulds*.[216] The *Foulds* court found that "even though the United States may be a relevant 'party' in this suit for some purposes of the litigation, the Federal Government certainly is not the acting party-of-record in this suit."[217] The court concluded that since the federal government chose not to intervene, the relator who brought the *qui tam* action was the party who had commenced and prosecuted the action.[218] Thus, the federal government was held to be merely a passive beneficiary and, therefore, the Eleventh Amendment barred the suit.[219] Although the *Long* court avoided the Eleventh Amendment issue by holding that states are not "persons" under the FCA, in dicta it argued that *both* the United States and the private plaintiff are real parties in interest because the FCA authorizes private persons to bring suit both for the federal government and for themselves.[220] Since "the Eleventh Amendment must be satisfied for *every* claim in the suit," the court stated that it seriously doubted the Eleventh Amendment would permit the *qui tam* relator's claim against the state.[221]

Even if the United States is held to be the real party in interest in a *qui tam* action, the Eleventh Amendment issues are not fully resolved. There remains the issue of whether allowing suits by *qui tam* relators against the states involves an improper delegation of the federal government's power to sue a

214. *See* 31 U.S.C. § 3730(h) (1994).
215. *Moore*, 860 F. Supp. at 404-05.
216. *See supra* notes 176-80 and accompanying text.
217. *Foulds*, 171 F.3d at 291.
218. *Id.*
219. *Id.* at 294.
220. *See* 31 U.S.C. § 3730(b).
221. *Long*, 173 F.3d at 884-86 (emphasis added).

state.[222] Suits brought by the federal government against states are brought by those under a constitutional duty to faithfully execute the laws. A private plaintiff has no such duty and, therefore, may abuse the power to sue. The D.C. Circuit in *Long* argued that allowing the federal government to delegate its Eleventh Amendment exemption to private plaintiffs creates an "all too easy . . . option" around the constraints on Congress' power to abrogate states' immunity.[223]

Those same concerns for the improper delegation of the federal government's power to sue are also evidenced in the Fifth Circuit's separation of powers analysis in *Riley*.[224] Article II of the Constitution vests the executive power in the President.[225] That Article also requires the President to "take Care that the Laws be faithfully executed."[226] The power of the Executive has been found to be unitary, that is, not subject to distribution among the other two branches of government.[227] Article II's Appointments Clause provides the President with the authority to execute the laws by vesting the President with the exclusive power to select the primary officers of the federal government, with the Senate's consent.[228] The Court has held that the Appointments Clause covers any government agent exercising significant authority under federal law.[229] Taken together these three clauses work in unison in our constitutional structure to vest enforcement of the laws exclusively with the President and his or her appointed officers, subject to the President's control. In this context James Madison noted "I venture to assert that the Legislature has no right to diminish or modify his executive authority."[230] In *Morrison v. Olson*, the Court noted that anyone who exercises the executive authority must be subject to at least some reasonable control by the President or his or her agents.[231] These same Article II clauses also form the basis for the limited waiver of sovereign immunity that the states consented to during the constitutional convention, allowing suit by those in the federal government under a constitutional duty to execute the laws.

Morrison involved a separation of powers challenge to the independent counsel statute. The Court in that case considered whether the statute

222. *See, e.g.*, *Alden*, 119 S. Ct. at 2267 (1999). ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

223. *Long*, 173 F.3d at 883.

224. *See Riley*, 196 F.3d at 531.

225. U.S. CONST. art. II, § 1, cl. 1 (the "Vesting Clause").

226. *Id.* § 3 (the "Take Care Clause").

227. *See* Printz v. United States, 521 U.S. 898, 922 (1997) (indicating that the Framers intended for unity in the Executive Branch to "insure both vigor and accountability").

228. U.S. CONST. art. II, cl. 2.

229. *See* Edmond v. United States, 520 U.S. 651, 659 (1997).

230. 1 ANNALS OF CONG. 463 (Joseph Gales ed., 1789).

231. 487 U.S. 654, 684 (1988).

impermissibly "reduce[d] the amount of control or supervision that the Attorney General and, through him, the President exercise[d] over the investigation and prosecution of a certain class of . . . criminal activity."[232] Affirming the constitutional diminution of the President's removal authority, the Court noted that the Attorney General could remove the independent counsel for misconduct or good cause.[233] *Morrison* makes clear that the President must still retain ultimate authority over the faithful execution of the laws. The apparent and perhaps fundamental flaw in the FCA is that it entrusts the initiation and prosecution of the laws to a private party and neither the President nor his lawful delegates can remove the relator, or limit his arguments or strategy in any way.[234] This is the case whether or not the government joins in the action. Only the court is allowed to silence a relator.[235] Additionally, the relator can frustrate the Executive's efforts to settle a case by objecting to that settlement, even when such objection only serves the relator's interests.[236] In some instances, such objections can take a year to resolve.[237] *Morrison* forbids such an intrusion on the Executive's authority. These concerns are especially problematic when such interference with Executive authority breaches the promise made to the states during the constitutional convention that only those vested with the constitutional duty to execute the laws could bring an unconsented to suit against them.

The court in *Blatchford v. Native Village of Noatak*[238] doubted whether the federal government's exemption from state sovereign immunity could be delegated. The *Blatchford* court found that "[t]he consent, 'inherent in the convention,' to suit by the United States . . . is not consent to suit by anyone whom the United States might select . . . ."[239] The *Stevens* court distinguished *Blatchford* by explaining that the plaintiffs in *Blatchford* were Native American tribes which brought suit against Alaska to remedy injuries the tribes, not the federal government, sustained.[240] The *Blatchford* plaintiffs believed that their suit against the State was proper "because the United States

232. *Id*. at 695.

233. *Id*. at 692.

234. *But see* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 120 S. Ct. 693 (2000), where the majority was unconcerned by the Executive's lack of control over private plaintiffs. In his dissent Justice Scalia strongly disagreed and argued that "permitting citizens to pursue civil penalties payable to the Federal Treasury . . . turns over to private citizens the function of enforcing the law." *Id.* at 719 (Scalia, J., dissenting).

235. 31 U.S.C. § 3730 (c)(2)(C).

236. *Id*. § 3730 (c) (2) (B).

237. United State *ex rel*. Burr v. Blue Cross and Blue Shield of Fla., Inc., 882 F. Supp. 166, 169 (M.D. Fla. 1995).

238. 501 U.S. 775, 785 (1991).

239. *Id*. at 785.

240. *Stevens*, 162 F.3d at 203.

is empowered to bring suit for the benefit of the tribes."[241] The *Stevens* court further noted that the relator sues on behalf of the United States in a *qui tam* action under the FCA for injuries sustained by the United States, and not for injuries sustained by the private relator.[242] Accordingly, using the Second Circuit's analysis in *Stevens*, there is no need to delegate the federal government's exemption from state sovereign immunity because the federal government is still the real party in interest. But this position ignores the *Morrison* and *Riley* separation of powers concerns noted above.

VII. WHO CAN CLAIM ELEVENTH AMENDMENT IMMUNITY?

If the courts conclude that Congress intended states, municipalities and their agencies to be included within the meaning of "person" for purposes of the Act, a cause of action against those entities for submitting false claims will be recognized. If, however, it is adjudged that the federal government is not the real party in interest in a *qui tam* action in which it does not intervene, or that the United States government is unable to delegate its Eleventh Amendment immunity exemption to a *qui tam* relator, the courts will nevertheless be left with the question of *which* entities have the privilege of claiming Eleventh Amendment immunity. The Supreme Court has already found that a state's Eleventh Amendment immunity bars suits against states by private plaintiffs in both federal and state courts.[243] Moreover, "[s]uits against state officials in their official capacity are considered to be suits against the individual's office, and so are generally barred as suits against the State itself."[244]

The situations and circumstances in which a state agency may claim Eleventh Amendment immunity have also been fairly clearly prescribed. A state agency may claim Eleventh Amendment immunity when the suit brought against it is considered to be, in fact, a suit against the state itself. This determination is based on whether the judgment sought in the suit would actually be satisfied by the public fisc rather than agency funds:

> The general rule is that a suit is against the sovereign if the 'judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'[245]

241. *See id*.

242. *See id*. at 202.

243. *See Alden*, 119 S. Ct. at 2255-56.

244. Wallace v. Texas Tech Univ., 80 F.3d 1042, 1047 n.3 (5th Cir. 1996) (citing *Will*, 491 U.S. at 71).

245. *Pennhurst*, 465 U.S. at 102 n.11 (1984) (citing Dugan v. Rank, 372 U.S. 609, 620 (1963)). *See also* Edelman v. Jordan, 415 U.S. 651, 663 (1974) ("It is also well established that

There is, however, an exception to this general rule. When an action is brought against a state agency that is a separate entity, generating its own profits and responsible for its own debts, the action will not be considered one against the state, and the Eleventh Amendment will not bar the suit.[246]

In *Zissler*, although the issue on appeal to the Eighth Circuit was whether or not states and state agencies fell within the FCA's meaning of "person," the court also addressed whether the defendant State university was entitled to claim Eleventh Amendment immunity to suit in any situation in which the State itself could claim such immunity.[247] In holding that states and state agencies were "persons" for purposes of the Act, the court also stated: "We agree with the University that it is an instrumentality of the State and is entitled to whatever immunities or defenses the State would have if sued in its own name."[248] It is, however, important to remember that when courts find that the United States is the real party in interest, as the Eighth Circuit did in *Zissler*, the state will be unable to claim Eleventh Amendment immunity against suit and, therefore, the state agency will also be precluded from raising the defense.[249]

The question of whether a municipality or one of its agencies can claim Eleventh Amendment immunity has been answered in the negative in *Alden*. The Supreme Court has held that sovereign immunity bars suits against states but not lesser entities, because "[t]he immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[250] Since Eleventh Amendment immunity cannot be claimed by a county or municipal corporation,[251] the issue of whether an agency can claim Eleventh Amendment immunity depends upon whether the courts treat the agency "as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend."[252] In *Monell v. Department of Social Services of the City of New York*, however, the Supreme Court addressed the issue by determining that

even though a State is not a named party to the action, the suit may nonetheless be barred by the Eleventh Amendment.").

246. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 52 (1994).

247. *See Zissler*, 154 F.3d at 871.

248. *See id.* at 871 n.2.

249. *Id*. at 872. *See also Rodgers*, 154 F.3d 865 (8th Cir. 1998) (holding that a state has no Eleventh Amendment immunity against a *qui tam* relator even when the government does not intervene).

250. *Alden*, 119 S. Ct. at 2267.

251. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

252. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

"local government units . . . are not considered part of the State for Eleventh Amendment purposes."[253]

VIII. DOES A PRIVATE PLAINTIFF HAVE STANDING TO SUE WHEN THE FEDERAL GOVERNMENT DOES NOT INTERVENE?

As previously noted, shortly before oral argument, the Court in *Stevens* requested briefing on the Article III standing of a relator under the FCA. Presumably, the request for supplemental briefing on an issue not raised in the proceedings below was premised upon the Court's holding in *Calderon v. Ashmus*,[254] in which the Court stated that standing must be established before considering the merits of any Eleventh Amendment challenge.[255] In *Calderon*, the Court raised the standing issue *sua sponte*. In *Stevens*, as noted earlier, the Court can dispose of the case by deciding that states are not "persons" under the FCA without addressing the Eleventh Amendment issue. Nonetheless, by requiring briefing on the standing issue, the Court cleared the way to address standing, albeit with rather slim profferings by the parties in the dispute. Hopefully, the Court will allow relator standing to be addressed in another case wherein the issue is briefed and addressed in the lower courts and in the main briefs before the reviewing Court. This section briefly identifies the key considerations surrounding relator standing, but the issue should be addressed more authoritatively on another occasion.

Article III of the Constitution provides that federal court jurisdiction extends only to cases and controversies.[256] In *Lujan v. Defenders of Wildlife*,[257] the Court described the three elements necessary to establish Article III standing:

1. Plaintiff must have suffered and "injury in fact" which is "actual or imminent" and must "affect the plaintiff in a personal and individual way;"

2. Plaintiff's alleged injury must be directly related to the defendant's conduct; and

3. Plaintiff's alleged injury must be redressible by the requested relief.[258]

Therefore, in order for a private plaintiff to maintain an action in federal court, that plaintiff must be able to meet these three elements of standing. In a

253. Monell v. Department of Social Serv. of City of New York, 436 U.S. 658, 691 n.54 (1978).

254. 533 U.S. 740 (1998).

255. *Id.* at 745.

256. U.S. CONST. art 3, § 2.

257. 504 U.S. 555 (1992).

258. *Id.* at 560-61 (citations omitted).

qui tam action under the FCA the private plaintiff has not suffered a personal injury-in-fact but is merely suing on behalf of the federal government or the public at large for injuries suffered due to the alleged false claims made by the defendant. While it is true that "Congress can . . . enact statutes creating new substantive legal rights, the invasion of which can give rise to the kind of particularized injury necessary to create standing[,]"[259] the plaintiff must still have suffered an actual personal injury which can be redressed by the requested relief. In other words, "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing [to sue]."[260]

The lower court in *Riley* dismissed the *qui tam* relator's case, holding that the relator had not established Article III standing because she lacked an injury-in-fact.[261] On appeal, the Fifth Circuit affirmed the district court's dismissal on different grounds and stated that it was precluded from addressing the relator's Article III standing by the Fifth Circuit's decision in *Foulds*,[262] which held that an uninjured *qui tam* plaintiff *may* have standing even if the government does not intervene.[263] Therefore, the Fifth Circuit in *Riley* reluctantly concluded that its *qui tam* relator *could* have Article III standing.[264] Since the *Foulds* court's limited discussion regarding standing was placed in a footnote, and was raised *sua sponte* without briefing from the parties,[265] the concurrence in *Riley* argued that the *Foulds* court's discussion of standing was only dicta and, therefore, was not controlling.[266] However, while the majority in *Riley* characterized the conclusion in *Foulds* as "no more than a passing reference in a brief footnote,"[267] it nonetheless held that the language was not dicta and was binding because standing is a justiciability issue that must be resolved before a court can adjudicate any remaining issues in a case.[268]

The *Foulds* analysis remains questionable because the only authorities the Fifth Circuit relied upon were a pre-*Lujan* decision[269] and a Supreme Court

259. *Riley*, 196 F.3d at 539 (DeMoss, J., concurring) (citing Linda R.S. v. Richard D., 410 U.S. 614 (1973)).

260. Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997) (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)).

261. United States *ex rel.* Riley v. St. Luke's Episcopal Hosp., 982 F. Supp. 1261, 1268 (S.D. Tex. 1997).

262. *See supra* notes 174-78 and accompanying text.

263. *See Riley*, 196 F.3d at 521.

264. Since this decision created a Circuit split, the court ordered "that this cause [of action] shall be reheard by the court en banc with oral argument on a date hereafter to be fixed." *Riley*, 196 F.3d at 563.

265. *See Foulds*, 171 F.3d at 288 n.12.

266. *See Riley*, 196 F.3d at 536 (DeMoss, J., concurring).

267. *Id.* at 521.

268. *Id.* at 522.

269. *See* United States *ex rel.* Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977).

decision which adjudicated an FCA suit without specifically addressing the standing issue because there was no objection to the *qui tam* relator's standing.[270] The fact that the Court requested additional briefing on the standing issue in *Stevens* shortly after publication of the Fifth Circuit's decision in *Riley* suggests that the Supreme Court is concerned about the issue and is looking for a vehicle to address those standing concerns created by *qui tam* actions under the FCA.

IX. CONCLUSION

The courts remain split on whether states are "persons" under the FCA and whether a *qui tam* relator may maintain an action against a state, county, or governmental agency. But the trend in the Circuits has been towards allowing such suits. There have been only two truly significant decisions holding the opposite, those being the D.C. Circuit in *Long* and the Fifth Circuit in *Foulds*.[271] While only the D.C. Circuit case addressed the issue of whether "person," as used in the Act, is broad enough to include states, both courts suggest that when the federal government fails to intervene in a *qui tam* action the Eleventh Amendment bars the relator from suing a state or state agency. One or both of these issues will be resolved by the Supreme Court in *Stevens*. The Court's treatment of similar concerns during 1999 suggests that it will lean toward using the Eleventh Amendment to protect the state fisc, especially where, as here, the federal government has alternative remedies to make itself whole.[272] However, the Court may choose to limit itself to the statutory issue by deciding that states are not "persons" under the FCA.[273] Such a holding would eliminate the need to address the more difficult Eleventh Amendment concerns.

270. *See* Hughes Aircraft Co. v. United States *ex rel*. Schumer, 520 U.S. 939 (1997).

271. *Long*, 173 F.3d 870 (D.C. Cir. 1999); *Foulds*, 171 F.3d 279 (5th Cir. 1999).

272. *See, e.g.*, 42 U.S.C. § 1320a-7a(a) (1994 & Supp. III 1997) (civil monetary penalty provisions); 42 C.F.R. § 405.1885(d) (1998) (reopening of determinations or decisions procured by fraud); and 42 U.S.C. § 1395h(a) (1994) (audit process provisions).

273. Although such a holding would bar suits brought by the federal government as well as suits brought by *qui tam* relators.