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"The Right to Conduct Actions": Definning the Scope of Qui Tam Relator Actions Under the False Claims Act

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INTRODUCTION

In the fiscal year 2017, the DOJ of Justice ("DOJ") recovered $3.7 billion in settlements and judgments from civil cases involving fraud under the False Claims Act ("FCA").[1] Of the $3.7 billion obtained, $3.4 billion was recovered in claims filed under the qui tam provision of the Act.[2] The qui tam provision authorizes private individuals ("relators") to bring claims of fraud on behalf of the United States. In the fiscal year 2017, the United States paid out $392 million to relators.[3]

While the qui tam mechanism provides an effective method for combatting corporate fraud on the government, it inevitably inundates the DOJ with meritless claims arising from opportunistic, disgruntled employees.[4] The public benefit of having a relator bring a claim against a corporation is undeniable: a private party with access to corporate records and executives can gather evidence within the corporation virtually undetected, providing the United States with a roadmap to make the case.[5] However, the increasingly large sums at stake coupled with the inherent conflict of interest has given rise to a growing qui tam plaintiffs' bar.[6] The implications of an industrialized

[1] Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Acts Cases in Fiscal Year 2017 (Dec. 21, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017.
[2] U.S. Dep't of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Acts Cases in Fiscal Year 2017, *supra* note 1.
[3] U.S. Dep't of Justice, Justice Department Recovers Over $3.7 Billion From False Claims Acts Cases in Fiscal Year 2017, *supra* note 1.
[4] David Freeman Engstrom, *Private Enforcement Pathways: Lessons From Qui Tam Litigation*, 114 Colum. L. Rev. 1913, 1916-1917 (2014).
[5] John Ashcroft *et al*., *Whistleblowers Cash In, Unwary Corporations Pay*, 40 Hofstra L. Rev. 367, 370 (2011).
[6] Ashcroft *et al*., *supra* note 5, at 371-372.

motivation for bringing qui tam claims may undermine the goals of relator litigation. While valuable, relator litigation seems to systematically contradict the FCA's objective of protecting the public fisc. Given the scope of the statute, the discretionary considerations required to intervene in a case, and the incentivizes involved in the very nature of qui tam claims, the United States should have an absolute right to veto proposed FCA settlements attendant by dismissal between a relator and a private party because: (1) Under §3730(b)(1), the Attorney General must consent to the dismissal of all qui tam actions; (2) the relator's right to conduct the action includes the right to negotiate a settlement, but it does not exclude the government's right to unilaterally oppose that settlement; and (3) the FCA is intended to recoup and return government money fraudulently taken by private parties, therefore the United States is the party suffering injury and should have control over the litigation.

This article addresses the seemingly broad right granted to relators through the FCA and the government's power to unilaterally supersede that right. §3730(b)(4)(B) states that when the United States notifies the court that it will not proceed with the action, "the person bringing the action shall have the right to conduct the action." It should be noted that §3730(b)(4)(A) states that when the United States elects to proceed with the action "the action shall be conducted by the Government".

The scope of a conducted action is unclear. Under §3730(b)(4)(A), actions conducted by the United States seem to grant a unilateral and unfettered ability to control every aspect of litigation, including settlement and subsequent dismissal through the court. However, the relatively limited scope of a relator's conduct may indicate that the "right to conduct the action" for a relator is more narrow than it is for the United States. Does a relator have the right to negotiate and execute a settlement agreement without government input? Does the right to conduct an action explicitly require the ability to negotiate and carry out a settlement in court? Or does the provision in §3730(b)(1) requiring the Attorney General's written consent to dismiss an action limit the relator to negotiating a settlement pursuant to the Attorney General's consent?

This article narrows the scope of relator action as permitted by the statute. Part I defines the FCA by examining its original text and subsequent amendments intended to both widen and limit the scope of relator conduct. It explores the government's potential course of action when faced with a relator claim filed under seal and what limitations the United States encounters when engaging in specific actions. Part II outlines the plain and unambiguous language of the Act, specifically addressing the §3730(b)(1) "consent-for-dismissal" provision. Part III evaluates the significance of legislative intent and the role Congress envisioned for both relators and the United States in qui tam litigation. Part IV addresses the policies implicated in relator actions, including the benefits of allowing motivated relators to bring FCA suits and how these benefits weigh against the public interest at stake in qui tam litigation.

I. DEFINING 31 USCS § 3730

31 USCS § 3730, known as the False Claims Act, holds liable any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" for payment from the government.[7] The FCA was originally enacted in 1863 to protect the United States against frauds committed by private contractors.[8] Specifically, it was intended to protect government funds and property from fraudulent claims and bills for shoddy goods and services provided during the war effort. [9]

[7] 31 U.S.C. § 3729(a)(1)(B).
[8] United States *ex rel*. Marcus v. Hess, 317 U.S. 537, 547 (1943).
[9] United States v. Silver, 384 F. Supp. 617, 619-620 (E.D.N.Y. 1974).

The FCA grants a relator the right to bring a civil action, called a qui tam action, [10] on behalf of the United States for a violation of the FCA. The loss is experienced by the United States, and the relator acts as a private attorney general to adjudicate the action on the government's behalf.[11] Whatever the relator and her attorney recovers is analogous to an attorney's contingency fee, while the rest of the damages are returned to the government to compensate for the injustice.[12] The United States, not the relator, is the party in interest suffering the requisite "injury in fact" to satisfy Article III standing.[13]

When the United States elects to intervene, the FCA's qui tam mechanism entitles relators to damages of fifteen to twenty five percent of any recovery.[14] When the relator conducts the action independently, she can recover up to thirty percent of any recovery.[15] Upon successful prosecution, the relator can also recover attorneys' fees, costs, and expenses in addition to the sum recovered from defendants.[16] When a relator is involved, the maximum recovery for the public fisc is only 85% of the sum recovered from defendants.

The FCA provides the United States with the discretion to proceed with claims of fraud brought by relators. The statute states that the private person must serve the United States a copy of the complaint disclosing substantially all material evidence the person possesses, pursuant to Fed. R. Civ. P. 4(d)(4).[17] As originally enacted, the United States had no right to take over an action.[18] All

[10] 31 U.S.C. § 3730(b)(1).
[11] United States *ex rel*. Milam v. University of Texas M.D. Anderson Cancer Center, 961 F.2d 46, 49 (4th Cir. 1992).
[12] *United States ex rel. Milam*, 961 F.2d at 49.
[13] *ex rel. Milam*, 961 F.2d at 49.
[14] 31 U.S.C. § 3730(d)(1).
[15] *Id*. at § 3730(d)(2).
[16] John Ashcroft *et al*., *supra* note 5, at 370.
[17] 31 U.S.C. § 3730(b)(2).
[18] United States *ex rel*. Killingsworth v. Northrop Corp., 25 F.3d 715, 721 (9th Cir. 1994).

actions were brought by a relator.[19] In 1943, the FCA was amended to accommodate for a 60-day period during which the United States could decide whether it wants to pursue the claim.[20] In 1986, the FCA was amended once again to allow the United States to extend the 60-day period upon a showing of good cause, pursuant to an in camera review by the court.[21] The complaint is filed under seal for a 60-day period, during which the United States may determine how to proceed with the action.[22] The government may elect to extend the 60-day period upon a showing of good cause.[23]

Once the United States is served with a relator claim filed under seal, it can proceed in three ways: (1) the government may dismiss the claim provided the relator is given the opportunity for a hearing on the motion;[24] (2) the government may intervene with the action and continue with the litigation independently;[25] or (3) the government may notify the court that it does not wish to proceed with the action and the relator has the "right to conduct the action".[26]

While the United States may seek dismissal of relators' claims under §3730(c)(2)(A), the FCA does not provide a standard to determine whether to request a dismissal.[27] The DOJ released a memorandum in January 2018 addressing discretionary dismissals of meritless qui tam claims.[28] The Granston Memo acknowledges that there has been a dramatic increase in meritless claims

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[19] *Id.*
[20] *Id.*
[21] 31 USCS § 3730(b)(3).
[22] *Id*. at § 3730(b)(2).
[23] *Id*. at § 3730(b)(3).
[24] *Id*. at § 3730(c)(2)(A).
[25] *Id*. at § 3730(b)(4)(A).
[26] *Id*. at § 3730(b)(4)(B).
[27] DOJ Memorandum, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, at 3, *available at* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.
[28] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 1.

filed under the FCA. The Memo establishes a "general framework for evaluating when to seek dismissal",[29] outlining factors for the United States to consider when determining whether to seek dismissal of a qui tam claim.

The first factor aims to "curb meritless claims" by dismissing claims relying on defective legal theories or where relator's factual allegations are frivolous.[30] Second, the DOJ intends to prevent "parasitic or opportunistic qui tam claims" by identifying claims brought by relators seeking an "unwarranted windfall" from the action.[31] Third, the DOJ seeks to dismiss claims in an effort to prevent "interference with agency policies and programs", where a qui tam action contradicts an agencies policies.[32] Fourth, to protect the government's gatekeeping role to litigation brought on its behalf, the DOJ asserts that it should seek dismissal when necessary to control litigation on behalf of the United States.[33] Fifth, in cases involving intelligence agencies or military contracts, the DOJ may dismiss a claim to "safeguard classified information and national security interests".[34] Sixth, the DOJ recommends seeking dismissal when "the government's expected costs are likely to exceed any expected gain."[35] Finally, the DOJ seeks to dismiss a claim when the relator committed "egregious procedural errors" prior to serving the United States with the complaint.[36]

The United States, which includes the DOJ, the U.S. Attorneys Office, and any agencies responsible for reimbursing claims from the public fisc, such as the DOJ of Health and Human

[29] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 1.
[30] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 3.
[31] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 4.
[32] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 4-5.
[33] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 5.
[34] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 6.
[35] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 6.
[36] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 7.

Services, the DOJ of Defense, and the Veterans Administration consult to determine whether to intervene in the qui tam action.[37] The United States conducts a preliminary investigation to determine whether intervention is necessary.[38] The United States typically intervenes "in cases that are high-profile, in cases that are novel, and in cases that involve the prospect of significant recovery".[39] Data collected by Professor David Freeman Engstrom indicates that the United States is more likely to intervene in cases brought by relators represented by "more sophisticated, repeat plaintiffs' counsel".[40]

After its investigation, the United States, represented by the Attorney General, may decide to intervene in actions brought by relators. The scope of this intervention right is defined in §3730(b)(2), which states "the Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." Once the United States intervenes, no party other than the government has the right to intervene or bring a related action.[41] The government's intervention before the conclusion of the 60-day period or any extensions allows it to proceed with the action.[42] The limits on the intervention clause are unclear because the United States can request extensions on the 60-day timeline for good cause.[43]

[37] Kathleen M. Boozang *et al*., The Ctr. For Health & Pharm. Law & Policy, Seton Hall Law, *The False Claims Act and the Policing of Promotional Claims About Drugs: A Call for Increased Transparency* 3 (2015).
[38] Boozang *et al*., *supra* note 37, at 3.
[39] Boozang *et al*., *supra* note 37, at 46.
[40] David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 Nw. U.L. Rev. 1689, 1696 (2013).
[41] 31 U.S.C. § 3730(b)(5).
[42] *Id*. at § 3730(b)(4)(A).
[43] *Id*. at § 3730(b)(3).

The United States has often been unwilling to intervene in qui tam claims.[44] As noted by the DOJ in the Granston Memo, while many qui tam claims reveal significant frauds against the government, a great volume of relator claims do not warrant the resources required to adequately investigate.[45] Because a relator's financial incentive is considerable, many claims brought by relators result in fruitless investigation and are decidedly meritless.[46] The United States will often decline to intervene in a case because the evidence provided by a relator is not substantive enough to warrant intervention until the government has the opportunity to see how the claim fares in court.[47] Thus, the United States retains the right to intervene at later date, upon a showing of good cause.[48]

In the Granston Memo, the DOJ asserts that it has an "unfettered discretion" to dismiss claims.[49] This "unfettered discretion" is derived from §3730(b)(1), which provides a further obstacle to settling a case on the relator's terms: "The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." This unfettered discretion becomes critically important at later stages in litigation. The question remains whether the Attorney General can force the relator and defendant to continue litigating by withholding consent for dismissal when the proposed settlement is deemed unsatisfactory by the United States.

[44] Peter Leininger, *A New Weapon To Help FDA Control Enforcement Priorities*, February 21, 2018, *available at* https://www.kslaw.com/attachments/000/005/669/original/2-21-18_Law360.pdf?1519248226.
[45] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 3.
[46] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 3.
[47] Boozang *et al*., *supra* note 37, at 49.
[48] 31 U.S.C. § 3730(c)(3).
[49] *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, *supra* note 27, at 7.

II. THE CONSENT-FOR-DISMISSAL PROVISION

Under §3730(b)(1) of the FCA, qui tam actions "may be dismissed only if the court and the Attorney General give written consent for the dismissal and their reasons for consenting." Some circuits suggest that the language of §3730(b)(1) is narrowed by its context; other provisions under the statute indicate limitations on the Attorney General's control. When reading the §3730(b)(1) consent-for-dismissal provision, the 9th Circuit decided that the Attorney General's consent is limited to dismissals made within the 60-day period for intervention.[50] During the 60-day (or extended) period, the government retains the absolute right to bar a dismissal.[51] The 9th Circuit said this absolute right to bar a dismissal does not extend past the 60-day period because, when read in conjunction with §3730(b)(2), the United States has the right to either "intervene" or "proceed with the action".[52] When the United States chooses not to intervene, it waives its right to proceed with the action.[53]

In *United States ex rel. Killingsworth v. Northrop Corp.*, the 9th Circuit held that the United States retains the right to *object* to a proposed settlement upon a showing of good cause, without having intervened earlier in the litigation, but it cannot block the settlement by withholding consent for dismissal. The case involved Killingsworth, a former employee of Northrop, who alleged as a relator that Northrop improperly inflated cost estimates supporting missile contract proposals, thereby violating the FCA.[54] After investigating the claim for more than 18 months, pursuant to the requisite extension, the United States chose to not intervene.[55] Killingsworth and Northrop

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[50] United States *ex rel.* Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994).
[51] *United States ex rel. Killingsworth*, 25 F.3d at 722.
[52] *ex rel. Killingsworth*, 25 F.3d at 722.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 718.

unsuccessfully attempted to settle multiple times due to government objections.[56] Although the United States never intervened, it objected to the proposed settlement which it contended was structured to ensure that the majority of the money was allocated to the relator under his wrongful termination claim and attendant attorneys' fees, rather than recovery to the government pursuant to the FCA claim.[57] Killingsworth and Northrop eventually reached an agreement without the United States and moved to dismiss the claim, however the United States objected to the settlement, and despite having declined to exercise its right to intervene for good cause, elected to intervene for purposes of appeal.[58] The lower court decided that the Attorney General's consent to dismiss was not required and dismissed the claim.[59]

In Part III of its decision, the 9th Circuit held that the §3730(b)(1) "consent-for-dismissal" provision must be read in conjunction with §3730(b)(2), which enumerates the temporal aspect of the government's intervention rights.[60] Therefore, consent by the Attorney General is only required to dismiss a claim during the 60-day period or when the United States has elected to intervene in the action.[61] Thus, under the 9th Circuit's interpretation, the consent-for-dismissal provision is temporally limited to the period during which the United States can elect to intervene.

Many courts have challenged the 9th Circuit's reading of the §3730(b)(1).[62] The 4th, 5th, and 6th Circuits have subsequently held that the consent-for-dismissal provision is not temporally

[56] *Id.* at 719.
[57] *Id.* at 718.
[58] *Id*.
[59] United States *ex rel*. Killingsworth v. Northrop Corp., 1994 U.S. App. LEXIS 699 (9th Cir. Cal., Jan. 19, 1994).
[60] 25 F.3d at 720-721.
[61] *Id*.
[62] See United States *ex rel*. Schweizer v. Oce N.V., 677 F.3d 1228, 1233-34 (D.C. Cir. 2012) (rejecting argument that DOJ dismissal or settlement authority is conditional on prior intervention); Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 931 n.8 (10th Cir. 2005) ("Even where

qualified or explicitly limited in any other manner. The 5th Circuit explicitly rejected the 9th Circuit's reading of the statute. The 5th Circuit held that the statutory language was unambiguous and that there is nothing in the FCA that negates or contradicts the plain meaning of the consent-for-dismissal provision.[63] In *Searcy v. Philips Elecs. N. Am. Corp.*, Bortner, a division manager at Philips, alleged that Philips illegally concealed its decision to withdraw from the US market from the US government.[64] The US government continued to buy and lease equipment from Philips without knowledge that Philips no longer operated in the US.[65] The government objected without intervening.[66] The lower court overruled the objection, executed the settlement, and dismissed the case, from which the United States appealed.[67]

The 5th Circuit held that courts may not grant a voluntary dismissal in a FCA suit unless the U.S. Attorney General consents to the dismissal.[68] Under the statutory construction, relators sue on behalf of both themselves and the government.[69] The United States is the real party in interest even when it does not control the FCA claim.[70] The Court rejected the legislative history argument from *Killingsworth* and found that in both of the amendments made to the FCA, Congress had expanded the government's ability to take control of the litigation.[71]

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the Government has declined to intervene, relators are required to obtain government approval prior to entering a settlement or voluntarily dismissing the action.")

[63] Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 159 (5th Cir. 1997).

[64] *Searcy*, 117 F.3d at 155.

[65] 117 F.3d at 155.

[66] *Id.* at 158.

[67] Searcy v. Philips Elecs. N. Am. Corp., No. 1:95-CV-363 (E. D. Tex. 1997), appeal docketed, No. 96-40515 (5th Cir. June 30, 1997).

[68] 117 F.3d at 155.

[69] *Id.*

[70] *Id.* at 156.

[71] *Id*. at 159-60.

The Court held that the language of §3730(b)(1) is unambiguous.[72] Despite each of the amendments to the FCA, Congress never changed the last sentence of §3730(b)(1) requiring the Attorney General's consent to the dismissal of a qui tam action.[73] Because Congress did not include language limiting the requisite consent, reading the statute plainly is sufficient to determine its intent.[74]

The 6th Circuit similarly, and perhaps, more harshly, rejected the 9th Circuits interpretation of the consent-for-dismissal provision. In *United States v. Health Possibilities, P.S.C.*, the Doyles', as relators, alleged that Health Possibilities illegally sought reimbursement for physician assistant services that were not "incident to" physician services as required for reimbursement by Medicare.[75] Their complaint was later amended to include allegations that Health Possibilities had submitted false Medicare claims to the DOJ of Health and Human Services by fraudulently inflating their Medicare bills by using billing codes that signified services that were more expensive than the services actually provided, in violation of the FCA.[76]

At the same time, an employee at Health Possibilities accused Dr. Doyle of sexual misconduct.[77] Dr. Doyle subsequently sued Health Possibilities for defamation.[78] The United States declined to intervene in the FCA action.[79] The Doyles' and Health Possibilities entered a settlement agreement without the United States, consolidating the FCA claim and the defamation suit.[80] Under the proposed agreement, the United States did not receive any damages because the

[72] *Id.* at 159.
[73] *Id.*
[74] *Id*. at 159.
[75] United States v. Health Possibilities, P.S.C., 207 F.3d 335, 337 (6th Cir. 2000).
[76] *Health Possibilities*, 207 F.3d at 337.
[77] 207 F.3d at 337.
[78] *Id*.
[79] *Id*.
[80] *Id*.

FCA suit was to be settled for attorneys' fees and injunctive relief.[81] The United States objected to the settlement on the grounds that the relator "essentially channeled damages payments to the defamation action" to avoid sharing the FCA settlement with the United States.[82] The District Court held that §3730(b)(1) consent-for-dismissal was only required to dismiss claims prior to government's original intervention decision and that when the government affirmatively chooses not to intervene, the Relator can settle notwithstanding the government's opposition.[83] The District Court further held that, by waiving its intervention right, the United States constructively consents to subsequent dismissal without its input.[84]

The 6th Circuit held that the relator cannot seek a voluntary dismissal of a complaint without the Attorney General's consent.[85] The Court found that the plain language of 3730(b)(1) did not temporally limit the consent-for-dismissal provision to the 60-day intervention period.[86] The Court unblinkingly rejected the 9th Circuit's reading of the statute and found that "If Congress wanted to limit the consent requirement to the period before the United States makes its initial intervention decision, we presume that it knew the words to do so."[87] The original version of the FCA did not have a mechanism for government intervention, however it did contain the consent-for-dismissal provision.[88] This suggests that the consent-for-dismissal provision was never intended to be limited by the intervention period.

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[81] *Id*. at 338.
[82] *Id.*
[83] United States v. Health Possibilities, P.S.C., No. 96-00485 (E. D. Ky. 2000) *appeal docketed*, No. 99-5259 (6th Cir. 2000).
[84] *Id.*
[85] United States v. Health Possibilities, P.S.C., 207 F.3d 335, 339 (6th Cir. 2000).
[86] 207 F.3d at 339.
[87] *Id*.
[88] *Id*. at 340.

Most recently, the 4th Circuit used the 9th Circuit's legislative context justification to prove the contrary: other provisions of the FCA use temporally-limiting language, but §3730(b)(1) does not.[89] In *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, several former Agape employees alleged that Agape fraudulently billed Medicare and other federal health care programs for services to thousands of patients that were not actually provided or were provided to ineligible patients.[90] The government declined to intervene but explicitly request that the relators and Agape solicit the Attorney General's written consent before asking the court to rule on a proposed settlement, pursuant to §3730(b)(1).[91] Because there were so many patients and claims involved in the case, the parties were relying upon statistical sampling of the claims to estimate damages; however, the United States and the parties disagreed over the methodology for such sampling, causing them, respectively, to arrive at significantly disparate estimates of the amount owed to the government.[92] Interestingly, the District Court rejected statistical sampling at all.[93] The relators, the United States, and Agape attempted to mediate but were ultimately unsuccessful.[94] The relators eventually came to a settlement agreement with Agape.[95] The United States objected to the proposed settlement because it had done its own statistical sampling during the course of its investigation and found that the damages would be at least $25 million, however the proposed settlement was appreciably less than such amount.[96] Agape filed a motion to enforce the settlement

[89] United States *ex rel*. Michaels v. Agape Senior Cmty., Inc., 848 F.3d 330 (4th Cir. 2017).
[90] *ex rel. Michaels*, 848 F.3d at 333.
[91] 848 F.3d at 334.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*. at 335.
[96] *Id*.

without the Attorney General's consent, but the District Court ruled that the United States possessed absolute veto authority over FCA settlements.[97]

The 4th Circuit affirmed the lower court's decision and held that the government possesses an unreviewable veto authority over the attempted dismissal of FCA claims.[98] The Court found that §3730(b)(1) means exactly what it plainly says: The Attorney General's written consent is required to dismiss an FCA claim.[99] The consent-for-dismissal provision is not temporally qualified or limited in any way. The Court found that other provisions of the statute require the United States to satisfy a standard of reasonableness which served to limit the provision by requiring the court to review the government's action.[100] The court pointed to the language in §3730(c)(2)(B) that says when the government settles an action over a relator's objection, the court must determine that "the proposed settlement is fair, adequate, and reasonable under all the circumstances" subject to a hearing.[101] Because this language was readily available to Congress as a mechanism for limiting the Attorney General's authority subject to judicial review and Congress chose not to use it in the consent-for-dismissal context, the 4th Circuit found that Congress did not intend to limit the Attorney General's power of dismissal.[102]

III. LEGISLATIVE HISTORY AND STATUTORY CONTEXT DEFINING THE SCOPE OF RELATOR CONDUCT

The purpose of the FCA is to protect the public from institutions that bring false claims and to protect government money. When the FCA was first enacted, Congress was responding to reports

[97] United States *ex rel.* Michaels v. Agape Senior Cmty. Inc., 2015 U.S. Dist. LEXIS 82379 D.S.C., June 25, 2015).
[98] 848 F.3d at 330.
[99] *Id*.
[100] *Id*. at 339.
[101] *Id*. at 340.
[102] *Id*.

that the United States was being billed for what the government believed to be valid contracts on wartime necessities, but was actually nonexistent goods and services.[103] In response to this egregious fraud on the United States, Congress imposed both civil and criminal liability for such fraud.[104] Since then, Congress has trebled the damages provision so that liability is "essentially punitive in nature."[105] This change indicates that Congress is primarily concerned with preventing fraud on the United States and is less concerned with compensating private parties affected by the fraud.

The 9th Circuit has held that Congress intended to place full responsibility for FCA litigation on private parties.[106] The Court came to this conclusion by attempting to discern Congress' intent in the context of the legislation's enactment and subsequent amendments. The Court held that the government's role in FCA actions pursued by relators has evolved since the legislation was enacted in 1863.[107] Under the original statute the United States did not have the right to take over an action initiated by a relator. The government's right to intervene was granted in 1943, when the Act was amended to give the United States the option to take over a relator's claim during a 60-day period of contemplation.[108] In 1986, the Act was further amended to give the government the option to extend the 60-day period upon a showing of good cause. The 9th Circuit examined the Senate Report accompanying the 1986 amendment to conclude that Congress intended to expand relators' control over the litigation.[109] The Senate Report stated that Congress' intent was to "encourage

[103] Universal Health Servs. v. United States *ex rel*. Escobar, 136 U.S. 1989, 1996 (2016).
[104] *ex rel. Escobar*, 136 U.S. at 1996.
[105] *Universal Health Servs. v. United States ex rel. Escobar*, 136 U.S. 1989 at 1996; quoting Vermont Agency of Natural Resources v. United States *ex rel*. Stevens, 529 U.S. 756, 764 (2000).
[106] United States *ex rel*. Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994).
[107] *ex rel. Killingsworth*, 25 F.3d at 721.
[108] *Id*.
[109] *Id*.

more private enforcement" by increasing incentives for relators bringing FCA claims.[110] The Court also noted that, according to the Senate Report, the government's ability to extend the 60-day intervention period was intended to provide the government with the opportunity to intervene in "situations where new and significant evidence is found".[111] The Court held that the Senate Report indicated that, absent early intervention by the United States, Congress intended to place full responsibility for FCA litigation in private parties.[112] It concluded that this intent would be fundamentally challenged by an absolute veto power.[113]

The 5th Circuit, too, looked at the legislative history of the FCA and came to a significantly different conclusion. In its decision in *Searcy*, the Court acknowledged that when the FCA was originally enacted in 1863, the United States had no right to intervene in a false claims action.[114] However, since the legislation's inception, Congress has both created the government's power to intervene in a relator action, and has subsequently expanded this power to assume control of the litigation.[115] While a number of changes have been made to the language and application of the Act, essentially resulting in an overhaul of its execution, Congress never eliminated the consent-for-dismissal provision.[116] The 5th Circuit did not credit the Senate Report to the extent that the Court did in *Killingsworth*, as the Senate Report, while persuasive, is not the law.

The 9th Circuit stands alone in its interpretation of the legislative intent of the FCA. The 6th Circuit perhaps said it best in its decision in *Health Possibilities*: "the FCA is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud against public

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[110] S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986)
[111] S. Rep. No. 345, 99th Cong., *supra* note 110.
[112] *Killingsworth* at 722.
[113] *Id*.
[114] Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 159 (5th Cir. 1997).
[115] *Searcy*, 117 F.3d at 159.
[116] *Id*.

monies."[117] The Court found that the qui tam mechanism is not intended to compensate relators. Instead, it is a mechanism to promote accountability among the public to ensure deterrence of frauds on the government.[118] The qui tam mechanism is an efficient and cost-effective way to make companies beholden to the system, as relators are individuals who have been wronged by a private actor and are incentivized to achieve justice.[119] This broad principle is entirely consistent with securing the government's ability to protect the public interest at stake. This suggests that Congress intended to grant the United States authority over privately negotiated settlements even when it does not intervene.[120]

The "right to conduct an action" under § 3730(b)(4)(B) includes the right to negotiate a settlement, but it does not preclude the United States from objecting to that settlement. While determining the plain meaning of a statute requires a determination of legislative intent to some extent, courts ultimately rely on statutory context to determine where the right to conduct an action begins and ends. The relator's right to conduct an action is derived from § 3730(b)(4)(B), which states that "[b]efore the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall … notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action", and § 3730(c)(3), which states that "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." One thing is clear: the legislation is intended to protect the public from institutions that bring false claims and to protect the public fisc. More generally, however, while some courts say that Congress intended to place full responsibility for

[117] United States v. Health Possibilities, P.S.C., 207 F.3d 335, 3340-341 (6th Cir. 2000).
[118] *Id*. at 341.
[119] *Id*. at 340.
[120] *Id*.

FCA litigation on the relators,[121] others have found that the United States has control over the litigation. Because the legislation is intended to avoid fraud on the government and the United States is the real party in interest, the United States should retain control over claims brought under the FCA.

The 9th Circuit held that the government does not have the right to block the settlement because the relator has the right to conduct the action on its own after the United States fails to intervene while the case is under seal.[122] The Court decided that the amendments to the FCA indicated that Congress intended to place full responsibility for FCA litigation on private parties when the United States declines to intervene.[123] According to the 9th Circuit, allowing the United States to have an "absolute" right to block a settlement contravenes this intent.[124]

The 9th Circuit further held that § 3730(b)(4)(B) grants relators the right to conduct the action when the United States has elected not to intervene and that the right to conduct the action necessarily includes the right to negotiate a settlement.[125] The Court held that the right to conduct an action obviously includes the right to negotiate a settlement according to § 3730(d)(2) because the person "bringing the action" or "settling the claim" must be the same person.[126] Under this assumption, the relator is both the person "bringing the action" and the person "settling the claim", and as that person satisfying those roles, the relator has conducted the action.

In part IV of its decision, however, the Court held in the United States' favor by finding that the government retains the right to object to a proposed settlement upon a showing of good cause,

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[121] United States *ex rel*. Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994).
[122] *ex rel. Killingsworth v. Northrop Corp.,* 25 F.3d at 722.
[123] *ex rel. Killingsworth*, 25 F.3d at 722.
[124] 25 F.3d at 720.
[125] *Id.* at 722.
[126] *Id.* at 721.

without having intervened earlier in the litigation.[127] In the Court's interpretation of 31 U.S.C. § 3730(c)(2)(B), it found that the United States cannot force a relator to continue litigation, but it can question a settlement upon a showing of good cause.[128] The Court noted that 31 U.S.C. § 3730(c)(3) grants the United States the right to intervene at a later date.[129] It distinguished this intervention upon a showing of "good cause" from the government's attempt to block the settlement as a limited intervention and determined that 31 U.S.C. § 3730(c)(3) did not apply.[130] However, the Court found that the same principal applies: upon a showing of good cause, the United States can object to the proposed settlement based on concerns fairness, adequacy, and reasonableness.[131] In the same way that a relator can question a settlement requiring a review by the court, the 9th Circuit extended this interpretation of the "good cause" requirement to the government when objecting to a relator settlement.[132] The case was remanded to the lower court for a determination of good cause.[133] Interestingly, the District Court subsequently affirmed the settlement and dismissed the case with prejudice.[134]

The 9th Circuit's analysis of 31 U.S.C. § 3730(d)(2) fails to account for the requisite consent from the Attorney General to dismiss the claim. While the relator can, and often does, negotiate the settlement, the Attorney General must ultimately consent to the dismissal of the claim. The 9th Circuit wants "settling the claim" to include dismissing the claim, however, claims cannot be dismissed without the Attorney General's consent, pursuant to 31 U.S.C. § 3730(b)(1).

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[127] *Id.* at 723.
[128] *Id.* at 724.
[129] *Id*.
[130] Id.
[131] Id. at 723.
[132] *Id*. at 725.
[133] *Id*.
[134] United States *ex rel*. Killingsworth v. Northrop Corp., No. 94-56599, 1995 U.S. App. LEXIS 31563, at *6-8 (9th Cir. Oct. 26, 1995).

The 4th and 5th Circuits have come to a similar conclusion. The 5th Circuit held that the relator's right to conduct the action under 31 U.S.C. § 3730(b)(4)(B) does not necessarily include the right to negotiate a settlement in that action.[135] The Court decided that "a relator has 'conducted' an action if he devises strategy, executes discovery, and argues the case in court, even if the government frustrates his settlement efforts".[136] Under this understanding of the "right to conduct the action" clause, there is no conflict between the government's right to veto voluntary settlements and the relator's right to control the litigation.[137]

In *Agape*, the Court held that, contrary to the decision in *Killingsworth*, 31 U.S.C. § 3730(b)(4)(B) and 31 U.S.C. § 3730(d)(2) do not create an unfettered right for the relator to settle an action.[138] The Court relied on the 5th Circuit's explanation of when an action is "conducted", as explained in *Searcy*. Under this analysis of the statute, the right to conduct the action and the right to settle the claim are not mutually exclusive.[139] In some cases, absent the Attorney General's objection, the relator will have control over the settlement.[140] However, an action has been conducted regardless of whether the United States decides to veto the settlement.[141]

IV. POLICY

The FCA includes a qui tam provision because the scope of fraud on the United States is much broader than the government's ability to detect it.[142] The qui tam provision allows the United States to detect fraud that it would not otherwise be able to discern. The system for submitting claims is

[135] Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997).
[136] *Searcy*, 117 F.3d at 160.
[137] 117 F.3d at 160.
[138] *United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330 at 339.
[139] *ex rel. Michaels*, 848 F.3d at 339.
[140] 848 F.3d at 339.
[141] *Id*.
[142] United States v. Health Possibilities, P.S.C., 207 F.3d 335, 341 (6th Cir. 2000).

fairly removed from the government’s watchful eye, therefore the United States must rely on participants holding themselves accountable. Allowing relators to bring a claim on behalf of the government is the most cost-effective and efficient method to hold perpetrators accountable.[143] Relators hold perpetrators liable to private persons who are motivated by “ill will” or “personal gain”.[144] Economic downturn and employee layoffs tend to create a class of relators willing to risk damaging their relationship with an employer, resulting an increase in qui tam filings.[145] In fact, there is no requirement that the relator be personally harmed by the defendant’s conduct at all to gain a percentage of the recovery from a successful suit.[146] The United States must retain control over the litigation because private interest and public good do not necessarily overlap, thus the government must focus the litigation on pursuing the public good.[147]

When allowing a relator to bring claim on behalf of the United States, the United States is wary of relators’ attempting to unjustly enrich themselves, therefore reducing benefits to the public fisc. Any judgment entered for the relator has a preclusive effect on the United States, as the relator brings the claim on behalf of the United States.[148] This res judicata concern is critical, as settling a claim with a relator becomes quite valuable for a defendant looking to avoid confrontation with the United States. This incentivizes the relator to “shift settlement proceeds away from FCA fraud claims, where a relator receives only a portion of the winnings under the FCA's bounty provisions, and toward the other claims, where recovery is dollar-for-dollar.”[149]

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[143] *Health Possibilities*, 207 F.3d at 341.
[144] 207 F.3d
[145] William E. Kovacic, *The Civil False Claims Act As A Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 233 (1998).
[146] 31 U.S.C. § 3730(e)(4)(B).
[147] *Health Possibilities*, 207 F.3d at 340.
[148] David Freeman Engstrom, *supra* note 4, at 1946.
[149] David Freeman Engstrom, *supra* note 40, at 1710.

In *Searcy*, Bortner, had negotiated with Philips without the government's input. The United States objected to the settlement on two grounds: (1) the Attorney General's investigation, the conclusion of which suggested that the proposed settlement amount was too low; and (2) releasing the claim would preclude the United States from pursuing future claims arising out of issues that the United States had not yet had the opportunity to investigate.[150] This preclusion would be valuable to Philips, a value that could potentially be leveraged by Bortner, and may have the result of increasing the settlement amount. Bortner had essentially boosted the value of the settlement by "bargaining away" claims on behalf of the United States.[151] However, 31 U.S.C. §3730(b)(1) provides protection against this by allowing the United States to refuse the settlement when it perceives the relator receiving an unjust enrichment from the agreement.

CONCLUSION

The dangers of allowing a relator to bring an FCA action against a company without input from the United States are significant. Due to res judicata concerns, the United States must consent to a dismissal of a proposed settlement attendant to the dismissal of a qui tam claim between a relator and a defendant, even if the United States does not choose to intervene at an earlier stage of litigation. The FCA provides such a mechanism under 31 U.S.C. § 3730(b)(1). It further narrows the scope of a relator's conduct under 31 U.S.C. §§§ 3730(b)(4), 3730(c)(3), and 3730(d)(4). Therefore, the United States reserves an absolute veto power over settlements attendant to dismissal under the FCA.

[150] Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 167-159 (5th Cir. 1997).
[151] *Searcy*, 117 F.3d at 160.