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NOTE: QUI TAM PROVISIONS AND THE PUBLIC INTEREST: AN EMPIRICAL ANALYSIS

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SUMMARY:  
... Do qui tam provisions, which allow private citizens to bring civil actions in the name of the government, really serve the public interest? Most scholarship on qui tam provisions ignores this question and simply addresses the constitutionality of the qui tam provision of the Federal False Claims Act (FCA or Act). ... Intervention Data Indicate that Qui Tam Provisions Lead to a Significant Number of Frivolous Suits. - Presumably, if the federal qui tam provision is in the public interest then suits brought under it will have merit, and where suits have merit the Attorney General will intervene. ... Overall, Illinois illustrates how a qui tam provision can benefit a state government trying to combat fraud. ... Second, these data indicate that despite the presence of frivolous claims, Tennessee's Medicaid qui tam provision has uncovered significant amounts of fraud that would have gone undiscovered otherwise. ... If a relator knows that after investing substantial time and money in a qui tam action the Attorney General has the ability to require him to change his strategy without actually intervening, and thus assisting in the suit, he is unlikely to invest those resources; however, if a suit has merit, this situation is not likely to occur in the first place because the Attorney General will intervene at the outset. ... 

HIGHLIGHT: Do qui tam provisions, which allow private citizens to bring civil actions in the name of the government, really serve the public interest? Most scholarship on qui tam provisions ignores this question and simply addresses the constitutionality of the qui tam provision of the Federal False Claims Act (FCA or Act). The few studies that have directly addressed this issue have failed to reach a consensus. The drastic increase in the utilization of the qui tam provision of the FCA since Congress amended it in 1986 - creating stronger incentives for citizens to bring such actions - is reason enough to make resolution of this question important. However, the recent proliferation of numerous state statutes modeled after the Federal Act, along with the passage of sections 6031 and 6032 of the Deficit Reduction Act of 2005, which promotes greater use of the federal qui tam provision and encourages the adoption of state qui tam provisions, has made resolution of this issue imperative.

Unlike previous articles on this subject, which have almost completely limited their analysis of this question to a theoretical discussion of the value of the qui tam provision of the Federal FCA, this Note uses an empirical approach to study both the Federal Act and similar state acts. Based on this analysis, this Note argues that while qui tam provisions lead to frivolous suits, they still serve the public interest through both enhanced detection and deterrence, although the degree to which they serve this interest is not nearly as great as proponents argue. Further, it contends that based on the experiences of both federal and state qui tam provisions, these provisions should be amended to minimize the number of frivolous suits and capitalize on the most valuable aspects of qui tam provisions. Specifically, it argues that on the federal level the Attorney General should retain greater control over qui tam actions even when he does not intervene, and their use should be limited to medical assistance claims; and on a state level that greater factfinding and systematic data collection need to be undertaken, both before and after enacting a qui tam provision, so that state qui
tam provisions can be tailored to the specific needs of each individual state.

Introduction

Do qui tam provisions, which allow private citizens to bring civil actions in the name of the government, really serve the public interest? Or, should decisions to bring such claims be left to the sole discretion of the Attorney General? There is a wealth of scholarship addressing the constitutionality and general use of the qui tam provision of the Federal False Claims Act (FCA or Act). However, only a limited number of studies have considered whether these provisions are desirable in the first place. Among the few articles that have addressed this issue, no consensus has been reached. Some assert that qui tam provisions lead to frivolous suits, while others claim that they are necessary to protect the government against fraud. The drastic increase in the utilization of the qui tam provision of the FCA since Congress amended it in 1986 - creating stronger incentives for citizens to bring such actions - is reason enough to make resolution of this question important. However, the recent proliferation of numerous state statutes modeled after the Federal Act, along with the passage of sections 6031 and 6032 of the Deficit Reduction Act of 2005, which promotes greater use of the federal qui tam provision and encourages the adoption of state qui tam provisions, has made resolution of this issue imperative. Given the increase in use of the federal qui tam provision, the federal government should ensure that its use is, in fact, beneficial to the public interest. State governments also need to ensure this, and additionally need to ascertain whether qui tam provisions have the same effect at the state level as they do on a national level so that they can determine whether they should follow a different path than the federal government.

Unlike previous articles on this subject, which have almost completely limited their analysis of this question to a theoretical discussion of the value of the qui tam provision of the Federal FCA, this Note uses an empirical approach to study both the Federal Act and similar state acts. Part I provides an overview of the Federal FCA, the expansion of similar provisions into the states, and a review of the debate over the value of qui tam provisions. Part II attempts to resolve this debate by exploring empirical evidence on both the Federal FCA and similar state statutes. First, it examines statistical data on the use of the Federal FCA qui tam provision, exploring the added detection and deterrence value of qui tam suits rather than suits initiated only by the Attorney General. Additionally, this section considers whether these findings change when qui tam actions are evaluated according to their application to contractor fraud versus medical assistance fraud. While a general qui tam provision may not serve the public interest, one limited in its application might. After completing this analysis for the federal qui tam provision, Part II undertakes a similar analysis of state qui tam provisions. Where available, statistical data are examined; otherwise, results of these statutes are based on specific cases. Finally, Part III makes recommendations on the optimal usage of qui tam provisions at both a federal and state level.

Based on this analysis, this Note argues that while qui tam provisions lead to frivolous suits, they still serve the public interest through both enhanced detection and deterrence, although the degree to which they serve this interest is not nearly as great as proponents argue. Further, it argues that based on the experiences of both federal and state qui tam provisions, these provisions should be amended to minimize the number of frivolous suits and capitalize on the most valuable aspects of qui tam provisions. Specifically, it argues that on the federal level the Attorney General should retain greater control over qui tam actions even when he does not intervene, and their use should be limited to medical assistance claims; on a state level greater factfinding and systematic data collection need to be undertaken, both before and after enacting a qui tam provision, so that state qui tam provisions can be tailored to the specific needs of each individual state.

I. Overview of the FCA and Similar State Provisions

Qui tam is a shorthand version of the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which translates to "who as well for the king as for himself sues in this matter." Qui tam provisions allow a private
citizen to bring a civil action in the name of the government. n10 These provisions have existed as far back as the thirteenth century in England, where they were used by private citizens to gain access [*952] to the royal courts. n11 In

the United States, qui tam actions date back to 1776, but most of the statutes passed at that time are no longer in existence today. n12 Of the few qui tam provisions that remain, n13 the FCA is the only one to generate a large number of cases. n14

Before considering whether these cases serve the public interest in Part II, this Part offers an overview of the Federal FCA and similar state provisions. Specifically, in Parts I.A and I.B, respectively, it describes the current form of the qui tam provision of the Federal FCA and the drastic increase in the use of this provision since 1986. Part I.C then documents the growth of state qui tam provisions. Finally, Part I.D outlines the academic debate surrounding the desirability of qui tam provisions.

A. The FCA Today

In its current form, the FCA allows either the Attorney General or a private party in the name of the government (often referred to as a "relator") n15 to bring an action against anyone who brings a false claim for payment to the government. n16 If a relator brings the claim, it is served on the government, not the defendant. n17 The complaint remains under seal for sixty days, during which time the Attorney General must investigate the claim and decide whether or not to intervene and proceed. n18 If the government elects to intervene, it assumes primary responsibility for prosecuting [*953] the action; however, the private party retains a right to continue as a party n19 and to receive up to 25% of the damages, plus reasonable attorneys' fees. n20 If, on the other hand, the government chooses not to intervene the relator may continue with the suit n21 and may receive up to 30% of the damages, plus reasonable attorneys' fees. n22 However, if the government elects not to intervene it retains the right to do so at a later time upon showing "good cause." n23 Additionally, the government may dismiss the case entirely, despite an objection from the relator, if the relator is given a chance to be heard before a court. n24

B. Since 1986, Use of the FCA Has Drastically Increased and Can Be Expected to Continue Doing So

The FCA, including a qui tam provision, was originally passed in 1863, during the Civil War, in response to widespread instances of military procurement fraud. n25 Even though the Act was passed to combat this specific type of fraud, it applied to any person or entity that submitted a false claim for payment involving the use of federal revenue. n26 Among other penalties, the Act provided for a forfeiture of $ 2,000. n27 Relators who pursued this remedy through a qui tam action were entitled to half the total recovery if they succeeded. n28 At that time the provision was rarely used. n29

[*954] Although the qui tam provision of the FCA as originally enacted was rarely used, in 1943 Congress severely restricted the provision, ensuring its underutilization. n30 The amendment provided that if the government had prior knowledge of the allegations, the relator did not have standing even if the relator had independent and direct knowledge of the allegations. n31 Additionally, Congress reduced the award to the relator from 50% to not more than 10% if the government intervened and not more than 25% if it did not. n32

It was not until 1986, when Congress again amended the FCA, that citizens began to actively use the qui tam provision of the FCA. n33 This change was caused by three significant incentives the amendment created for relators to bring qui tam actions. First, it increased a relator's ability to recover under the FCA. The amendment granted that prior government knowledge of the allegations does not automatically prevent a relator from filing a qui tam action. n34 More importantly, the 1986 amendment provided that even if the government joins the lawsuit and has "primary responsibility for prosecuting the action," the relator "shall have the right to continue as a party to the action." n35 Second, it increased a relator's recovery for a successful suit to a maximum of 30% if the government does not intervene, and to a maximum of 25% if it does, and increased the overall damages and penalties that can be imposed on a defendant from double to treble damages. n36 Finally, the 1986 amendment protected a relator from retaliatory actions by employers, making it safer for an individual to bring qui tam actions by adding whistleblower protection language to the statute. n37
The combination of these three new incentives directly led to the drastic increase in qui tam actions since that time. In 1987, only 32 qui tam suits were filed and they did not result in any recoveries. By 1997, the number of such suits filed reached 533, with $629.9 million recovered for the government. Although 1997 represented the peak of the number of qui tam actions filed, the amount of recovery to the government has continued to grow, reaching $1.5 billion in 2003. According to the Department of Justice (DOJ), by September 30, 2004, 4,704 qui tam lawsuits had been filed since the 1986 amendment, and $8.4 billion had been recovered for the government as a result.

These numbers are likely to continue to rise as a result of new legislation recently passed by Congress. In early 2006, Congress passed the Deficit Reduction Act of 2005. Section 6032 of this bill requires any entity that receives or makes annual Medicaid payments of $500 million or more to include in their employee handbook a detailed discussion of the provisions of the Federal FCA, including the rights of whistleblowers. It has been asserted that a key obstacle to achieving the optimal usage of the qui tam provision is a lack of awareness of the existence of the provision and its mechanics. Thus, improved education regarding qui tam provisions should result in their increased use.

C. Many States Have Recently Adopted State False Claims Acts Containing Qui Tam Provisions

Prior to 1987, not a single state had a false claims act with a qui tam provision. Today, the situation is much different. Following the passage of the 1986 amendment to the FCA, eighteen states and the District of Columbia have enacted qui tam legislation, and another nine states have introduced similar bills in their legislatures. With the enactment of sections 6031 and 6032 of the Deficit Reduction Act of 2005, the situation can be expected to change even further.

In response to the passage of the 1986 amendment to the FCA and accompanying increase in use of the federal qui tam provision, a substantial number of states have enacted or are considering enacting their own false claims statutes including qui tam provisions. California, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, New Hampshire, Tennessee, Virginia and Washington have already enacted such legislation. Additionally, six states - Connecticut, Louisiana, Michigan, New Mexico, Tennessee and Texas - have enacted similar statutes restricted to claims related to medical assistance. Even two cities - Chicago and New York City - have passed their own versions of the Federal Act. In addition to all this enacted qui tam legislation, qui tam legislation is pending in Alabama, Colorado, Georgia, Minnesota, Missouri, New Jersey, New York, Oklahoma, and Pennsylvania.

While the trend of following the federal government's lead in enacting a powerful qui tam provision has been strong, some states have expressly opted not to do so, sometimes in the face of strong advocacy for such a provision. For example, the New York State Legislature has repeatedly struck down legislation for a state false claims act that included a qui tam provision. In other cases, there was no desire for such a provision in the first place. For example, Utah's 1981 version of the FCA did not contain a qui tam provision, and although the state's legislature has amended it as recently as 2000, there have been no attempts to add a qui tam provision. Furthermore, in some of these states, such as Arkansas, although private citizens cannot initiate suits, they can still receive a reward for providing information that leads to the recovery of state funds.

Even those states that have followed the federal government's lead by enacting a false claims act with a qui tam provision have sometimes incorporated significant alterations into their statutes. Certainly, states that have restricted the reach of their act to medical assistance have varied from the Federal Act substantially. But even those states that have more closely modeled their statutes on the Federal Act have incorporated numerous and noteworthy changes.

The number of qui tam lawsuits that have been brought as a result of these provisions is unclear, as most states do not keep detailed statistics on their qui tam provisions. However, the total is likely low compared to federal usage. The majority of these acts were only passed in the last six years. Given the lag time between a statute's enactment and use, the number of state qui tam lawsuits from these states is likely very small.
that were enacted soon after the 1986 amendment have statistics indicating that they have seen moderate usage. \textsuperscript{85}

Overall, it is clear that the 1986 amendment has had a substantial impact on the number of state qui tam statutes, as well as their use. The adoption of sections 6031 and 6032 of the Deficit Reduction Act of 2005 is likely to advance these trends - section 6031 will likely result in an expansion in the overall number of state qui tam statutes, while section 6032 is expected to increase the number of suits brought under these provisions.

Section 6031 increases state awards from FCA litigation by 10\% if the state adopts a state false claims act law that is as strong as the federal version. \textsuperscript{86} For states that have not previously considered passing such a statute, they now have an even greater financial incentive to consider doing so. Further, states that have specifically opted not to enact a qui tam provision may now find the benefit of doing so substantial enough to support enacting one. For example, despite several failed qui tam bills in the past, the New York State Legislature has already introduced new qui tam legislation following the passage of section 6031 and may find that this added financial incentive is enough to get the legislation passed this time. \textsuperscript{87} Finally, states that have diverged from the FCA may opt to amend their laws to be identical to the FCA to receive this financial bonus. Exactly what the result of this provision will be is not certain, but it seems \textsuperscript{[*959]} very likely that it will lead to an increase in the number of state qui tam provisions that mirror the federal provision.

Section 6032 is also likely to increase the total number of suits brought under these provisions. This provision imposes the identical requirement for False Claims Act employee education on state governments as it does on the federal government, and additionally requires such education for comparable state acts. \textsuperscript{88} Accordingly, for the same reasons that it is expected to increase the amount of federal qui tam actions, \textsuperscript{89} it will also increase state qui tam actions. However, the effect on state governments may be even more pronounced given that there is currently less awareness about state qui tam provisions than the federal provision. \textsuperscript{90}

The passage of state qui tam provisions is significant in two ways. First, it increases the importance of determining whether qui tam provisions serve the public interest. If qui tam provisions do not serve the public interest, then all of the governments that have enacted such provisions are likely imposing costs on their state - such as the time and money of the Attorney General's Office - which could be avoided. If, on the other hand, they do serve the public interest, other states should be encouraged to enact similar provisions. Second, to the extent that these provisions vary from the federal qui tam provision, they may provide insight into how the Federal FCA could be improved.

D. The Debate over the Value of Qui Tam Provisions

The scholarship concerning qui tam provisions can be separated into two distinct areas. First, there are questions concerning the legality of the provisions. These questions generally center around the constitutionality of the provisions - whether relators have standing under Article III, whether these provisions violate the separation of powers doctrine, and so forth. \textsuperscript{91} Second, there are questions regarding whether qui tam provisions are sound public policy. \textsuperscript{92} Most scholarship on qui tam provisions seems to assume that qui tam provisions are good policy - while there are numerous articles addressing the question of legality, there is almost no scholarship on the question of public policy. Moreover, the few articles that do address the latter question are sorely lacking - their analysis of the Federal FCA is minimal and limited to purely theoretical arguments. They also completely fail to address state false claims acts. In the end, the relevant scholarship provides no consensus as to the public policy value of qui tam provisions. Given the inadequacies in this literature and the increased use of qui tam provisions, the current need for empirical work on this subject is imperative. Before turning to such an analysis, a review of the limited debate that has occurred is necessary to understand where to focus that analysis.

The primary justification asserted for the qui tam provision of the FCA is that it recovers money for the government by encouraging individuals to come forward with information about fraud. Blackstone's Commentaries recognized this benefit as early as the eighteenth century, stating that the "common informer" advances the public interest. \textsuperscript{93} This benefit is still the main justification offered by supporters of the qui tam provision of the FCA today.
In support of this proposition proponents [*961] have cited the great increase in qui tam litigation. Yet whether or not the provision has actually resulted in such recoveries has not been examined.

Arguments affirmatively supporting the qui tam provision do not go much beyond this point. Proponents assert that the qui tam provision is necessary because government agencies have been ineffective at combating fraud. However, this contention is not actually an argument that affirmatively supports the qui tam provision - it tells us that the present system is flawed, but does not articulate why the qui tam provision is the solution to this problem. The remainder of proponents' scholarship concerning the qui tam provision focuses on rebutting the arguments of qui tam critics - explaining why qui tam provisions are not harmful to the public interest, rather than why they are valuable./Public policy critics of the qui tam provision have four primary concerns. First, they argue that the provision appeals to the worst instincts of individuals - "greed and self-advancement." Second, they contend that because relators are only interested in money, they do not see the broader picture of the government interest. Third, they assert that claims of fraud result in high costs to companies and would be better left to internal investigations. Finally, and most importantly, they claim that the qui tam provision leads to meritless lawsuits.

Proponents of the qui tam provision of the FCA have responded to each of these arguments in great detail, and thus the debate remains unresolved. First, proponents contend that it is inaccurate to say that the qui tam provision provides the wrong motives - they maintain that the "law encourages people to do the honest thing" and that not all relators are motivated by financial gain. Second, they assert that even if relators are not aware of broad governmental interests, there are "significant protections of vital government interests built into the updated qui tam provision." One such example is the sixty-day period where the complaint is held under seal while the government decides if it wants to intervene. Another protection includes governmental authority to prevent a relator from bringing a claim if it can show that it would interfere with the government's interest in a criminal case. Third, proponents do not deny that companies may be harmed by the provision, but argue that "the negative consequences for organizations are, at the very least, tolerable in comparison to the strong benefits of encouraging external whistleblowing under the qui tam provision[.]

In the end, it is certainly not clear on a theoretical level whether the qui tam provision of the FCA harms the public interest. Both sides make persuasive arguments, but neither examines whether the theoretical results they envision actually occur in practice. Further, many of these articles were written only a few years after the 1986 amendment to the FCA was passed, making their assessment of the qui tam provision premature and out of date. More uncertain is whether the qui tam provision actually advances the public interest. If there is any hope of resolving this debate, studies will have to move beyond theoretical arguments and actually examine the empirical effect of qui tam provisions.

II. Empirical Evidence on the Value of Qui Tam Provisions

As previously noted, the 1986 amendment to the FCA resulted in a dramatic increase in the number of federal qui tam actions and spurred the enactment of multiple state false claims statutes with qui tam provisions modeled after the federal provision. Further, sections 6031 and 6032 of the Deficit Reduction Act of 2005 can be expected to augment both of these trends. Therefore, it is imperative to begin resolving the scholarly debate regarding whether qui tam provisions are good public policy. By examining the outcomes of the profusion of federal lawsuits and state provisions, this section attempts to provide an answer. Specifically, Part II.A presents an empirical analysis of the qui tam provision of the Federal FCA, exploring the added detection and deterrence value of qui tam suits, and considering such actions in the context of contractor fraud versus medical assistance fraud. Then, Part II.B performs a similar empirical analysis of the qui tam provisions enacted in Illinois and Tennessee.

A. Empirical Evidence on the Value of the Qui Tam Provision of the FCA Shows that It Benefits the Public in
Some Ways, but Harms It in Others

Many scholars have cited the drastic increase in the usage of the *qui tam provision* of the FCA since the 1986 amendment, along with the associated recoveries, as evidence of the provision's success. Other scholars have noted its deterrent effect as proof of its success. However, virtually no empirical analysis on the effects of the *qui tam provision* has been conducted to verify these assertions. This section considers statistical data published by the Civil Division of the DOJ in March 2005 on the FCA from October 1987 to September 2004 to see if the *qui tam provision* has actually been as successful as proponents assert. First, it considers data on the Attorney General's decision to intervene in *qui tam* actions. Second, it analyzes the disposition of these cases. Third, it examines the number of actions brought under the FCA by the Attorney General rather than a *qui tam* relator. Fourth, it considers whether the provision has led to deterrence of illegal behavior. And, finally, it considers whether any of these results vary depending on what type of fraud is at issue.

1. Intervention Data Indicate that *Qui Tam Provisions* Lead to a Significant Number of Frivolous Suits. -

Presumably, if the federal *qui tam provision* is in the public interest then suits brought under it will have merit, and where suits have merit the Attorney General will intervene. Therefore, as discussed below, this Note assumes that a high intervention rate would indicate that the *qui tam provision* is in the public interest, while a low intervention rate would indicate that it is not.

Data on the rates of intervention in false claims actions appear to indicate that the *qui tam provision* leads to a significant number of frivolous suits. The discovery of frivolous suits alone is not dispositive evidence that the federal *qui tam provision* does not serve the public interest. But it does show that *qui tam* actions result in some harm to the public since public funds, which are not offset by monetary returns, must be used to investigate each of these suits. If there is some benefit - monetary or otherwise - that offsets this harm, then the *qui tam provision* of the FCA may still benefit the public.

This section begins by stating and defending the assumptions upon which its later analysis will be based. Then it analyzes the data provided by the DOJ on the Attorney General's intervention patterns to determine whether or not the *qui tam provision* of the FCA serves the public interest.

a. Assumptions About Intervention Decisions. - When a federal *qui tam* action is filed, the claim is not immediately served on the defendant as would normally be the case in other types of suits. Instead it is placed under seal and delivered to the Attorney General, who has sixty days to decide if he wants to intervene in the suit. If sixty days is not adequate time to make this decision, the Attorney General can petition the court for an extension. In some cases, courts have granted multiple extensions.

The statute does not indicate what factors the Attorney General should consider when deciding whether to intervene, nor has the Supreme Court spoken on this issue. Moreover, the DOJ has never formalized the method by which it makes this decision. But in order to analyze the quantitative results of the Attorney General's decision to intervene, one must first understand the rationale behind his decision. Given that the Attorney General's main role is to serve the public interest, one would assume the public interest is the determinative factor in the decision.

One might question whether the Attorney General would intervene in all cases that would advance the public interest. What if the Attorney General believed that the suit would advance the public interest without his participation? Even then, he still might want to intervene to ensure that the case does not take a turn such that it would no longer fully advance the public interest, such as when the relator settles on terms unfavorable to the government. Thus, there is little basis for concluding that the Attorney General will decline to intervene even though a suit has merit.

However, the Fifth Circuit has noted that the FCA does not require the Attorney General to intervene even if a suit has merit and that, in fact, "absent any obligation to the contrary, it may opt out for any number of reasons." Certainly, if a suit is without merit the Attorney General will not intervene, but the courts have identified several
other reasons he [\*967] might choose not to intervene. These include: a "lack of available Assistant United States Attorneys," n120 a cost-benefit analysis, n121 "respect for the skill of the relator's attorneys," n122 or the Attorney General's ability to participate without actually intervening. n123 Of course, other possible reasons exist, but these are the ones most commonly cited by the courts. n124 Each of these alternative justifications suggests why a case in which the Attorney General declines to intervene might still be in the public interest. To be sure, the exact reasoning behind the Attorney General's choice to intervene cannot be studied systematically as the Attorney General is not required to report his reasoning. However, as discussed below, multiple reasons, including comments by many courts, support the assumption that these alternative factors do not commonly have a strong effect and that the merits of the case are likely to be the primary factor influencing the Attorney General's decision. n125

Some contend that limited resources are a reason for the Attorney General's failure to intervene. n126 Two Fifth Circuit judges, however, have specifically noted that "in cases ... in which the government has declined to intervene, it is likely that that decision is not a result of limited resources, but instead because the government has decided for some reason [\*968] that to pursue the claim is inappropriate." n127 One requirement of the qui tam provision of the FCA makes it likely that the Fifth Circuit has correctly described the role that resources play in the intervention process. Under the FCA, the Attorney General is required to investigate all qui tam actions, regardless of the financial resources of the office. n128 Accordingly, even if the Attorney General might not have allocated resources to qui tam actions on his own, the statute requires him to do so. It is hard to imagine that after expending substantial resources to investigate a suit and finding that its claim has merit, the Attorney General would then drop the matter.

Numerous courts have recognized that the FCA does not bar the Attorney General from undertaking a cost-benefit analysis when deciding to intervene. n129 The effect of such an analysis on the Attorney General's decision to intervene is complicated. On the one hand, intervening may lead to higher awards, thus swaying most cost-benefit analyses in favor of intervening. First, when the Attorney General chooses not to intervene the recovery to the government can drop by as much as fifteen percentage points. n130 And, second, a relator may have less credibility than the government, leading to an overall lower award. n131 On the other hand, the incentive for private lawyers to pursue larger settlements than the government may outweigh the above-mentioned factors. Given that the FCA guarantees that recovery to the government will be lower when the Attorney General does not intervene and that the other two factors are only speculative (and may cancel each other out), there is reason to believe that even when the Attorney General undertakes a cost-benefit analysis, he will intervene if a claim has merit.

In United States ex rel. Downy v. Corning, Inc., the District Court of New Mexico cited "respect for the skill of the relator's attorneys" as a possible reason that the Attorney General may not intervene in a qui tam action. n132 However, given that the government stands to lose fifteen percentage points of its recovery, it seems unlikely that this rationale on its own would be a common reason for declining to intervene.

[\*969] Furthermore, while the FCA does not bar the Attorney General from participating in a qui tam action without actually intervening, n133 courts have made clear the limits on the Attorney General's power when he does not. When the Attorney General opts to intervene, he takes full control of the suit. n134 However, when the Attorney General opts not to, he retains only a limited set of powers. n135 For example, he gives up all right to conduct the action. n136 Instead, the relator is responsible for "devising strategy, executing discovery, and arguing the case in court." n137 The Attorney General has "no control over the breadth of a relator's suit." n138 Further, he "has no power to remove a relator in an FCA case, no matter how irresponsible the suit becomes." n139 Nor can he require the relator, unlike independent counsel, to "adhere to the rules and policies of the Department of Justice." n140 Finally, some courts have held that the "government's consent to dismissal is only required during the initial sixty-day (or extended) period in which the government may decide whether to intervene." n141

Just as there is no reason to expect the Attorney General not to intervene when a suit has merit, there are noteworthy reasons to believe that he will intervene if it does. First, a significant number of judicial decisions have found that the failure of the Attorney General to intervene is a sign that the suit is without merit. For example, the Fifth Circuit has noted that "the United States had declined to intervene in the suit, ... which could be interpreted ... as
substantially weakening [the] case." n142 Additionally, the First Circuit has also said that "the government's decision not to intervene in the action also suggested that [plaintiff]'s pleadings [\*970] of fraud were potentially inadequate." n143 Furthermore, the Second Circuit has suggested that the Attorney General's decision to decline to intervene indicates to the public that the suit is frivolous. n144 Additionally, several district courts have also reached this conclusion. n145

Second, and similar to stating that a failure of the Attorney General to intervene indicates that the case lacks merit, the Second and Ninth Circuits have held that not intervening is tantamount to consenting to dismissal. n146 However, two circuits have specifically rejected this conclusion, n147 so it is unclear what effect this reasoning has on the Attorney General's decisionmaking process outside of the Second and Ninth Circuits.

Finally, there is no incentive for the Attorney General to intervene in a case that appears to lack merit just to ensure that he has a chance to participate if it later becomes evident that the case does in fact have merit. Under the FCA, if the Attorney General later discovers that a case has merit, he can intervene with a showing of good cause. n148 His ability [\*971] to make this determination is not diminished by failing to intervene, because he can require that all court documents be provided to him even if he does not intervene. n149

Based on the above analysis, there is much support for the assumption that the Attorney General will intervene when a suit has merit.

b. Analysis of Intervention Data. - According to the DOJ's data, summarized in Table 1 below, the Attorney General has opted not to intervene in the majority of qui tam actions brought under the FCA. As of September 30, 2004, 1,037 of the 4,704 qui tam cases brought since the 1986 amendment were still under investigation. n150 Of those in which the investigation was complete, the Attorney General intervened in 809 cases (22%), and declined to intervene in 2,858 cases (78%). n151

Table 1: Attorney General Intervention
Decisions in Qui Tam Actions
October 1987-September 2004 n152

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<thead>
<tr>
<th>Number of Actions</th>
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<tr>
<td>U.S. Intervened</td>
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<tr>
<td>U.S. Declined</td>
</tr>
<tr>
<td>Under Investigation</td>
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<tr>
<td>Total</td>
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</table>

Based on the above assumption - that the Attorney General intervenes whenever a suit is in the public interest n153 - these data indicate that 78% of all qui tam actions are without merit. n154 As discussed above, in a limited number of situations the Attorney General might opt not to intervene even when a case has merit; thus, the number of frivolous cases will fall somewhere below 78%. While we can never know the exact amount that the 78% should be reduced by, even if we choose a large estimate for the number of cases where the Attorney General opts not to intervene despite the fact that the case has merit, the number of frivolous suits will still be high.

2. Disposition Data Support the Conclusion that Qui Tam Provisions Lead to a Significant Number of Frivolous Suits. - Data on the disposition of false claims actions also indicate that the number of frivolous suits is high. Just as it is reasonable to presume that if qui tam actions have merit the Attorney General will intervene, so too is it reasonable to presume that where [\*972] they are frivolous the Attorney General will not intervene and they will ultimately be dismissed. As noted above, the discovery of frivolous suits alone is not dispositive evidence that the federal qui tam provision does not serve the public interest. n155 But it is important because it indicates that qui tam actions result in some harm to the public - a waste of the time and money of the Attorney General's Office.
Similar to the previous section, this section begins by stating the assumptions on which its analysis proceeds, and then analyzes the data on the disposition of false claims actions provided by the DOJ.

a. Assumptions About Disposition of Qui Tam Actions. - Qui tam suits are disposed of in three ways: judgment on the merits favorable to the relator, settlement, and dismissal of the relator's claim. Interpreting the first disposal method is simple - a qui tam action that results in a favorable judgment on the merits for the relator must have had merit. The remaining two disposal methods are not nearly as easy to interpret; accordingly, some assumptions about what they indicate need to be made. For the purposes of this Note, I will assume that the most likely reason for dismissal is that the suit lacked merit and that the most likely reason for settlement is that the suit was meritorious. Of course, these are not the only possible conclusions. Accordingly, before moving on to an analysis based on these assumptions, an explanation of the basis of these assumptions is necessary.

Beginning with dismissal, there are two primary reasons for dismissing a suit: Either it lacks merit or it is deficient on some technical ground. Two reasons support preferring the former explanation over the latter. First, there is a public policy in the law that favors disposition on the merits. Specifically, it has been noted that "the primary objective of the law is to obtain a determination on the merits of the claim, and that accordingly, a case should be tried on the proofs rather than on the pleadings." n156 As a result of this general public policy, many laws seek to avoid dismissals on technical grounds. For example, 28 U.S.C. §1653 provides that complaints may be amended to avoid dismissal based on jurisdiction. n157 Further, courts presume that motions to dismiss are disfavored and grant them sparingly. n158 Lastly, some courts have held that dismissal is inappropriate where less drastic sanctions will effectively remedy a party's noncompliance with court rules or court orders. n159 Second, and more specific to qui tam actions, unlike most suits where the complaint is filed directly with the court, qui tam complaints are first reviewed by the Attorney General. n160 During this review, the Attorney General has the opportunity to correct any technical errors in the complaint. According to Michael Bassham, Tennessee Assistant Attorney General, it is common for state attorneys general to correct such errors at this stage. n161 As a result of this, qui tam actions that go before the court are less likely to suffer from technical errors than other suits and thus are less likely to be dismissed on procedural grounds. Taking these two arguments together it is fair to assume that the most likely reason for dismissal is that a suit lacked merit.

Moving on to settlement, there is substantial debate over whether or not the merits of a case affect the decision to settle. Many scholars have suggested that other factors, such as the "estimate of damages that plaintiffs would be able to present to the jury," have a greater impact on settlement than the merits of the case. n162 Others have vehemently disputed those conclusions. n163 Ultimately, no clear evidence exists to establish which view is correct. Accordingly, this Note adopts the assumption most favorable to qui tam statutes - that the most likely reason for settlement is that the suit was meritorious.

Applying those two assumptions to the qui tam data, as well as the obvious conclusion about what a judgment on the merits means, we can compare the ratio of meritorious and nonmeritorious qui tam suits. We shall see that even when we use an assumption regarding settlements that favors qui tam provisions, disposition data lend support for the conclusion that qui tam suits do not serve the public interest.

b. Analysis of Disposition of Qui Tam Actions. - Looking at the federal data, we see that when the Attorney General opted to intervene, a settlement or judgment was reached in the vast majority of cases. Also, when the Attorney General chose not to intervene, but the relator continued with the suit, dismissal was the typical result. Excluding active cases, n164 94% of the cases (705) where the Attorney General intervened resulted in judgment or settlement, while only 6% of the cases (164) where the Attorney General did not intervene resulted in judgment or settlement. n165 These figures may be skewed by the fact that judges' decisions might be biased given that the Attorney General opted not to intervene - they may defer to the DOJ's judgment on the substantive merits of the case. However, even if this is the case, it is unlikely that this bias alone would result in such a large number of cases being dismissed. Again, excluding qui tam actions that are still active, 4% of the cases (31) where the Attorney General intervened were dismissed, while 92% of the cases (2,384) where the Attorney General declined to intervene were dismissed. These data are summarized in Table 2 below. [*975]
First, these data indicate that, excluding active cases, 73% of all qui tam actions are ultimately dismissed. This high rate of dismissal lends strong support to the conclusion that qui tam statutes result in many frivolous claims. Ideally, to solidify this conclusion, this Note would compare the dismissal rate of qui tam actions with the dismissal rate of suits initiated by the Attorney General to show the superiority of the latter over the former. Unfortunately, data indicating the number of suits initiated by the Attorney General that are dismissed are not available. However, even if one were to find that the dismissal rate for suits initiated by the Attorney General is as high as that for qui tam actions, the conclusion that qui tam provisions are not in the public interest would still hold true. Discovering that the Attorney General also initiates frivolous lawsuits would not change the fact that qui tam provisions result in frivolous suits. Moreover, even if qui tam actions result in a lower dismissal rate than suits initiated by the Attorney General, the fact that they result in such a high number of frivolous suits alone would provide evidence that they do not serve the public interest and that society would be better off finding a different way of dealing with the inefficiencies of the Attorney General.

Second, using these data as a proxy to determine the number of suits with merit where the Attorney General does not intervene, it also appears that qui tam provisions lead to a substantial number of frivolous suits. Based on the intervention data in Part II.A.1.b, 78% of qui tam suits were frivolous. However, this figure overestimates the number of frivolous suits to the extent that the Attorney General does not intervene in suits even though they have merit. Dismissal data indicate that 6% of all qui tam suits where the Attorney General opts not to intervene but where the relator continues result in a judgment or settlement. These 164 actions represent the number of suits with merit in which the Attorney General opted not to intervene. Accordingly, the 78% figure should be reduced by at least this amount. This calculation further supports the conclusion that a substantial number of qui tam actions, 72%, are frivolous.

3. The Attorney General Appears to Have the Ability to Uncover and Prosecute Fraud Without the Assistance of a Qui Tam Provision. - Despite the fact [*976] that the qui tam provision of the FCA encourages a large number of frivolous actions, the provision would still serve the public interest if the recoveries to the government from suits with merit outweighed the cost of investigating frivolous suits and if the Attorney General could not uncover the fraud involved in the suits with merit and obtain the same recoveries on his own. However, this does not appear to be the case. Suppose that it is correct that the Attorney General always intervenes when a suit has merit and never intervenes when the suit is frivolous. Under this condition, the 22% intervention rate indicates that 78% of all qui tam actions are frivolous. Despite such a high percentage of frivolous suits, the qui tam provision might still be valuable if the recoveries from the 22% of suits with merit exceed the cost of investigating the 78% of frivolous suits. For example, if the 22% of suits with merit lead to $10,000,000,000 in recoveries, while the cost of investigating the frivolous suits is only $10,000,000, then net recovery to the government would be $9,990,000,000, thus leaving the public better off. However, this conclusion is only true if the Attorney General would not have discovered the meritorious cases on his own. If he would have discovered the cases on his own, then the $10,000,000 was wasted. Accordingly, to show that qui tam provisions have value despite the presence of frivolous suits it must be true that: (1) recoveries from qui tam suits with merit outweigh the cost of investigating frivolous suits; and (2) the Attorney General would not uncover the
fraud involved in the suits with merit and obtain the same recoveries on his own. A review of the data on *qui tam provisions* indicates that while the recoveries from suits outweigh the cost of investigating frivolous suits, the Attorney General could uncover the fraud involved and obtain similar recoveries on his own. Therefore, the *qui tam provision* of the FCA does not serve the public interest to the extent that it allows a percentage of the recovery to go to a relator that the government would otherwise retain.

a. Total Recoveries and the Cost of Investigating Frivolous Cases. - Since the adoption of the 1986 amendment to the FCA, the government has recovered $8.4 billion through its *qui tam provision*. At most, 78% of the suits brought under the *qui tam provision* were frivolous. The government does not publish data on the cost of investigating qui tam actions. However, using state data as a proxy for federal costs, according to Mark S. Thomas, Assistant Attorney General of Florida, "The cost of investigation runs along a wide range, depending upon the case, from a few thousand dollars to hundreds of thousands of dollars." It is likely that frivolous suits will require less investigation than ones with merit, so they will fall on the low end of this scale. But even assuming that all federal cases fall on the high end of this spectrum, recoveries from suits with merit still exceed the cost of investigating frivolous claims.

b. Ability of the Attorney General to Discover and Prosecute Fraud on His Own. - It is impossible to know for sure whether the Attorney General would have discovered the claims brought to him through the *qui tam provision* on his own, and, even if he discovered the fraud, whether or not he would be able to achieve the same recoveries without the evidence provided by private parties. Information on the number of non-qui tam actions brought by the Attorney General under the FCA and the average recovery from qui tam versus non-qui tam suits might be the best proxy for this information.

The FCA allows either the Attorney General or private citizens to initiate claims. A finding that the same number of claims might still be brought without qui tam actions would indicate that the *qui tam provision* is not necessary to uncover fraud because the Attorney General would discover this fraud on his own.

In 1987, the Attorney General initiated 361 non-qui tam actions under the FCA. Since that time, the number of non-qui tam suits has dropped at a rate proportional to the increase in qui tam actions. Looking at the total number of actions brought under the Act, it appears as though the 1986 amendment regarding the *qui tam provision* has not had as significant an effect as some scholars assert. The number of qui tam suits has increased by almost 1,200%. However, the total number of actions has only increased by an average of 19%, and in some years has actually been lower than before the 1986 amendment was passed. Figure 1 below compares the number of non-qui tam versus qui tam actions on a yearly basis.

Two possible conclusions can be drawn from these data. First, they might indicate that the Attorney General would have continued to bring a large number of claims on his own, but the 1986 amendment took away his incentive to do so. Second, they could support the assertion that private citizens bring claims of fraud in a more timely manner than the Attorney General - it is not the Attorney General's decreased incentive to bring these claims that has led to the decrease in non-qui tam actions, it is the fact that private citizens get to them first.

Regardless, these numbers show that the Attorney General would likely be able to discover the same amount of fraud as he had in the past. That the Attorney General was previously able to discover such a large number of claims indicates that he could likely do the same today. While any delay in finding fraudulent behavior is problematic because it unnecessarily allows the fraud to continue, as long as the fraud is eventually discovered, that money will ultimately be recovered. The only monetary loss caused by a delay is the investment income that could be earned off of recoveries if they had been awarded earlier; however, it is unlikely that this income would exceed the cost of
investigating frivolous suits.

Of course, as indicated above, the total number of claims under the FCA has grown by 19% since 1986. So, one has to ask if the Attorney General would have been able to identify these claims without the qui tam provisions. Even if the answer is no, this finding is not problematic if the increase is attributed to frivolous suits. While there is no way to know the precise nature of these actions, it seems likely that they were frivolous given the substantial increase in qui tam lawsuits - where the Attorney General has not intervened - that have been dismissed over the same period. In fact, one might postulate that frivolous qui tam suits have replaced merit-based suits that the Attorney General might have brought otherwise, if he had not had to spend time and resources investigating frivolous claims.

Still, there is one more relevant consideration here: It is not only important to know that the Attorney General could identify fraudulent claims, it is also important to know that he could collect the necessary evidence to obtain judgments against these defendants. An examination of recoveries shows that he likely could.

Total recoveries to the government have increased substantially since the enactment of the 1986 amendment; however, this is likely due to the treble damages provision included in the amendment and enhanced discovery rules under the Federal Rules of Civil Procedure. Therefore, the increase in total recoveries does not necessarily show that qui tam actions lead to higher recoveries.

Average recovery for a non-qui tam action since the 1986 amendment has been $1.4 million, while the average recovery from qui tam actions over the same period has been $1.7 million. Certainly, this difference is not insubstantial, but when you factor in that the Attorney General must investigate every qui tam claim that is filed, this increased cost is likely to offset any increase in recoveries from qui tam actions. Further, average recoveries may not be the appropriate factor to study to determine whether relators or the Attorney General achieve higher recoveries. The average value does not take into account outlier cases. Potentially, the Attorney General has consistently obtained recoveries close to $1.4 million, while relators have had more varied results - perhaps a cluster of suits settling for $0.3 million and $3.1 million. If this were the case, it would better serve the public interest to have the Attorney General litigate cases that fall on the lower end of this spectrum, and thus avoid giving up part of the award to a relator. Because data on recoveries by individual suits are not available, it is impossible to determine with certainty if this variation in recoveries occurs, but there is other evidence to suggest that it does. Many circuits do not give the Attorney General the power to veto settlements when he does not intervene. As has been extensively discussed by the Sixth Circuit, relators have an incentive to "manipulate settlements in ways that unfairly enrich them and reduce benefits to the government." This observation implies that at least some relators would rather settle at a low amount to ensure they recover some money than proceed to trial and risk receiving no monetary award.

Overall, although data on non-qui tam suits are not conclusive, they suggest that the qui tam provision of the FCA is not as valuable in protecting the public interest as proponents claim, since it allows relators to receive funds that the government would otherwise earn.

4. No Conclusive Evidence Shows that the Qui Tam Provision of the FCA Increases the Deterrent Effect of the Statute. - In addition to providing value by promoting the detection of fraud, the FCA and its qui tam provision may also add value to the extent that they deter such crimes in the first place. Therefore, even if the recoveries associated with qui tam actions are not greater than the cost of frivolous suits, the Act may still serve the public interest if it deters a substantial amount of fraudulent activity. Of course, the relevant question is not simply the degree to which the FCA deters illegal behavior; it is also how much more crime the FCA with a qui tam provision deters over the FCA without such a provision, i.e., the marginal deterrent value of the qui tam provision.

Generally, "deterrence ... is a difficult, if not impossible, magnitude to actually measure." This is because it requires one to first predict how much illegal behavior is going to occur at some point in the future, and then, if that crime does not occur, develop a causal relationship between this decrease and the suspected deterrence factor. The uncertainty associated with both of these steps is so great as to render any quantitative analysis merely an estimate,
which is highly suspect.

Likely as a result of these difficulties, "very little has been done to measure the deterrence impact" of qui tam actions. The one study that has considered this question concluded that the deterrent effect is substantial. It estimated that deterrence of fraud due to the qui tam provisions of the amended Act for their first ten years of existence (1986-1996) was between $35.6 billion and $71.3 billion, and for their second ten years of existence (1996-2006) was between $105.1 billion and $210.1 billion. However, these estimates are highly suspect. This study calculated the expected deterrent level based on the overall recoveries of the Act. While this conclusion may seem reasonable on its face, it implicitly relies on the assumption that these recoveries would not have occurred without the assistance of qui tam plaintiffs. As discussed above, there is reason to believe that in most cases the Attorney General could discover this fraud on his own.

5. Results May Differ for Medical Assistance Claims, but Hold Constant for Contractor Fraud. - So far, this Note has considered the ability of the federal qui tam provision to serve the public interest without distinguishing between the different types of fraud that can be protected against under the FCA. Qui tam provisions potentially have a different effect depending on what type of fraud is involved. This section considers the theoretical and empirical evidence in this area.

Today, FCA litigation deals with many categories of fraud, the most significant of which are contractor fraud and medical assistance fraud. Originally, the FCA was passed to prevent military contractor fraud. This likely explains why, for many years, matters where the Department of Defense (DOD) was the primary agency represented the greatest number of qui tam actions. However, some scholars theorized that Medicare "should be a prime target for Federal Claims Act litigation," and in the late 1990s this supposition became a reality. Starting at that point, and continuing today, qui tam actions related to the Department of Health and Human Services (HHS), which deals with all Medicare and Medicaid issues, represent the greatest number of qui tam claims, while claims related to the DOD are second. The remainder of claims varies so much in type that the DOJ just records them all as "other." Because contractor fraud and medical assistance fraud represent the majority of claims, and the DOJ does not identify what specific types of fraud are included within the "other" category, the remainder of this section focuses on the first two.

a. Theoretical Arguments. - Unlike contractor fraud, which can be equally detected and deterred by suits initiated by either the Attorney General or a relator, there are several reasons why it may be more difficult for the Attorney General to spot fraud related to medical assistance than other types of fraud. As will be described below, these reasons include: substantive differences between medical assistance fraud and contractor fraud; issues of privacy only present in medical assistance fraud; the tremendous number of Medicaid claims; and the substantial autonomy given to medical professionals not present in other fields.

A key reason why the Attorney General has more difficulty spotting fraud related to medical assistance than contractor fraud is the substantive differences between the two fields. Both fields require highly specialized knowledge to identify fraudulent practices. However, the type of expertise needed to discover this fraud is different. Identifying contractor fraud often requires legal expertise, while discovering health care fraud requires medical expertise. The Attorney General generally possesses the former, but rarely possesses the latter. Accordingly, the Attorney General needs the assistance of a qui tam plaintiff to spot health care fraud, but not contractor fraud.

Contractor fraud often involves knowingly violating "arcane rules and regulations surrounding defense acquisition practices" that are "extremely complicated." Thus, to discover this type of fraud, a clear understanding of these laws is necessary. Once that knowledge is obtained, spotting fraud requires no further expertise. The Attorney General's Office, staffed with lawyers, will generally possess the necessary legal expertise. Qui tam plaintiffs, on the other hand, generally come from within the industry, and as contractors, are unlikely to have a legal background. Accordingly, the Attorney General is much more suited to discover contractor fraud than a qui tam plaintiff.
Unlike contractor fraud, where the necessary expertise is knowledge the Attorney General is likely to possess, health care fraud requires an expertise that only medical professionals are likely to have. Common health care fraud includes administering and billing for an excessive dosage of medication or an unnecessary procedure, n199 charging for procedures and tests not performed, n200 and prescribing unsolicited and unnecessary medical equipment to elderly patients. n201 To determine whether or not any of these practices are fraudulent, one first has to make a medical determination, such as determining that a dose of medication provided was, in fact, excessive. The Attorney General is unlikely to have the medical knowledge to make this determination. On the other hand, qui tam plaintiffs who are immersed in the medical community and have some level of medical training will have this knowledge. Therefore, in many cases, qui tam plaintiffs are more suited to identify health care fraud than the Attorney General.

Another important issue unique to the health care industry is the great need for privacy between health care provider and patient. Privacy is "a deeply imbedded value in American culture" and "is considered an essential ingredient to individual autonomy and a free society." n202 The Supreme Court has long acknowledged that "various guarantees [in the Constitution] create zones of privacy." n203 Health care is one area where this right has been deemed very significant. n204 Although some scholars have argued that the community's interest in projects that use medical surveillance to detect health care fraud should trump a patient's desire for confidentiality, n205 the majority view rejects this proposition. Instead, most scholars argue that "the Fourth Amendment 'reasonable expectation of privacy' standard is eroded if the citizen now must anticipate that medical and financial records are widely accessible to the public." n206 In light of this academic debate, the Attorney General is permitted to use surveillance methods in detecting medical fraud, but this power is limited by statute. n207 Qui tam plaintiffs, on the other hand, are generally already privy to all of the personal information that is necessary to uncover health care fraud. n208 For this reason, the privacy concerns implicated when the Attorney General looks for health care fraud are not implicated in the same way as when a qui tam plaintiff does so. As a result, qui tam plaintiffs [*984] have an advantage in uncovering health care fraud over the Attorney General. But given that none of these privacy concerns are present in contractor claims, there is no special reason to rely on relators over the Attorney General in this area.

A third feature unique to the health care industry which makes health care more susceptible to claims by qui tam plaintiffs is the tremendous volume of Medicaid claims. n209 Because of the enormous number of claims submitted, "the Department of Health and Human Services is simply unable to detect the vast amount of fraud that regularly occurs." n210 The number of government contracts, on the other hand, is substantially fewer. n211 Accordingly, the Attorney General needs the assistance of qui tam plaintiffs in the former case, but not in the latter.

A final reason why it may be more difficult for the Attorney General to spot fraud related to medical assistance than contractor fraud is the level of autonomy that physicians possess. "Physicians as a professional group enjoy a high level of autonomy in practicing medicine ... ." n212 As a result, physicians who engage in fraud are able to participate in what Katz has labeled "pure" white collar crime: n213

In the purest "white-collar" crimes, white-collar social class position is used: (1) to diffuse criminal intent into ordinary occupational routines so that it escapes unambiguous expression in any specific, discrete behavior; (2) to accomplish the crime without incidents or effects that furnish presumptive evidence of its occurrence before the criminal has been identified; and (3) to cover up the culpable knowledge of participants through concerted action that allows each to claim ignorance. n214

According to scholars who have studied this classification of crime, undertaking these practices makes "the search for evidence of wrongdoing both difficult and complex." n215 As a result, it can be expected that the parties most likely to be able to uncover this type of fraud are those closest to the physician - in other words, qui tam plaintiffs. In direct contrast with physicians, contractors have very little autonomy. The terms of the contract under which they were hired
vastly limit their discretion, thus alleviating any special reason to rely on qui tam plaintiffs.

Based on the above reasons, it is clear that in theory qui tam suits may be more valuable in the context of health care fraud than in any other.

b. Empirical Evidence. - Empirical evidence on the use of qui tam versus non-qui tam suits supports this conclusion.

[*985] The DOJ does not break down its data on the number of Attorney General interventions and the disposition of cases by the primary agency involved, so it is not possible to determine the percentage of these claims that are likely to be frivolous as was done above for the Act as a whole. However, the DOJ does provide this breakdown for the number of qui tam and non-qui tam actions initiated. n216 While it would be ideal to have data on all three variables, the data on the number of qui tam and non-qui tam actions initiated provides useful insight into the Attorney General's ability to discover this fraud on his own.

In the case of claims related to the DOD, the Attorney General was once responsible for bringing a large number of claims. In 1987, the Attorney General brought 245 claims in this area. n217 Since that time, as the number of qui tam actions has increased, this number has steadily declined. While suits initiated by the Attorney General used to account for 93% of all DOD related claims, they now account for only 13%. n218 The inverse relationship exhibited in these data, displayed in Figure 2 below, indicates that the Attorney General has the capability of discovering this type of fraud without a qui tam provision.

Figure 2: Non-Qui Tam Versus Qui Tam Actions by Year: Department of Defense
October 1987-September 2004 n219

[SEE FIGURE 2 IN ORIGINAL]

[*986] The situation for claims related to the HHS is much different. In 1987, the Attorney General only initiated 14 claims in this area. Though the number has increased slightly since that time, the total amount remains at only a nominal level - for example, in 2004 the Attorney General initiated 27 suits related to HHS. n220 Qui tam actions related to HHS, on the other hand, have increased substantially. They have gone from a mere 4 suits in 1987, to 276 suits in 2004. n221 These data, displayed in Figure 3 below, show that the Attorney General is not as capable of finding medical assistance fraud as are relators. Thus, even if frivolous claims related to medical assistance exist - because the Attorney General is unlikely to discover those claims with merit on his own - a qui tam provision restricted to HHS claims may serve the public interest. Further, because the presence of a qui tam provision greatly increases the likelihood of detection, the deterrent effect of the provision may be significant for medical assistance claims.

Figure 3: Non-Qui Tam Versus Qui Tam Actions by Year
Health and Human Services
October 1987-September 2004 n222

[SEE FIGURE 3 IN ORIGINAL]

Overall, these data appear to indicate that the Attorney General's ability to uncover fraud depends on the specific type of fraud involved - he is proficient at discovering contractor fraud, but not as capable of discovering medical assistance fraud. This conclusion suggests that the qui tam provision of the FCA may only be necessary for this latter type of fraud.

B. Empirical Evidence on the Value of State Qui Tam Provisions Indicates that They Likely Serve the Public Interest

Based on the apparent success of the Federal FCA, many states have adopted their own version of the Federal Act. As is clear from the above analysis, the qui tam provision of the FCA alone does not provide sufficient support for the
enactment of state **qui tam provisions.** Its results have been mixed, at best. Moreover, even if data indicated conclusively that the **qui tam provision** of the FCA was successful, that would still not decisively show that **qui tam provisions** are in the public interest when enacted by states. States face different circumstances than the federal government. For example, State Attorneys General's Offices typically have less funding than their corresponding federal offices. n223 Construction fraud is thought to be less of a problem for state governments, n224 and most State Attorneys General are elected, n225 while the U.S. Attorney General is appointed. n226 Accordingly, the value of state **qui tam provisions** must be considered separately from the federal **qui tam provision.** It is possible that whether or not **qui tam provisions** are good public policy may depend on whether they are enacted by the federal or state government. The federal data should be considered, but the experiences of individual states must also be considered. This section analyzes the effects of state **qui tam provisions.**

The number of states that can be studied in this analysis is limited. Because many of these statutes have been enacted only recently, it is too early to judge their effects. But those that were passed soon after the 1986 amendment provide valuable insight into the ability of state **qui tam provisions** to serve the public interest. Ideally, this Note would review all of the state statutes passed soon after the 1986 amendment: California, Connecticut, Illinois, Tennessee, and Florida. n227 Unfortunately, the majority n*988* of these states do not collect sufficient data on the use of their qui tam statutes. Connecticut and Florida do not track data on the use of their qui tam statutes at all. n228 California only collects these data based on recoveries, but does not track the number of suits brought under its false claims Act, whether the suits were initiated by the Attorney General or under its **qui tam provision,** or the disposition of each of these cases. n229 Only Illinois and Tennessee collect any data, although even these data are not collected systematically. n230 As a result, a review of states' experiences with qui tam statutes is limited to these two states.

1. Illinois Shows the Value of Giving the Attorney General Significant Control. - In 1991, with the passage of the Whistleblower Reward and Protection Act (WRPA), n231 Illinois became the third state to adopt its own version of the FCA. n232 Although not denominated a false claims act, it is a near exact replica of the Federal Act. n223 Despite the similarities in the text of the two statutes, the implementation of the WRPA has diverged significantly from that of the FCA - Illinois courts grant the Attorney General much more control over qui tam actions than the federal government does. Although the Illinois Supreme Court's decision of June 3, 2005 has collapsed much of this difference, n234 the Illinois Attorney General still retains more control over cases that he chooses not to intervene in than the U.S. Attorney General. Therefore, reviewing the use of the WRPA provides a useful example of how increasing the control of the Attorney General over qui tam actions affects their ability to serve the public interest.

[*989*] Both the WRPA and the FCA contain a provision allowing private citizens to proceed on behalf of the government after the Attorney General declines to intervene. n235 Based on this provision, the federal courts have always allowed private citizens to proceed with a case on their own if the Attorney General declines to intervene. n236 In contrast, under the WRPA, a relator has traditionally not been allowed to proceed with a claim if the Attorney General declined to intervene.

In Lyons v. Ryan, the Illinois Supreme Court held that "only the Attorney General is empowered to represent the state in litigation when it is the real party in interest." n237 Further, it held that allowing a whistleblower to continue with such a suit violated the Illinois Constitution. n238 This case confirmed that qui tam plaintiffs in Illinois were not entitled to proceed when the State Attorney General declined to intervene. n239

Starting in 2004, however, the Illinois courts began to bring the WRPA into line with the FCA. First, though, based on the reasoning in Lyons, an Illinois circuit court took a step away from the FCA, by holding that the entire WRPA was an unconstitutional usurpation of the exclusive authority of the Attorney General to sue on behalf of the state. n240 This ruling prompted the Illinois Supreme Court to act. In 2005, in Scachitti v. UBS Financial Services, it found that the appellate court erred in its ruling and that qui tam actions under the WRPA are constitutional. n241 Even more significantly, and despite pressure from the Attorney General to do otherwise, n242 it also held that even when the Attorney General declines to intervene, qui tam actions are permitted because the Attorney General "retains complete control over the litigation." n243 Accordingly, this decision not only reversed the lower court's ruling, but it also
overruled Lyons.

While the Scachitti ruling seems to bring the WRPA completely into line with the FCA, one important distinction between the implementation [*990] of the two statutes still exists. The Scachitti decision makes it clear that even when the Attorney General opts not to intervene, he maintains complete control over the case. n244 The federal courts have not given the Attorney General this type of power. n245 The importance of this distinction will be revisited later. n246

Given the past differences in the implementation of the WRPA and the FCA, it is not surprising that the statutes have had very different usage patterns. The Illinois Office of the Attorney General does not collect data on qui tam provisions in the same manner as the DOJ; however, a memorandum to Chaka M. Patterson, Illinois Assistant Attorney General, reveals much of the same information for the years 1991 (the year the WRPA was passed) through 2004. These data are summarized in Table 3.

<table>
<thead>
<tr>
<th>Table 3: Illinois False Claims Data</th>
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<tr>
<td>1991-April 2004 n247</td>
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<tr>
<td>Total Number Actions</td>
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<tr>
<td>Qui Tam Actions</td>
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<tr>
<td>Non-Qui Tam Actions</td>
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<tr>
<td>Total Number Suits Where AG Intervened</td>
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<td>Total Amount Recovered</td>
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</table>

According to this memorandum, the WRPA was not used once in the first five years after it was enacted. n248 However, starting in 1996, this situation changed drastically. n249 Since that time, approximately 136 cases have been brought under the Act. n250 All of these cases were initially filed by private parties; there were no non-qui tam actions. n251 Further, the Attorney General opted to intervene in 96% of these cases (130 cases). n252 The memorandum provides no information on the number of suits dismissed. These figures on the number of interventions and non-qui tam [*991] actions provide strong support that the qui tam provision of the WRPA serves the public interest.

First, like the Federal Act, the WRPA provides no direction to the Attorney General on when to elect to intervene. Nonetheless, one would expect that, just as with the U.S. Attorney General, the Illinois Attorney General's purpose in serving the public interest would also be a driving factor in the decision. n253 If this expectation is correct, then a 96% intervention rate would be solid evidence of the value of the WRPA's qui tam provision in serving the public interest. Both the Illinois Supreme Court and the Illinois Attorney General's Office have provided evidence that this expectation is, in fact, correct.

Qui tam suits in Illinois are handled by the Special Litigation Bureau of the Attorney General's Office. Assistant Attorney General Patterson, who serves as the chief of this unit, stated that while his unit makes decisions on a case by case basis, there are four general factors that they look to when deciding to intervene. n254 These include whether the case: (1) "involves an important principle or large dollar amount;" (2) "has been developed by experienced Relator's counsel, who has actually put in enough work to convince us that the case is viable and is willing to continue working hard on the case along side us;" (3) "raises novel issues of first impression, and we want to ensure that the case makes good law for the government;" and (4) "is pending in Illinois, so that [the] Illinois [Attorney General] will take the lead or co-counsel with DOJ." n255 All of these factors could easily be categorized as considerations that make certain that the ensuing litigation serves the public interest.

Further support for this conclusion comes from the Illinois Supreme Court. In Lyons, the Illinois Supreme Court noted that "it is presumed that the Attorney General will act to enforce the laws of this state" and that where the Attorney General does not intervene it will be for "legitimate reasons." n256 The court does not articulate what it means by "legitimate," but by simply relying on its plain meaning, it seems fair to interpret this statement as stating that the
Attorney General will make every effort to intervene unless there are reasons based in law that dictate otherwise.  n257

Just as the intervention data indicate that the *qui tam provision* of the WRPA serves the public interest, so too does the data on non-qui tam actions. The fact that the Illinois Attorney General has not initiated any suits under this Act on her own is an indication that these claims might [*992] never have been brought but for the *qui tam provision*. This conclusion is supported by statements made by the current Illinois Attorney General, Lisa Madigan. In her brief as an intervenor in Scachitti, she stated: "Private citizens play a vital role in bringing these cases to the attention of the State. In many instances, but for the efforts of these private citizens and their attorneys, the Attorney General would not have known of these schemes to defraud the State."  n258

Moreover, the fact that the Illinois Attorney General has not initiated any suits under this Act on her own indicates that the deterrent effect of the *qui tam provision* is likely to be stronger than at the federal level. On the federal level, because the Attorney General is able to uncover a substantial amount of fraud on her own, the marginal deterrent effect of the *qui tam provision* is minor. But in Illinois, where the Attorney General uncovers no fraud on her own, the baseline is much lower, thus increasing the marginal deterrent effect of a *qui tam provision*.

Given the data on the WRPA, as well as statements of the State Attorney General and the Illinois Supreme Court, it seems clear that, at least up until this point, the WRPA has served the public interest. n259 This observation leads to an important question: If the text of the WRPA and the FCA are virtually identical, why have the statutes' *qui tam provisions* met such varying degrees of success with their use? The answer seems to rest on two distinctions. First, the Illinois Attorney General has always retained significantly more control over qui tam actions than the U.S. Attorney General. Second, the Illinois Attorney General has not initiated any actions under the WRPA on her own, unlike the U.S. Attorney General who has often done so under the FCA, at least in the past.

The difference in control retained by the U.S. and Illinois Attorneys General appears to have had a significant impact on the results of each statute. Although it is impossible to precisely quantify the effect that this added control has had on Illinois's success, there are many reasons that one would expect an increase in control by the Attorney General to discourage frivolous suits and foster success. First, it may discourage relators from bringing frivolous suits in the first place by simply increasing accountability to the public - through the Attorney General - at all stages of the case, instead of just the first sixty days while it is under seal. Second, it discourages relators from manipulating settlements to their advantage. The Sixth Circuit has addressed this point extensively. It stated that "the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in qui tam litigation." n260 It explained that, in qui tam litigation,

there is a danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States [at little cost to himself]. The potential for such profiteering is exacerbated [*993] when ... a relator couples FCA claims with personal claims. In these circumstances, a relator can avoid the FCA's recovery division requirements by allocating settlement monies to the personal claims. Relators can thereby use the bait of broad claim preclusion to secure large settlements, while steering any monetary recovery to the personal action. n261

Absent giving the Attorney General the power to veto settlement, regardless of whether he chooses to intervene, "relators can manipulate settlements in ways that unfairly enrich them and reduce benefits to the government." n262 By allowing the Attorney General to retain this power in all circumstances, this problem could be avoided. As has been previously noted, n263 the circuit courts are currently split on this point. Both the Fifth and Sixth Circuits have granted this power to the Attorney General, while the Ninth Circuit has not.

The difference in the capability of the U.S. and Illinois Attorneys General to initiate suits under their respective
false claims Acts also appears to have a significant impact on the overall effect of each statute. Neither the case law nor the literature on the WRPA indicates why this is the case. Potentially, it is because the Illinois Attorney General does not have the same funds as the federal government to investigate fraud on her own. Or, it may be due to the type of fraud that is most prevalent in Illinois. As the federal experience indicates, it may be harder for the Attorney General to discover medical fraud than other forms. Alternatively, political considerations may keep the Illinois Attorney General from bringing such claims. For example, since the Illinois Attorney General is elected and supported by many contributors, her incentive to bring claims of fraud against certain parties may be reduced. Finding the exact reasoning is of great significance to states that want to use Illinois as a model for how to fashion their own false claims acts. Only if their Attorneys General have similar difficulties uncovering fraudulent behavior will they find a false claims act similar to Illinois’s helpful.

Overall, Illinois illustrates how a **qui tam provision** can benefit a state government trying to combat fraud. The **qui tam provision** of the WRPA has uncovered substantial fraud that would not have been discovered otherwise. It has done so without the presence of a substantial number of frivolous suits. This success must, at least in part, be attributed to the control that the Illinois Attorney General retains over all suits, including those where she does not intervene. This factor may be instructive to other states, as well as to the federal government.

[*994]

2. Tennessee Demonstrates the Value of Limiting False Claims Acts to Medical Assistance. - Tennessee passed its own version of the FCA in 1993, becoming the fourth state to do so. However, unlike its predecessors - California, Connecticut, and Illinois - Tennessee restricted its **qui tam provision** to Medicaid claims. In 2001, Tennessee passed a second antifraud statute with a **qui tam provision**, but this statute was not limited in its application. Several states have also recognized the value of **qui tam provisions** in assessing medical fraud - as noted, six states have specifically chosen to limit their statutes to medical assistance. Further, some states that have only a general false claims act handle their medical assistance cases in a separate department than their other qui tam claims. Tennessee is unique, though, in that it is the only state to enact both a medical assistance statute and a general statute. Tennessee's experience with both of these false claims acts indicates that false claims acts limited to medical assistance better serve the public interest than those that allow for general claims.

There is virtually no case law available to assess the results of either of these statutes. According to Michael Bassham, Tennessee Assistant Attorney General, "No court in Tennessee has ever interpreted any provision of the Medicaid False Claims Act." Further, there are no decisions that interpret the general Act. However, data provided by the Tennessee Attorney General’s Office provide a useful means to judge the **qui tam provision** of each of these statutes. Table 4 summarizes these data.

<table>
<thead>
<tr>
<th>Table 4: Tennessee False Claims Data</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1999-April 2005</td>
<td></td>
</tr>
<tr>
<td>Total Number Actions</td>
<td>110</td>
</tr>
<tr>
<td>Qui Tam Actions</td>
<td>110</td>
</tr>
<tr>
<td>Non-Qui Tam Actions</td>
<td>0</td>
</tr>
<tr>
<td>Total Number Suits Where AG Intervened</td>
<td>12</td>
</tr>
<tr>
<td>Total Amount Recovered</td>
<td>$ 16,032,635</td>
</tr>
<tr>
<td>Medicaid False Claims Act</td>
<td>$ 16,032,635</td>
</tr>
<tr>
<td>False Claims Act</td>
<td>$ 0</td>
</tr>
</tbody>
</table>

[*995]
These data, in connection with information provided about them from the Tennessee Attorney General's Office, support several important conclusions about the state's false claims acts. First, these data indicate that based on the limited number of times that the Attorney General has opted to intervene, there appears to be a significant number of frivolous qui tam actions. According to Bassham, "Meritless suits do occur."\(^{n270}\) While he did not indicate how many meritless suits occur, the fact that the Attorney General has only intervened in just over 10% of the qui tam actions filed with the office since 1999 shows that it is likely to be large. This conclusion is based on the presumption, explained in detail above, that when deciding whether to intervene, the Attorney General is primarily influenced by the capacity of the suit to serve the public interest.

A review of the Tennessee Attorney General's decisionmaking process when determining whether to intervene demonstrates that this presumption is valid with regard to the Tennessee Attorney General. According to Bassham, all of the Attorney General's decisions regarding how to handle a qui tam action are based on the assumption that the claim has merit.\(^{n271}\) If it does not, investigation of the claim will not go far and settlement talks will not be initiated.\(^{n272}\) Resources of the office are considered during this process.\(^{n273}\) The Tennessee Attorney General's Office only has a limited number of attorneys to investigate and prosecute claims.\(^{n274}\) As opposed to many other states, the State's Medicaid Fraud Control Unit is not located in the Attorney General's Office.\(^{n275}\) However, the availability of resources is balanced against the merit of the claim,\(^{n276}\) making it unlikely that many claims with merit are dismissed due to a lack of resources.

Second, these data indicate that despite the presence of frivolous claims, Tennessee's Medicaid qui tam provision has uncovered significant amounts of fraud that would have gone undiscovered otherwise. The provision is therefore valuable. The Tennessee Attorney General has never initiated an action under either state act - likely due, in part, to the fact that he does not have the resources to do so.\(^{n277}\) Over the last year and a half, the Office of the Inspector General has been expanded for the purpose of "bringing suits outside of qui tam actions" in the context of Medicaid fraud, but historically the Attorney General has not initiated these claims on his own.\(^{n278}\) Moreover, even if the Attorney General begins to initiate these claims on his own, this would not decrease the value of qui tam actions, given that, according to Bassham, much of the fraud \([*996]\) uncovered would not come to the attention of the Attorney General without the relators.\(^{n279}\) Consequently, Tennessee's experience with its Medicaid False Claims Act shows that even though it leads to frivolous suits, it has significant value in uncovering fraud that would go undiscovered otherwise.

Third, in addition to showing the ability of qui tam provisions to serve the public interest despite leading to frivolous suits, these data also confirm that qui tam actions play a much larger role in medical assistance claims than general claims. The Medicaid False Claims Act has led to over $16 million in recoveries, while nothing has been recovered under the general FCA. One would expect to see a larger impact under the Medicaid False Claims Act at this time, given that it has been in existence for almost ten years longer than the general Act. According to Bassham, part of the failure of the general Act has been its "overall lack of exposure."\(^{n280}\) For that reason, Tennessee will potentially see greater use of the general statute in years to come. Further, it is possible that, given the time that it takes to investigate a false claims suit, the general Act has had an impact, but the recoveries have just not been realized yet. Nonetheless, Bassham indicates that neither of these possibilities is likely. Despite expecting more actions under the general statute, Tennessee's experience has been "overwhelmingly" driven by the Medicaid False Claims Act.\(^{n281}\) Accordingly, they are not expecting more general actions or recoveries from general suits in the future. This means that the above conclusion - that despite frivolous suits, qui tam provisions have value - might only be valid with respect to medical assistance claims.

Tennessee is not the only state to support this conclusion. Texas, which has a Medicaid False Claims Act similar to Tennessee's, recovered $15.8 million in the first five years after its enactment through qui tam suits, but nothing through non-qui tam actions over the same period.\(^{n282}\) Likewise, qui tam actions brought under Florida's False Claims Act have been identified as key contributors to the "groundbreaking results" in combating medical fraud in the state.\(^{n283}\) Additionally, California handles MediCal qui tam actions separately from all other qui tam actions,\(^{n284}\) presumably because they are of such importance. In sum, regardless of whether a state has enacted a general qui tam provision or one tailored to \([*997]\) attack health care fraud, the result seems to be a reduction in medical assistance
Finally, the Tennessee provisions are likely to have a greater deterrent effect than at the federal level for the same reason that they do in Illinois: The State Attorney General does not uncover any fraud on his own, thus increasing the marginal effect of the provision.

Overall, Tennessee's experience with its qui tam provisions illustrates how such a provision can advance the public interest. Perhaps more importantly, Tennessee's experience shows that qui tam provisions are especially useful for combating Medicaid fraud. Given the prevalence of Medicaid fraud throughout the country today, this wisdom should prove valuable.

III. Recommendations

The experiences of the federal and state governments with qui tam provisions show that qui tam provisions can greatly benefit the public interest, but only when they are carefully tailored to account for their flaws and potential abuses. Further, the divergent experiences of federal and state governments demonstrate that the provisions may have a greater value for states than for the federal government. Accordingly, a broad set of recommendations applying to all levels of government would be inappropriate. Instead, recommendations need to be individually tailored to the specific circumstances of the federal and state governments. This section makes recommendations for each level of government in turn.

A. The Qui Tam Provision of the FCA Should Be Amended to Restrict Its Use by Relators

The qui tam provision of the FCA has the potential to greatly benefit the public interest. However, it has at least three significant flaws that must be corrected if it is to be retained: The qui tam provision allows settlements that are unfavorable to the government, results in many frivolous suits, and allows relators to recover funds that the Attorney General could have recovered for the government on his own. The experiences of the federal government, Illinois, and Tennessee suggest two amendments to the Act that are likely to reduce these problems.

First, Congress should amend the qui tam provision to incorporate the type of control that Illinois's common law gives its Attorney General over all qui tam actions. As previously noted, granting this authority to the Illinois Attorney General has had a positive effect in Illinois. One could argue that an amendment of this type would completely negate the incentive effect that the 1986 amendment to the qui tam provision of the FCA was meant to create. If a relator knows that after investing substantial time and money in a qui tam action the Attorney General has the ability to require him to change his strategy without actually intervening, and thus assisting in the suit, he is unlikely to invest those resources; however, if a suit has merit, this situation is not likely to occur in the first place because the Attorney General will intervene at the outset. Thus, this logic applies only to suits without merit and such suits will be discouraged.

Even if Congress chooses not to give the Attorney General complete control over all qui tam actions, it should grant the Attorney General the right to veto all settlements, even when he has not intervened in the suit. When the Attorney General does not retain this power, there is a risk that qui tam actions will be settled in a manner that is unfavorable to the government. The government cannot rely on the courts to prevent this outcome - judges are unbiased arbitrators, and therefore are unlikely to veto a settlement between a relator and defendant even if it is not in the best interest of the government. Accordingly, some other party needs to be responsible for looking after the interests of the government. The obvious choice to protect these interests is the Attorney General. Illinois's experience shows that this type of control can have a very positive effect on qui tam actions. Currently, the circuit courts are split on how much power the Attorney General should retain over an action when he does not intervene. This suggests that if Congress does not act to resolve this issue, the Supreme Court may be called on to do so for them. Rather then wait for this to occur, Congress should exercise its authority now.
Second, the **qui tam provision** should be amended so as only to apply to medical assistance claims. Where the Attorney General can discover fraud on his own, there is no need for qui tam actions. In these cases, qui tam actions impose burdens - such as introducing frivolous actions and lowering the net recoveries to the government - without providing any offsetting benefits. On the other hand, where the Attorney General needs the assistance of private citizens to uncover and prove fraud, these burdens should be tolerated. Since the Attorney General has shown his proficiency in prosecuting defense contractor fraud, there is no reason to permit qui tam actions in this area. However, when it comes to medical assistance fraud, where the Attorney General has proved to be an inefficient [*999*] prosecutor, qui tam actions are preferable. The experiences of Tennessee and the federal government support this conclusion. This amendment would have the effect of eliminating costly, frivolous suits, without affecting the overall amount of fraud discovered.

B. State Governments Need Improved Data Collection Before and After Enacting Qui Tam Statutes

Like the federal government, state governments can benefit from the enactment of **qui tam provisions**. Both Illinois and Tennessee illustrate this fact. However, Illinois and Tennessee also illustrate that these provisions should only be adopted at the state level if they are tailored to the specific needs of each state government. No two state governments are identical, and certainly, all face different circumstances than the federal government. Accordingly, adopting a one-size-fits-all provision - i.e., adopting an exact replica of the federal provision or adopting a model state provision - will likely not satisfy the specific demands of each state and will fail to serve the public interest. As a result, it is inappropriate to make general, substantive recommendations about state **qui tam provisions**. Therefore, the advice that follows focuses on what individual states should consider doing both before and after enacting a **qui tam provision**.

Prior to enacting a **qui tam provision**, states need to undertake factfinding measures to assess their specific needs in combating fraud. Pertinent considerations include: (1) the type or types of fraud that are most prevalent in the state; (2) the resources and manpower available to the Attorney General to aid him in discovering fraud; (3) the degree to which politics influences the Attorney General's ability to pursue fraud; and (4) the number of claims of fraud initiated by the Attorney General. n294 By examining these factors, a state can customize its **qui tam provision** to meet its exact needs. For example, if a state finds that its Attorney General is ineffective at combating fraud, or that even with plenty of resources he chooses not to do so, the state may want to adopt a broad **qui tam provision** that does not restrict the types of fraud to which it applies. If, on the other hand, it finds that the Attorney General is proficient in combating all types of fraud except medical assistance fraud, as appears to be the case with the federal government, the state may want to restrict the use of its **qui tam provision** to this type of fraud alone. Whichever is the case, the key point is that each state needs to determine what particular circumstances it faces before enacting a **qui tam provision**.

In addition to considering the specific needs of the state before enacting a **qui tam provision**, states must also take into account the degree to which a state **qui tam provision** will result in an overlap of state and [*1000*] federal efforts to combat fraud. n295 This Note has considered the effects of the federal and state **qui tam provisions** in isolation of each other. However, in reality, it is likely that in many ways the litigation resulting from state and federal **qui tam provisions** will intersect. For example, the investigation efforts of a State Attorney General may replicate those of the U.S. Attorney General. If a situation like this were to occur, then even though each statute might be good public policy independent of the other, the overlap would be a waste of valuable resources. Accordingly, states should consider whether enactment of a state **qui tam provision** would add value beyond that of the **qui tam provision** of the FCA.

After enacting a **qui tam provision**, states should undertake systematic data collection to assess the effect of the provision and ensure that it has operated as expected. No matter how well conditions in a state are studied before enacting a provision, only data collected on the actual results of a provision can ensure that it has been used successfully in practice. To this end, data should be tracked on the number of qui tam and non-qui tam actions initiated and what recoveries are associated with both, broken down by the type of fraud involved. These data would allow each state to undertake an analysis similar to that used in Part II of this Note.

While factfinding investigations and data collection are both costly endeavors, this short-term expenditure could
eliminate the long-term expense of frivolous qui tam actions.

Conclusion

Qui tam provisions have the potential to be a powerful weapon to protect the public interest from fraud. In their current form, though, they appear to be a mixed blessing; they do uncover fraud that the Attorney General would not be able to detect on his own, but only at the cost of a substantial number of frivolous suits. On the federal level, the size of the recoveries related to the fraud uncovered outweighs the cost of investigating frivolous suits, suggesting that the public is better off with the qui tam provision of the FCA. To the extent that there is doubt about this conclusion, any marginal deterrent effect from the qui tam provision would likely tip the scales in support of the qui tam provision. On the state level, states such as Illinois and Tennessee have shown notable success with their use of qui tam provisions. Accordingly, continued reliance on the qui tam provision of the FCA, as well as the adoption of similar provisions by state governments, is positive.

This does not mean that the federal provision should be retained in its current form, or that states should adopt exact replicas of it. Congress, as well as states that have already passed qui tam provisions, should undertake measures to reduce the number of frivolous suits. The experiences of Illinois, Tennessee, and the federal government suggest possible amendments to accomplish this goal. Further, before concluding that a qui tam provision is to their benefit, state governments should pay careful attention to the specific demands of their own state and the ways in which a state provision might overlap with the federal provision.

Of course, many of the above conclusions are preliminary, as they rely on a great number of assumptions and a limited set of data. In order to conclusively determine the ability of qui tam statutes to serve the public interest, issues such as whether claims serve the public interest even when they do not recover money for the government must be resolved. Data collection is needed on elements such as the cost to investigate qui tam actions, what factors influenced the Attorney General’s decision to intervene, and whether cases were dismissed on procedural or substantive grounds. With this information, qui tam provisions can be altered to realize their full potential as powerful weapons that protect the public interest from fraud.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstLabor & Employment LawEmployer LiabilityFalse Claims ActCoverage & DefinitionsQui Tam Actions

FOOTNOTES:


n2. For examples of scholarship about the qui tam provision of the FCA, see infra note 91 and accompanying text.
n3. See infra Part I.D.


n5. See infra Part I.C.


n7. See infra Part I.D.

n8. The term "public interest" can be used in multiple ways. On the one hand, the term may refer to the result of any single case. In this sense, the term would consider the ability of any individual qui tam action to prevent fraud and earn money for the government treasury. On the other hand, "public interest" may refer to the aggregate effects of all qui tam suits. In this sense, the term considers whether all qui tam suits, added up and considered as a whole, outweigh the aggregate costs of investigating all suits. Many times these two concepts will be one and the same - when individual suits are in the public interest, their aggregate effect will be as well. However, it is possible that an individual suit will be in the public interest, while the aggregate effect of all suits will not be. When this outcome occurs, legislatures need to consider why this has occurred so they can tailor the provisions to allow only the types of individual suits that are in the public interest and, thus, ensure that the aggregate effect is also in the public interest. When it is unclear why this outcome has occurred, the aggregate effect should be considered over the individual. Although false claims actions may be pursued by many different relators, as well as the Attorney General, in reality there is really only one plaintiff - the government. No single plaintiff would deem a series of actions successful because it led to a recovery in one instance, if in the aggregate the plaintiff lost money.


n14. See Beck, supra note 12, at 555 ("Despite the availability of qui tam actions under [other] statutory provisions, only the False Claims Act has generated a large number of federal qui tam cases.").

n15. See id. at 541 (noting that person who pursues qui tam actions is often referred to as "relator").

n16. 31 U.S.C. §3730(a) (2000) ("The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person."); id. §3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government.").

n17. Id. §3730(b)(2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government ... ").

n18. Id. ("The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.").
n19. Id. §3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action ... ").

n20. Id. §3730(d)(1) (providing that if government proceeds with action, relator is entitled to "at least 15 percent but not more than 25 percent of the proceeds" plus "reasonable attorneys' fees and costs").

n21. Id. §3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.").

n22. Id. §3730(d)(2) (providing that if government does not proceed with action, then relator is entitled to "not less than 25 percent and not more than 30 percent of the proceeds" plus "reasonable attorneys' fees and costs").

n23. Id. §3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.").

n24. Id. §3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.").


n26. See Hamer, supra note 4, at 90.

n27. See Klismet, supra note 11, at 289.
n28. See id.

n29. See id. ("Following its enactment in 1863, the False Claims Act remained a sporadically used provision.").

n30. See id. (noting "several restrictions and modifications" made to Act's provisions during World War II).

n31. See Kenneth D. Brody, Recent Developments in the Area of "Qui Tam" Lawsuits: A New Weapon for Challenging Those Who May Be Submitting False Claims to the Government, 37 Fed. B. News & J. 592, 592 (1990) ("The Congress severely restricted qui tam actions by precluding those cases based on information known to the government at the time the suit was filed ... ").

n32. See Klismet, supra note 11, at 290.

n33. See id. at 292 (noting that "the 1986 Amendments rejuvenated the use of the False Claims Act").

n34. See 31 U.S.C. §3730(c)(4) (2000) (barring qui tam suits in such situations unless relator has "direct and independent knowledge of the information on which the allegations are based").

n35. Id. §3730(c)(1).

n36. See Klismet, supra note 11, at 291 ("Congress increased the damages provision from double to treble damages and raised the award for the informer to (1) fifteen to twenty-five percent of the proceeds of the suit ... when the government intervenes, and (2) twenty-five to thirty percent when the government chooses not to intervene.").
n37. See id. at 291-92 & n.48 (noting that employee who is discharged or otherwise harmed because of lawful action taken under qui tam provision "shall be entitled to all relief necessary to make the employee whole" (quoting 31 U.S.C. §3730(h))).


n39. Fraud Statistics, supra note 38.

n40. Id.

n41. Id.

n42. Id.


n44. Id. §6032.

n45. Cf. Telephone Interview with Michael Bassham, Tenn. Assistant Attorney Gen., in New York, N.Y. (Nov. 16, 2005) [hereinafter Bassham Interview] (explaining that key impediment to use of Tennessee False Claims Act is "overall lack of exposure to the act" and fact that it "is not a simple area of the law to deal with").
n46. See infra notes 47-77 and accompanying text.


n72. H.F. 483, 2007-08 Leg., 85th Sess. (Minn. 2007).


n78. Based on the apparent success of the FCA, then-New York Attorney General Eliot Spitzer has advocated adoption of a state false claims act with a **qui tam provision** in New York since as early as 2003. See Press Release, Office of N.Y. Attorney Gen., Spitzer Calls for Passage of State False Claims Act (June 12, 2003), available at http://www.oag.state.ny.us/press/2003/jun/jun12a03.html (on file with the Columbia Law Review). However, when he introduced this bill in the New York Legislature, it was defeated after being denounced by two powerful lobbying groups, the Healthcare Association of New York State - representing hospitals, nursing homes, and other health care providers - and the State Medical Society - representing doctors. See Michael Luo & Clifford J. Levy, As Medicaid Balloons, Watchdog Force Shrinks, N.Y. Times, July 19, 2005, at A1. They predicted that “the bill would lead to an epidemic of frivolous allegations.” Id. Despite this opposition, the New York State Legislature is again considering a qui tam proposal. Richard Perez-Pena & Danny Hakim, Lawmakers Hit Deadlock on Medicaid, N.Y. Times, Mar. 28, 2006, at B1.


n80. For example, in 1993, Arkansas passed a false claims act, which, while it does not contain a **qui tam provision**, does provide a reward for whistleblowers who supply information that leads to the recovery of state funds, without allowing them to file suit on their own. Ark. Code Ann. §§20-77-902, -911(a) (1997). The reward provided under the Arkansas statute is substantially smaller than that provided to a qui tam plaintiff under the FCA. The reward may not exceed ten percent of the aggregate money recovered and is capped at $100,000. Id. Further, either the Attorney General or the private party must petition the court to grant an award to the private party. Id. Finally, even if the court grants a reward, the private party cannot recover any of his attorneys' fees. Id. While the Arkansas Legislature amended this statute twice, in both 1999 and 2003, it has still refrained from including a **qui tam provision**. See 2003 Ark. Acts 1473; 1999 Ark. Acts 1544.


n82. Most commentators would agree that California, Florida, and Texas have had the most activity. See E-mail from Patrick Burns, Dir. of Commc’ns, Taxpayers Against Fraud Educ. Fund, to author (Oct. 4, 2005, 14:22:00 EST) (on file with the Columbia Law Review) (“The three states that are doing the most with their state False Claims Act laws are California, Texas, and Florida.”).

n84. See, e.g., Memorandum from John Mitchell to Chaka Patterson, Chief of Special Litig., Ill. Attorney Gen. Office 1 (Apr. 2, 2004) (on file with the Columbia Law Review) [hereinafter Patterson, Memo] (noting that no claims were brought under Illinois’s Whistleblower Reward and Protection Act in first five years after its enactment).

n85. For example, although Illinois’s Whistleblower Reward and Protection Act was enacted in 1991, see Whistleblower Reward and Protection Act, Public Act 87-662, 1991 Ill. Legis. Serv. 3281 (West) (codified at 740 Ill. Comp. Stat. Ann. 175/1 to /8 (West 2002)), no claims were brought until 1996. Patterson, Memo, supra note 84, at 1. However, since 1996 over 130 suits have been initiated by private citizens. Id.

n86. Deficit Reduction Act of 2005, Pub. L. No. 109-171, §6031(a)-(b), 120 Stat. 4, 72-74 (2006) (to be codified at 42 U.S.C. §§1396 & 1396a) (providing that if state adopts qui tam provision that is as strong as federal provision then “the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points”).

n87. See supra note 78.

n88. Deficit Reduction Act of 2005 §6032(a)(3) (requiring states to “establish written policies for all employees of the entity ... that provide detailed information about the False Claims Act”).

n89. See supra notes 44-45 and accompanying text.

n90. The documentation of the growing awareness of federal qui tam provisions, see, e.g., James J. Graham & Jesse A. Witten, Am. B. Ass’n Ctr. for Continuing Legal Educ. Nat’l Inst., Pre-Trial Motions Practice in False Claims Act Litigation Against Healthcare Providers J-1 (1998); William E. Kovacic, Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 Loy. L.A. L. Rev. 1799, 1804 (1996), has not been seen on the state level. Further, the mere fact that the federal qui tam provision has been in place for over one hundred years, see supra note 25 and accompanying text, while state qui tam provisions are a relatively recent phenomenon, see supra
notes 46-77 and accompanying text, suggests that knowledge of state qui tam provisions would be substantially less than that of the federal provision.


n92. See, e.g., Hamer, supra note 4, at 90 (addressing "policy arguments posed against the qui tam provisions of the False Claims Act").

n93. 3 William Blackstone, Commentaries 161.

n94. See, e.g., False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary, 99th Cong. 325-26 (1986) (testimony of Sen. Grassley) ("In short, S. 1562 would shift the incentives for individuals to come forward by allowing them more involvement in the litigation process as well as increased portions of damage awards."); False Claims Reform Act: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 99th Cong. 29 (1985) (testimony of Jay Stephens, Deputy Associate At'y Gen.) (stating that through incentive of personal recovery, qui tam enforcement encourages individuals with information to bring that information to appropriate authorities, thereby assisting in prosecution of fraud); id. at 102 (testimony of John Phillips, Co-Director, Center for Law in the Public Interest) ("What this law will do is create inducements and encouragement to the very people seeing the fraud going on day in and day out in these defense establishments. It will help the Justice Department ferret out the information."). Additional justifications for qui tam provisions include "the Justice Department's unwillingness to aggressively prosecute fraud cases" and "the limited enforcement resources available to the federal government." Beck, supra note 12, at 562-63.

n95. See Pamela H. Bucy, "Carrots and Sticks": Post-Enron Regulatory Initiatives, 8 Buff. Crim. L. Rev. 277, 322 (2004) ("The number of suits filed and monetary judgments obtained in qui tam FCA actions, especially when compared to other existing private attorney general actions, shows that the qui tam FCA private justice model is successful."); see also Hamer, supra note 4, at 89 (noting that increase in qui tam actions since 1986 amendments has "led many members of Congress to hold out the False Claims Act as a model of federal law enforcement").
n96. See Beck, supra note 12, at 565 (citing need to "supplement government enforcement resources" as justification for qui tam enforcement); F. Paul Bland, Why "Qui Tam" Is Necessary, Nat'l L.J., Nov. 4, 1991, at 13, 14 ("[A] major reason for revitalizing qui tam suits was that public prosecutors did not have the time or resources to go after a high proportion of reported significant fraud.").

n97. See Hamer, supra note 4, at 101 (concluding that qui tam provisions of FCA do not pose any "glaring policy concerns"); Bland, supra note 96, at 14 (noting that FCA has "built-in corrective to suits without merit" and does not appeal to worst instincts of relators as "critics fear").


n100. See Elletta Sangrey Callahan & Terry Morehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273, 334-35 (1992) (arguing for "procedures to encourage reporting within the organization").

n101. See Kovacic, supra note 90, at 1855 (noting five basic flaws of qui tam mechanism, including that "the qui tam mechanism provides inadequate disincentives for relators to file meritless suits"); Joan H. Krause, "Promises to Keep": Health Care Providers and the Civil False Claims Act, 23 Cardozo L. Rev. 1363, 1383 (2002) (suggesting that one explanation for increase in qui tam litigation is "meritless lawsuits"); Waldman, supra note 99, at 14 (suggesting meritless suits as one explanation for increase in qui tam litigation); Paula J. Zimmerman, The Sequoia Significance: The Role of the Civil False Claims Act's Dismissal Provision in Procurement Reform, 29 Pub. Cont. L.J. 329, 345 (2000) ("As more [qui tam] suits are being filed, it is inevitable that there are more meritless suits among them.").

n102. Bland, supra note 96, at 14. Proponents contend that it is naive to assume that because the FCA provides large financial incentives the relators' main motivation would be monetary reward. They note that any financial gains are often minimal and the personal risks to attain them are quite high. See Hamer, supra note 4, at 99 ("The reward for undertaking a qui tam action seldomly [sic] outweighs the significant personal risks that relators face.").

n104. Id. (citing 31 U.S.C. §3730(b)(2), (c)(4) (2000)).

n105. Id.

n106. Hamer, supra note 4, at 101. Proponents also maintain that internal reporting systems are not appropriate in the case of fraud. Id. at 100-01 ("When organizations internalize fraud problems, the national treasury continues to lose money and the public ultimately pays through a decreased level of services and higher taxes.").

n107. See Bland, supra note 96, at 14 (noting that "harsh judgments" written before 1991 were "a little premature").

n108. See id. (acknowledging that it was "premature" to make "judgments" about the 1986 amendments).

n109. See supra Parts I.B-C.


n111. See supra Part I.C.

There are multiple ways to determine if a qui tam claim has merit. According to Black's Law Dictionary, "merits" refers to the "elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure." Black's Law Dictionary, supra note 9, at 1010. In contrast, the Oxford English Dictionary defines "merit" as "something that entitles to reward or gratitude." 9 The Oxford English Dictionary 634 (2d ed. 1989). This broader, latter definition would characterize a case that was dismissed for procedural reasons as lacking merit, while the former would not. In considering the value of qui tam actions, some would argue that a broader definition is more appropriate because whether a claim is dismissed for procedural reasons or a failure to have factual validity, the Attorney General and the courts have expended valuable resources and have not earned an award for the government. On the other hand, some would argue that a narrower definition is more fitting because a broader use is too focused on monetary factors and ignores that a suit that costs the public money to pursue would still have merit if it advances principles of justice by attacking fraudulent behavior and discouraging future illegal behavior.

Ultimately, there is no definitive answer as to which side is correct, but multiple reasons support adopting a monetary focus. First, when a qui tam action is filed, the Attorney General has at least sixty days to investigate the claim. Although this time is set aside to allow the Attorney General to decide whether to intervene, see False Claims Act, 31 U.S.C. §3730(b)(2) (2000), it also gives him time to correct any procedural flaws in the filing, thus decreasing the number of qui tam actions that will later be dismissed on procedural grounds. Of course, certain procedural errors are beyond the scope of what the Attorney General can "correct." For example, there is little the Attorney General can do to avoid having a qui tam action dismissed on procedural grounds when the statute of limitations has expired. See Graham County Soil & Water Conservation Dist. v. United States, 125 S. Ct. 2444, 2447-48 (2005). But if one considers that the statute of limitations, just like many other procedural requirements, was implemented to promote justice - by ensuring that a defendant does not have to defend a case long after all evidence to support his claim has been destroyed or become virtually impossible to locate - then issues of justice are implicated on both sides of the debate and offset each other. See Order of R.R. Tels. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944) ("Statutes of limitations ... are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber ... ."). Second, while there is certainly a case for alerting the public to fraudulent behavior, even when it is not behavior sufficient to warrant a monetary award through the legal system, public awareness can be raised without further burdening an already overtaxed legal system. Finally, the FCA seeks to combat false claims for payment by the government, and thus, by its own terms, takes on a monetary focus. Taking these reasons together, unless otherwise indicated, the term "merit" is used to refer to its more inclusive ordinary meaning, not its narrow legal meaning. Further, wherever possible the term "frivolous" is used to avoid confusion.


n115. Id. §3730(b)(3); see also Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 930 (10th Cir. 2005) (stating that "the Government requested and received several time extensions from the district court, totaling two years"); United States ex rel. Mikes v. Strauss, 931 F. Supp. 248, 259 n.6 (S.D.N.Y. 1996) (noting that court had "ordered several stipulations extending the time from the United States to intervene in [the] action").


n117. The Attorney General is generally thought to serve two main functions - representing the government interest in legal proceedings and representing the public interest in legal proceedings. The Attorney General's role as the chief litigator for the government has long been recognized. See, e.g., The Attorney General's Role as Chief Litigator for the United States, 6 Op. Off. Legal Couns. 47, 48 (1982) ("We conclude that ... the Attorney General has full plenary authority over all litigation ... to which the United States, its agencies, or departments,
are parties.”); Neal Devins & Michael Herz, The Uneasy Case for Department of Justice Control of Federal Litigation, 5 U. Pa. J. Const. L. 558, 578 (2003) (identifying role of Attorney General as chief litigator for United States); Mark B. Stern & Alisa B. Klein, The Government's Litigator: Taking Clients Seriously, 52 Admin. L. Rev. 1409, 1415 (2000) (same). As a corollary to this role, he is also expected to represent the public interest. See, e.g., Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 149 (1967) (Stewart, J., dissenting) (noting that Attorney General represents public interest in federal antitrust proceedings); Charities Bureau, N.Y. State Attorney Gen., The Regulatory Role of the Attorney General's Charities Bureau 1 (2003), available at http://www.oag.state.ny.us/charities/role.pdf (on file with the Columbia Law Review) (“The Attorney General has broad authority ... to commence law enforcement investigations and legal actions to protect the public interest.”); Philip Weinberg, Office of N.Y. Attorney General Sets Pace for Others Nationwide, 76 N.Y. St. B.J. 10, 10 (2004) (noting that role of Attorney General has evolved to be "not just the government's chief legal officer but a 'guardian of the public interest'" and arguing that this conception is a "nationwide reality" (footnote omitted)). Several state supreme courts have specifically noted that a key role of the Attorney General is to protect the public interest. See, e.g., People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003) (affirming power of Colorado Attorney General to challenge laws he considers against public interest); Feehey v. Commonwealth, 366 N.E.2d 1262, 1266 (Mass. 1977) (holding that Attorney General “has a common law duty to represent the public interest” (citations omitted)).


n119. Common sense indicates that the Attorney General will not expend limited resources on suits which have little or no possibility of achieving a reward for the government, and by extension, the public. Cf. supra note 117 and accompanying text.


n121. United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1458 (4th Cir. 1997).

n122. Downy, 118 F. Supp. 2d at 1170.

n123. Potential ways that the Attorney General may participate in a case without actually intervening include choosing to file an amicus brief, testifying for the plaintiff, and, in some cases, retaining the right to consent to settlement. See, e.g., United States v. Health Possibilities, P.S.C., 207 F.3d 335, 339 (6th Cir. 2000) (holding that “a relator may not seek voluntary dismissal of any qui tam action without the Attorney General's consent”); Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 158, 160 (5th Cir. 1997) (noting that government may appeal district court decision or veto settlement despite its failure to intervene); Mason v. Am. Tobacco Co., 212 F. Supp. 2d 88, 90 (E.D.N.Y. 2002) (noting that “despite the decision not to intervene directly, a representative of the government argued forcefully on plaintiffs' behalf”); United States ex rel. Dept' of Def. v. Caci Int'l Inc., 953 F. Supp. 74, 77-78 (S.D.N.Y. 1995) (noting that “there is nothing in the [False Claims Act] which prohibits the government from communicating with the defendants or submitting an amicus curiae brief on their behalf”); United States ex rel. LaValley v. First Nat'l Bank of Boston, 707 F. Supp. 1351, 1363 (D. Mass. 1988) (citing DOJ amicus brief). Additionally, the Attorney General has a right to be served with all court documents in the case. See, e.g., United States ex rel.

n124. See supra note 123.

n125. In this instance, "merits" is used in its legal sense.

n126. See United States ex rel. Roberts v. Lutheran Hosp., No. 1:97Cr-174, 1998 WL 1753335, at 3 (N.D. Ind. Apr. 17, 1998) ("Because the government has limited resources to devote to FCA investigations, the Department of Justice may not be granted sufficient time to investigate an allegation of fraud, and may therefore reserve the right to intervene at a later date.").


n129. See, e.g., United States ex rel. Williams v. Bell Helicopter Textron Inc., 417 F.3d 450, 455 (5th Cir. 2005) ("[A] decision not to intervene may 'not [necessarily be] an admission by the United States that it has suffered no injury in fact, but rather [the result of] a cost-benefit analysis.'" (quoting United States ex rel. Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1458 (4th Cir. 1997))).

n130. 31 U.S.C. §3730(d)(1)-(2) (providing that where government does not intervene relator can recover 30% of proceeds, but if it does recovery can drop to 15%).

n131. See infra notes 142-145 and accompanying text.

n133. 31 U.S.C. §3730(c)(3) (providing that even if government does not intervene "it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts").

n134. Id. §3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action.").

n135. See, e.g., United States ex rel. Detrick v. Daniel F. Young, Inc., 909 F. Supp. 1010, 1016 (E.D. Va. 1995) (noting that decision not to intervene "affects both the amount of the relator's recovery and the extent of his participation in the suit"). For a description of the limited powers the Attorney General retains even when he opts not to intervene, see supra note 123.


n139. Id.

n140. Id.

n141. United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 722-23 (9th Cir. 1994); see also United States ex rel. Gilbeault v.
Tex. Instruments Corp., 25 F.3d 725, 728 (9th Cir. 1994) ("Following Killingsworth, we hold the government may not both withhold its consent to the settlement and refuse to intervene ... ").


n144. United States ex rel. Pilon v. Martin Marietta Corp., 60 F.3d 995, 999 (2d Cir. 1995) ("[A] defendant's reputation is protected to some degree when a meritless qui tam action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them.").

n145. See, e.g., United States ex rel. Mikes v. Straus, 78 F. Supp. 2d 222, 225-26 (S.D.N.Y. 1999) (suggesting that "the reason the Government chose not to intervene in this matter is its recognition that Relator's allegations ... were a 'stretch' under the False Claims Act - a suspicion that [was] all but confirmed by the Government's repeated disclaimer of any interest in the outcome"); United States v. Fiske, 968 F. Supp. 1347, 1350 (E.D. Ark. 1997) ("The filing and service requirements protect defendants' reputations to some degree by making public the United States' decisions not to intervene and thereby flagging some meritless allegations." (citing Pilon, 60 F.3d at 999)).

n146. See Killingsworth, 25 F.3d at 722-23 (finding that plaintiff who wishes to dismiss case will stop prosecuting regardless of whether government consents to dismissal, so government's refusal to intervene is tantamount to dismissal); Minotti v. Lensink, 895 F.2d 100, 104 (2d Cir. 1990) ("The Attorney General's refusal to enter the suit may be taken as tantamount to the consent of the District Attorney to dismiss the suit." (internal quotation marks omitted) (quoting United States ex rel. Laughlin v. Eicher, 56 F. Supp. 972, 973 (D.D.C. 1944))); see also United States ex rel. Fender v. Tenet Healthcare Corp., 105 F. Supp. 2d 1228, 1231 (N.D. Ala. 2000) ("The decision by the Attorney General not to intervene in and conduct the lawsuit is tantamount to consent by the Attorney General to have the action dismissed.").


n148. See 31 U.S.C. §3730(c)(3) (2000); see also United States ex rel. Hall v. Schwartzman, 887 F. Supp. 60, 62 (E.D.N.Y. 1995) (allowing government to intervene because "since its initial decision to decline intervention as of right, it has uncovered information suggesting that the scope of the alleged fraud is more extensive than it originally anticipated, and ... the qui tam plaintiffs have sought its assistance to
investigate and prosecute the action.

n149. 31 U.S.C. §3730(c)(3).

n150. Fraud Statistics, supra note 38.

n151. Id.

n152. Id.

n153. See supra Part II.A.1.a.

n154. This figure assumes that the Attorney General will make his decisions regarding the cases under investigation in the same proportion as the cases for which he has already made decisions.

n155. See supra Part II.A.1.a.

n156. 61 A. M. Jur. 2d Pleadings §582 (1999) (footnotes and citations omitted); accord Carss v. Outboard Marine Corp., 252 F.2d 690, 691 (5th Cir. 1958) (noting that "cases are generally to be tried on the proofs rather than the pleadings" (quoting Des Isles v. Evans, 200 F.2d 614, 616 (5th Cir. 1952))); Rennie & Laughlin, Inc. v. Chrysler Corp., 242 F.2d 208, 213 (9th Cir. 1957) ("The primary objective of the law is to obtain a determination of the merits of any claim; and ... a case should be tried on the proofs rather than the pleadings." (citing De Loach v. Crowley's, Inc., 128 F.2d 378, 380 (5th Cir. 1942))); Beenken v. Chi. & Northwestern R.R. Co., 367 F. Supp. 1337, 1337 (N.D. Iowa 1973) ("Dismissal should only be granted with care in order to avoid improperly denying plaintiff the opportunity to have his claim adjudicated on the merits." (citing Dann v. Studebaker-Packard Corp., 288 F.2d 201, 215-16 (6th Cir. 1961))). Although this policy was stated in the context of pleadings, there is no reason to believe that it would not apply more broadly.


n159. See, e.g., Cherokee Nation of Okla. v. United States, 24 Cl. Ct. 695, 698 (Cl. Ct. 1992) ("Dismissal is inappropriate, however, when less drastic sanctions would effectively remedy a party's noncompliance." (citing Hendler v. United States, 19 Cl. Ct. 27, 30 (Cl. Ct. 1989))).


n161. See Bassham Interview, supra note 45.

n162. Denise N. Martin et al., Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions, 5 Stan. J.L. Bus. & Fin. 121, 125-26 (1999) (finding that "the merits don't much matter"); see also Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 548-49 (1991) (noting that securities litigation is more expensive for defendants than plaintiffs, in part because discovery is virtually one-sided). The literature suggests that some plaintiffs bring claims that they know do not have merit, because they realize that some defendants will have reasons to settle outside of the merits of the case. Such suits are known as "strike suits." For a discussion of this possibility, see David Rosenberg & Steven Shavell, A Model in Which Suits Are Brought for Their Nuisance Value, 5 Int'l Rev. L. & Econ. 3 (1985). For an overview of the problem, see Robert G. Bone, Civil Procedure: The Economics of Civil Procedure 45-50 (2003).

n163. See William S. Lerach, "The Private Securities Litigation Reform Act 1995 - 27 Months Later": Securities Class Action Litigation Under the Private Securities Litigation Reform Act's Brave New World, 76 Wash. U. L.Q. 597, 601-02 (1998) ("All experienced practitioners know that strong cases generally settle for more than weak cases... . The strength of a case is often the first matter discussed in settlement talks and, along with defendants' ability to pay, typically drives the discussion and the result.").
n164. "Active" indicates that the Attorney General is actively litigating or investigating the case.

n165. Fraud Statistics, supra note 38.

n166. Id.

n167. Id.

n168. Although the DOJ does not publish information on the cost of investigating frivolous qui tam actions, the fact that there has been some debate over whether recoveries should be placed in general state coffers or used to reimburse costs indicates that they are not insubstantial. See Ginger R. Burton, Note, Piercing the State Sovereign Immunity Shield: Utilizing Suit by the United States on Behalf of Individuals to Provide the Complete Remedy for States’ Violation of Federal Laws Enacted Under Article I, 37 Ga. L. Rev. 1401, 1433 (2003) (discussing federal government’s discretion in disposing of damages award, including its ability to “withhold[] from the disbursement to the individuals on whose behalf it brought suit an amount to cover the litigation costs and the costs to investigate the claim”).

n169. E-mail from Mark S. Thomas, Bureau Chief, N. Dist., Medicaid Fraud Control Unit, Office of the Fla. Attorney Gen., to author (Dec. 13, 2005, 17:33:00 EST) (on file with the Columbia Law Review).

n170. To reach this conclusion subtract from the total recovery under the FCA the number of frivolous suits times the cost of investigating a frivolous suit, using the high end of the spectrum.

n171. Note that this analysis assumes that the Attorney General would not spend substantially more resources to discover fraud then do qui tam relators. If it were the case that the cost to the attorney general to discovery fraud exceeded the portion of the award going to a relator plus the cost of investigating frivolous suits, then it would still be beneficial to have qui tam relators. However, given the vast number of frivolous suits it seems reasonable to assume that this is not the case.
n172. Fraud Statistics, supra note 38.

n173. Id.

n174. Id.

n175. Id.

n176. Id.

n177. Id.


n179. See Todd B. Castleton, Compounding Fraud: The Costs of Acquiring Relator Information Under the False Claims Act and the 1993 Amendments to Federal Rules of Civil Procedure, 4 Geo. Mason L. Rev. 327, 349-50 (1996) (noting that "revised discovery rules provide a potential qui tam plaintiff with a potent weapon: the ability to glean valuable information through permissive abuse of the discovery process. If a relator can survive a Rule 12(b)(6) motion to dismiss - a relatively simple task - the automatic disclosure provisions become active.") (citations omitted)).

n180. Fraud Statistics, supra note 38.


n184. Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 4 n.6 (2002).

n185. See Stringer, supra note 183, at 33.

n186. Id. at 35.

n187. Id. at 34.

n188. See supra Part II.A.3.b.

n189. See Fraud Statistics, supra note 38 (recording false claims statistics in three categories: contractor fraud, medical assistance fraud, and other).

n190. See supra note 25 and accompanying text.
n191. See Jennifer Moses, False Claims, 40 Am. Crim. L. Rev. 495, 499 n.28 (2003) ("Qui tam suits have historically been predominantly concerned with the defense industry.").

n192. John R. Phillips, Qui Tam Litigation: A New Forum for Prosecuting False Claims Against the Government, 14 J. Legal Med. 267, 272 (1993); see also Krause, supra note 101, at 1367-68 (noting that emergence of "more innovative theories of liability" under FCA makes it useful tool to combat health care fraud).


n194. See Fraud Statistics, supra note 38.

n195. See infra notes 197-201 and accompanying text.

n196. Qui tam plaintiffs generally come from within the industry. See Martie Ross & Jenny Brannon, False Claims Act and Qui Tam Litigation: The Government Giveth and the Government Taketh Away (and Then Some), 68 J. Kan. B. Ass'n 20, 28 (1999) (noting that "whistleblowing by employees and competitors comprises most of the qui tam lawsuits filed").

n197. Phillips, supra note 192, at 272.

n198. See id. (providing description of most common forms of contractor fraud).

n200. See Phillips, supra note 192, at 273.

n201. See id.


n206. Hatch, supra note 202, at 1486.

n207. See supra note 204.

n208. As previously noted, qui tam relators generally come from within the industry. See supra note 196. This implies that in the context of medical fraud, they will already have access to patients' medical records.
n209. See Phillips, supra note 192, at 272-73.

n210. Id.

n211. Id.

n212. Pontell, Jesilow & Geis, supra note 199, at 117.

n213. See id.


n215. Pontell, Jesilow & Geis, supra note 199, at 117.

n216. See Fraud Statistics, supra note 38.

n217. Id.

n218. Id.
n219. Id.

n220. Id.

n221. Id.

n222. Id.

n223. See, e.g., Barger, Jr. et al., supra note 66, at 485 (noting that "virtually all the states report inadequate resources to develop cases under their own statutes"); Bassham Interview, supra note 45 (noting limited resources of State Attorneys General's Offices compared to federal offices).


n225. Justin G. Davids, State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers, 38 Colum. J.L. & Soc. Probs. 365, 365 (2005) ("In the majority of states ... the attorney general is a constitutional office directly elected by the people ... ").


n227. See supra notes 47, 50, 52, 58, 60.

n229. See E-mail Interview with Chris Ames, Cal. Assistant Attorney Gen. (Nov. 16, 2005) (on file with the Columbia Law Review) [hereinafter Ames Interview] (indicating that California only tracks qui tam recoveries).

n230. See Patterson, Memo, supra note 84, at 1 (providing data on Illinois's experience with its qui tam provision); E-mail from Susan Steckel, Staff Serv. Manager, False Claims Section, to author (Nov. 17, 2005, 11:32:00 EST) (on file with the Columbia Law Review) (providing data on Tennessee's experience with its qui tam provision).


n232. California was the first state to pass a false claims act with a qui tam provision, passing its statute in 1987. See Barger, Jr. et al., supra note 66, at 489-95. Connecticut followed later in that year. See supra note 60. It was not until five years later that Illinois became the third state to pass such a provision. See Barger, Jr. et al., supra note 66, at 489-95.


n236. See Vt. Agency, 529 U.S. at 769, 774-78 ("If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action . . ").

n238. Id. at 1102.

n239. Id. at 1102-05 (holding that qui tam actions resemble type of action disapproved in Fuchs v. Bidwill, 359 N.E.2d 158 (Ill. 1976)).


n241. Id. at 563.

n242. Attorney General Lisa Madigan advocated a different outcome in her brief - she supported a return to the regime under Lyons, whereby qui tam actions were only permitted where the Attorney General intervened. See Brief of the Attorney General as Intervenor at 13-14, Scachitti, 831 N.E.2d 544 (No. 97023) (urging court to find that WRPA is constitutional but to dismiss on basis that plaintiff lacked standing after Attorney General declined to intervene).

n243. Scachitti, 831 N.E.2d at 560-61.

n244. Id.

n245. See supra notes 134-141 and accompanying text.
n246. See infra notes 260-263 and accompanying text.

n247. These data were provided by the Office of the Illinois Attorney General. See Patterson, Memo, supra note 84, at 1.

n248. Id.

n249. Although the Illinois Attorney General's Office has not indicated what led to this drastic increase, Michael Bassham, Tennessee Assistant Attorney General, offers one possible explanation. Bassham suggests that an "overall lack of exposure" to a new qui tam provision, combined with the complexity of the law in this area, may result in few cases being filed in an act's early years. Bassham Interview, supra note 45. Accordingly, one would expect to see an increase in suits after citizens are exposed to the law and have time to comprehend its complexities.

n250. Patterson, Memo, supra note 84, at 1.

n251. Id.

n252. Id. at 2.

n253. See supra note 117 and accompanying text.

n254. E-mail from Chaka M. Patterson, Assistant Attorney Gen., Special Litig. Bureau Chief, Office of the Ill. Attorney Gen., to author (Nov. 5, 2005, 08:27:00 EST) (on file with the Columbia Law Review).

n255. Id.
n256. Lyons v. Ryan, 780 N.E.2d 1098, 1105 (Ill. 2002).

n257. See Oxford English Dictionary (2d ed. 1989) (defining "legitimate" as "conformable to law or rule; sanctioned or authorized by law or right; lawful; proper").


n259. What effect the Scachitti decision will have on these results is yet to be seen.


n261. Id. at 341 (citations omitted).


n263. See, e.g., Health Possibilities, 207 F.3d at 339 (holding that "a relator may not seek voluntary dismissal of any qui tam action without the Attorney General’s consent"); Searcy, 117 F.3d at 158, 160 (noting that government may appeal district court decision or veto settlement despite its failure to intervene); United States v. Tex. Instruments Corp., 25 F.3d 725, 728 (9th Cir. 1994) ("Following Killingsworth, we hold the government may not both withhold its consent to the settlement and refuse to intervene ... ").


n266. See supra notes 60-65.

n267. For example, although California passed a general false claims act in 1987, the Attorney General's office handles MediCal claims entirely separately from all other claims. See Ames Interview, supra note 229.

n268. Bassham Interview, supra note 45.

n269. This data was provided by the Tennessee Attorney General's Office. See E-mail from Susan Steckel, supra note 230.

n270. Bassham Interview, supra note 45.

n271. Id.

n272. Id.

n273. Id.

n274. Id.
n275. Id.

n276. Id.

n277. Id.

n278. Id.

n279. Id.

n280. Id.

n281. Id.


n284. See Ames Interview, supra note 229.

n285. See Barger, Jr. et al., supra note 66, at 483 ("Regardless of whether a state's qui tam statute applies to all false claims or only those concerning healthcare, presently the majority of qui tam cases ... are healthcare related." (footnote omitted)).

n286. See supra notes 192-193 and accompanying text.

n287. See supra Part II.A.3.b.

n288. See supra Parts II.A.1-2.

n289. See supra Parts II.A.3-4.

n290. See supra Part II.B.1.

n291. See supra notes 260-262 and accompanying text.


n293. See supra note 263 and accompanying text.
n294. This list is in no way exhaustive. Instead, it is only meant to illustrate the types of considerations a state should make before enacting a qui tam provision.

n295. See Barger, Jr. et al., supra note 66, at 485 (questioning "whether the state statutes bring anything new to law enforcement, or whether the states are simply using their statutes to maximize 'piling on' or piggy-backing opportunities").