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The False Claims Act: Government Employees as Qui Tam Plaintiffs in the Tenth Circuit

THE FALSE CLAIMS ACT: GOVERNMENT EMPLOYEES AS *QUI TAM* PLAINTIFFS IN THE TENTH CIRCUIT

INTRODUCTION

The federal government's chief weapon in battling fraud is the False Claims Act ("FCA").¹ Under the FCA, private citizens can bring a civil suit known as a *qui tam* action² against any person or entity that has filed a false claim "for payment or approval"³ with the federal government.⁴ Upon a favorable judgment, the *qui tam* plaintiff, also known as the relator,⁵ is entitled to a portion of the damages recovered from the defendant.⁶ Commentators have argued that the FCA is a useful deterrent against fraud and an excellent tool by which the government can recoup fraudulently appropriated funds with the help of private citizens.⁷ Conversely, some have noted that *qui tam* suits reduce the government's recovery of misappropriated funds and may actually interfere with other efforts to inhibit fraud.⁸

When Congress amended the FCA in 1986, it enlarged the potential recovery for private plaintiffs, which in turn resulted in a dramatic increase of *qui tam* actions.⁹ With this rise came a proliferation in disputes over the proper interpretation of the FCA.¹⁰ In the period covered by this survey, September 1, 2001, to August 31, 2002, the Tenth Circuit decided a number of cases interpreting the FCA.¹¹ This survey specifically

1. 31 U.S.C. §§ 3729-3733 (2000); see Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 381-82 (2001).

2. *Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translated is: who as well for the king as for himself sues in this matter. BLACK'S LAW DICTIONARY, SECOND POCKET EDITION 578 (2d ed. 2001).

3. 31 U.S.C. § 3729(a)(1) (2000).

4. *Id.* § 3730(b)(1).

5. Susan G. Fentin, *The False Claims Act – Finding Middle Ground Between Opportunity and Opportunism: The "Original Source" Provision of 31 U.S.C. S 3730(E)(4)*, 17 W. NEW ENG. L. REV. 255, 259 (1995).

6. 31 U.S.C. § 3730(d).

7. Fentin, *supra* note 5, at 255.

8. *Id.* at 255-56.

9. Virginia C. Theis, *Government Employees as Qui Tam Plaintiffs: Subverting the Purposes of the False Claims Act*, 28 PUB. CONT. L.J. 225, 226 (1999). In 1987, 33 *qui tam* actions were filed while, in 1997, 533 *qui tam* suits were filed. Phillips & Cohen, Attorneys at Law, *Qui Tam Statistics*, at <http://www.whistleblowers.com/HTML/BODY/Stats.htm> (last visited Oct. 12, 2002) [hereinafter *Qui Tam Statistics*]. The amount recovered by the Department of Justice in *qui tam* suits in 1988 totaled \$355,000 while, in the year 2001, the recoveries totaled over \$1 billion. *See id.*

10. *See* Theis, *supra* note 9, at 231-39 (discussing different interpretations of FCA terms by various courts).

11. *See* United States *ex rel.* Stone v. Rockwell Int'l Corp., 282 F.3d 787 (10th Cir. 2002); United States *ex rel.* Holmes v. Consumer Ins. Group, 279 F.3d 1245 (10th Cir. 2002), *vacated*, 318 F.3d 1199 (10th Cir. 2003) (en banc); United States *ex rel.* Stone v. Rockwell Int'l Corp., 265 F.3d 1157 (10th Cir. 2001); United States *ex rel.* King v. Hillcrest Health Cir., Inc., 264 F.3d 1271 (10th Cir. 2001).

examines the opinion in *United States ex rel. Holmes v. Consumer Insurance Group* ("Holmes I"),¹² which addressed whether government employees were eligible to file a *qui tam* action under the FCA,¹³ as well as the recent en banc rehearing of that opinion, *United States ex rel. Holmes v. Consumer Insurance Group* ("Holmes II").¹⁴

Part I of this survey describes the erratic history of the FCA, while Part II discusses the pertinent portions of the Act itself. Part III examines Tenth Circuit precedents on applying the FCA. Part IV then analyzes and compares the Tenth Circuit's major decision concerning *qui tam* actions within the survey period (*Holmes I*), along with its subsequent en banc decision (*Holmes II*), with the opinions of other circuits. Finally, Part V argues that the *Holmes II* en banc decision was justified because it correctly followed Tenth Circuit precedents and appropriately interpreted the FCA.

I. HISTORY AND DEVELOPMENT OF THE FCA

Qui tam legislation has been ubiquitous since Roman times.¹⁵ Similar regulations have been part of America's legal code since colonial times.¹⁶ Throughout the first century of our republic, the federal legislature passed several bills containing *qui tam* provisions.¹⁷ Congress enacted the original FCA in 1863,¹⁸ largely in response to both claims of fraud against the Union Army during the Civil War¹⁹ and the requests of President Abraham Lincoln.²⁰

The 1863 version of the FCA, also known as the "Lincoln Law,"²¹ proscribed conduct knowingly intended to fraudulently appropriate money from the federal government.²² The Act included civil and criminal penalties for those convicted of such acts.²³ The civil penalties included a \$2,000 fine for each false claim a defendant made, plus twice the amount of damages incurred by the government.²⁴ The criminal pen-

12. 279 F.3d 1245 (10th Cir. 2002), *vacated*, 318 F.3d 1199 (10th Cir. 2003) (en banc).

13. *Holmes*, 279 F.3d at 1248.

14. 318 F.3d 1199 (10th Cir. 2003) (en banc).

15. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 566 (2000).

16. Bales, *supra* note 1, at 387 ("Prior to the American Revolution, several colonies passed statutes authorizing *qui tam* suits.").

17. *Id.* For example, Act of Mar. 1, 1790, ch. 2, § 3, 1 Stat. 101, 102, allowed the informer to collect half the amount of the applicable fine for information on a person failing to file a census return. *Id.* at 387 n.37.

18. Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696, 696-99.

19. Beck, *supra* note 15, at 555 ("The Army had received small arms that inspection revealed to be useless and artillery shells filled with sawdust rather than explosives.").

20. Theis, *supra* note 9, at 227.

21. Joan R. Bullock, *The Pebble in the Shoe: Making the Case for the Government Employee*, 60 TENN. L. REV. 365, 368 (1993).

22. Beck, *supra* note 15, at 555.

23. Fentin, *supra* note 5, at 258.

24. Bullock, *supra* note 21, at 369.

alties allowed a court to fine a defendant between \$1,000 and \$5,000, or to imprison him for between one and five years.²⁵ To elicit more *qui tam* actions, the Act awarded the informer half of the recovered damages, plus an award for litigation costs upon successful conclusion of the action.²⁶ Any person who possessed information about a fraudulent claim filed with the government, whether a government employee or private citizen, qualified to be a *qui tam* plaintiff.²⁷ Furthermore, the Act prevented anyone, including the government, from intervening once litigation commenced.²⁸

Initially, the 1863 version of the FCA was seldom used due to the general lack of knowledge about its existence²⁹ and the Union's cutbacks in defense spending, which curtailed most opportunities for fraud.³⁰ During the 1930s, however, the use and abuse of the FCA increased,³¹ largely because the Act did not require a plaintiff to have "independently-acquired information."³² Hence, anyone who heard about an accusation through the media³³ or copied the information from a government file or indictment³⁴ could rush to the courthouse and file a *qui tam* suit against the alleged perpetrator.³⁵ The increase in *qui tam* actions was further exacerbated by the Supreme Court's decision in *United States ex rel. Marcus v. Hess*,³⁶ where the Court held that since "there [were] no words of exception or qualification," any person, no matter how the information is gathered, qualified as a *qui tam* plaintiff.³⁷

In 1943, due to widespread "parasitic" suits and the *Marcus* decision, Congress revised the FCA to reduce the private sector's participation in *qui tam* litigation.³⁸ In passing the new amendments, the House of

25. *Id.*

26. *See* Theis, *supra* note 9, at 227.

27. *Id.*

28. *Id.*

29. Bales, *supra* note 1, at 389.

30. *See id.* Interestingly, many of the amendments to the FCA have occurred with the fluctuations in defense spending by the federal government. *See id.* at 385-91 (outlining the history of *qui tam* legislation).

31. *Id.* at 389. ("[T]he New Deal and World War II greatly expanded the role of the federal government in the national economy, and commensurately expanded the opportunities for unscrupulous contractors to defraud the government.").

32. *Id.*

33. *Id.* (noting that suits brought by people who learned of fraud through the media were nicknamed "parasitic" suits).

34. Bullock, *supra* note 21, at 370.

35. Bales, *supra* note 1, at 389.

36. 317 U.S. 537 (1943). *See* Beck, *supra* note 15, at 556-60, for an excellent discussion of the *Hess* case.

37. *Marcus*, 317 U.S. at 546. In *Hess*, contractors pled *nolo contendere*, and were fined \$54,000. *Id.* at 545. Subsequently, a *qui tam* plaintiff who brought suit against the contractors won a judgment of \$315,000. *Id.* at 540. The Supreme Court held the FCA did not prohibit *qui tam* suits based upon information acquired from a prior indictment. *Id.* at 546-48. The Court declined to extrapolate restrictions from the plain language of the statute, but rather gave Congress the opportunity to provide "specifically for the amount of new information which the informer must produce to be entitled to reward." *Id.* at 546 n.9.

38. Theis, *supra* note 9, at 229. The bill provided:

Representatives attempted to repeal the entire *qui tam* provision.³⁹ The Senate, however, rejected such an extreme measure.⁴⁰ After debate, the final version of the 1943 amendments preserved the *qui tam* concept, but prohibited plaintiffs from filing actions "based on evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."⁴¹ Therefore, under the new version, government employees were barred from suing under the Act.⁴² The statute was further interpreted as disallowing private *qui tam* suits when the government already possessed the information, regardless of the source.⁴³ Unlike the 1863 version of the Act, the 1943 amendments gave the government the right to intervene.⁴⁴ Furthermore, under the 1943 amendments, a *qui tam* plaintiff's recovery could not exceed 25% of the total damages, or 10% of the total when the government chose to intervene.⁴⁵ With such extreme restrictions, the use of the FCA diminished significantly.⁴⁶ More than 40 years later, due to increasing incidence of fraud perpetrated against the government, Congress found it imperative to revise the Act again.⁴⁷

In 1986, Congress amended the FCA to "encourage more private enforcement suits"⁴⁸ by diminishing the Act's strict requirements and increasing the incentives for potential *qui tam* plaintiffs to bring claims.⁴⁹ The report of the Senate Judiciary Committee for the 1986 amendments to the FCA stated that the purpose of the modernized legislation was to "encourage any individual knowing of Government fraud to bring that information forward."⁵⁰ Importantly, Congress eliminated the 1943 provision that prohibited *qui tam* suits based upon information possessed by the government at the time of filing.⁵¹ Moreover, Congress also removed the language precluding government employees from filing suit under the Act.⁵² Interestingly, although it increased the number of potential *qui*

The court shall have no jurisdiction to proceed with any [qui tam] suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought. . . .

Id. (quoting 31 U.S.C. § 232(C) (Supp. III 1943)).

39. Fentin, *supra* note 5, at 260.

40. *Id.*

41. Theis, *supra* note 9, at 229 (quoting 31 U.S.C. § 232(C)).

42. *Id.*

43. *Id.* at 229-30.

44. *Id.* at 229.

45. 31 U.S.C. § 232(C).

46. Bales, *supra* note 1, at 390.

47. *Id.*; see also Fentin, *supra* note 5, at 262 (noting that Congress amended the FCA in 1986 because of outcry over an appellate decision and "the growing pervasiveness of fraud against the government").

48. United States *ex rel.* v. Raytheon Co., Inc., 913 F.2d 17, 19 (1st Cir. 1990) (quoting S. REP. NO. 99-345, at 23-24 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5288-89).

49. See Beck, *supra* note 15, at 561-62.

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

51. Theis, *supra* note 9, at 230.

52. 31 U.S.C. § 3730 (1988).

tam plaintiffs, Congress retained a jurisdictional bar against parasitical suits in the 1986 amendments by excluding actions based upon “public disclosure of allegations” unless the plaintiff was an “original source” of that information.⁵³ Lastly, the 1986 amendments increased the minimum penalty for each fraudulent act against the government.⁵⁴

II. RELEVANT PROVISIONS OF THE FCA

Under the current version of the FCA, private persons, or “relators,” can sue any person or entity in the name of the federal government⁵⁵ who files a false claim with the United States as defined by the statute.⁵⁶ When the relator files suit, she is required to provide the government “all material evidence and information” she possesses at that time.⁵⁷ The complaint is kept under seal for a period of 60 days, during which time the government decides if it will intervene.⁵⁸ If the government does so, “it shall have the primary responsibility for prosecuting the action.”⁵⁹ The original plaintiff nevertheless maintains the right to be a party to the action.⁶⁰

A *qui tam* plaintiff is entitled to a portion of the proceeds from a successful *qui tam* suit.⁶¹ The federal government, however, is the primary beneficiary of recovered damages in any *qui tam* action.⁶² If the government chooses to intervene, the relator is eligible for between 15% and 25% of the damages recovered in a successful action, “depending upon the extent to which the person substantially contributed to the prosecution of the action.”⁶³ If the government chooses not to join the action, however, the relator may recover an amount between 25% and

53. 31 U.S.C. § 3730(e)(4)(A).

54. See 31 U.S.C. § 3729(a)(7).

55. 31 U.S.C. § 3730 (2000).

56. 31 U.S.C. § 3729. Pertinent portions of the Act state:

Any person who--(1) knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; . . .

Id. § 3729(a).

57. *Id.* § 3730(b)(2).

58. *Id.*

59. *Id.* § 3730(c).

60. *Id.*

61. See *id.* § 3730(d)-(d)(2).

62. See *id.* § 3729(a)(7).

63. *Id.* § 3730(d).

30% of the proceeds upon a favorable decision, "which the court decides is reasonable for collecting the civil penalty and damages."⁶⁴ Damages under the FCA are defined by 31 U.S.C. § 3729, which, if violated, makes a defendant liable for "a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person."⁶⁵

The Act restricts the federal courts' jurisdiction for particular claims.⁶⁶ Courts may not hear suits brought by a member of the armed forces nor against a member of the armed forces for actions arising out of her service in the armed forces.⁶⁷ Also, no suit can be brought against "a member of Congress, a member of the judiciary, or a senior executive branch official" if the government possesses the information upon which the allegations are based.⁶⁸

The provisions of the statute that have caused the most confusion, however, are the "public disclosure" restriction and the "original source" requirement.⁶⁹ The FCA prohibits *qui tam* suits based "upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media," unless that person is an "original source of the information."⁷⁰ "Original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [a *qui tam* action] based on the information."⁷¹ The current version of the FCA does not provide that government employees are disqualified as original sources.⁷²

Additionally, whether or not the provisions of the FCA are satisfied "is a question of subject matter jurisdiction."⁷³ Since a federal court is a court of limited jurisdiction, there is no presumption of jurisdiction "absent a showing of proof by the party asserting federal jurisdiction."⁷⁴ Hence, the *qui tam* plaintiff carries "the burden of alleging facts essential

64. *Id.* § 3730(d)(2).

65. *Id.* § 3729(a)(7).

66. *See id.* § 3730(e).

67. *Id.* § 3730(e)(1).

68. *Id.* § 3730(e)(2)(A).

69. These provisions are found in 31 U.S.C. § 3730(e)(4)(A)-(B).

70. 31 U.S.C. § 3730(e)(4)(A).

71. *Id.* § 3730(e)(4)(B).

72. *See id.*

73. *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1003 (10th Cir. 1996).

74. *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir. 1992).

to show jurisdiction under the False Claims Act, as well as supporting those allegations by competent proof.”⁷⁵

Finally, the current statute creates even more incentive for a person with information about fraud on the government to come forward by providing protection from employer reprisal.⁷⁶ The Act asserts that an employee who is discharged or discriminated against by her employer for participation in a *qui tam* suit “shall be entitled to all relief necessary to make the employee whole.”⁷⁷

III. TENTH CIRCUIT COURT OF APPEALS PRECEDENT

Since 1986, the Tenth Circuit Court of Appeals has interpreted the newly enacted amendments to the FCA on several occasions.⁷⁸ However, two decisions are relevant to the primary opinions discussed in this survey.⁷⁹ The first case deals with the Tenth Circuit’s definition of “public disclosure,”⁸⁰ while the second case sets forth a test for determining when a *qui tam* suit may proceed.⁸¹

In *United States ex rel. Ramseyer v. Century Healthcare Corp.*,⁸² a former employee of Century Healthcare filed a *qui tam* action against her former employer alleging it had repeatedly failed to comply with Medicaid requirements.⁸³ The plaintiff personally gathered information against the defendant, while the Oklahoma Department of Human Services (“DHS”) simultaneously conducted an independent investigation.⁸⁴ The DHS investigation revealed the same deficiencies that the plaintiff had uncovered, which were detailed in a report that the DHS provided to the involved parties.⁸⁵ Importantly, this report was available to the members of the public only by “a written request for the specific record and approval from the DHS legal department.”⁸⁶ A district court, relying on the “public disclosure” bar, held that since the general public could obtain this report, the “‘allegations or transactions’ therein were ‘publicly disclosed’ within the meaning” of the FCA.⁸⁷

75. *Fine*, 99 F.3d at 1004.

76. *See* 31 U.S.C. § 3730(h).

77. *Id.*

78. *See United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996); *United States ex rel. Fine v. Advanced Scis., Inc.*, 99 F.3d 1000 (10th Cir. 1996); *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995).

79. *See Fine*, 99 F.3d 1538; *Ramseyer*, 90 F.3d 1514.

80. *Ramseyer*, 90 F.3d at 1519.

81. *Fine*, 99 F.3d at 1544.

82. 90 F.3d 1514 (10th Cir. 1996).

83. *Ramseyer*, 90 F.3d at 1517.

84. *Id.*

85. *Id.* The report was given to the administrator of DHS, the defendants, and one copy was placed within the DHS files. *Id.*

86. *Id.*

87. *Id.* at 1518.

The Tenth Circuit, finding the rulings of the District of Columbia Circuit⁸⁸ and the Ninth Circuit⁸⁹ persuasive, rejected the district court's conclusion⁹⁰ and held that "in order to be publicly disclosed, the allegations or transactions upon which a qui tam suit is based must have been made known to the public through *some affirmative act of disclosure*."⁹¹ Relying on the congressional objectives of the FCA,⁹² the court argued that "mere possession by a person or an entity of information pertaining to fraud, obtained through an independent investigation and not disclosed to others, does not amount to 'public disclosure.'"⁹³ Accordingly, the court found that allowing the relator's suit to proceed concurred with Congress's aim to encourage persons with "first-hand knowledge of fraudulent misconduct to report fraud,"⁹⁴ since "defendants' fraudulent activities may have gone undetected because the evidence essentially was 'hidden in files.'"⁹⁵

In *United States ex rel. Fine v. MK-Ferguson Co.*,⁹⁶ a former employee of the Inspector General of the Department of Energy who had been in charge of financially related audits brought suit against MK-Ferguson Company and Industrial Contractors Corporation.⁹⁷ His complaint alleged that the companies had filed false and fraudulent reimbursement claims with the Department of Energy.⁹⁸ A district court concluded that although the plaintiff's allegations were based upon a report from the Inspector General's Office, which the plaintiff oversaw, the reports had been publicly disclosed because the office had forwarded them to a third party.⁹⁹ Since public disclosure had occurred, the district court had to decide whether the plaintiff qualified as an "original source."¹⁰⁰ Because the plaintiff did not conduct any actual investigation on his own, but rather based his allegations primarily on the submitted report of the Department of Energy, the district court determined that the plaintiff could not have had "direct and independent knowledge" of the information in the allegations and, therefore, he failed to qualify as an "original source" under the FCA.¹⁰¹ Accordingly, the district court dismissed the plaintiff's action, and the plaintiff appealed.¹⁰²

88. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

89. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995).

90. *Ramseyer*, 90 F.3d at 1518.

91. *Id.* at 1519 (emphasis added).

92. *Id.* at 1520 (referring to the FCA as meaning to discover fraud and deter "parasitic" suits).

93. *Id.* at 1521.

94. *Id.* (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991)).

95. *Id.* (quoting *Stinson*, 944 F.2d at 1161).

96. 99 F.3d 1538 (10th Cir. 1996).

97. *Ramseyer*, 90 F.3d at 1540-42.

98. *Id.* at 1542.

99. *Id.* at 1543.

100. *Id.*

101. *Id.*

102. *Id.* at 1541.

By analyzing the FCA and previous case law,¹⁰³ the Tenth Circuit developed a four-step inquiry to determine who could qualify as a *qui tam* plaintiff.¹⁰⁴ First, a court must decide “whether the alleged public disclosure contains allegations or transactions from one of the listed sources.”¹⁰⁵ Next, a court must determine “whether the alleged disclosure has been made ‘public’ within the meaning of the” FCA.¹⁰⁶ Third, a court must determine whether the plaintiff’s complaint is “‘based upon’ this ‘public disclosure.’”¹⁰⁷ If so, then the court must decide “whether the relator qualifies as an ‘original source.’”¹⁰⁸ The *qui tam* action proceeds if there is a negative response to any of the first three inquiries.¹⁰⁹ A court only undertakes a determination of whether the plaintiff qualifies as an original source when there is an affirmative reply to each of the first three queries.¹¹⁰

Concluding that the Department of Energy’s audit report was one of the sources of information precluded by the FCA, the Tenth Circuit answered the first inquiry in the positive.¹¹¹ Next, the court concluded that the audit report, which was sent to MK-Ferguson and the State of Oregon, placed no limitations on the State of Oregon, a stranger to the fraud, that would prevent its dissemination once the report was under their control.¹¹² The court found this to be an affirmative act of public disclosure, thus, answering the second question of the test positively.¹¹³ Next, the court discussed whether the complaint was based on the allegations or transactions publicly disclosed in the final audit report.¹¹⁴ Using the standard of “whether ‘substantial identity’ exist[ed] between the publicly disclosed allegations and the *qui tam* complaint,”¹¹⁵ the court stated that the plaintiff’s allegations were sufficiently identical to the audit report to conclude that they were based upon the publicly disclosed allegations.¹¹⁶

103. The Circuit Court analyzed *United States ex rel. Precision Co. v. Koch Industries Inc.*, 971 F.2d 548 (10th Cir. 1992). *Fine*, 99 F.3d at 1543-44.

104. See *Fine*, 99 F.3d at 1544.

105. *Id.*

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (2000).

106. *Fine*, 99 F.3d at 1545. (“[T]he court [in *Ramseyer*,] interpreted the False Claims Act to contain an ‘affirmative disclosure’ requirement.”).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1544.

111. *Id.*

112. *Id.* at 1544-45.

113. *Id.* at 1545.

114. *Id.*

115. *Id.* at 1545 (quoting *Precision*, 971 F.2d at 553-54).

116. *Id.* at 1546-47.

Lastly, since the first three inquiries were answered in the affirmative, the court sought to determine if the plaintiff was an “original source” within the meaning of the FCA.¹¹⁷ The court noted that to qualify as an “original source,” the plaintiff must have “direct and independent knowledge of the information on which the allegations are based and [have] voluntarily provided the information to the government before filing a *qui tam* action based on the information.”¹¹⁸ The plaintiff argued that he qualified as an original source because he fixed the limits of the investigatory audit, he recognized the equipment estimates as fraudulent, and he personally notified the Inspector General of his findings.¹¹⁹ However, the court found that the plaintiff did not actually perform the investigations that revealed the fraudulent activities.¹²⁰ Instead, investigators under the plaintiff’s guidance were directly responsible for uncovering the incriminating information.¹²¹ Furthermore, the plaintiff’s complaint consisted only of the information the investigators gathered.¹²²

The Tenth Circuit found that since the plaintiff “did not himself discover the allegedly fraudulent practices[,] . . . was not an observer of the purported fraud,” and did not have “direct and independent knowledge” of the publicly disclosed allegations and transactions upon which his Complaint [was] based,” he could not qualify as an original source.¹²³ Therefore, the court dismissed the plaintiff’s claims.¹²⁴ Interestingly, the fact that the plaintiff utilized information that he learned of as a government employee was not a stated factor in the court’s determination of the plaintiff’s qualifications as a *qui tam* relator.¹²⁵

IV. CAN GOVERNMENT EMPLOYEES BRING A QUI TAM ACTION WITH INFORMATION GAINED IN THE COURSE OF THEIR EMPLOYMENT?

A. *Tenth Circuit: United States ex rel. Holmes v. Consumer Insurance Group (“Holmes I”)*¹²⁶

1. Facts

The Postmaster at the United States Post Office in Poncha Springs, Colorado, discovered that the Consumer Insurance Group (“CIG”) had misinformed the Post Office about the weight of its mail, and that the

117. *Id.* at 1544, 1547. If the plaintiff was found to be an “original source” under the FCA, then his suit could proceed. *See id.* at 1547. However, if the plaintiff was found not to be an “original source” under the FCA, and the three preliminary inquiries in *Fine* have been answered in the affirmative, then the suit must be dismissed by the court for lack of jurisdiction. *Id.* at 1544.

118. *Id.* at 1547.

119. *Id.* at 1547-48.

120. *Id.* at 1548.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1549.

125. *See id.* at 1547-48.

126. 279 F.3d 1245 (10th Cir. 2002).

true weight of its mail disqualified it from receiving the per-pound-rate for bulk mailing that it had been utilizing.¹²⁷ Upon this discovery, the Postmaster alerted CIG that it could no longer employ the special rate.¹²⁸ A few years later, the Postmaster found that CIG had continued to employ the original rate and, therefore, had been defrauding the government.¹²⁹ The Postal Inspection Service initiated an investigation that it later turned over to the U.S. Attorney's Office.¹³⁰

The Postmaster filed a *qui tam* action under the FCA against CIG.¹³¹ Upon its intervention, the United States moved to dismiss the Postmaster from the litigation because, it claimed, the court lacked subject matter jurisdiction.¹³² The government argued that the government's disclosure of the allegations to three individuals who were then or had been associated with CIG constituted "public disclosure."¹³³ Since there was public disclosure, the government reasoned that the Postmaster would have to qualify as an "original source"¹³⁴ to continue her claim.¹³⁵ The United States further argued that the Postmaster was ineligible for the "original source" exception and that her claim was jurisdictionally barred.¹³⁶ The district court granted the government's motion, although it did not rely on the public disclosure bar in doing so.¹³⁷ Since the government was still investigating CIG's alleged misconduct at the time, the district court dismissed the Postmaster as a party after concluding that the ongoing investigation precluded the Postmaster's suit.¹³⁸ The Postmaster appealed that decision.¹³⁹

2. Decision

The Tenth Circuit Court of Appeals, with Chief Judge Tacha writing for the majority¹⁴⁰ and Circuit Judge Briscoe dissenting,¹⁴¹ affirmed the lower court's dismissal of the Postmaster, but based its decision on different grounds than the district court.¹⁴² The Tenth Circuit held that the Postmaster could not qualify as a proper *qui tam* plaintiff under the

127. *Holmes*, 279 F.3d at 1246-47.

128. *Id.* at 1247.

129. *Id.*

130. *Id.* The Postmaster was later rewarded with \$500 by the Postal Service for her efforts. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. "[O]riginal source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B) (2000).

135. *See Holmes*, 279 F.3d at 1247.

136. *Id.*

137. *Id.*

138. *Id.* at 1247-48.

139. *Id.* at 1248.

140. *Id.* at 1246.

141. *Id.* at 1258.

142. *Id.* at 1248.

FCA.¹⁴³ The court found the “public disclosure” bar inapplicable and disagreed with the district court’s conclusion that an ongoing government investigation was a bar to a *qui tam* suit.¹⁴⁴ The court, observing that the *Fine* four-step inquiry¹⁴⁵ was the appropriate test to judge the appropriateness of a *qui tam* claim, decided that in “the specific circumstances of [that] case – where a government employee pursues a *qui tam* action during an ongoing investigation – [gave] rise to a different inquiry.”¹⁴⁶ The court concluded that allowing a *qui tam* suit to proceed where the plaintiff is a government employee who is participating in an ongoing investigation “would destroy the statute’s distinction between the government and relator, would contravene the purpose of the FCA, and would create impermissible conflicts of interest for federal employees pursuing such suits.”¹⁴⁷ However, the court was careful not to exclude all government employees from pursuing a *qui tam* action.¹⁴⁸

Interestingly, the court also made a distinction between an “insider’s action” and a “non-insider’s action.”¹⁴⁹ The court hinted that if an action by a government employee is an insider’s action, then it would most likely be upheld.¹⁵⁰ An example of an insider suit would be where a government employee brings a *qui tam* suit against his or her supervisor for defrauding the government.¹⁵¹ In the instant case, the court found the Postmaster’s suit a non-insider suit since the action was brought by a government employee against a private company.¹⁵²

The court observed that the “concept of a *qui tam* action assumes a distinction between the government and the individual *qui tam* plaintiff.”¹⁵³ However, this distinction between relator and government is lost

143. *Id.*

144. *Id.* at 1248-49.

145. Please note that in the *Holmes I* decision, the opinion referred to the *Fine* test as the *MK-Ferguson* test. *Holmes*, 279 F.3d at 1250. Contrarily, while *Holmes II* utilized the same test, the decision called the inquiry the *Fine* test. *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1203 (10th Cir. 2003). This survey will follow the *Holmes II* decision and will refer to the inquiry as the *Fine* test. The *Fine* test asks:

(1) [W]hether the alleged ‘public disclosure’ contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made ‘public’ within the meaning of the False Claims Act; (3) whether the relator’s complaint is ‘based upon’ this ‘public disclosure’; and, if so, (4) whether the relator qualifies as an ‘original source’ under [§] 3730(e)(4)(B). If the court were to answer ‘no’ to any of the first three questions, its inquiry ends at that point and the *qui tam* action proceeds. The last inquiry, whether the relator is an original source, is necessary only if the answers to each of the first three questions is ‘yes,’ indicating the relator’s complaint is based upon a specified public disclosure.

Fine, 99 F.3d at 1544.

146. *Holmes*, 279 F.3d at 1250.

147. *Id.* at 1252.

148. *Id.* (“It is our view, however, that while the Act does not explicitly authorize or preclude all actions [brought by government employees], it may allow some and disallow others.”).

149. *Id.* at 1250 n.5.

150. *Id.*

151. *See id.*

152. *Id.*

153. *Id.* at 1252.

when a government employee who obtains information about fraud in accordance with her duties as an employee sues.¹⁵⁴ Hence, the potential plaintiff “obtains the information *as the government*” and therefore cannot file a *qui tam* suit under § 3730(b) of the FCA “for the person and for the United States Government.”¹⁵⁵ In the instant case, the Postmaster was found to have obtained all the information in accordance with her duties as postmaster and, thus, was acting as the federal government.¹⁵⁶ The court defended this reading of the FCA by asserting four main policy arguments.¹⁵⁷

First, the court noted that the FCA was instituted to encourage private citizens to “expose fraud that the government itself cannot easily uncover.”¹⁵⁸ Since the Postmaster uncovered the fraudulent activities in the course of her employment, the court found that the investigation was easily within the government’s capacity to pursue.¹⁵⁹ Next, the court argued that the 1986 amendments to the FCA reflected “Congress’s ‘concern that the government was not pursuing known instances of fraud.’”¹⁶⁰ The court believed that allowing the Postmaster’s *qui tam* suit to proceed would conflict with the purposes of the FCA¹⁶¹ based on the fact that the record revealed that the government was investigating CIG’s misconduct, coupled with the fact that the relator only brought suit after she was “confident that the government was adequately investigating her information.”¹⁶²

Third, the court observed that the FCA was intended to “encourage private citizens with first-hand knowledge to expose fraud.”¹⁶³ Here, there was no need for the government to encourage a private citizen to assist it in uncovering fraud since the government already possessed the information provided by the Postmaster.¹⁶⁴ Furthermore, the court stated that allowing *qui tam* actions by federal employees based upon information gathered in the course of their employment contradicts Congress’s intention of eliminating “parasitic” suits under the FCA.¹⁶⁵ Throughout the opinion, the Tenth Circuit continually made a fundamental distinction between information possessed by the federal government and the inde-

154. *Id.*

155. *Id.* (quoting 31 U.S.C. § 3730(b)(1)).

156. *Id.* at 1253.

157. *Id.* at 1255-56.

158. *Id.* at 1255 (quoting *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995)).

159. *Id.*

160. *Id.* at 1256 (quoting *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996)).

161. *Id.*

162. *Id.*

163. *Id.* at 1255 (quoting *United States ex rel. Precision Co. v. Koch Indus. Inc.*, 971 F.2d 548, 552 (10th Cir. 1992)).

164. *Id.* at 1256.

165. *Id.*

pendent knowledge of private citizens.¹⁶⁶ When the government possesses information that has not been publicly disclosed, private citizens are still allowed to pursue a *qui tam* action.¹⁶⁷ However, “[g]overnment employees frequently have access to government information even though it has not been ‘publicly disclosed.’”¹⁶⁸ Thus, the court noted that a potential exists for “parasitic *qui tam* suits by government employees before ‘public disclosure’ occurs, just as there is a potential for such suits by private persons following public disclosure.”¹⁶⁹

Lastly, the court argued that the statutory restrictions placed on federal employees to avoid conflicts of interest further supports the conclusion that federal employees should not be able to act as *qui tam* plaintiffs in circumstances like those presented in the case.¹⁷⁰ Citing the Code of Federal Regulation, the court observed that federal employees are prohibited from using “‘nonpublic Government information’ to ‘further any private interest.’”¹⁷¹ Furthermore, the court also cited other federal statutes that prohibit a government employee from participating in government matters when the employee has a financial interest, such as “the use of public office for private gain, the use of government property or time for personal purposes, and holding a financial interest that may conflict with the impartial performance of government duties.”¹⁷² Accordingly, the court reasoned that the plaintiff’s action in the case “directly reduce[d] the amount that the government may ultimately collect,” which would give the government employee a personal stake in the outcome of the litigation.¹⁷³ Thus, the Tenth Circuit concluded that the plaintiff was not a proper relator under the FCA and dismissed the suit on the grounds that the court lacked subject matter jurisdiction.¹⁷⁴

*B. Tenth Circuit: United States ex rel. Holmes v. Consumer Insurance Group (“Holmes II”)*¹⁷⁵

1. Decision

In February 2003, sitting en banc,¹⁷⁶ with Circuit Judge Briscoe writing for the majority and Chief Judge Tacha dissenting,¹⁷⁷ the Tenth

166. *Id.*

167. *See id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1257.

171. *Id.* (quoting 5 C.F.R. § 2635.101(b)(3) (2003)).

172. *Id.* (citations omitted) (referring to 5 C.F.R. §§ 2635.402, 2635.501, 2635.502, 2635.101(b)(7), 2635.702, 2635.704-5, 2635.403).

173. *Id.*

174. *Id.* at 1258.

175. 318 F.3d 1199 (10th Cir. 2003).

176. There is no source that explains the Tenth Circuit’s decision to rehear *Holmes I* en banc.

177. *Holmes*, 318 F.3d at 1200, 1215. Circuit Judges Seymour, Ebel, Henry, Murphy, Hartz and O’Brien joined the majority opinion, while Circuit Judges Kelly and Lucero joined the dissent. *Id.*

Circuit vacated its decision in *Holmes I*¹⁷⁸ and reversed the district court.¹⁷⁹ The Tenth Circuit rejected the district court's conclusion that the four-part inquiry defined in *Fine*¹⁸⁰ "is applicable only 'where the government is not actively investigating the alleged wrongdoing.'"¹⁸¹ Rather, the Tenth Circuit found the *Fine* test "applicable in all cases filed by qui tam relators."¹⁸² The Tenth Circuit also held that because no "public disclosure" occurred, there was no need for it to address whether or not the Postmaster qualified as an "original source" under the FCA.¹⁸³ Lastly, the Tenth Circuit concluded that the relator, even though she brought the *qui tam* claim against CIG with information gained in her capacity as a postmaster, was a "person" permitted to bring suit under the FCA.¹⁸⁴

The government initially argued that the Postmaster should be removed from the litigation since a "public disclosure" occurred when three former and present employees of CIG were interviewed and notified of the allegation that CIG had committed fraud.¹⁸⁵ However, the court rejected this argument because the public disclosure bar was inapplicable since "all three individuals participated to some degree, in the alleged fraudulent scheme" and were thus "previously informed."¹⁸⁶ The government further maintained that if the court did not accept its modified view of the "public disclosure" test, the government would "be forced 'to make disclosures of relevant allegations to 'innocent' third parties in order to satisfy the public disclosure bar – and ensure that opportunistic qui tam suits" would be barred.¹⁸⁷ The court refuted this contention by questioning the government's "blanket characterization of qui tam suits filed by government employees as 'opportunistic.'"¹⁸⁸ The court asserted that the Postmaster's action was not opportunistic, since she had "direct and independent knowledge of the fraud allegedly committed by CIG" and because she was the individual who first discovered the fraudulent activities by CIG.¹⁸⁹ The court further rejected the government's position because it found the "public disclosure" test robust.¹⁹⁰ Lending to this conclusion was the court's determination that no other test echoed the language of § 3730(e)(4)(A) as accurately.¹⁹¹ Since the

178. *Id.* at 1245.

179. *Id.*

180. See *Fine*, 99 F.3d at 1004, for a description of the inquiry.

181. *Holmes*, 318 F.3d at 1203.

182. *Id.* at 1204.

183. *Id.* at 1204, 1208.

184. *Id.* at 1204.

185. *Id.*

186. *Id.* at 1204-05. "[P]ublic disclosure occurs only when the allegations or fraudulent transactions are affirmatively provided to others not previously informed thereof." *Id.* at 1205 (citing *Ramseyer*, 90 F.3d at 1521).

187. *Id.* at 1207.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

court found that no public disclosure had occurred, the court halted its *Fine* four-step jurisdictional inquiry and it did not answer the question of whether the *qui tam* plaintiff qualified as an “original source.”¹⁹²

The government next contended that a government employee who is required to disclose information about fraudulent activities obtained in the course of her occupational obligations does not qualify as a “person” permitted to bring a *qui tam* action under § 3730(b)(1).¹⁹³ In establishing its framework for analyzing cases brought under the FCA, the court stated that “in all cases involving statutory construction, our starting point must be the language employed by Congress[,] . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.”¹⁹⁴ Furthermore, “[a]bsent a clearly expressed legislative intention to the contrary, that language [of the statute] must ordinarily be regarded as conclusive.”¹⁹⁵ The court examined the relevant portion of the FCA,¹⁹⁶ and noted that nowhere in the statute is the word “person” defined.¹⁹⁷ The court found that the Dictionary Act¹⁹⁸ defined “person” “for the purposes of ‘determining the meaning of any Act of Congress’ as including ‘individuals.’”¹⁹⁹ Hence, the court concluded that “person” “unambiguously encompasses all individual human beings, including [the Postmaster].”²⁰⁰

The government further argued that the title of § 3730(b) of the FCA, “Actions by private persons,” demonstrated that Congress intended to limit the ability of government employees to bring suit under the FCA.²⁰¹ The court, however, found that the title, which was part of the 1986 amendments, “was simply intended as an easy reference for the reader of the statute, and not as a substantive amendment to [the FCA].”²⁰² Furthermore, the court cited the Supreme Court’s explanation

192. *Id.* at 1208.

193. *Id.* That section states:

A person may bring a civil action for a violation of [§] 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b)(1).

194. *Holmes*, 318 F.3d at 1208 (quoting *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)).

195. *Id.* (quoting *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

196. The relevant portion of the FCA was § 3730(b)(1). *Id.* That section provides:

A person may bring a civil action for a violation of [§] 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(b)(1).

197. *Holmes*, 318 F.3d at 1208.

198. The court used this term to refer to 1 U.S.C. § 1 (2000). *See id.*

199. *Id.* (quoting 1 U.S.C. § 1).

200. *Id.* at 1208-09.

201. *Id.* at 1209 (quoting 31 U.S.C. § 3730(b)(1)).

202. *Id.*

that a title to a statutory provision may not “limit the plain meaning of the text,” and can only be utilized as a reference when “[it] shed[s] light on some ambiguous word or phrase.”²⁰³ The court also noted that the title could mean either that all government employees would be excluded or that all government employees were included as persons capable of filing a *qui tam* suit under the FCA.²⁰⁴ However, the court found that the potential total prohibition of government employees from being able to file FCA claims “would render superfluous the specific exclusions adopted by Congress in 31 U.S.C. § 3730(e)(1).”²⁰⁵

Next, the government asserted that Congress’s intention to exclude government employees from acting as *qui tam* plaintiffs under the FCA was “inadequately expressed.”²⁰⁶ In rejecting this argument, the court stated that it “appears clear that Congress did not consider the question of whether government employees should be allowed to use information obtained in the course of their employment as the basis for a *qui tam* action.”²⁰⁷ Hence, the court reasoned that if it were to follow the Government’s plea to exclude government employees, it would actually rewrite the statute.²⁰⁸

Next, following Chief Judge Tacha’s decision in *Holmes I*, the government averred that allowing a government employee to bring a *qui tam* suit with information gained in the course of her employment would eliminate “the critical distinction between the government and the individual *qui tam* plaintiff.”²⁰⁹ The court answered by stating that it “fail[ed] to see how the word [‘person’] could rationally be construed to exclude some, but not all, government employees, and under some, but not all, conditions.”²¹⁰ In addition, the court discussed how the principles of agency law further controverted the government’s position.²¹¹ The court stated that “it is apparent that [the Postmaster], in filing her complaint in this matter, was not acting within the scope of her employment and was therefore not acting ‘as the government’ since she was not employed to file suit under the FCA.”²¹² Therefore, although the Postmaster might have gained the information used in the *qui tam* claim in the course of

203. *Id.* (alteration in original) (quoting *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)).

204. *Id.*

205. *Id.* Section 3730(e)(1) mandates that: “No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.” 31 U.S.C. § 3730(e)(1).

206. *Holmes*, 318 F.3d at 1209.

207. *Id.* at 1209-10.

208. *Id.* at 1210.

209. *Id.*; *Holmes*, 279 F.3d at 1252.

210. *Holmes*, 318 F.3d at 1210.

211. *Id.*

212. *Id.*

her employment, the postmaster was acting “as a ‘person,’ i.e., in her individual capacity, in filing and pursuing this qui tam action.”²¹³

One of the dissent’s primary arguments focused on the language of the FCA that empowers a plaintiff to file a *qui tam* suit “for the person and for the United States Government.”²¹⁴ The dissent argued that this phrase revealed “a fundamental assumption”²¹⁵ about the *qui tam* plaintiffs, which “requires that there be some distinction between a potential *qui tam* relator and the people acting as ‘the government’ with regard to the fraud at issue.”²¹⁶ The majority, however, maintained that “the dissent read[] too much into the phrase.”²¹⁷ The court found that the phrase indicated “that the relator functions as the partial assignee of the United States and [that the phrase] emphasize[d] that both the relator and the government have an interest in the lawsuit and both will benefit should any recovery occur.”²¹⁸ Further, the court argued, if Congress had intended “to exclude some or all federal government employees from the class of” of possible *qui tam* plaintiffs, it was able to do so in a much more obvious and definite manner.²¹⁹ Additionally, the court noted that since the FCA utilizes the term “person” numerous times, the dissent’s limitation of that term failed because it was contrary to the doctrine that “identical words used in different parts of the same act are intended to have the same meaning.”²²⁰ The majority found the interpretation of the FCA by the Supreme Court in *United States ex rel. Marcus v. Hess*²²¹ persuasive.²²² There, the Supreme Court found no exceptions or qualification of the jurisdictional phrase “as well for himself as for the United States,” and it also noted that the original FCA allowed anyone to bring suit under the FCA.²²³ Similarly, the Tenth Circuit concluded that although Congress changed the language of the FCA to “for the person and for the United States Government,” it was difficult to find that “the change was intended to override *Marcus* and implement new restrictions on who could qualify as relator.”²²⁴

Lastly, the government argued that allowing the Postmaster’s suit to continue would be contrary to numerous federal regulations, the purpose of the FCA, and public policy.²²⁵ The Tenth Circuit replied by observing that “nothing in the FCA expressly precludes federal employees from

213. *Id.*

214. *Id.* at 1217 (Tacha, C.J., dissenting) (emphasis added) (quoting 31 U.S.C. § 3730(b)(1)).

215. *Id.* (Tacha, C.J., dissenting).

216. *Id.* (Tacha, C.J., dissenting).

217. *Id.* at 1210.

218. *Id.*

219. *Id.*

220. *Id.* at 1211 (quoting *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)).

221. 31 U.S. 537 (1943).

222. *Holmes*, 318 F.3d at 1211.

223. *Id.* (quoting Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. 696, 698).

224. *Id.* at 1211-12 (quoting 31 U.S.C. § 3730(b)(1)).

225. *Id.* at 1212.

filing qui tam suits.”²²⁶ Further, the court noted that it appeared that Congress probably did not consider the possibility of government employees bringing *qui tam* suits under the FCA.²²⁷ In addition, the court noted that Congress’s activity since the 1986 amendments implies that Congress may see the FCA as allowing actions by government employees.²²⁸ Specifically, the court cited two different bills introduced in Congress that “would have established limitations on government employees who file[d] qui tam suits based on information gained during the course of their employment.”²²⁹ Nonetheless, Congress passed neither bill.²³⁰

Lastly, the Tenth Circuit turned to the reasoning of the Eleventh Circuit to justify why government employees can utilize information gathered in the course of their employment as the basis of a *qui tam* suit.²³¹ Specifically the Tenth cited the Eleventh Circuit’s reasoning from *United States ex rel. Williams v. NEC Corp.*²³²

We recognize that the concerns articulated by the United States may be legitimate ones, and that the application of the False Claims Act since its 1986 amendment may have revealed difficulties in the administration of qui tam suits, particularly those brought by government employees. . . . Notwithstanding this recognition, however, we are charged only with interpreting the statute before us and not with amending it to eliminate administrative difficulties. The limits upon the judicial prerogative in interpreting statutory language were well articulated by the Supreme Court when it cautioned:

Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. “The natural meaning of words cannot be displaced by reference to difficulties in administration.” . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the [Act] . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it.²³³

226. *Id.*

227. *Id.* at 1212 (citing Major David Wallace, *Government Employees as Qui Tam Relators*, ARMY LAW., Aug. 1996, at 14, 22 (“The sponsors of the 1986 FCA amendments simply did not contemplate the issue of government employees using information they learned in the course of their duties as the basis of lawsuits in their own names.”)).

228. *Id.* at 1213.

229. *Id.* (quoting Theis, *supra* note 9, at 238-39).

230. *Id.*

231. *Id.*

232. 931 F.2d 1493 (11th Cir. 1991).

233. *Holmes*, 318 F.3d at 1214 (quoting *Williams*, 931 F.2d 1493, 1503-04 (11th Cir. 1991) (quoting *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1944))).

Congress could have certainly indicated its desire to prevent government employees from filing qui tam suits based upon information acquired in the course of their government employment. . . . The False Claims Act is devoid of any statutory language that indicates a jurisdictional bar against government employees as qui tam plaintiffs. We also note an absence of any clear indication that Congress intended such a bar to be implied in spite of the plain language of the statute. Therefore, we decline to judicially create an exception where none exists.²³⁴

The Tenth Circuit reversed the district court's ruling that it lacked subject matter jurisdiction and found that the Postmaster qualified to act as a *qui tam* plaintiff and hence allowed her action to proceed.²³⁵

C. Other Circuits

1. First Circuit: *United States ex rel. LeBlanc v. Raytheon Co.*²³⁶

a. Facts

A former employee for the United States Government Defense Contract Administrative Service filed suit against Raytheon Company Inc., alleging that it had committed fraud in its administration of contracts with the federal government.²³⁷ The district court held that all government employees were excluded from bringing *qui tam* suits under the FCA.²³⁸ The district court reasoned that since "government employees maintain a dual status--arms of the government while at work, private citizens while not a work--a 'public disclosure' necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* suit in his private capacity."²³⁹ Therefore, the district court dismissed the plaintiff's claim.²⁴⁰ The plaintiff appealed.²⁴¹

b. Decision

The First Circuit Court of Appeals, after studying the issue of whether a government employee falls within one of the four excluded groups within § 3730(e)(4), upheld the district court's decision, but upon different grounds.²⁴² Initially, the First Circuit found that 31 U.S.C. § 3730(e)(4)(A),²⁴³ contrary to the district court's findings, only barred

234. *Id.* (quoting *Williams*, 931 F.2d at 1504).

235. *Id.* at 1215.

236. 913 F.2d 17 (1st Cir. 1990).

237. *LeBlanc*, 913 F.2d at 18.

238. *Id.* at 18, 19-20.

239. *Id.* at 19 (quoting *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 729 F. Supp. 170, 175 (D. Mass. 1990)).

240. *Id.* at 18.

241. *Id.*

242. *Id.* at 19-20.

243. That section provides:

suits “based on information made available to the public during the course of a government hearing, investigation, or audit or from the news media.”²⁴⁴ Moreover, the court rejected the notion that government employees “lead schizophrenic lives and can publicly disclose information to themselves,”²⁴⁵ and found that the district court’s analysis created an exception to federal court jurisdiction not found within the language of the FCA.²⁴⁶ Hence, the court concluded that § 3730 (e)(4)(A) “does not prevent government employees from bringing *qui tam* actions based on information acquired during the course of their employment.”²⁴⁷

The First Circuit held, however, that a government employee who, as a condition of his employment, was responsible for exposing fraud could not qualify as an “original source” under the FCA.²⁴⁸ The court reasoned that the “fruits of [the plaintiff’s] effort belonged to his employer—the government,” therefore, he “was not someone with ‘independent knowledge of the information’” used in the allegations.²⁴⁹ Finally, the court limited its holding by concluding that its decision did “not mean that . . . no government employee . . . could qualify to bring a *qui tam* action under the original source exception.”²⁵⁰

2. Eleventh Circuit: *United States ex rel. Williams v. NEC Corp.*²⁵¹

a. Facts

The plaintiff, an attorney for the United States Air Force in charge of the Contracts Law Division at Yokota Air Base, Japan, brought a *qui tam* suit against NEC Corporation with information he had gained in the course of his employment.²⁵² He alleged that the company had committed fraud by participating in “bidrigging” while it sought telecommunications contracts with the federal government.²⁵³ The United States intervened and moved to have a trial court remove the plaintiff for lack of subject matter jurisdiction.²⁵⁴ The government asserted that the plaintiff had gathered all the information in the complaint while he was an employee of the government and, thus, was jurisdictionally barred by the

No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

244. *LeBlanc*, 913 F.2d at 20.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. 931 F.2d 1493 (11th Cir. 1991).

252. *Williams*, 931 F.2d at 1494-95.

253. *Id.* at 1495.

254. *Id.*

FCA.²⁵⁵ The district court agreed with the United States and granted the motion.²⁵⁶ The plaintiff appealed.²⁵⁷

b. Decision

The Eleventh Circuit reversed the district court's ruling because it found the FCA unambiguous and "devoid of any statutory language that indicate[d] a jurisdictional bar against government employees as *qui tam* plaintiffs."²⁵⁸ The United States argued that the plaintiff's *qui tam* claim was precluded because when a "government employee uses official information as a private citizen, he has disclosed the information to himself so that a 'public disclosure' occur[red]."²⁵⁹ On the other hand, if a government employee uses the information in an official capacity, then no public disclosure has occurred.²⁶⁰ The court rejected this contention by noting that the acts that constitute public disclosure under the FCA are "not qualified by words that would indicate that they are only examples of the types of 'public disclosure' to which the jurisdictional bar would apply."²⁶¹ The court pointed to the language of § 3730(e)(4)(A), which prohibits *qui tam* suits that are "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."²⁶² Therefore, the court refused to give the statute "a broader effect than that which appears in its plain language."²⁶³

Interestingly, the court then refused to analyze whether the plaintiff in the case before it was an original source according to the FCA.²⁶⁴ The court noted that "[t]he 'original source' inquiry only becomes necessary once a court makes a factual determination that the particular *qui tam* suit before it was based upon information that was publicly disclosed."²⁶⁵ Hence, because the commencement of a *qui tam* action by a government employee is not a public disclosure under the FCA, there was no need to discuss whether the plaintiff was in fact an "original source."²⁶⁶

255. *Id.* at 1494.

256. *Id.*

257. *Id.* at 1495.

258. *Id.* at 1504.

259. *Id.* at 1499.

260. *Id.*

261. *Id.* at 1499-1500.

262. *Id.* at 1499 (quoting 31 U.S.C. § 3730(e)(4)(A)). The court also stated that "[a] plain reading of this language reveals that 'congressional, administrative, or Government Accounting Office' modifies 'report, hearing, audit, or investigation.' Any other reading of that phrase would be illogical." *Id.* at 1500 (quoting 31 U.S.C. § 3730(e)(4)(A)).

263. *Id.* at 1449-1500.

264. *Id.* at 1500.

265. *Id.*

266. *Id.*

Finally, the Eleventh Circuit held that “nothing in [§ 3730(e)(4)(A) of the FCA] operates to preclude *every* government employee from bringing a *qui tam* action based upon information acquired in the course of his government employment” unless precluded by the “public disclosure” bar.²⁶⁷ The court found the four limitations set forth in 31 U.S.C. § 3730(e)²⁶⁸ conclusive, and reasoned that if Congress had wished to preclude government employee actions, it could have done so explicitly.²⁶⁹

V. ANALYSIS

In *Holmes II*,²⁷⁰ the Tenth Circuit properly reheard *Holmes I*²⁷¹ and reversed the district court’s decision. The circuit’s second determination was justified for several reasons. *Holmes I* subverted Tenth Circuit precedent. In addition, the FCA is devoid of any language that precludes government employees from filing a *qui tam* suits. Furthermore, the Postmaster’s suit is congruent with the purposes of the FCA. Finally, allowing government employees to bring these suits would aid tremendously in recovering fraudulently appropriated assets.

In order for the Tenth Circuit to rehear a case en banc, there must be a need for the entire court to focus “on an issue of exceptional public importance or on a panel decision that conflicts with a decision . . . of [that] court.”²⁷² *Holmes I* satisfied both of these requirements since it conflicted with the precedents of *United States ex rel. Ramseyer v. Century Healthcare Corp.*²⁷³ and *United States ex rel. Fine v. MK-Ferguson Co.*²⁷⁴ The question presented in that case “involve[d] a question of exceptional importance, i.e., whether and under what circumstances a district court has jurisdiction over a *qui tam* complaint brought under the

267. *Id.* at 1501.

268. Subsections (1) through (4) of § 3730(e) bar actions when:

[(1)] brought by a former or present member of the armed forces . . . against a member of the armed forces arising out of such person’s service in the armed forces . . . [(2)] brought . . . against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought . . . [(3)] based upon the allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party . . . [and (4)] based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(1)-(4).

269. *Williams*, 931 F.2d at 1502.

270. 318 F.3d 1199 (10th Cir. 2003).

271. 279 F.3d 1245 (10th Cir. 2002).

272. 10TH CIR. R. 35.1(A).

273. 90 F.3d 1514, 1521 (10th Cir. 1996) (concluding that since the *qui tam* plaintiff did not have first hand knowledge of fraudulent misconduct, the lower court should have dismissed her claim).

274. 99 F.3d 1538, 1548 (10th Cir. 1996) (concluding that since the *qui tam* plaintiff was not an original source, the lower court properly dismissed her complaint).

False Claims Act by a government employee relator.”²⁷⁵ The *Holmes I* decision improperly modified Tenth Circuit precedent and created a jurisdictional bar to certain potential *qui tam* plaintiffs²⁷⁶ despite the fact that the test conceived in *Fine* was the result of a practical and logical analysis of the FCA.²⁷⁷ Although the *Fine* court did not explicitly decide whether a federal employee could bring a *qui tam* suit, the decision implies that there are no specific limitations on the inquiry.²⁷⁸ The test announced in that case illustrates that the FCA lacks any express language precluding government employees from filing *qui tam* suits.²⁷⁹ The Tenth Circuit’s decision in *Holmes II* was proper since it followed this precedent.

The 1986 amendments to the FCA removed the language precluding government employees from filing *qui tam* suits.²⁸⁰ To interpret a statute, a court should “begin with the plain language of the law.”²⁸¹ The plain meaning of the words in a statute “must be construed in their ‘ordinary, everyday sense.’”²⁸² In *Holmes II*, the court appropriately read the plain meaning of the words into the FCA and found that nowhere were government employees excluded.²⁸³ Notwithstanding the fact that a different version of the FCA was at issue, *Holmes II* correctly followed the Supreme Court’s interpretation of the FCA in *United States ex rel. Marcus v. Hess*²⁸⁴ and found that since government employees are not expressly precluded from filing suit under the FCA, the Postmaster’s suit should have been allowed to proceed.²⁸⁵

Additionally, as the *Holmes II* court noted, if the interpretation of the term “person” in *Holmes I* was allowed to stand, its prohibition of government employees bringing *qui tam* actions “would render superflu-

275. Appellant’s Petition for Rehearing En Banc at 3, *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199 (10th Cir. 2003) (No. 01-1077).

276. See *Holmes*, 279 F.3d at 1251.

277. The *Fine* test involves four inquiries:

(1) whether the alleged ‘public disclosure’ contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made ‘public’ within the meaning of the False Claims Act; (3) whether the relator’s complaint is ‘based upon’ this ‘public disclosure’; and, if so, (4) whether the relator qualifies as an ‘original source’ under [§] 3730(e)(4)(B). If the court were to answer ‘no’ to any of the first three questions, its inquiry ends at that point and the *qui tam* action proceeds. The last inquiry, whether the relator is an original source, is necessary only if the answers to each of the first three questions is ‘yes,’ indicating the relator’s complaint is based upon a specified public disclosure.

Fine, 99 F.3d at 1544.

278. See *id.* at 1544-49.

279. See *id.*

280. See 31 U.S.C. § 3730 (2000).

281. *United States v. Morgan*, 922 F.2d 1495, 1496 (10th Cir. 1991).

282. *Chickasaw Nation v. United States*, 208 F.3d 871, 876 (10th Cir. 2000) (quoting *Julius M. Israel Lodge of B’nai B’rith v. Comm’r*, 98 F.3d 190, 191 (5th Cir. 1996)).

283. *Holmes*, 318 F.3d at 1212.

284. 317 U.S. 537, 546 (1943) (noting that since the statute did not include “words of exception” the Court would not read such words into the statute).

285. *Holmes*, 318 F.3d at 1213, 1215.

ous the specific exclusions adopted by Congress in 31 U.S.C. § 3730(e)(1),” which prohibit “former or present member[s] of the armed forces’ from filing *qui tam* actions ‘against a member of the armed forces arising out of such person’s service in the armed forces.’”²⁸⁶ Interestingly, as Chief Judge Tacha, the author of the *Holmes I* decision, once wrote, the Tenth Circuit “refrains from construing the words and phrases of a statute – or entire statutory provisions – in a way that renders them superfluous.”²⁸⁷

Furthermore, by creating an additional restriction on who can qualify as a *qui tam* plaintiff, thereby making a portion of the FCA unnecessary, *Holmes I* effectively rewrote the FCA and invaded the legislative function of Congress.²⁸⁸ As the Eleventh Circuit stated, “Congress could have certainly indicated its desire to prevent government employees from filing *qui tam* suits based upon information acquired in the course of their government employment,” but in the “absence of any clear indication that Congress intended such a bar to be implied in spite of the plain language of the statute,” none should be incorporated.²⁸⁹ Furthermore, as *Holmes II* stated, “[a]lthough there may be sound public policy reasons for limiting government employees’ ability to file *qui tam* actions, that is Congress’ prerogative, not [a court’s].”²⁹⁰

In 1993, the Department of Justice, which would have agreed with the *Holmes I* decision, urged Congress to amend the Act to specifically exclude government employees from such actions.²⁹¹ *Holmes II* found Congress’s decision not to accept these proposed amendments persuasive.²⁹² The fact that Congress has taken no such action in nearly a decade further supports this contention. If Congress had accepted the view of the Department of Justice, it could have easily taken the necessary steps to expressly preclude federal employees from bringing *qui tam* actions.²⁹³ However, Congress may simply be waiting to see how the various circuits will resolve this issue. This argument is supported by the fact that the three circuits that have addressed this issue, the First, Tenth (*Holmes I*), and Eleventh, have all come to their respective decisions differently.²⁹⁴ The Eleventh Circuit’s conclusion, which *Holmes II* and

286. *Id.* at 1209 (quoting 31 U.S.C. § 3730(e)(1)).

287. *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998).

288. *See Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (“[I]t is for Congress, not . . . [the Supreme] Court, to rewrite the statute.”); *Shapiro v. United States*, 335 U.S. 1, 74 (1948) (Rutledge, J., dissenting) (“[T]he Court’s reduction of the statutory wording to equivalence in effect with the constitutional immunity, nearly if not quite makes that wording redundant or meaningless; in any event, it goes so far in rewriting the statutory language as to amount to invasion of the legislative function.”).

289. *Holmes*, 279 F.3d at 1267 (Briscoe, J., dissenting) (quoting *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1504 (11th Cir. 1991)).

290. *Holmes*, 318 F.3d at 1214.

291. *Bullock*, *supra* note 21, at 368.

292. *Holmes*, 318 F.3d at 1213.

293. *Bullock*, *supra* note 21, at 368.

294. *See United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990); *Holmes*, 279 F.3d at 1248; *Williams*, 931 F.2d at 1496 n.7, 1502.

this survey advocate, was decided in 1991, while the First Circuit handed down its decision in 1990.²⁹⁵ Therefore, Congress's silence may indicate that it agrees with the Eleventh Circuit's decision since Congress, if it disagreed with the court's conclusion, probably would not have allowed that decision to stand for the past twelve years.²⁹⁶

Holmes I argued that allowing government employees to bring *qui tam* suits is contrary to the purposes of the FCA.²⁹⁷ Citing *United States ex rel. Fine v. Sandia Corp.*,²⁹⁸ the court stated that the purpose of the FCA is "to encourage private citizens to expose fraud that the government itself cannot easily uncover."²⁹⁹ *Holmes I* averred that the information the Postmaster uncovered did "not constitute information that the government would not otherwise uncover. [Further,] [t]he duty to report itself assures that [the Postmaster's] information is the government's information."³⁰⁰ This statement refers to the fact that once a government employee has uncovered fraud in the course of her employment, the government does possess that information per se. The 1986 amendments to the FCA, however, expanded the number of *qui tam* actions possible by allowing suits even when the government possesses the information on which the complaint is based, so long as there has been no public disclosure.³⁰¹ Hence, it is hard to justify why the court that decided *Holmes I* did not allow the Postmaster's suit to proceed.

Interestingly, allowing the Postmaster's action can be considered contrary to the FCA's purpose of enticing whistle-blowers, since the Postmaster was not a CIG employee.³⁰² It was undisputed, however, that employees of CIG knew of the company's fraud and failed to report it to the appropriate authorities or file a *qui tam* suit.³⁰³ It is possible that one of the employees had considered such action; however, no one had taken action two years after the fraud began.³⁰⁴ Hence, allowing a government employee to file a *qui tam* suit would serve two purposes. First, it would prevent opportunistic employees from allowing fraud to continue in order to maximize their *qui tam* recovery. Secondly, it would force every potential *qui tam* plaintiff, both government and private employees alike,

295. See *Leblanc*, 913 F.2d 17; *Williams*, 931 F.2d 1493.

296. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one."); *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.").

297. *Holmes*, 279 F.3d at 1255.

298. 70 F.3d 568 (10th Cir. 1995).

299. *Holmes*, 279 F.2d at 1255 (quoting *Fine*, 70 F.3d at 572).

300. *Id.*

301. See 31 U.S.C. § 3730.

302. See *Holmes*, 279 F.3d at 1251 n.5, 1256.

303. See *id.* at 1248.

304. See *id.* at 1247.

to bring forth information about fraudulent activity as soon as possible. Although government employees may not be considered whistle-blowers in the traditional sense, their standing as potential *qui tam* plaintiffs would enhance the effectiveness of the FCA.

The 1986 amendments to the FCA reflect Congress's intent to allow *qui tam* actions even though the federal government possesses the information that forms the basis of the claim, except where that information has been publicly disclosed and the plaintiff is not an original source to that information.³⁰⁵ Those amendments are "Congress' attempt to find 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.'"³⁰⁶ A government employee who discovers fraud perpetrated against the government in the course of her work obligations is not an opportunistic relator, she is simply using information that she has gathered.³⁰⁷

Furthermore, the Tenth Circuit already decided how to determine when a governmental employee is acting in a parasitic manner in *Fine*.³⁰⁸ There, a government employee attempted to bring a *qui tam* suit with information gathered by individuals whose work he oversaw.³⁰⁹ Using its newly fashioned test, the Tenth Circuit concluded that the government employee was simply using information discovered by others and thus was precluded from acting as a *qui tam* plaintiff.³¹⁰ In *Holmes*, however, the Postmaster was the individual who discovered the information that was used to recover the funds that were fraudulently appropriated from the federal government.³¹¹ Therefore, the Postmaster deserved to continue with her action.

Although the Tenth Circuit made a number of persuasive arguments against allowing suits brought by government employees in *Holmes I*,³¹² several policy arguments support permitting the Postmaster's suit.³¹³ First, in many instances the government may be completely incapable of discovering fraudulent activities.³¹⁴ Thus, in such circumstances, the extra time a diligent government employee spent investigating what she

305. *Id.* at 1260 (Briscoe, J., dissenting) (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997)).

306. *Id.* (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

307. *See id.* at 1270 (Briscoe, J., dissenting).

308. *See Fine*, 99 F.3d at 1548.

309. *Id.* at 1543.

310. *Id.* at 1548.

311. *Holmes*, 279 F.3d at 1270 (Briscoe, J., dissenting).

312. *Id.* at 1257.

313. *See Bullock*, *supra* note 21, at 366, for an in depth analysis of arguments from both sides of this issue.

314. *See id.* at 386.

believed was fraud would be extremely useful to the government.³¹⁵ Taxpayers can only benefit from government employees having greater incentive to report fraud in situations where that activity may never be reported otherwise.³¹⁶ Importantly, no distinction should be made between government employees who bring *qui tam* suits with information gathered in the course of their duty and those who go above and beyond their employment obligations since courts do not distinguish between non-government employees that way.

Furthermore, many fraudulent actions are never discovered because of budgetary problems.³¹⁷ Many investigations are cut short and never completed.³¹⁸ If government employees were given an incentive to explore such activities, taxpayers would not only benefit from the money recovered, but would also benefit from the free investigations conducted by these diligent employees.³¹⁹ Lastly, many people might be deterred from committing fraud against the government "if they knew that they could not rely on the ineptitude or malaise of government employees in ferreting out illegal activity."³²⁰

Clearly, allowing a federal employee, or any person for that matter, to retain a portion of the proceeds recovered in a *qui tam* action reduces the amount the federal government recoups, which indirectly affects taxpayers. But, as § 3729(a)(7) of the FCA makes clear, a defendant can be held liable for "not less than \$5,000 and not more than \$10,000, *plus 3 times* the amount of damages which the Government sustains because of the act of that person."³²¹ Therefore, compensating a relator does not prevent the government from recovering its true losses. Further, the federal government may recover a significantly greater amount of money than it lost, so it is unclear why a federal employee who furnished the federal government with the information it used to try the defendant should be prohibited from enjoying a portion of the judgment.

Since Congress amended the FCA in 1986, the number of *qui tam* suits has soared.³²² In 1987, only 33 *qui tam* cases were filed, while 533

315. See *id.* at 384.

[T]he United States Merit Systems Protection Board conducted a survey in 1983 that found sixty-nine percent of government employees who believed they had direct knowledge of illegalities failed to report the information. Those employees who chose not to report fraud were then asked why they had failed to come forward. The most frequently cited reason given ([fifty-three] percent) was the belief that nothing would be done to correct the activity even if reported.

Id.

316. *Id.* at 386.

317. See *id.*

318. *Id.*

319. *Id.* at 387.

320. *Id.*

321. 31 U.S.C. § 3729(a)(7) (emphasis added).

322. See Phillip & Cohen, Attorneys at Law, *History of the Law*, at <http://www.whistleblowers.com/HTML/BODY/history.htm> (last visited Oct. 12, 2002).

were filed in 1997.³²³ Although the number of suits have tapered in recent years, with only 300 *qui tam* suits filed in 2001, the amount recovered in cases where the government decides to intervene has steadily risen from \$355,000 in 1988, to \$1.07 billion in 2001.³²⁴ These numbers demonstrate how important *qui tam* suits have become to conserving federal resources. The *Holmes I* decision could have diminished the government's recovery of misappropriated funds. *Holmes II*, however, prevented this potential from being realized and actually implemented another deterrent against those who propose to defraud the government.

CONCLUSION

The FCA has had a long and curious existence. The ever-changing interpretation of the statute recently took a difficult turn in the Tenth Circuit, but the court's common sense en banc decision put the circuit back on the correct course. There are many arguments why government employees should not be able to utilize information gathered in the course of employment to bring *qui tam* actions. However, the arguments in favor of their allowance are superior.

In *Holmes II*, the Tenth Circuit properly followed precedent within the jurisdiction. The *Holmes II* decision accurately interpreted the language of the FCA and, unlike *Holmes I*, did not read a hidden limitation on the ability of government employees to pursue a *qui tam* action into the Act. It is unclear whether Congress intended the present version of the FCA to proscribe or include governmental employees as *qui tam* plaintiffs.³²⁵ Arguably then, the *Holmes II* decision appropriately followed the plain meaning of the statute and permitted the Postmaster's claim to proceed. If Congress had intended to prohibit government employees from bringing a *qui tam* suit, it could have made its intentions more clear. The Tenth Circuit took appropriate action in *Holmes II* by not engaging in judicial legislation and allowing Congress the opportunity to amend the FCA as it sees fit.

Miro Kovacevic *

323. *Qui Tam Statistics*, *supra* note 9.

324. *Id.*

325. *United States ex rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245, 1265-66 (10th Cir. 2002) (Briscoe, J., dissenting) ("The sponsors of the 1986 FCA amendments simply did not contemplate the issue of government employees using information they learned in the course of their duties as the basis of lawsuits in their own names." (quoting Wallace, *supra* note 227, at 22)).

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