



U.S. CHAMBER  
Institute for Legal Reform



# The Great Myths of State False Claims Acts

*Alternatives to State Qui Tam Statutes*

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FEBRUARY 2018 UPDATE



**U.S. CHAMBER**  
**Institute for Legal Reform**

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# Executive Summary

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In the movie *Field of Dreams*, a mystical voice convinces an Iowa farmer to rip out a chunk of his revenue-producing corn field and replace it with a baseball diamond, promising “If you build it, they will come.” Later in the film, the farmer learns that “they” were ghosts of professional baseball players looking for a field on which to play again. In 2006, Congress offered states a very similar deal—build a state Medicaid *qui tam* statute to federal specifications, and whistleblowers hiding in the shadows will bring the state new fraud cases and millions of dollars in new revenue.

Congress implemented this ethereal bargain through an incentive provision included in the Deficit Reduction Act of 2005 (DRA).<sup>1</sup> Fueled by testimonials from the very plaintiffs’ attorneys who stood to gain from increased rewards, Congress adopted the provision with no public debate, pointing only to the government’s success under the federal civil False Claims Act (FCA) and its signature *qui tam* provisions to bolster its prediction. A decade later, 30 states and the District of Columbia, having invested in their field of dreams, are still waiting for the ghosts to arrive.<sup>2</sup>

Instead of new whistleblowers bringing state-specific schemes to the attention of state prosecutors, the only available evidence shows that whistleblowers who report to the federal government are the ones living the dream—in reality, these

hybrid federal-state *qui tam* actions deliver a windfall to the whistleblowers on every dollar recovered for federal and state governments. Careful consideration of the incentives provided by the DRA coupled with the state’s new obligation to pay relators’ fees, among other costs, shows that states are frequently made worse off by enacting their own state statutes. Now, for beleaguered state agencies, the burden of *qui tam* litigation is about to get much heavier. Recent developments in federal legislation, case law, and policy will add to the already existing burden on states seeking recoveries under their own FCA statutes.

The movement towards state FCAs began in the early 2000s, when the U.S. Department of Justice (DOJ) and its state partners had begun to collect ever-



increasing civil settlements under the federal FCA, largely from pharmaceutical manufacturers. These collections were premised on allegations that the manufacturers' conduct impacted state Medicaid programs nationwide. Because states supplied roughly half the funding for Medicaid programs, state treasuries were the beneficiaries of roughly half the growing recoveries, even without state FCAs.<sup>3</sup> Furthermore, because only a handful of the states sharing in those growing recoveries had whistleblower or *qui tam* statutes authorizing the payment of any rewards, whistleblowers saw the vast majority of states as collecting windfalls without paying any reward.<sup>4</sup> Indignant, the whistleblowers' bar organized around a cause of its own—finding a way to force states to pay bounties through enactment of state FCAs, thereby doubling the rewards paid to whistleblowers in Medicaid false claims cases.

Unfortunately for states, the proliferation of *qui tam* laws and relator-driven lawsuits has had—at best—a mixed impact on state Medicaid fraud recovery efforts. Newly minted *qui tam* provisions have exacted a price few states appear to have anticipated. Most of these provisions entitle whistleblowers to increased shares of state recoveries for doing little more than they do now under the federal statute. A rise of multi-jurisdictional litigation—under state and federal law, largely in federal courts—has complicated the resolution of those FCA lawsuits that governments do actually pursue. More significantly, that increase in complexity comes at a time when the number of cases litigated by whistleblowers alone, after federal and/or

state governments have declined to adopt their allegations, is also on the rise.

The cost and burden of those cases is consuming ever-greater amounts of resources—government resources as well as defense resources. Too often, these laws have prioritized the interests of whistleblowers and their attorneys over those of the state. In recent years, these complications have been exacerbated by directives from the Office of the Inspector General, Department of Health and Human Services (OIG) that states loosen key safeguards against opportunistic litigation. Perhaps most importantly for the states, the actual benefit from the implementation of these state FCAs (for anyone other than the whistleblowers) remains unclear at best.

State FCA proponents tend to equate the statutes' laudable *purpose*—to enhance state fraud detection and recoveries—with *efficacy*. This paper seeks to separate the wheat from the chaff. First, it outlines the fundamentals of the DRA and the incentives that have prompted states to enact their own *qui tam* laws. Second, it examines recent case law and policy directives that may impact the burden on states with their own FCA statutes. Third, it dispels common misconceptions about the impact these laws have wrought on state efforts to recoup the proceeds of Medicaid fraud, and the challenges they have presented to states and defendants alike. Finally, the paper considers alternatives to the prevailing state *qui tam* model that may empower states to combat Medicaid fraud while mitigating the risks of lawsuit abuse.

# The Evolution of State FCAs

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Drafted as an amendment to the Medicaid statute, the DRA provides that states enacting a *qui tam* law modeled on the federal FCA shall receive an additional 10% of federal Medicaid fraud recoveries. Without the DRA increase, states only receive the proportion that they contribute to their Medicaid programs. The DRA's sponsors theorized that by encouraging states to pass their own FCAs, the law would invigorate local efforts to tackle Medicaid fraud.

As amended, the Medicaid statute now provides that "the Federal medical assistance percentage" (FMAP) of any amounts recovered in an action brought under a qualifying state FCA will be "decreased by 10 percentage points." Thus, instead of the federal government receiving 60%, its recovery percentage drops to 50%. Put another way, in a state where the federal government covers 60% of the state Medicaid expenses, the qualifying state would receive 50% of Medicaid fraud settlements rather than 40%.

A state's receipt of this bonus is by no means automatic; it rests on a determination by OIG, in "consultation with

the Attorney General . . . that the State has in effect a law that meets [certain] requirements." Those requirements are that the law:

- (1) establishes liability to the State for false or fraudulent claims to Medicaid consistent with the liability provisions of the federal FCA;
- (2) is at least as effective as the federal FCA at rewarding and facilitating *qui tam* actions;
- (3) provides for filing an action under seal for 60 days with review by the state attorney general; and,

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(4) contains a civil penalty that is not less than that authorized by the federal FCA.<sup>5</sup>

Nor does OIG's determination that a statute satisfies these prerequisites guarantee that a state will *remain* eligible for the DRA bonus. Recent—and repeated—history demonstrates that to retain provisions “as effective” as those in the federal FCA, and thus maintain its bonus, a state must continually amend its statute to keep pace with new federal legislation and the changing views of OIG, or face funding whistleblower rewards without that federal support.

In October 2015, for example, Congress passed legislation requiring federal agencies to annually increase FCA penalties to account for inflation, as measured by the Consumer Price Index.<sup>6</sup> As a result of the legislation, effective for penalties assessed after August 1, 2016, DOJ initially increased FCA civil penalties from a range of \$5,500 to \$11,000 per false claim to a range of \$10,781 to \$21,563 per false claim.<sup>7</sup> In February 2017, DOJ *again* increased the penalties to a range of \$10,957 to \$21,916.<sup>8</sup> As a result of these increases, nine states that were previously found to be DRA-compliant are currently under a grace period with OIG that ends on December 31, 2018, by which time the states must update their statutes to reflect the increased penalties or lose their DRA bonus.<sup>9</sup>

This is by no means a new phenomenon. In 2011, OIG issued over 20 new state FCA reviews—the first since Congress amended the federal FCA in 2009 and 2010. OIG concluded that *all* then-existing state FCAs were not DRA-compliant because they were “not at least as effective” as the amended

“ Thus, compliance is not only affected by amendments made to the federal FCA by Congress, but also by the changing interpretations of OIG.”

federal FCA “in rewarding and facilitating *qui tam* actions.” States with FCAs previously deemed DRA-compliant were provided two years to bring their statutes in line, during which time they would continue to receive a 10% bump in their Medicaid fraud recoveries.

Importantly, provisions previously deemed compliant by OIG were held to be non-compliant in their subsequent review, even where the federal amendments did not relate to those provisions.<sup>10</sup> Thus, compliance is not only affected by amendments made to the federal FCA by Congress, but also by the changing interpretations of OIG. This lack of clarity over whether a state FCA will be held DRA-compliant—and how long it will remain compliant—raises the risk states take when enacting their own *qui tam* provisions. Their costs are certain to increase, but states may never see the benefits promised in the DRA.

Currently, only 20 of the 31 existing parallel statutes have been certified by OIG as DRA-compliant, including the nine states currently in a grace period.<sup>11</sup> In other words, less than two out of three states with their

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own FCAs are eligible for the incentives provided by the federal government; however all 30 states and the District of Columbia remain liable to pay bounties to relators and to take on the administrative burdens of dealing with litigation filed by third parties that invokes the law they are charged with enforcing. By the end of 2018, unless these nine states pass legislation deemed sufficient by OIG, just over one out of three states with a state FCA will remain eligible for the DRA incentive.

## New Developments

In addition to the constant pressure for states to keep up with a Congressional agenda, developing case law and policy determinations also impact the states' burdens in making recoveries under their state FCAs.

### **SUPREME COURT DECISION IN *ESCOBAR*: INCREASED BURDEN IN LITIGATING MATERIALITY**

In *Universal Health Servs., Inc. v. United States ex rel. Escobar*,<sup>12</sup> the Supreme

Court identified the FCA's materiality requirement as a check on abuse of the statute. The Court offered no bright line to determine materiality, but found the element anchored in common law fraud. The Supreme Court also characterized the materiality element as requiring a "rigorous" and "demanding" analysis. The Court made it clear that a mere option to deny payment for a false claim was not enough to establish materiality. Rather, the Court observed that a falsity is likely material if the government in fact denied payment because of the falsity or there is evidence that the government would have refused payment had it known of the alleged falsity at the time payment was made.<sup>13</sup> Numerous courts have applied federal decisions, such as *Escobar*, to claims brought under state FCAs, which are substantively similar to or track the language of the federal FCA,<sup>14</sup> and thus the *Escobar* decision impacts states' FCA litigation dockets in significant ways.

In the wake of *Escobar* and the heightened materiality standard it articulated, the regulatory intricacies of state and federal programs—and the deliberations of the state and federal employees and contractors who manage them—have been the subject of increased scrutiny in litigation. As direct consequences of this trend, states face increased litigation costs, increased disruption of routine services as a result of added discovery burdens on state agencies, and growing risk that federal courts might adopt disfavored constructions of state program rules and regulations. At the same time, the odds of those complaints resulting in a recovery are falling.

Take, for example, litigation that alleged that the marketing of Plavix caused false

claims to be submitted to state Medicaid programs. The original FCA complaint was filed in March 2011.<sup>15</sup> Two amended complaints were filed (on November 27, 2012 and September 20, 2013 respectively) on behalf of the U.S., 23 states, and the District of Columbia. Multiple motions to dismiss were argued before the case was stayed pending the Supreme Court's ruling in *Escobar*.<sup>16</sup> Following the *Escobar* decision, the case was re-opened and a fourth amended complaint was filed on August 16, 2016.<sup>17</sup> This fourth amended complaint was ultimately dismissed when the court found that it failed to adequately allege materiality under the heightened materiality standard established by *Escobar*.<sup>18</sup>

In another recent case, the relator filed her FCA complaint under seal on December 16, 2013, alleging violations of the FCA and Florida's state equivalent of the FCA. She alleged: (1) a marketing strategy through which sales representatives for the defendant pharmacy distributed pre-printed prescriptions that automatically authorized six refills regardless of medical necessity and coached physicians to prescribe products with the most generous reimbursement rate; and (2) a practice of charging vastly different prices for the same product for individuals who were uninsured, had private insurance, or were covered by TRICARE, Medicare, or Medicaid.<sup>19</sup>

More than three years later, on April 28, 2017, the federal government elected to intervene in part only in relation to the claims that the defendants charged disparate prices. The relator then filed an Amended Complaint on July 12, 2017, advancing her claims related to the other marketing schemes. The amended

complaint alleged claims under the federal FCA and the FCAs for Florida, Virginia, Massachusetts, California, Colorado, Delaware, Georgia, Illinois, Indiana, Louisiana, Maryland, Nevada, New Jersey, New Mexico, Oklahoma, Tennessee, and Texas. Defendants moved to dismiss.

Although the court dismissed with leave to amend on grounds that did not include materiality, it signaled that future litigation will need to address the question of materiality of the relator's claims.<sup>20</sup> Specifically, the court noted that "[b]ecause the Court has already determined that [relator's] § 3729(a)(1)(A) claim fails to meet the Rule 9(b) standard, the Court need not address the materiality argument at this juncture. But [relator] is advised that, in amending this claim, she should consider the importance of alleging facts supporting materiality—i.e. why [the alleged marketing scheme], and inadequate training regarding drug warnings would influence each government's decision to pay such claims."<sup>21</sup>

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The decision thus anticipates additional litigation about materiality, and, importantly, in the context of an alleged scheme to defraud Medicaid, the materiality analysis will require “rigorous” analysis of the decisions each state would have made in assessing claims for payment. These two cases suggest, at least anecdotally, that states with their own FCAs may be pulled in as parties to ongoing litigation about the parameters of materiality after *Escobar*. Monitoring and participating in such litigation is costly and states would have every incentive to be involved in order to preserve their litigation interests under their own state statutes. These added costs would work to offset any gains state treasuries might reap by enacting a state FCA.

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### **INCREASED DISCOVERY BURDEN**

The practical implications of *Escobar* cannot be overstated. In *Escobar*, the Supreme Court flung open gates of discovery that federal and state governments had long fought to keep closed—discovery into the decision making of officials, employees, and others who implement state programs. The Supreme Court held that proof of lack of materiality can include evidence that

“the government pays a particular claim in full despite its knowledge that certain requirements were violated.”<sup>22</sup> Subsequent cases have viewed this as an implied mandate for increased discovery, requiring that government agencies open themselves up to discovery in an effort to collect required evidence on materiality. In state *qui tam* litigation involving state agencies, this development logically extends to those agencies as well.<sup>23</sup>

In *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, for example, the court held that when evidence shows that the “agency armed with robust investigatory powers to protect public health and safety is told what Relators have to say, yet sees no reason to change its position,” “it is not plausible that the conduct of the manufacturer in securing FDA approval constituted a material falsehood capable of proximately causing the payment of a claim by the government.”<sup>24</sup> Therefore, such evidence is at the crux of the materiality finding, and it is primarily found through discovery. Further justifying such discovery and underscoring its importance, the *Nargol* court added that “[r]uling otherwise would ‘turn the FCA into a tool with which a jury of six people could retroactively eliminate the value of FDA approval and effectively require that a product largely be withdrawn from the market even when the FDA itself sees no reason to do so.’”<sup>25</sup>

Likewise, in *United States ex rel. Kelly v. Serco Inc.*,<sup>26</sup> the defendant was able to show through discovery a lack of materiality of the government sub-contractor’s decision-making process. Specifically, the court noted that the evidence in the case



showed that the government contractor continued payment despite known noncompliance.<sup>27</sup> Such evidence could not support a finding of materiality, particularly under *Escobar*'s heightened burden.

Moreover, *Escobar*'s implied discovery mandate only adds to discovery burdens that already exist. For example, well before *Escobar*, the defendant in *United States ex rel. King v. Solvay S.A.*<sup>28</sup> submitted over 600 exhibits involving 47 states and the District of Columbia in order to defend against relators' specific state claims.<sup>29</sup> Critically, the relators in that case had provided *no evidence* of wrongdoing against many of those states—but the state agencies were nevertheless burdened with discovery while defendants attempted to show lack of evidence at the summary judgment stage.

The additional awards available under state *qui tam* statutes clearly lead relators to bring cookie-cutter allegations under as many state statutes as possible as a means of ensuring they do not miss a chance to claim a bounty from every sovereign that benefits from their disclosure. The result in a number of cases has been that relators who survive a motion to dismiss federal claims are free to pursue burdensome, fishing-expedition discovery on a state-by-state basis, forcing defendants to bear the burden of showing no such evidence exists.

## POLICY DIRECTIVES

On January 10, 2018, a Justice Department official who oversees enforcement of the federal FCA issued a memorandum providing guidance to Trial Attorneys in the Fraud Section and Assistant U.S. Attorneys about the circumstances in which it may be appropriate to invoke the power that the government has under the False Claims Act to seek to dismiss *qui tam* complaints.<sup>30</sup> The new policy appears motivated in part by the large volume of *qui tam* cases filed annually. Though historically relators would not proceed with declined cases, they now do so with growing frequency. DOJ has always been concerned with what it views as “bad FCA law” arising from such cases. By seeking to dismiss some of the non-meritorious cases at an earlier stage, before they can generate rulings that may set bad precedent for the government, DOJ may be trying to exert greater control over the case law that gets made under the FCA.

Moreover, as discussed above, the Supreme Court's *Escobar* decision imposed a “demanding” and “rigorous” materiality requirement on FCA actions. That requirement obliges relators and defendants obtaining discovery from the government to examine whether any supposed noncompliance affected payment decisions. DOJ is also clearly concerned about trying to fend off some of that discovery in meritless cases.

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If nothing else, this memorandum reveals that DOJ recognizes that the burden of *qui tam* litigation in which the government declines to intervene is growing. Apparently, in a post-*Escobar* era, this burden may tip the scales more often in favor of dismissal. The open question in those cases will be whether state attorneys general can match the federal resources required to get the United States out of a lawsuit.<sup>31</sup>

As illustrated above, changes in case law and policy can impact the burdens to the states that implement their own FCA statutes. None of the cost-benefit calculations offered by the whistleblowers' bar and other proponents of state FCAs take these significant and unpredictable costs into account.

### **CHANGING FEDERAL TAX POLICY**

Recent federal legislation amending the Internal Revenue Code raises yet another set of potentially thorny issues for states enacting *qui tam* statutes. The Tax Cut and Jobs Act enacted in December 2017 amended Section 162(f) of the Code to alter the tax treatment of payments made under the federal and state FCAs.<sup>32</sup> The Code now provides that payments made for, or to settle, alleged FCA violations are generally not deductible except to the extent that they constitute restitution for damage or harm caused by the violation, or payments to come into compliance with any law which was violated. The payment must have been identified as such in the court order or settlement agreement or in an information report that the "government entity" is required to file with the Internal Revenue Service describing all such settlements.

The amendment thus raises the burden on the taxpayer and mandates that the federal

or state government entity collecting the payment segregate amounts paid for restitution from any amounts paid as penalties or reimbursements to the government for the cost of investigation. Effectively, the amendment requires the government and defendants to agree to that allocation in settlement when, historically, no such negotiation or agreement was required. The impact of this amendment on the settlement of state and federal FCA and *qui tam* lawsuits has yet to be seen.

Further complicating matters, in the recent Budget Bill, Congress also adopted an amendment to the Code that accommodates whistleblowers who pay attorneys' fees and court costs "in connection with any award under . . . a State false claims act, including a State false claims act with *qui tam* provisions" up to the amount of the taxpayer's gross income during the year the award is paid.<sup>33</sup> Notably, no similar specific deduction applies to amounts paid for cases brought under the federal statute. In other words, for whistleblowers choosing between filing a federal *qui tam* and a *qui tam* under federal and state law, the amendment creates an additional incentive to file under both by rendering attorneys' fees and costs incurred "in connection" with the state reward tax deductible.

While amendments to the Internal Revenue Code appear beyond the scope of OIG's review of state *qui tam* statutes under the DRA, these changes in federal tax policy (and perhaps others to come) will further complicate litigation under state *qui tam* statutes for those states who choose to adopt or retain them.

# Prevailing Myths About State *Qui Tam* FCAs

Not only can multiple variables impact the cost and burden of *qui tam* on a state, but many of the cited advantages of state *qui tam* provisions are without merit.

## Myth #1: State *Qui Tam* FCA Statutes are Necessary to Detect State-Specific Fraud and Have the Effect of Increasing Detection of State-Specific Fraud

Though many proponents of state *qui tam* statutes assume that a state's enactment of an FCA statute would improve law enforcement and promote state-specific fraud detection,<sup>34</sup> there is little evidence to support that claim. States presumably adopt false claims laws to empower their attorneys general to prosecute fraud committed against their states and to recover monies lost on account of that fraud.<sup>35</sup> Furthermore, while relators have taken advantage of this proliferation to file complaints under every possible legal mechanism,<sup>36</sup> states have been slower to avail themselves of these options.

In fact, statistics indicate that state attorneys general have filed few, if any, actions under the new statutes. Nine states, post-DRA, have adopted an FCA that requires them to report the various statistics including the number of cases

filed by relators and the government, and money recovered under the statute: Colorado, Connecticut, Delaware, Maryland, Minnesota, Montana, New Jersey, North Carolina, and Washington. Their experiences are instructive. For example, the New Jersey attorney general reported 95 cases filed in 2016 under its *qui tam* provision—and zero filed by the state.<sup>37</sup> In 2015, New Jersey filed one case, and private individuals filed 46. Iowa had a similar experience in 2014: 50 cases were filed but none by the attorney general.<sup>38</sup>

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A closer review of recovery statistics also belies the notion that state *qui tam* statutes uncover “local” fraud that would otherwise be overlooked in the wake of large multi-district actions filed under the federal FCA. Though proponents of state FCAs often contend that such laws incentivize whistleblowers to bring state-specific fraud to the attention of state authorities, there is not yet any convincing evidence of this. In state reports, cases filed under a state statute and in a court located in the “victim” state proved nearly nonexistent. Almost all reported cases were filed elsewhere, in federal courts, pursuant to claims under the federal FCA, and pertained to nationwide fraud allegations. As a law enforcement matter, because the federal FCA claims at issue required federal prosecutors to work with state law enforcement to investigate claims to and payments from state Medicaid programs, these cases, and the states’ role in them, did not depend on the existence of state *qui tam* statutes.

For instance, in 2016 in North Carolina, only eight percent (20 out of 242) of cases filed under the state’s statute were actually

filed in North Carolina.<sup>39</sup> That same year, Montana reported that only two out of 186 cases filed under the Montana False Claims Act were filed in the state.<sup>40</sup> In 2014, only one out of 50 cases alleging a violation of the Iowa act was filed in Iowa.<sup>41</sup> In 2012, Colorado reported that 52 cases were filed in out-of-state federal court, and that none were filed by the state attorney general in state court or an in-state federal court.<sup>42</sup> In 2010 in Connecticut, 79 *qui tam* cases were filed in out-of-state federal courts, while only two cases were filed in state court or in-state federal courts.<sup>43</sup> None were filed by the state attorney general.

Similarly, in 2010 in New Jersey, 120 cases were filed in out-of-state federal court but none were filed in state court or by the state attorney general, while 18 were filed in New Jersey federal courts.<sup>44</sup> Likewise, Delaware’s 2010 report indicated that its attorney general filed only two cases, while the rest of the state’s 49 FCA cases were filed in out-of-state federal courts.<sup>45</sup> Delaware’s 2012 report showed an increase in out-of-state federal court actions (81) and a decrease in cases filed by the attorney general (zero).<sup>46</sup> These numbers do not indicate that states are uncovering local violations. They show only that relators are adding whichever state laws they can to generalized, national complaints to increase their recoveries.

## Myth #2: State *Qui Tam* FCA Statutes are Necessary for States to Protect Their Interests in Multi-State Investigations and Recoveries

States without their own *qui tam* statutes are not prohibited from recovering as a

result of fraud allegations brought to their attention by an action filed only under the federal FCA.<sup>47</sup> In truth, the overwhelming majority of state recoveries stem from multi-district actions filed under the federal FCA. The available state reports illustrate this reality. New Jersey, for example, reported recoveries in over a dozen cases in 2016. Almost all of these cases were filed under the federal FCA, named multiple states as plaintiffs, and importantly, did not require a state False Claims Act for participation. The fact is that New Jersey, or any other state, need not have adopted an FCA or shouldered the associated costs to have been named in the case or to recover a share of the proceeds.

Moreover, the absence of a state *qui tam* statute does not preclude a state's recovery for state-specific fraud claims in single- or multi-state investigations. In addition to whatever state statutory and common law authorities exist, fraud actions can be—and are—brought under the federal FCA in order to punish and deter state-specific fraud. Consider *United States, ex rel. Gallick*, where although the state of Ohio has no state *qui tam* statute, the relators were able to bring an FCA action against an Ohio medical facility in an in-state federal court, and the Ohio attorney general was able to participate in the investigation under the federal FCA.<sup>48</sup> In other words, the federal FCA functions so that state-specific fraud is effectively litigated without foisting unwelcome costs on states that it benefits.

Furthermore, even without state *qui tam* statutes, states have established mechanisms for coordinating with federal authorities in fraud litigation. The reality is that state attorneys general already obtain

information to enable prosecution of state crimes where that information is the product of a federal whistleblower action. In fact, “working protocols have been developed through which state and federal prosecutors share evidence as necessary, and at an appropriate time, in investigating each federal Medicaid *qui tam* filed.”<sup>49</sup>

Federal prosecutors work with state employees to determine whether and how the alleged conduct implicates the particular state reimbursement scheme at issue. In cases involving a single state's Medicaid program, federal prosecutors work with the state's Medicaid Fraud Control Unit (MFCU)—lawyers and investigators working in a state prosecutor's office, funded by a federal appropriation. In national cases, MFCUs across the country have developed a mechanism for coordinating the interactions of multiple states with the federal investigation. Working through the National Association of MFCUs (NAMFCU), teams of MFCU lawyers serve as liaisons

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between state Medicaid program officials, MFCUs, and state prosecutors to facilitate a coordinated investigation and either negotiation of a “global” resolution, if settlement is achievable, or coordinated litigation, if it is not. As a result, a relator’s share of the “proceeds” in such cases has been measured as a percentage of, and has been paid from, the federal recovery only, not the state recovery. These coordinated efforts ensure that states’ interests are considered during federal FCA actions and that states receive necessary information regarding fraud within their state. They do not require state *qui tam* statutes to function.<sup>50</sup>

### Myth #3: State *Qui Tam* Statutes are Necessary to Increase States’ Shares in Multi-State Settlements

Another common misconception is that the DRA incentives necessarily provide a tangible financial benefit to the states that qualify.<sup>51</sup> While states that pass a False Claims Act may expect a 10% bump in their recovery share, they must also pay a bounty of up to 30% to whistleblowers who file suit under that statute. The result, for many, will be no net increase in recovery. In fact, in numerous scenarios, states may actually lose money.

By way of example, presume a settlement of an alleged national Medicaid fraud with a total recovery of \$160 million, with the state and federal governments each procuring 50% (\$80 million each) of the total reward. Absent a *qui tam* provision, the state’s recovery remains at \$80 million, while the federal government alone bears the burden of paying out, from its \$80 million recovery, the relator’s percentage.

Now, consider a similar scenario involving a state with a *qui tam* statute. Instead of recovering 50%, or \$80 million, of the \$160 million award, the state would recover 60%, or \$96 million. However, the state would now be required to pay the relator a share of that recovery—an obligation the state would not shoulder if the action were filed only under the federal statute. Assuming an average relators’ share of 20%,<sup>52</sup> the hypothetical state must now subtract \$19.2 million (20% of the \$96 million) from its recovery and retain only \$76.8 million for its Medicaid program losses. In other words, the state keeps \$3.2 million less than if it had no state *qui tam* statute. By design, the only financial “winner” in this scenario is the relator, who receives double the recovery—from \$16 million to \$32 million—he or she would have received in the pre-DRA era. The result is a direct transfer of recovered monies from the state, subsidized in part by the federal government’s DRA incentive, to relators (and their attorneys through contingency fees).

Note that with the increased penalties implemented in 2016 and again in 2017, the potential losses are compounded. Say that, as a result of the increased penalty

“*The result, for many, will be no net increase in recovery. In fact, in numerous scenarios, states may actually lose money.*”



amendments, rewards are now much larger than they had been under the previous construct, and the reward is now \$320 million. A state with no FCA recovering 50% would recover \$160 million. A state with a DRA-compliant law would increase its initial reward to \$192 million, but be forced to pay

out (assuming again an average of 20% to the relator) \$38.4 million, resulting in a take-home amount of \$153.6 million, a loss of \$6.4 million. Thus, the increase in penalties also increases the stakes—and means that a state has that much more to lose.

### Hypothetical \$160 Million Medicaid Fraud Settlement

	With NO State FCA	With State FCA
Federal Government Recovery from <i>Qui Tam</i> Action <u>Before</u> Relator's Fee	<b>\$80M</b> (50% of settlement)	<b>\$64M</b> (40% of settlement)
State Recovery from <i>Qui Tam</i> Action <u>Before</u> Relator's Fee	<b>\$80M</b> (50% of settlement)	<b>\$96M</b> (60% of settlement)
Relator's Share From Federal Government	<b>\$16M</b> (20% <sup>1</sup> of \$80M recovery)	<b>\$12.8M</b> (20% of \$64M recovery)
Relator's Share From State Government	<b>\$0</b> (no obligation to pay Relator)	<b>\$19.2M</b> (20% <sup>2</sup> of \$96M recovery)
Federal Government's Recovery <u>After</u> Relator's Fee	<b>\$60M</b> (\$80M-\$20M)	<b>\$51.2M</b> (\$64M-\$12.8M)
State Government's Recovery <u>After</u> Relator's Fee	<b>\$80M</b> (50% of settlement, no Relator's fee)	<b>\$76.8M</b> (\$96M-\$19.2M—\$3.2M less compared with no State FCA)
Relator's Total Recovery	<b>\$16M</b> (Federal Government's 20% fee only)	<b>\$32M</b> (Federal Government's 20% fee plus State Government's 20% fee—a double recovery compared with no State FCA)

<sup>1</sup> Relators may recover between 15-25% of an intervened *qui tam* action or 25%-30% of a declined *qui tam* action. These calculations use 20% as an average percentage of recovery.

<sup>2</sup> Again, 20% has been used as an average percentage based on the statutory range. See EN 50.

Importantly, these figures do not account for the states that are unable to either keep pace with legislative changes to the federal FCA or are otherwise deemed noncompliant under the DRA. In these cases, the states received no percentage bump but are still required to pay a portion of their recoveries to the relator. In the above scenario, when a state receives a 50% recovery of a \$320 million reward (\$160 million), it would lose anywhere from \$24 to \$48 million in payouts to the relator (this accounts for the whole statutory range for relator's percentage of the reward, from 15% to 30%).

The numbers suggest that the “break-even” point for states—at the average 20% relator's reward—is at the 60% FMAP<sup>53</sup> mark. That is, states with an FMAP of less than 60% “stand to lose, and can be worse off, than if they had no *qui tam* provision.” In fact, further inquiry shows that states must fit a very limited set of criteria in order to hope to gain from the DRA incentives at all, and very few states actually achieve this narrow set of standards. For example, no state benefits from being DRA-compliant in declined *qui tams*, and only four states benefit from being DRA-compliant at the average relator's reward of 20%.<sup>54</sup>

Clearly, there are many scenarios in which the state is set up to lose, and only a few in which the state stands to gain marginal increases—increases which do not account for the additional costs that a state faces when it enacts an FCA. Many state legislatures fail to account for the new costs—most drastically the share paid out to relators, but also administrative expenditures—in their cost-benefit analysis.<sup>55</sup>

Several states, including West Virginia, Kentucky, Kansas, Oregon, and Maine, have taken this cost-benefit analysis into consideration when determining whether a state FCA statute would increase recoveries.<sup>56</sup> West Virginia, for example, notes that “it does not make fiscal sense for West Virginia to have a *qui tam* provision.”<sup>57</sup> In other words, the windfall to relators, in many cases, makes a state *qui tam* statute fiscally detrimental to the state. It is relevant to note that the reason that state *qui tam* statutes are potentially fiscally detrimental has little to do with state FCA provisions generally, but rather with the requirement of *qui tam* provisions and the associated relator's award specifically.

“Many state legislatures fail to account for the new costs—most drastically the share paid out to relators, but also administrative expenditures—in their cost-benefit analysis.”

# Additional Considerations

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The text of the DRA suggests that its authors assumed Medicaid cases would be litigated in state court, under one state statute. Nothing prevents a relator or the state from suing for Medicaid damages in state court. In fact, the Medicaid program is set up to facilitate just that result—the federal Medicaid statute provides a mechanism for state programs to return to the federal government the federal share of funds recouped from providers and suppliers.

Relators have chosen not to follow this preferred model. Instead, they tend to file a single complaint in federal court invoking the federal FCA and all available state FCAs. As a result, many federal *qui tam* suits routinely contain frivolous state claims that add no state-specific allegations.<sup>58</sup>

The rationale for doing so likely includes that: (1) federal prosecutors take the lead on investigating cases filed in federal court and have more resources to bring to an investigation than do most state attorneys general; (2) federal courts offer a mechanism to join several state statutes in one lawsuit; and (3) most *qui tam* lawyers have more experience and comfort in federal courts. Regardless of the reason, nothing in the federal statute or any state statute precludes the same relator from bringing the same claims under state and federal statutes. Nor do the DRA incentives address the procedural and practical complexity of investigating, defending,

or litigating Medicaid fraud allegations under multiple state and federal *qui tam* provisions.

While most often these duplicative claims are filed as pendant claims in one action in federal court, the potential for facing multiple duplicative actions in multiple courts and jurisdictions poses obvious heightened risks and costs for defendants. Such actions also threaten the rights of individuals, witnesses or defendants in the civil action, who may also be subject to parallel criminal investigation. Furthermore, filings under multiple state statutes often impede the progress and coordination of investigations of alleged multi-state schemes. Thus, while state *qui tam* laws promise large rewards—mainly to relators—they do so at the peril of government, judicial, and defense interests alike. The examples below illustrate the complications such laws beget.

“ [W]hile state *qui tam* laws promise large rewards—mainly to relators—they do so at the peril of government, judicial, and defense interests alike. ”

## State Costs of DRA Noncompliance

A typical argument in favor of state *qui tam* actions compares the money a state stands to gain under a compliant statute to what it would gain with no statute at all. This ignores the costs of a noncompliant statute—a very real risk based on past OIG practice. Indeed, the federal government often moves the carrot and forces states to compromise their own interests. Since the DRA was passed in 2005, Congress and OIG have both added new requirements for compliance<sup>59</sup> and entirely changed interpretations of existing requirements.<sup>60</sup> Each change necessitates that non-compliant states re-examine their statutes and decide whether to continue to seek DRA compliance. Some states decline or are simply unable to surpass the legislative hurdles to modify their statute, and this comes at a substantial price. When a state’s statute is noncompliant, it loses the 10% incentive, but it still must pay the relators’ reward. The result is a compounded loss compared to what the state would recover without any *qui tam* provision.

Wisconsin faced this exact situation. In 2011, OIG determined that Wisconsin’s FCA was noncompliant, offering multiple bases for the decision.<sup>61</sup> Wisconsin did not amend its FCA in response. Instead it entirely repealed the statute in 2015.<sup>62</sup> The whistleblower bar decried the repeal and endorsed a report by the Wisconsin Center for Investigative Journalism and whistleblower bar group Taxpayers Against Fraud. The report argued that Wisconsin’s repeal lost the state millions of dollars in potential recovery.<sup>63</sup> It presented a hypothetical \$20 million fraud in which, after treble damages, the state and federal government would split \$60 million in recovery. “According to the report, when Wisconsin’s False Claims Act was DRA-compliant, the state and federal governments would have received \$24.9 million each after accounting for relator payouts.” Note, however, this assumes that both the state and federal government intervened and that the relator was awarded the lowest possible range of recovery permitted by statute.

Without a state FCA, the report contended, the state recovers \$24 million. However, the report concedes that when Wisconsin’s FCA was noncompliant, the state would have recovered only \$19.92 million from this hypothetical fraud. This is an over-\$4 million loss from what the state would now recover without any *qui tam* statute.

As with many pro-*qui tam* discussions, the report mischaracterized and brushed aside the state’s real costs. First, the report improperly calculated the relator reward under the now-repealed Wisconsin FCA. Wisconsin’s statute authorized a range of

awards for a relator, which would affect the state's total recovery. When the state intervened, it owed the relator between 15 and 25% of the state's recovery, and between 25 and 30% when it did not.<sup>64</sup> But the state declined to intervene in most cases.<sup>65</sup> Therefore, a typical relator's state recovery under the report's hypothetical would range from \$7.5 million to \$9 million with a compliant statute, and the state would expect to recover anywhere from \$21 million to \$22.5 million. The state's typical recovery is much lower when it declines intervention under a noncompliant statute—between \$16.8 million and \$18 million. The relator in this scenario would receive between \$6 million and \$7.2 million from Wisconsin.

Put simply, Wisconsin repealed its *qui tam* statute because legislators saw the state had little to gain and much more to lose by keeping it in place or attempting to update it.

## The Civil Penalties Moving Target

In 2016, Congress mandated that all federal agencies raise civil penalties to adjust for inflation.<sup>66</sup> The federal FCA penalties nearly doubled in 2016 and will increase with inflation every year after.<sup>67</sup> OIG determined that the penalty increase made 11 states' FCAs noncompliant and ineligible for the 10% incentive unless they make changes to their state statutes by the end of 2018.<sup>68</sup> History shows that many states will face the increased loss of a noncompliant statute as a result of these legislative changes. In fact, *no* state has ever regained compliant status after OIG rejected its statute.<sup>69</sup> But as of

*“When a state’s statute is noncompliant, it loses the 10% incentive, but it still must pay the relators’ reward. The result is a compounded loss compared to what the state would recover without any qui tam provision.”*

2017, only Wisconsin had repealed its statute to restore its recovery levels to pre-*qui tam* amounts. A number of states therefore are receiving significantly lower recoveries under a noncompliant act than they would if they had never passed a *qui tam* act at all. Furthermore, with the federal government's recent history, states that do remain compliant should anticipate more changes that risk putting them in a similar posture.

In addition, such civil penalty increases will contribute to the disproportionate incentives already impacting relators' counsel. With a dangling carrot of increased penalties and double recovery from state FCAs, relators may be willing to take more risks in litigation, pursue claims with less support, and continue longer with claims that show little merit.

## Preventing State-Specific Modifications to Limit the Cost of *Qui Tam*

OIG has interpreted the DRA to require that states emulate changes to the federal statute if they are to remain DRA-compliant. OIG has recently taken this threshold to new, highly literal extremes. OIG has mandated that states enable relators to litigate a category of claims otherwise barred under a recently amended version of the federal *qui tam* provisions.

In 2010, Congress amended provisions of the federal FCA that, until then, had divested federal courts of subject matter jurisdiction in cases where relators' allegations were based on publicly-disclosed information. Since its inception in 1986, the public disclosure bar served to enhance statutory incentives for "those with knowledge of fraud against the government to bring that information to the fore" while "avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of fraud."<sup>70</sup>

The 2010 amendments narrowed the bar's scope, eliminated its status as a jurisdictional defense and, notably, excluded "state" hearings and litigation from the list of proceedings that qualify as "public

disclosures" for purposes of triggering the bar. Thus, while its predecessor included no such qualification, the current federal FCA specifies that:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in a *Federal* criminal, civil or administrative hearing . . . or other *Federal* report, hearing, audit, or investigation . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.<sup>71</sup>

Under the auspices of requiring states to maintain provisions "at least as effective" at incentivizing whistleblowing as those in the federal FCA, OIG issued new guidance in March 2013 advising states to impose additional restrictions on the public disclosure bars of their false claims statutes. It directed states to exclude from the list of "public disclosures" triggering the bar those disclosures that are made in federal criminal, civil, or administrative hearings or in federal reports, hearings, or investigations, notwithstanding the fact that Congress and OIG itself frequently convene federal hearings and issue federal reports describing fraud schemes involving specific state Medicaid programs. Regardless of this

*“OIG’s decree seems likely to yield a string of ‘parasitic’ lawsuits of the exact type the original public disclosure bar was designed to prevent.”*



incongruity, if states fail to adhere to OIG’s latest directive, they forgo their eligibility for an increased share of Medicaid fraud recoveries.

OIG’s decree seems likely to yield a string of “parasitic”<sup>72</sup> lawsuits of the exact type the original public disclosure bar was designed to prevent. As noted, state Medicaid programs are often subject to federal review, audits, and legislation. Thus, narrowing state bars to cover only disclosures in state proceedings would have the perverse effect of allowing relators to sue and to recover proceeds from states, based on information already publicly disclosed to the states in federal forums—even if those disclosures would preclude the same relators from suing under the federal FCA.

For example, under these rules, a “whistleblower” could track down allegations disclosed to the state Medicaid agency by federal investigators and auditors in reports or federal court proceedings and copy them into a lawsuit under a state false claims statute. Then, when the state finishes its prosecution, the “whistleblower” could demand a bounty from the state’s share of the recovery, which in the absence of a federal lawsuit could very well include the recovery of all dollars paid out of the state program, triggering a remittance of the federal share of that recovery from the state to the federal government.<sup>73</sup>

Moreover, the statute would force the state to pay out at least 15% of its recovery, even when the plaintiff had not helped the state at all—or would have been barred altogether

under the federal public disclosure bar. Adding insult to injury, if collected under a DRA-compliant statute, the federal government would not only lose a share of its recovery from the state, but would also subsidize the state’s payment of a bounty to the very whistleblower Congress barred from pursuing claims on behalf of (or for a bounty against) the United States. OIG’s edict on the public disclosure bar, discussed above, may be the most revealing piece of evidence that the DRA incentive really operates to serve one primary purpose—maximizing payments to relators (and their contingency fee attorneys).

## Fairness and Due Process

A proliferation of whistleblower suits based on identical allegations, under state and federal statutes, likewise raises fairness and due process concerns. For one, the federal FCA and each state *qui tam* statute permit the government to seek a stay of relator discovery pending completion of the government’s investigation or prosecution of a civil or criminal matter arising out of the same facts as those alleged in a *qui tam* complaint. Yet no state statute authorizes a court to stay discovery in deference to the investigation by another state, and where a statute limits the granting of a stay to certain circumstances, invoking the court’s general supervisory powers to issue a stay outside those circumstances will likely prove difficult. Thus, the normal remedy available to avoid one of the primary perils of parallel proceedings is simply unavailable in the context of multi-state *qui tam* litigation where some states investigate diligently and others have no reason, or resources, to do so.<sup>74</sup>

## Whistleblower Gamesmanship

Too often, multi-jurisdictional complaints breed gamesmanship, as whistleblowers seek multiple state recoveries for identical claims.<sup>75</sup> In a classic example, the United States brokered a settlement for \$124 million, \$50.6 million of which was to be paid to twenty-two states—only to watch the relator launch a post-settlement campaign for more money.<sup>76</sup> The relator’s thrice-amended complaint invoked the federal FCA and several state *qui tam* provisions. Prior to announcement of the settlement, the relator did not serve any state with his complaint or disclosure of material evidence. Once the settlement went public, however, he served the *qui tam* states, asserted a right to share in the proceeds, and took discovery to challenge the fairness and adequacy of the settlement and obtain a share of the

estimated value of the Corporate Integrity Agreement the defendant had signed with the OIG.

The district court dismissed all of the relator’s claims to share in the state recoveries. Yet notwithstanding the relator’s sweeping loss, at least four months passed between the execution of the settlement and actual resolution of the matter, all because the various state *qui tam* statutes provided the relator with opportunities to delay resolution and demand a greater reward than he expected when he first filed his *qui tam* action.<sup>77</sup>

As implemented, the DRA incentives and the state *qui tam* statutes they inspire pose latent risks to the government and defendants alike. The challenge is to recognize those risks while supporting the pursuit of true fraud, not bounties.

“As implemented, the DRA incentives and the state *qui tam* statutes they inspire pose latent risks to the government and defendants alike.”

# Alternatives to State *Qui Tam* Statutes

## Legislative Efforts to Address the Challenges of State *Qui Tam*

In enacting the DRA provision, Congress offered state legislatures an opportunity and a challenge. The opportunity (or false promise) was clear—enact Medicaid *qui tam* statutes and increase the revenues flowing back to the state from each FCA investigation. For states pursuing that opportunity, the challenge has been to protect the state and defendants by mitigating the various problems illuminated in investigations and litigation under existing state *qui tam* statutes. And because the anti-federalist formulation of the DRA discouraged states from straying from the federal statute as a model, states seeking to meet that challenge also risk losing access to the DRA's incentive payments.

While there are solutions to many of the challenges posed by state *qui tam* statutes, state legislatures need to carefully consider whether *qui tam* makes sense and, if so, must draft their statutes in a way that targets categories of schemes that still evade detection. At the same time, state legislatures must guard against exacerbating the complexity of multi-state investigations and litigation and providing windfalls to existing relators.

Some states have met this challenge by providing alternatives to existing state *qui tam* provisions. Examples include the following:

### **DECLINED *QUI TAM* DISMISSED**

The Maryland FCA specifies that a relator cannot pursue a *qui tam* action that the state declined to take over. Md. Code, Health-Gen. § 2-604(a)(7) (“If the State does not elect to intervene and proceed with the action . . . before unsealing the complaint, the court shall dismiss the action”).

### **NON-*QUI TAM* WHISTLEBLOWER REWARD**

Arkansas' Medicaid fraud statute does not include a *qui tam* provision. Instead, it provides successful whistleblowers a financial reward without corresponding rights to litigate on the state's behalf. Ark. Code Ann. § 20-77-911(a) (The court “is authorized to pay a person sums, not exceeding ten percent (10%) of the aggregate penalty recovered, as it may deem just, for information the person may have provided which led to the detecting and bringing to trial and punishment persons guilty of violating the Medicaid fraud laws”). Both the attorney general and the whistleblower can petition the Court to provide this reward. Only the former can prosecute the case itself.

### **NO *QUI TAM* FOR CLAIMS WITHIN GOVERNMENT'S KNOWLEDGE**

Prior to implementation of the DRA, Massachusetts' original FCA barred courts from exercising jurisdiction over *qui tam* actions if relators knew or had reason to know that the government already had knowledge of the claim. Mass. Gen. Laws Ann. ch. 12, § 5G (2000) (“No court shall

“ These statutes reflect awareness by states that, DRA incentives aside, state FCAs carry their own risks and *qui tam* provisions may not be the optimal way to boost state fraud recoveries.”

have jurisdiction over an action . . . brought by a person who knew or had reason to know that the attorney general, the state auditor or the inspector general already had knowledge of the situation”).<sup>78</sup>

These statutes reflect awareness by states that, DRA incentives aside, state FCAs carry their own risks and *qui tam* provisions may not be the optimal way to boost state fraud recoveries. The models above provide incentives and/or mechanisms for reporting fraud while averting, or at least limiting, the potential for private interests to usurp those of the state.<sup>79</sup>

Notably, the Maryland legislature limited the burden of declined *qui tam* litigation, knowing that a provision mandating dismissal of declined claims would cost it the federal incentive payment by rendering the statute DRA-noncompliant. Other states adopted limitations in hopes that OIG would recognize that literal emulation of the federal statute was not the only way to balance the dicta of the DRA with the state’s need to curtail abusive litigation. Oklahoma, Colorado, and Delaware, for example, initially adopted provisions designed to prevent existing relators, who had already initiated a lawsuit, from piling on parasitic claims in a single action or in a series of actions filed in other courts.<sup>80</sup>

The so-called “first-to-file anywhere” provision was intended to adapt a provision of the federal statute to the construct of Medicaid-style actions where the same false claims could be subject to both federal and state jurisdiction; where the same scheme is frequently alleged to victimize more than one state in the same way; or where law enforcement partners are alerted in the normal course to the fraud by the first whistleblower filing, regardless of jurisdiction. The underlined section below shows how Oklahoma modified the federal “first-to-file” provision to address these multijurisdictional concerns:

When a person brings an action under this section, under the federal False Claims Act, or under any similar provision of the law of any other state, no person other than the state may intervene or bring a related action based on the facts underlying the pending action.<sup>81</sup>

Despite being tied to the federal provision, OIG rejected the provision for consistency purposes, forcing each of the states to assess whether the DRA incentive was worth the cost and risk of duplicative *qui tam* litigation. For Colorado and Delaware, the answer was “yes,” the incentive was more important.<sup>82</sup> For Oklahoma, the answer was “no,” the federal incentive was

not worth changing their first-to-file provision.

State FCA proponents often opine that states need private litigants to carry out the cases they decline or are otherwise unable to pursue, but the facts tell another story. Year after year, statistics indicate that the overwhelming majority of declined *qui tams* are dismissed. In fact, as noted above, 86% of cases that are declined by the government are ultimately dismissed in court,<sup>83</sup> thus suggesting that the government already litigates a large majority of meritorious actions. The truth is that state and federal recovery data expose the fundamental flaws of the arguments advanced in support of state *qui tam* laws. As states come to realize those flaws, an increasing number may well reject the DRA incentive and consider alternatives to the *qui tam* model. Those alternatives must provide mechanisms for encouraging fraud reporting, but discourage self-interested parties from gaining a windfall and undermining the states' interests.

## An Alternative Solution— Modernize *Qui Tam* Statutes

Since the enactment of the DRA and of numerous DRA-inspired state *qui tam* statutes, commonsense, comprehensive FCA reforms have been proposed. If adopted, these measures would create incentives and rewards not only for whistleblowers and their attorneys, but for corporations and individuals doing business with state and federal governments.

First and foremost, FCA reforms should align the goals of business and government in preventing, detecting, and punishing fraud. This could be accomplished through the promulgation of voluntary standards for organizational compliance and ethics programs designed to reduce the risk of wrongdoing, increase the likelihood that wrongdoing that does occur will be detected and handled responsibly, provide strong protections to whistleblowers, and ensure integrity in an organization's performance.

“Year after year, statistics indicate that the overwhelming majority of declined *qui tams* are dismissed.”

“First and foremost, FCA reforms should align the goals of business and government in preventing, detecting, and punishing fraud.”

Companies that comply with the promulgated standards would be subject to unique penalty provisions for violations of False Claims Acts. For example, if a certified company timely discloses a possible False Claims Act violation to the government, its liability for the violation would be capped at one and a half times the amount of damages sustained by the government, and civil monetary penalties would only apply in the event that the government sustained no damages. In addition, suspension or debarment of a certified organization on the basis of a False Claims Act violation should be prohibited unless a principal of the organization is found to have acted with specific intent to defraud.

Relators should also be prevented from filing False Claims Act suits against certified organizations that have previously

disclosed the allegations of fraud to the government. However, if an employee or contractor of a certified organization reports allegations of fraud to the company prior to the company's disclosure to the state, the employee or contractor would be entitled to an award of up to 20% of the proceeds of any action or settlement.

An additional change is warranted that applies to False Claims Acts generally: government employees should be prevented from taking advantage of knowledge gained during their employment with the government to bring a *qui tam* action.

Consideration of these and other proposals is incumbent upon legislators at both the state and federal level because reform is essential to appropriately re-balancing the risks and rewards of *qui tam* litigation.



# Conclusion

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State legislatures considering whether to add or keep *qui tam* statutes on the books should think long and hard about the costs they exact. Ultimately, while *qui tam* provisions are certain to escalate a state's costs, little evidence exists that they have led to greater fraud detection.

Worse, the incentives given by the DRA fail to provide states with adequate funding to cover those costs and often subsidize little more than increased relator rewards. Though well-intentioned, the DRA has not functioned as its drafters envisioned. Thus for many states, the endless pursuit of DRA

compliance—and the often illusory benefits it promises—is simply not worth the price. Those states would be wise to consider alternative laws that serve to improve local fraud detection without the high costs *qui tam* provisions entail.

*“ [F]or many states, the endless pursuit of DRA compliance—and the often illusory benefits it promises—is simply not worth the price. ”*

# Endnotes

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- 1 Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031, 120 Stat. 4, 72-73 (2006).
- 2 As discussed later in this paper, Wisconsin repealed its state Medicaid *qui tam* statute in 2015, finding that the cost of waiting for the ghosts outweighed the benefits. Notably, Wisconsin had been one of the first states to adopt a state *qui tam* provision, even before Congress offered the DRA incentive.
- 3 For example, in *U.S. ex rel. Bogart v. King Pharm.*, Civ. A. No. 03-1538 (E.D. Pa.), DOJ announced the settlement of claims against King Pharmaceuticals for a total of \$124.1 million. DOJ, King Pharmaceuticals to Pay U.S. \$124 Million for Medicaid Rebate and Underpayments & Overcharges For Drug Products, (2005), available at [http://www.justice.gov/opa/pr/2005/November/05\\_civ\\_581.html](http://www.justice.gov/opa/pr/2005/November/05_civ_581.html) (last visited September 19, 2013), from which states recovered \$50.6 million. See *U.S. ex rel. Bogart v. King Pharm.*, 493 F.3d 323, 325-26 (3d Cir. 2007) (summarizing state share of district court settlement). Relator Bogart received “relator fees in excess of \$9 million,” in addition to counsel fees and expenses of \$800,000. *Id.* at 325.
- 4 In *Bogart*, after months of litigation, the District Court held that it lacked jurisdiction to invoke common law theories such as the “common fund doctrine” to order a state to pay whistleblowers and their attorneys any bounty on their share of such recoveries in the absence of a statute, like a *qui tam* statute, that explicitly authorized the payment. *U.S. ex rel. Bogart v. King Pharm.*, 410 F. Supp. 2d 404, 410 (E.D. Pa. 2006) *aff’d*, 493 F.3d 323 (3d Cir. 2007).
- 5 42 U.S.C.A. § 1396h (West).
- 6 Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599–600 (2015) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461).
- 7 81 Fed. Reg. 42,491, 42,501 (June 30, 2016).
- 8 82 Fed. Reg. 9,131, 9,133 (Feb. 3, 2017).
- 9 These are: California, Delaware, Georgia, Hawaii, Minnesota, New York, Rhode Island, Virginia, and Washington. OIG, U.S. Department of Health & Human Services, State False Claims Act Reviews, <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp> (last visited Jan. 1, 2018).
- 10 For example, in March 2011, OIG sent a letter to the Nevada attorney general stating that due to the amendments to the FCA made by the Fraud Enforcement and Recovery Act of 2009 (FERA), the Patient Protection and Affordable Care Act (ACA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), the Nevada statute could no longer be deemed “at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.” Letter from the Office of Inspector General, Daniel R. Levinson, to Nevada Attorney General, Catherine Cortez Masto (Mar. 21, 2011). OIG provided Nevada, along with other states in noncompliance, two years to modify its laws in concordance with the 2009 and 2010 amendments to the federal FCA. Interestingly, however, OIG labeled provisions in the Nevada statute non-compliant when those provisions remained unaffected by the amendments. Later in 2011, OIG issued another letter to Nevada (among other states) pointing out yet another provision of the Nevada FCA they suddenly realized had never been DRA-compliant.

- 11 The additional 11 states are: Colorado, Connecticut, Illinois, Indiana, Iowa, Massachusetts, Montana, Oklahoma, Tennessee, Texas, and Vermont. *Id.*
- 12 *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016).
- 13 *Id.* at 2002-03.
- 14 See e.g. *In re Plavix Mktg., Sales Practice & Products Liab. Litig. (No. II)*, CV131039FLWLHG, 2017 WL 2780744, at \*23 (D.N.J. June 27, 2017).
- 15 See Docket, *United States v. Bristol Meyers Squibb*, No. 3:13-cv-01039-FLW-TJB (D.N.J.).
- 16 *Id.*
- 17 *Id.*
- 18 See *In re Plavix Mktg., Sales Practice & Products Liab. Litig. (No. II)*, CV131039FLWLHG, 2017 WL 2780744, at \*11 (D.N.J. June 27, 2017) (holding that implied false certifications by prescribing physicians could not have been material to Medicaid’s decision to pay for Plavix prescriptions because Plavix was included on each relevant state’s preferred drug list and thus state Medicaid agencies would reimburse Plavix prescriptions automatically regardless of any representations made by the prescribing physician).
- 19 See *United States ex rel. Stepe v. RS Compounding LLC*, 8:13-CV-3150-T-33AEP, 2017 WL 5178183, at \*1-2 (M.D. Fla. Nov. 8, 2017).
- 20 *Id.* at \*2.
- 21 *Id.* at \*7.
- 22 *Escobar*, 136 S. Ct. at 2003.
- 23 Prior to *Escobar*, limited discovery into the government’s decision-making process impacted the success of an FCA claim. In *U.S. ex rel. Williams v. Renal Care Group, Inc.* the defendants sought information about whether Medicare knew about the allegedly improper relationship during discovery. The government, however, withheld evidence responsive to that issue solely on the grounds of the deliberative process privilege, which the district court and the Sixth Circuit Court of Appeals upheld. The defendant was unable to obtain information about what the government knew prior to the allegations and could not meet even the pre-*Escobar* materiality standard. In light of *Escobar*, such privilege claims may fail, or be deemed waived.
- 24 *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 35 (1st Cir. 2017).
- 25 *Id.* (quoting *D’Agostino v. ev3, Inc.*, 845 F.3d 1, 8 (1st Cir. 2016).
- 26 846 F.3d 325 (9th Cir. 2017).
- 27 *Id.* at 334.
- 28 *U.S. ex rel. King v. Solvay S.A.*, No. CIV.A. H-06-2662, 2015 WL 338032, at \*1 (S.D. Tex. Jan. 23, 2015).
- 29 *United States of America ex rel. John King and Jane Doe, et al., v. Solvay S.A., et al.*, 2014 WL 11460610 (S.D.Tex. Feb. 1, 2018).
- 30 Leaked DOJ Memo Indicates New Government Focus on Dismissing Meritless False Claims Act Cases, *The National Law Review* (January 29, 2018).
- 31 A recent directive of the Associate Attorney General to attorneys in the Civil Divisions of DOJ and the United States Attorneys’ Offices could similarly give rise to a divergence between state and federal prosecutors. The memorandum directed that U.S. civil enforcement prosecutors not build cases on sub-regulatory guidance documents.

- Whether that directive will influence state prosecutors in parallel Medicaid *qui tam* investigations is an open question. However, in light of the directive, state prosecutors could end up bringing cases to recover federal dollars under their own Medicaid *qui tam* statutes based on theories that the federal government would not pursue as a matter of policy. See Memorandum from the Associate Attorney General, U.S. Department of Justice, to the Heads of Civil Litigating Components and United States Attorneys, Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases (January 25, 2018).
- 32 26 U.S.C. Sec 162(f) (2017).
- 33 Bipartisan Budget Act of 2018. Pub. L. No. 115-123, § 41107, 2018
- 34 For example, in advocating for the renewal of the State’s Medicaid False Claims Act in 2016, the attorney general in Washington stated “[t]he Medicaid False Claims Act has brought enormous benefit to our state by giving my office a powerful tool to hold fraudsters accountable.” Wa. Office of the Att’y Gen., AG-Request Bill to Reauthorize Medicaid False Claims Act Passes House and Senate (Feb. 12, 2016), <http://www.atg.wa.gov/news/news-releases/ag-request-bill-reauthorize-medicaid-false-claims-act-passes-house-and-senate>. And yet, prior to the enactment of the Washington statute, state AGs could and did file fraud claims under the federal FCA and state common law. As a Washington Senate Report noted in 2010, the only difference the state *qui tam* statute made was to empower private whistleblowers to sue in state court—the AG’s “power” did not change. S. B. Rep. No. 95-797, at 1 (Wa. 2010), <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bill%20Reports/Senate/5144%20SBA%20JUD%2010.pdf>. (“[a] private citizen is unable to initiate an action, on behalf of an injured state governmental entity, against another party submitting a false claim for payment,” and that a private citizen can only do so “on behalf of the federal government under the federal False Claims Act”).
- 35 See, e.g., Marc S. Raspanti & Pamela C. Brecht, The Minnesota False Claims Act: Is It Minnesota Nice?, 67 *Bench & B. Minn.* 20, 22 (April 2010) (Minnesota’s False Claims Act “will provide the Minnesota Attorney General’s Office, as well as private attorneys general, also known as “whistleblowers,” a powerful potential tool in ferreting out fraud committed against the state and its many agencies.”). The Raspanti article includes the litany of arguments whistleblower lobbyists presented to convince legislators that state *qui tam* was the answer to their fiscal woes: “Presumably, members of the Minnesota legislature were interested in passing such a statute to avail Minnesota of the 10 percent incentive for having a DRA-compliant statute,” *id.* at 20; “Due to the remarkable success of the federal FCA over the last 24 years, numerous state governments have enacted similar laws to protect the public fisc and recover funds obtained fraudulently,” *id.* See also Attorney General Martha Coakley’s Fiscal Year 2009 Annual Report, at 29 (“The AGO has used the False Claims Act aggressively to help prevent fraud and recover monies wrongfully procured from public sources.”); Attorney General Eric T. Schneiderman, The False Claims Act, <http://www.ag.ny.gov/whistleblowers/false-claims-act> (last visited September 9, 2013) (“The False Claims Act is an important new tool for people to help the state or local governments recover funds or property lost through fraud or corruption.”).
- 36 Practice under existing state *qui tam* statutes demonstrates that relators do not utilize state FCA statutes to address a gap in fraud detection, but rather as an additional mechanism for increased recoveries. See *infra*.
- 37 Attorney General’s Report to the Legislature Concerning the New Jersey False Claims Act (2017), [https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/42215/l4152016z\\_d.pdf?sequence=1&isAllowed=y](https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/42215/l4152016z_d.pdf?sequence=1&isAllowed=y).

- 38 Memorandum from Eric Tabor, Chief Deputy, Iowa Dep't of Justice, to the Iowa Legislature, 2014 False Claims Act Annual Report (July 2015), <https://www.legis.iowa.gov/docs/publications/DF/680602.pdf>.
- 39 Memorandum from Seth Dearmin, Chief of Staff, N.C. Dep't of Justice, to N.C. Legislature, Annual *Qui Tam* Report for 2016 Under G.S. § 1-617(b) (Feb. 1, 2017), [https://www.ncleg.net/documentsites/committees/JointAppropriationsJPS/Reports/FY%202016-17%20Mandated%20Reports/DOJ\\_Annual\\_Qui\\_Tam\\_Report\\_2017-02-01.pdf](https://www.ncleg.net/documentsites/committees/JointAppropriationsJPS/Reports/FY%202016-17%20Mandated%20Reports/DOJ_Annual_Qui_Tam_Report_2017-02-01.pdf).
- 40 Memorandum from Chris McConnell, Assistant Att'y Gen, to Jon Bennion, Chief Deputy Att'y Gen., Mont. Code Ann. § 17-8-416 Reporting (Jan. 30, 2017), <http://leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Committee-Topics/ljic-agency-oversight-false-claims-act-report-june-2017.pdf>.
- 41 Memorandum from Eric Tabor, Chief Deputy, Iowa Dep't of Justice, to Iowa Legislature, 2014 False Claims Act Annual Report (July 2015), <https://www.legis.iowa.gov/docs/publications/DF/680602.pdf>.
- 42 Letter from Attorney General John Suthers to The Honorable Pat Steadman, Chairperson of the Joint Budget Committee, The Honorable Irene Aquilar, Chairperson of the Senate Health and Human Services Committee, and The Honorable Beth McCann, Chairperson of the House Health and Environment Committee (Jan. 6, 2012) (on file with author).
- 43 Letter from Attorney General Richard Blumenthal to Thomas P. Sherida, Clerk of the Senate and Garey E. Coleman, Clerk of the House of Representatives, at (Nov. 4, 2010) (on file with author).
- 44 Attorney General's Report To The Legislature Pursuant to N.J.S.A. 2A:32C-18 Concerning The New Jersey False Claims Act (2010) (on file with author).
- 45 Letter from Attorney General Joseph R. Biden, III to The Honorable Anthony J. DeLuca, President Pro Tempore, Delaware General Assembly and The Honorable Robert F. Gilligan, Speaker of the House, Delaware General Assembly (Dec. 3, 2010) (on file with author).
- 46 Letter from Attorney General Joseph R. Biden, III to The Honorable Anthony J. DeLuca, President Pro Tempore, Delaware General Assembly and The Honorable Robert F. Gilligan, Speaker of the House, Delaware General Assembly (Feb. 13, 2012) (on file with author).
- 47 In fact, many states have recovered, and continue to recover, in multi-state actions filed under the federal FCA without their own FCA statute and without incurring the burden of paying relators. For example, Ohio has successfully recovered millions in Medicaid fraud actions, without a state false claims act and its associated costs. *See, e.g.*, AG Announces Settlement to Recover \$446,800 for Ohio Medicaid Program, *Circleville Herald* (May 12, 2017), [https://www.circlevilleherald.com/community/ag-announces-settlement-to-recover-for-ohio-medicaid-program/article\\_341e1daf-fb18-5aa0-838b-f46b760f1029.html](https://www.circlevilleherald.com/community/ag-announces-settlement-to-recover-for-ohio-medicaid-program/article_341e1daf-fb18-5aa0-838b-f46b760f1029.html) (last visited Jan. 3, 2018). Kentucky also has no state *qui tam* statute, but it still recovers millions of dollars annually for its state Medicaid Program. *See, e.g.*, Press Release, Kentucky Attorney General's Office, AG Conway Announces \$22 Million Settlement with DaVita Healthcare Partners (Jan. 6, 2015), <http://kentucky.gov/Pages/Activity-Stream.aspx?viewMode=ViewDetailInNewPage&eventID=%7B9033CC1F-073B-46C9-B67E-77067D1D8CA5%7D&activityType=PressRelease>. Furthermore, Kentucky received that money without having to pay a single penny of its recovery to the whistleblowers as a "bounty" for blowing the whistle.
- 48 *United States ex rel. Gallick et al., v. EHSI et al.*, C.A. 2:13cv-092 (2014 S.D. Ohio).



- 49 Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell, & Chad Vacarella, *States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime*, 31 *Cardozo L. Rev.* 1523, 1546 (hereinafter “States, Statutes, and Fraud”).
- 50 Anecdotal evidence suggests that the proliferation of *qui tam* statutes in recent years has actually frayed some of these connections as representatives of states with *qui tam* statutes have begun to exclude representatives of states without them from accessing some aspects of their investigations, acting under the guise of new interpretations of the statutes’ seal provisions. In the past, during the investigative stage of a *qui tam*, the fact of a *qui tam* filing and a witness’ status as a relator were distinguished from the evidentiary product of the investigation itself and withheld from non-*qui tam* state officials participating in the investigation. Today, separate deliberations by groups whose states pay whistleblowers and those states that don’t have given rise to the impression that valuable evidence is not being shared equally among law enforcement partners. Far from the populist notion of disclosure said to underlie the *qui tam* statutes, the DRA incentive seems to have given rise to a bureaucratic, pay-to-play mentality among some state Medicaid law enforcement personnel, with the payment to benefit already well-compensated whistleblowers and their attorneys.
- 51 Many states expect financial benefits from their support of state *qui tam* provisions. For example, 17 states answered “yes” when asked whether they anticipated greater recoveries following the enactment of their state *qui tam* statutes. *States, Statutes, and Fraud*, at 1601-02.
- 52 *States, Statutes, and Fraud*, at 1547. Under the federal FCA, when the government declines to intervene, a relator in a successful *qui tam* suit is entitled to 25-30%, even higher than the average. *Id.* These percentages are somewhat illusory, however, due to the fact that, as of September of 2010, 86% of all *qui tam* cases that were declined by the government were ultimately dismissed. Civil Division, DOJ, *Fraud Statistics – Overview*, at 9 (2010). Furthermore, excluding active cases (some of which may yet be dismissed), that number jumps to 94%. *Id.*
- 53 The Federal Medical Assistance Percentages (FMAPs) are used in determining the amount of Federal matching funds for State expenditures for assistance payments for certain social services, and State medical and medical insurance expenditures.
- 54 These are: Georgia, Indiana, Montana, and Nevada.
- 55 Proponents of state *qui tam* statutes argue that states stand to recover more if they enact their own *qui tam* provisions, but they frequently fail to calculate these additional costs. For example, in 2011, following a \$26 million settlement under the federal FCA, Ohio State Attorney General Mike DeWine encouraged Ohio to enact a state *qui tam* provision, arguing that Ohio’s “share of the recovery would have been greater.” 12-5 BRPAPERS 1, 12-5 Briefing Papers 1, 5. In reality, an Ohio FCA would *not* have increased the state’s share of any actual recoveries to the Medicaid program. Without a state FCA, Ohio recovered \$10.24 million—39% of the total recovery. With a state *qui tam* statute, they would have recovered 10% more—or \$12.74 million—but would also have had to pay the relator’s share. Using the average percentage for relators’ recovery, 20%, Ohio would have recovered \$10.19 million, or \$50,000 less than without a state *qui tam* provision. In fact, the figures from this real-world example indicate that even those states whose FMAP is greater than 60% still stand to lose. Thus, taking into account both the relators fees and administrative costs, even

- states with greater than 60% FMAP should be wary of the claimed benefits of enacting a state *qui tam* statute.
- 56 States, Statutes, and Fraud, at 1621.
- 57 *Id.*
- 58 *See, e.g., United States ex. rel. Hagerty v. Cybertronics*, 95 F.Supp.3d 240, 270 (D. Mass. 2015) (“Out of the 28 state-law false-claims counts, 25 do not even come close to satisfying the pleading requirements of Rules 9(b) and 12(b)(6). Those counts contain nearly identical language that incorporates by reference the allegations of the foregoing paragraphs and allege violations of the state analogues to the federal FCA for false claims submitted to state Medicaid programs ‘that otherwise would not have been allowed’”).
- 59 *See, e.g.,* Letter from Inspector General Daniel R. Levinson, U.S. Dep’t of Health & Human Servs., to California Att’y Gen. Kamala D. Harris (Dec. 28, 2016) (finding California’s False Claims Act noncompliant after federal civil penalties increased).
- 60 *See* discussion *infra* p. 18.
- 61 Letter from Inspector General Daniel R. Levinson, U.S. Dep’t of Health & Human Servs., to Thomas Strom, Director of the Wisconsin Medicaid Fraud Control Unit (May 11, 2011).
- 62 2015 Wis. Act 55, § 945n. OIG oddly sent a letter in December 2016 again deeming Wisconsin’s FCA noncompliant. Letter from Inspector General Daniel R. Levinson, U.S. Dep’t of Health & Human Servs., to Brad Schimel, Director of the Wisconsin Medicaid Fraud Control Unit (December 28, 2016). The letter discusses the FCA that the state repealed over a year before. *Id.*
- 63 Julie Spitzer and Dee J. Hall, Wisconsin Taxpayers Lose Out on Millions after Gov. Scott Walker, Lawmakers repeal Anti-Fraud Law, Wisconsin Watch (Nov. 5, 2017), <https://www.wisconsinwatch.org/2017/11/wisconsin-taxpayers-lose-out-on-millions-after-gov-scott-walker-lawmakers-repeal-anti-fraud-law/>.
- 64 Wisc. Stat. § 20.931(11) (2015) (repealed).
- 65 E-mail from Charlie Morgan, Program Supervisor at Wisconsin Legislative Fiscal Bureau to Julie Spitzer (April 13, 2017), <https://www.documentcloud.org/documents/3673345-CM-Emails.html>.
- 66 28 U.S.C. § 2461 note (West) (Federal Civil Penalties Inflation Adjustment Improvements Act of 2015).
- 67 28 C.F.R. § 85.5 (West).
- 68 Those states are California, Delaware, Georgia, Hawaii, Michigan, Minnesota, New Hampshire, North Carolina, Rhode Island, Virginia, and Wisconsin. Office of the Inspector General, U.S. Department of Health & Human Services, State False Claims Act Reviews, <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>.
- 69 This is based on the publicly available letters from OIG as of January 3, 2018. Office of the Inspector General, U.S. Department of Health & Human Services, State False Claims Act Reviews, <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>. OIG’s policy states that when a statute has been rejected, it will review any amendments to determine DRA compliance. *Id.* According to its website, OIG has not conducted any reviews of post-rejection amendments. *Id.*
- 70 *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 321 (2d Cir. 1992). *See also Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 413 (2011) (“As we have observed, ‘[r]ather than simply repeal the Government knowledge bar,’ the public disclosure bar was ‘an effort to strike a balance between encouraging private persons to root out fraud

- and stifling parasitic lawsuits.’” (quoting *Graham Cnty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010)).
- 71 31 U.S.C.A. § 3730 (West) (emphasis added).
- 72 *See, e.g., Schindler Elevator Corp.*, 563 U.S. at 413.
- 73 Letter from Herb B. Kuhn, Acting Director, Center for Medicaid and State Operations, Dep’t of Health and Human Services to State Health Officials, at 1-2 (Oct. 28, 2008), *available at* <http://downloads.cms.gov/cmmsgov/archived-downloads/SMDL/downloads/SHO08004.pdf> (last visited Jan. 3, 2018) (requiring states to return to CMS the FMAP proportion of recoveries collected for Medicaid fraud, less any federal recovery already received).
- 74 For instance, where one state declines to intervene and take over a relator’s civil action, while other states and the federal government continue to conduct a criminal investigation in connection with the same alleged underlying conduct, the first state’s declination could entitle, or obligate, the relator to commence civil discovery against that defendant in the midst of the parallel criminal investigation.
- 75 *See, e.g., Hagerty*, 95 F.Supp.3d at 270 (holding that 25 out of relator’s 28 state-law claims did not “come close” to alleging specific conduct in the states).
- 76 *See Bogart*, 414 F. Supp. 2d at 544-45 (disposing of whistleblower’s demands for share of proceeds recovered by various states).
- 77 Among the more extreme of the relator’s allegations was the charge that the proposed transfer of the state settlement amount into an escrow account maintained by the New York attorney general was an attempt to undermine the jurisdiction of the Court and deprive the relator of his rightful share of the settlement funds. *See Relator’s Response in Opposition to the United States’ Motion to Dismiss with Prejudice Count I of the Third Amended Complaint at 3, Bogart*, 414 F. Supp. 2d 540 (E.D. Pa. 2006) (No. Civ. A. 03-1538).
- 78 OIG initially deemed the statute DRA-compliant, only to later reverse course and direct Massachusetts to remove this provision. *See John T. Boese*, 2 Civil False Claims and *Qui Tam* Actions 6-57 n.326 (4th ed. & Supp. 2012-2). Massachusetts did so in 2012, evidencing again that states seeking to retain their DRA bonuses must continually amend their statute to keep pace with the changing views of OIG.
- 79 Conflicts between relators and the government over their “piece of the pie” make this danger abundantly clear. For example, in *United States ex rel. Schweizer v. Oce N.V.*, the government and relator disagreed to the terms of settlement. The D.C. Circuit held that the government could not settle without relator’s consent unless the court approved the settlement agreement. 677 F.3d 1228, 1233-34 (D.C. Cir. 2012). Thus, not only is conflict between the government and relators a reality, it is a barrier to the government reaching a result it sees as meeting its interests.
- 80 *See Okla. Stat. Ann. tit. 63, § 5053.2* (2007); *Colo. Rev. Stat. § 25.5-4-306(2)(e)* (2010); *Del. Code tit. 6, § 1203(b)(5)* (2000).
- 81 *Okla. Stat. Ann. tit. 63, § 5053.2* (2007).
- 82 Both states amended their statutes in 2013; neither has yet to be deemed DRA-compliant.
- 83 *See Fraud Statistics – Overview, supra* note 51, at 9.











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