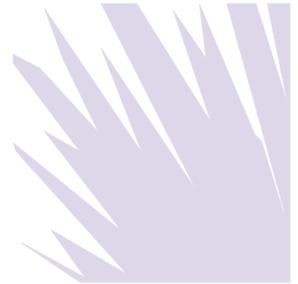


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CONTROLLING GOVERNMENT CONTRACTORS: CAN THE FALSE CLAIMS ACT BE MORE EFFECTIVE?

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I. INTRODUCTION

As the federal government seeks to reduce its deficit, there has been significant dialogue around the question of which programs to cut. The answer to this question is secondary to that of whether the government is actually securing the benefits of the bargain for existing programs. One can, for example, debate the benefits of the Department of Education's \$25 million yearly expenditure to keep public school libraries open on the weekends when the public already benefits from local libraries. Before making the decision to cut the program, however, one might first ask: are the private contractors who are tasked to keep these libraries open even showing up for work?

More than fifty percent of all federal discretionary spending is paid out to private firms. Spending on direct contracts rose from \$205.6 billion in FY 2000 to more than \$538 billion in FY 2011, while the total number of government employees has remained almost constant, increasing from 4,126,000 employees to 4,403,000 employees. Medicare and Medicaid spending has also risen dramatically over the last decade, cumulating in combined spending of over \$900 billion in FY 2011.

Managing the conduct of government contractors, or those operating with government monies, in the era of government privatization is essential to both managing the government's debt and, quite simply, good governance. Unfortunately, this has been a challenge for at least three reasons. First, the federal government lacks the ability to manage and oversee contractor conduct and enforce compliance where laws, regulations and the contracts themselves have been violated. Second, compliance enforcement is increasingly complex as contractors now perform inherently governmental functions, including establishing policy and implementation of compliance enforcement mechanisms.³ Third,

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2 Jennifer Williams is an Attorney with the Grant & Eisenhofer False Claims Litigation group and co-authored "Collecting Evidence in Financial Fraud Cases: Insider Trading," used during a training program for prosecutors in Shanghai China.

3 See, e.g. Guttman, Daniel, *The Shadow Government*, (Pantheon 1976); Guttman, R., *Fraudsters Lobby to Muzzle Whistleblowers*, Market Watch (Feb. 8, 2011), http://articles.marketwatch.com/2011-02-08/commentary/30720145_1_whistleblowers-corporate-misdeeds-tyco-international.

the volume of federal contracts and the myriad of terms governing compliance renders it impossible for government compliance personnel to catch every dereliction and bring the wrongdoer to terms.

With their *qui tam* provisions, False Claims Acts at both the Federal and State levels offer opportunities for private-public civil law enforcement partnerships for the purposes of enforcing compliance where public-private partnerships have broken down through malfeasance or outright fraud. Whistleblower lawsuits under the False Claims Act alert the government to wrongful or fraudulent schemes while providing additional resources to enforce compliance.

Whistleblowers seeking relief under the False Claims Act must retain counsel because pro se actions are not proper where the government is the party in interest; that is to say that the government's interests must be represented by counsel. At the initial intake process, private counsel serve the important role of weeding out cases that are non-meritorious. Counsel bear the initial burden of conducting an investigation to ascertain that the complaint is indeed meritorious.⁴

In 2012, the Department of Justice (DOJ) reported the resolution of \$4.9 billion in cases involving civil fraud or malfeasance against the government⁵, a slight increase from the \$3.3 billion recovered the previous year. Yet, the following is noteworthy with regard to a deeper analysis of this aggregate recovery:

1. Of the \$4.9 billion recovered in 2012, \$2 billion came from cases involving healthcare fraud. This lofty recovery was approximately 2.5% of the estimated \$80 billion annual cost of healthcare fraud to the federal government.⁶
2. Some of the wrongdoers – such as Abbott Laboratories – are repeat offenders who were not deterred by hefty sanctions and administrative remedies (i.e., corporate integrity agreements) imposed through earlier enforcement actions.⁷
3. Of the top 30 recoveries in FY 2012, 20 came from the healthcare sector, 2 came from the defense sector, and none were principal contractors for the Departments of Energy, Environment or Education.

All of this raises questions about whether this potentially powerful statute is being used broadly (or even efficiently) and whether regulators need to rethink questions about penalties, targets, the role of Agency Inspector Generals, the effect of extending the seal, and the role played by the private plaintiffs' bar.

4 Rule 11 requires attorneys to certify that (1) the case is not being presented to harass, (2) the legal contentions are warranted by existing law, and (3) the factual contentions have evidentiary support. F.R.C.P. Rule 11(b). Sanctions may be imposed on attorneys that do not follow these requirements. F.R.C.P. Rule 11(c).

5 The False Claims Act is not technically a fraud statute as "reliance" is not an element of the claim but the statute is also broad enough to capture fraudulent conduct.

6 The Federal Bureau of Investigation, "Rooting out health care fraud is central to the well-being of both our citizens and the overall economy," Health Care Fraud, http://www.fbi.gov/about-us/investigate/white_collar/health-care-fraud (last visited Apr. 18, 2013).

7 2003 pleading and resolution of civil claims for \$600 million overall (<http://www.nytimes.com/2003/06/27/business/abbott-to-pay-622-million-to-end-inquiry-into-marketing.html>); 2010 settlement of false claims act allegations for \$421 million (<http://www.justice.gov/opa/pr/2010/December/10-civ-1398.html>); 2012 settlement of False Claims Act and criminal allegations for \$1.5 billion (<http://www.justice.gov/opa/pr/2012/May/12-civ-585.html>).

II. IS IT TIME TO CHANGE COURSE?

A. Are Current Penalties Effective Deterrents?

Do existing False Claims Act enforcement paradigms merely establish a fee for the license to break the law? Disparity between fraud recovery and revenue streams, market resilience – and even growth – in response to settlement announcements, and unenforced boilerplate corporate integrity agreements prompt questions about the effectiveness of the False Claims Act as a deterrent.

The recovery-to-revenue ratio in pharmaceutical cases alone is revealing. In 2009, Pfizer paid \$2.3 billion to resolve civil and criminal allegations that it had unlawfully marketed 13 drugs.⁸ The revenue stream for those drugs during the damage period, however, exceeded \$171 billion. In 2010, AstraZeneca settled claims with the government involving the off-label marketing of the drug Seroquel for \$550 million. That drug, however, brought in revenue of \$4.5 billion annually. Interestingly enough, after the settlement was announced, the market capitalization for AstraZeneca increased 1.35% as seen in the chart opposite.

Company	Settlement	Date of Settlement	Market Cap Change After Settlement Announced	Market Cap Prior to Settlement	Percentage Change
GlaxoSmithKline	\$3.0 billion	2-Jul-12	\$1,940,000,000	\$115,739,632,800	1.68%
Pfizer	\$2.3 billion	2-Sep-09	(\$72,000,000)	\$109,876,054,700	-0.07%
Abbott Laboratories	\$1.5 billion	7-May-12	\$63,000,000	\$98,288,023,400	0.06%
Eli Lilly	\$1.4 billion	15-Jan-09	\$91,000,000	\$42,692,597,700	0.21%
TAP Pharmaceutical Products	\$875 million	3-Oct-01	Not a public company		
Amgen	\$762 million	19-Dec-12	(\$598,000,000)	\$67,903,265,600	-0.88%
GlaxoSmithKline	\$750 million	26-Oct-10	\$343,000,000	\$104,315,500,000	0.33%
Merck	\$650 million	7-Feb-08	unchanged	\$99,469,132,800	unchanged
Purdue Pharma	\$601 million	10-May-07	Not a public company		
Allergan	\$600 million	1-Sep-10	\$554,000,000	\$19,459,351,600	2.85%
AstraZeneca	\$520 million	27-Apr-10	\$850,000,000	\$63,076,109,400	1.35%
Bristol-Myers Squibb	\$515 million	28-Sep-07	(\$312,000,000)	\$57,003,332,000	-0.55%
Schering-Plough	\$500 million	17-May-02	\$2,250,000,000	\$38,294,964,800	5.88%
Schering-Plough	\$435 million	29-Aug-06	\$918,000,000	\$31,018,914,100	2.96%
Pfizer	\$430 million	13-May-04	(\$274,000,000)	\$270,121,031,300	-0.10%
Cephalon	\$425 million	30-Sep-08	(\$84,000,000)	\$5,267,870,100	-1.59%
Novartis	\$423 million	30-Sep-10	(\$839,000,000)	\$152,111,718,800	-0.55%
AstraZeneca	\$355 million	20-Jun-03	(\$1,090,000,000)	\$73,923,460,900	-1.47%
Schering-Plough	\$345 million	30-Jul-04	(\$115,000,000)	\$28,642,316,400	-0.40%

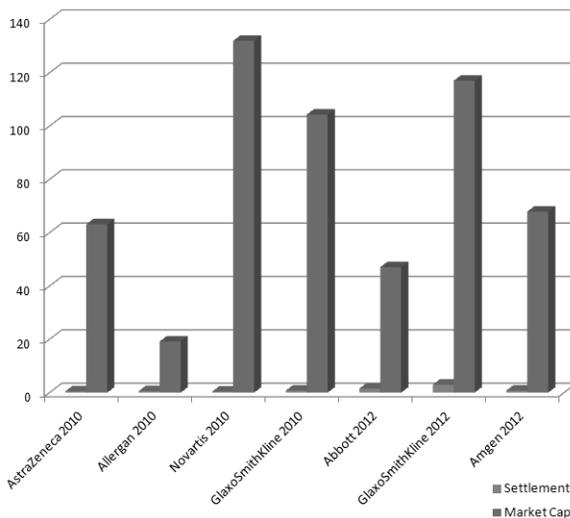
A recent article in *Health Affairs* by researchers from Harvard Medical School and Brigham and Women's Hospital in Boston concluded that the large damages paid as part of False Claims Act settlements do not act as deterrents. The article examined prescribing data and spending for the Neurontin epilepsy medication and found that "[a]lthough False

⁸ The criminal allegations pertained to one drug.

Claims Act prosecutions of off-label promotion of pharmaceuticals have recovered some improper payments for the government, [the Neurontin] case suggests that such legal approaches may have little or no impact on commercial behavior by the manufacturer under investigation.”⁹

An analysis of nineteen of the largest settlements over the past decades, as seen in the chart above, indicates that in eight cases the market capitalization of the defendant company increased, in eight cases the market capitalization of the company dropped, and in one case the market capitalization of the company remained the same with the announcement of the settlement of a False Claims Act case. The largest percentage increase was 5.88%, while the biggest drop was 1.59%.¹⁰ Undoubtedly, earlier revelations in SEC filings had the market at least partially accounting for the prospect of litigation or settlement. While few concrete conclusions can be drawn, it is easy to surmise that the market does not view these cases as having a long term impact.

When the DOJ announced its \$1.6 billion settlement with Abbott Laboratories on May 7, 2012, Abbott’s share price jumped 61 cents for the day.¹¹ When the Department announced its \$3 billion settlement with GlaxoSmithKline on July 2, 2012, the company’s share price increased 74 cents.¹² Even when False Claims Act settlements seem to cause a drop in share price, that drop is usually less than 50 cents and is recovered, with gains, within two days.¹³ Another way to look at these settlements when answering the question of the materiality to the Defendant is to compare the settlement size to market capitalization, as demonstrated in the chart on page 6.



9 Aaron S. Kesselheim, Devan Darby, David Studdert, Robert Glynn, Rasia Levin and Jerry Avorn, *False Claims Act Prosecution Did Not Deter Off-Label Drug Use in the Case of Neurontin*, 30 Health Affairs 2318 (2011).

10 The largest percentage increase was seen after the announcement of the settlement of the whistleblower case about off-label marketing of Claritin. The biggest drop was seen after the announcement of the settlement of the whistleblower case against Cephalon.

11 ABT share price opened on May 7, 2012 at \$41.90 per share and closed at \$62.51.

12 GSK share price opened on July 2, 2012 at \$45.62 per share and closed at \$46.36.

13 Merck share price dropped 19 cents on April 19, 2012, the day of the DOJ announcement of the False Claims Act settlement; however, by the close of April 20, 2012, the share price had recovered and even gained 18 cents. When the DOJ announced the AstraZeneca False Claims Act settlement on April 27, 2010, AstraZeneca’s share price dropped 34 cents, but recovered and even gained 42 cents by April 29th.

If it is correct that the monetary penalties are small in comparison to the market capitalization, then the corporate integrity agreements arguably take on greater significance as a deterrent. Corporate Integrity Agreements, however, at least in the healthcare sector that are drafted by the agency, are frequently boilerplate and appear to be written without accounting for the evidence and schemes uncovered during the investigation. In 2009, Pfizer settled claims that it had paid kickbacks to induce sales and misbranded its drugs. The alleged kickbacks were paid to doctors. While the corporate integrity agreement mandated the disclosure of Pfizer's payments to doctors, the required disclosure – which was to be made one year after settlement – only covered payments made after the date of settlement. Patients were left not knowing whether Pfizer had paid their own doctor during the damage period.

The existence of repeat offenders is troubling as these are entities that have – in some cases – violated existing corporate integrity agreements. These circumstances might counsel for the use of independent monitors that have been the norm with the resolution of large Title VII cases, including those brought against Texaco and Coca Cola. *Abdallah v. Coca-Cola Co.*, 133 F. Supp. 2d 1364 (N.D. Ga. 2001); *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997). Yet, with limited exception, independent monitors have not been utilized to monitor compliance with resolutions of False Claims Act cases. *U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County, N.Y.*, No. 06-Civ-2860, 2012 WL 13777 (S.D.N.Y. Jan. 4, 2012) (discussing the consent decree establishing a monitor to ensure that the county meets its obligations as part of the resolution of a False Claims Act case).

B. Who should be Targeted?

When President Abraham Lincoln signed the False Claims Act into law in 1863, the immediate target of enforcement was undoubtedly on wrongdoing by civil war defense contractors. In 2012, a majority of the top thirty settlements were related to healthcare fraud and did not involve direct government procurements. What can be done to expand the use of the statute to other sectors and are there means to expand the targets to better utilize the statute as a deterrent? This raises three subordinate questions: (1) which captains of industry should be held accountable? (2) is agency capture by direct procurement contractors impacting enforcement? and (3) are there circumstances where delegations of government oversight to the private sector actually deterred or has the potential to deter compliance enforcement?

1. Individual Liability

While arguments could be made on both sides about whether the dollar value of each of the top 20 settlements in 2012 was fair and reasonable, even if the recoveries were doubled, the settlement values would remain small in comparison to the market capitalization of the wrongdoers. This is not to say that efforts should *not* be made to maximize corporate recoveries. Large recoveries send a message to the public and when the recoveries are significant enough or involve criminal penalties, shareholders are incentivized to take action. As Professors Greenfield and Gertner explained in their Amicus Curie Brief in *Lampers v. Hershey Company*, “Shareholders have an interest in monitoring whether the corporation is acting unlawfully.” Greenfield and Gertner Amicus Brief, *Lampers v. Hershey Company*, C.A. No. 7996-ML (Del. Ch. filed April 12, 2013).

While the market may take action, as in the Pfizer case where a derivative action followed the resolution of the False Claims Act case,¹⁴ an initial step may be to focus attention on the wrongdoers within the corporation. No individual directors or officers in any of the top nineteen cases listed in the chart on page 4 were held accountable under the False Claims Act, or any other statute, for the fraudulent or wrongful conduct of the corporation. It is axiomatic that corporations are ships that are guided to wrongful paths by their captains who are temporary caretakers incentivized to maximize their own immediate gain. Enron, WorldCom and Tyco exemplify pervasive fraud schemes that would not have occurred but for the actions – and greed – of corporate insiders.¹⁵ While pervasive wrongful schemes – as in the case of off-label marketing of drugs – bring massive revenue to wrongdoers, insiders who are rewarded with bonuses from tainted profits are seldom if ever pursued. This is curious in light of the logic articulated in the “Thompson Memo.”

In that memo, the then Deputy Attorney General emphasized, “Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.” Larry D. Thompson, Memorandum to the Heads of Department Components & U.S. Attorneys, (Jan. 20, 2003), http://www.justice.gov/dag/cftf/corporate_guidelines.htm. The memo explains that because corporations can act only through individuals, individual liability may “provide the strongest deterrent against future corporate wrongdoing.” *Id.*

While evidence is of course necessary to pursue wrongdoers, one question exists as to whether the absence of oversight, as perhaps required by corporate law, satisfies the “reckless” standard of the False Claims Act. The Delaware Chancery Court highlighted this question in *In re Caremark Int’l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). There, Chancellor Allen required corporations to establish reporting and information systems such that the directors are adequately informed. *Caremark*, 698 A.2d at 970. Directors may be held personally liable for losses caused by non-compliance if they fail to assure that this reporting system exists and is adequate. *Id.* The House Judiciary Committee stated, when issuing its report on the 1986 amendments to the False Claims Act, that the inclusion of the term “reckless disregard” in defining knowledge was intended to mean that people who play “ostrich” would be liable under the False Claims Act. *See* H.R. Rep. No 660, 99th Cong., 2d Sess. 2 (1986). Thus, if directors are required to be aware of what is going on, but ignore the “red flags” that the information being provided is inaccurate, then they are possibly acting recklessly under the False Claims Act, and should be held liable.

2. Agency Cooperation

The DOJ must have agency cooperation to pursue a whistleblower case. Absent agency cooperation, the DOJ is without a client. Outside the healthcare arena, and occasional cooperation by the Department of Health and Human Services and the Food and Drug Administration (FDA), there has been a dearth of successful large dollar enforcements. Of the DOJ’s reports of the thirty largest False Claims Act settlements for fiscal year 2012, twenty involved the healthcare industry, four involved banks, and two involved the United States military. There were no major settlements involving Department of Education contractors, Environmental Protection Agency contractors, Department of Homeland Security contractors, or Department of Energy contractors. The dearth of settlements involving the military sector is particularly stunning considering the magnitude of private sector involvement.

¹⁴ *In re Pfizer Shareholder Derivative Litig.*, 722 F. Supp. 2d 453 (S.D.N.Y. 2010).

¹⁵ *See, e.g.*, Kurt Eichenwald, *Conspiracy of Fools: A True Story* (Broadway Books, 2005).

What accounts for this? One possible explanation is that some agencies are very protective of their contractors; hence, it is extremely difficult for the DOJ to get agency cooperation when confronted with claims against contractors. Do agencies that depend on contractors overlook small derelictions for fear of disrupting relations? Does enough money, if any, from the recovery flow back to the agency to make the risk of disruption worthwhile?

The protection that some agencies afford their contractors can sometimes be seen in the actual agreements. Some Department of Energy (DOE) contracts actually provide indemnification for contractors who prevail in defending claims brought by the government. These contracts, which eliminate the “American Rule,” add a layer of complexity to the government’s decision to intervene in litigation. The question is not simply whether the government will prevail but what will the costs be to the government if it partially prevails or fails to prevail in entirety? Even where the government does intervene, these clauses alter the “judicial laws of nature” which would implicate a process through motions and discovery that would otherwise prompt settlement in the ordinary course of events. Where the Defendant has something to gain by staying the course of litigation, its settlement analysis calculates both the potential for gain and the potential for loss.

3. Governmental Functions

Does the delegation of inherently governmental functions impact compliance enforcement? In 2011, the Centers for Medicare-Medicaid Services (CMS) hired Northrop Grumman to do a predictive model for healthcare fraud. Perhaps the logic of the retention was that “it takes a thief to catch a thief” as Northrop, itself, had been a violator of the False Claims Act.¹⁶

The Northrop example is an interesting anecdote which perhaps punctuates a more pervasive concern. Two examples:

1. The Department of Education delegates authority to private entities which certify educational institutions so that students may pay for their tuition with government monies.
2. Even though the FDA establishes the indications for specific drugs, the CMS approves of private entities that publish “compendia” that purportedly document uses for the drug outside the FDA indication, which then are used to justify the payment of Medicare funds. Ironically, CMS also delegates some authority to the insurance industry to interpret the compendia.

When oversight is delegated by the government to the private sector, or when the private sector can re-write government regulations, as in the constructive expansion of FDA indications through the back-door channel of the compendia, contractor oversight and compliance enforcement is complicated. Moreover, these types of situations promote conflicts of interest or potential conflicts of interest that cannot be cured. For-profit colleges and universities now have a seat on the board of the private regulatory bodies that provide licensing and are thus the gatekeeper for government dollars. Compendia publishers, which also may sell their services to the pharmaceutical industry, have the ability to expand the orbit for which their customers’ drugs will receive government reimbursement.

¹⁶ Guttman, R., *Fraudsters Lobby to Muzzle Whistleblowers*, Market Watch (Feb. 8, 2011), http://articles.marketwatch.com/2011-02-08/commentary/30720145_1_whistleblowers-corporate-misdeeds-tyco-international.

C. Is the Process as Efficient and Transparent as Possible?

The False Claims Act litigation process to some degree re-writes the Federal Rules of Civil Procedure. Instead of serving the complaint on a Defendant within 120 days of filing, F.R.C.P. Rule 4, the case is placed under seal, the Defendant is not served, and the government conducts an investigation.

The process requires the relator to file under seal, serve the government with the complaint, and provide the government with information supporting the allegations. While the statute provides for a 60-day seal, the seal is often extended for months and sometimes years depending on the complexity of the case. “The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal.” 31 U.S.C. § 3730(b)(3).

Before the case is fully unsealed, the government and the relator may ask the court for a partial unsealing for the purposes of showing the complaint to the Defendant or for discussion of the allegations with the Defendant. This occurs before the Defendant has formally been served and before the complaint is aired to the public. In the False Claims Act case against AstraZeneca relating to the marketing of Seroquel, the Government’s press release announcing settlement apparently alluded to a partial unsealing: “In March 2006, AstraZeneca brought certain conduct to the attention of the government and then cooperated in the investigation of the allegations being settled today.”¹⁷

Ultimately, the government must decide whether it wants to intervene in the relator’s case. If it does, the False Claims Act provides that the government “shall have the primary responsibility for prosecuting the action,” but does not deny the right of the relator to continue as a party to the action. If the government decides not to intervene in the case, the relator has the right to conduct the action, but must serve the government with copies of all pleadings filed in the case. The government may also choose to dismiss the action, settle the action, or pursue any alternative remedy, notwithstanding the objections of the relator. Additionally, even before the government decides whether it wants to intervene in the relator’s suit, it can issue Civil Investigative Demands in accordance with 31 U.S.C. § 3733.

Each of these steps deserves a closer look, but two issues are examined in depth below: (1) the ramifications of allowing a case to remain under seal for an extended period of time and (2) the role of private False Claims Act lawyers both during the government investigation stage and once the government intervenes.

1. The Seal

Most False Claims Act cases remain under seal up until the time of settlement or dismissal. The documents and statements discovered through the use of Civil Investigative Demands, which can produce hundreds and thousands of documents, never see the light of day. Cases are settled with agreements that summarily memorize the basic allegations and with corporate integrity agreements that lack detailed transparency of the underlying conduct. In the healthcare arena, these settlements leave doctors, patients, and pharmacists with little or no guidance on how drugs, allegedly misbranded for years, should be used or have been inappropriately used. In other areas, contracting officers are left without

¹⁷ Department of Justice, Office of Public Affairs, *Pharmaceutical Giant AstraZeneca to Pay \$250 Million for Off-label Drug Marketing*, Justice News (Apr. 27, 2010), <http://www.justice.gov/opa/pr/2010/April/10-civ-487.html>.

guidance on schemes that repeat and, thus, there is no basis for root cause analysis to develop contracting paradigms to control the private sector. Does keeping cases under seal for extended periods conflict with the public interest? What about cases in which unsealing the case could alert the public to a health hazard?

The mandatory seal provision is not original to the False Claims Act. It was added in 1986 with the amendments that expanded the scope of the False Claims Act, increased the penalties, lowered the requisite standard of knowledge and intent, and strengthened the *qui tam* provisions. Congress gave four reasons for its addition of the seal provisions: (1) to permit the United States to determine whether it already was investigating the fraud allegations; (2) to permit the United States to investigate the allegations to decide whether to intervene; (3) “to prevent an alleged fraudster from being tipped off about an investigation”; and, (4) to “protect the reputation of the defendant in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene.” *ACLU v. Holder*, 673 F.3d 245, 250 (4th Cir. 2011) (citing S. Rep. No. 99-345, at 24-25 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5289-90).

In *ACLU v. Holder*, the Fourth Circuit held that the seal provisions were narrowly tailored to a compelling government interest for three reasons: (1) by adopting a detailed process for initiating and pursuing a *qui tam* complaint under the False Claims Act, Congress accounted for the complex nature of modern fraud investigations, the government’s limited resources, and the unique nature of *qui tam* action under the False Claims Act; (2) the “good cause” requirement to extend the seal does not require heightened First Amendment scrutiny; and (3) the seal provisions “limit the relator only from publicly discussing the filing of the *qui tam* complaint.” *Id.* at 254. The majority opinion stated, “Nothing in the [False Claims Act] prevents the *qui tam* relator from disclosing the existence of the fraud.” *Id.*

But the *ACLU* case was a challenge to the constitutionality of the statute’s seal provisions and not its application as applied to particular circumstances. It did not address the question of partial unsealing or seals extending for years. It did make clear that the seal is limited as it applies only to the existence of the case and does not preclude public dialogue about the underlying facts. There may be an opportunity for Judges to take a careful look at the seal, particularly in cases that raise collateral issues of health and safety. Where a complaint alleges misbranding by a pharmaceutical company, perhaps there is a need to explore whether relevant information needs to be made public? Or perhaps the court should make clear in its seal order that no party is precluded from public discussion of facts which would implicate health and safety concerns?

This leaves the question of what information should be made public at the end of the case where the matter is settled under seal and there is no public proceeding. Should there be a summary of the evidence or some public report that provides information at least in cases where the complaint and investigation raised matters involving safety and health? As a matter of law, False Claims Act cases must be approved by the Court. 31 U.S.C. § 3730(c)(2) (the court must allow the relator a hearing on a motion to dismiss by the government and must determine that a proposed settlement is fair, adequate, and reasonable under all circumstances). Is there an opportunity for the Court to raise questions and ensure that cases are resolved with sufficient public record?

2. Balancing Counsel

While the number of filed False Claims Act cases has expanded, the question is whether these claims are meritorious. The optimal scenario is one where private sector counsel weed out non-meritorious claims and allocate the time and effort to put cases together, applying fact to law and utilizing outside experts where necessary, before presenting matters to the government in the form of a sealed complaint. While there appears to be some perception among the private bar that pursuit of a False Claims Act case is like a ride on a Greyhound Bus – leave the driving to the DOJ – the reality is that efficiencies under the statute cannot be achieved if the private bar does not diligently prepare cases and pursue them as if they were required to litigate the matter absent government support.

Part of the disconnect may be that the private attorneys and government prosecutors are sometimes guided by different standards in their prosecutorial decisions. The standard by which the government makes a decision to prosecute – whether civil or criminal – in most cases reflects an intricate investigation where a determination is made that the facts as applied to the law mandate a finding of culpability. The fact gathering process is highly front loaded. With the notice pleading requirements as articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), it is perhaps a fair observation that private lawyers have not historically front loaded their investigation of cases. Of course this has changed with the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which will create a dynamic where fact investigation must occur at the pre-filing stage; otherwise the complaint will not be sustained.

Whether *Twombly* and *Iqbal* will place private counsel and government lawyers more in sync remains to be seen. Perhaps the DOJ should consider very targeted outreach to potential whistleblower counsel outlining steps that can be taken to create efficiencies? Would it be worthwhile for DOJ to promulgate a guidance document for those representing whistleblowers? Clearly the relationship needs refinement.

III. CONCLUSION

A number of questions have been raised in this paper with only some hints for solution. We have, to some degree, thrown a rock at a hornets' nest with the hope that we will see what the hornets look like. Our goal is to generate dialogue and receive input from those within the government and those who adjudicate these matters. Undoubtedly, much of what we have discussed here may look quite different from other perspectives.