St. Mary's Law Journal

Volume 37 | Number 1 Article 4

1-1-2005

Qui Tam: Survival of the Action and Fate of the Proceeds following the Death of the Relator for the King and for Himself ... and His Heirs.

Joseph E. Hoffer

COMMENTS

QUI TAM: SURVIVAL OF THE ACTION AND FATE OF THE PROCEEDS FOLLOWING THE DEATH OF THE RELATOR. FOR THE KING AND FOR HIMSELF . . . AND HIS HEIRS[1]

JOSEPH E. HOFFER

1. A *qui tam* action is an abbreviation of the Latin *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, which means one "who as well for the king as for himself sues in this matter." BLACK'S LAW DICTIONARY 1262 (7th ed. 1999). The addition "and his heirs" in the title above follows from the conclusion of this Comment—that the action survives and the proceeds pass to the heirs following the death of the relator.

I. INTRODUCTION

In the highly complex market economy of the United States, a large segment of industry is focused on providing goods and services to the government or to the public on behalf of the government.[2] These businesses range from small "emerging" businesses to multinational corporations; they may be contractors, subcontractors, or authorized service providers that implement various government programs. Whatever the case may be, small businesses are often preferred.[3] They perform a wide array of trades—delivering garbage trucks to government agencies, selling motorized scooters to the disabled under Medicare or Medicaid, and

2. *See* Michael Watts, *What Is a Market Economy?* (1998), *in* U.S. DEP'T OF STATE, PUBL'N, http://usinfo.state.gov/products/pubs/market/homepage.htm (discussing the fundamentals of a market economy and the interaction of government with the market economy) (on file with the *St. Mary's Law Journal*). The interaction of government with the market economy of interest to this Comment is the government's providing of "public goods," or items that: (1) are open to joint consumption by all citizens; and (2) no private business alone could provide directly to all. *Id.* at http://usinfo.state.gov/products/pubs/market/mktec8.htm. Included in this category are items such as national defense, income and social welfare, education programs, and many other services provided to the public. *Id.* For a general overview of many possible public goods, simply look to the various administrative agencies in existence and the services they provide the public. *Id.* Still open to debate is whether the services provided by these agencies should in fact be included within public goods properly provided by the government versus ones that should be left to the free market. *Id.* Watts points out that there are in fact few "true" public goods, and that others should be more appropriately left to the private sector. *Id.*

3. *See* GSA Federal Acquisition Regulation, 48 C.F.R. § 1.101 (2005) (providing for "the codification and publication of uniform policies and procedures for acquisition by all executive agencies"); *see also* GSA Federal Acquisition Regulation, 48 C.F.R. § 19.201(a) (2005) (stating that "[i]t is the policy of the [g]overnment to provide maximum practicable opportunities in its acquisitions to small business[es] .... Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance.").

rebuilding the infrastructure of war torn nations.[4] Providing goods and services to the government, or providing services under a government program are essential to the operation of the administrative state. However, when the actions of a business toward the government involve phantom billing, double billing, reflex testing, up-coding, phantom employees, unbundling, improper cost reports, or any other method of deceit, the business's legitimate actions have turned into fraud against the government.[5]

Now imagine yourself as an employee of one of these organizations and a witness to the fraud. What do you do? One option is to file a *qui tam* action under § 3729 of the False Claims Act ("FCA" or "the Act").[6] This is precisely what occurred in a recently settled federal lawsuit against HealthSouth Corp., where several relators filed suit in San Antonio under the False Claims Act.[7] As a result of this suit, HealthSouth agreed

---

4. *See* HomeCare, *FBI Conducts Investigation of the Scooter Store*, Dec. 1, 2003, http://www.homecaremag.com/mag/Medical_fbi_conducts_investigation (discussing allegations of fraud among Texas scooter retailers) (on file with the *St. Mary's Law Journal*); Lisa Meyers & the NBC Investigative Unit, *New Halliburton Waste Alleged*, July 26, 2004, http://msnbc.msc/com/id/5333896/print/1/displaymode/1098 (discussing fraud within Halliburton, a government no-bid "super contractor") (on file with the *St. Mary's Law Journal*); Trash Collectors and Recycling Vehicles (TRACY Program), http://apps.fss.gsa.gov/vehicles/buying/tracy.cfm (last visited July 24, 2005) (listing various contractors authorized to sell refuse trucks to government agencies) (on file with the *St. Mary's Law Journal*).

5. *See* Qui Tam Online Network, *Common Types of Qui Tam Fraud*, http://www.quitamonline.com/fraud.html (last visited Sept. 7, 2005) (discussing and defining many types of government fraud) (on file with the *St. Mary's Law Journal*); Centers for Medicare & Medicaid Services, *Medicare Definition of Fraud* http://www.cms.hhs.gov/providers/fraud/DEFINI2.ASP (last visited Oct. 31, 2004) (discussing Medicare fraud) (on file with the *St. Mary's Law Journal*). The Health Insurance Association of America conducted a survey in 1993 and broke down health care fraud as follows: "43% [f]raudulent diagnosis, 34% [b]illing for services not rendered, 21% [w]aiver of patient deductibles and co-payments, [and] 2 % other." *Id.* The most common types of Medicare fraud were up-coding, unbundling charges, phantom billing, and offering free services in exchange for a Medicaid/Medicare number. *Id.*

6. False Claims Act, 31 U.S.C. §§ 3729-3733 (1994).

7. *See* Laurence Arnold & Kristen Hallam, *Over-billing Case to Cost HealthSouth $325-Million*, BLOOMBERG NEWS, Dec. 31, 2004, http://www.theglobeandmail.com/serv/let/story/LAC.20041213.IBHEALTH31/BNPRINT (noting that the HealthSouth settlement is "the seventh-largest over allegations of false claims with the U.S. [G]overnment") (on file with the *St. Mary's Law Journal*); *HealthSouth Agrees to Pay $325m to US, Action Settles Fraud Allegations*, BOSTON GLOBE, Dec. 31, 2004, http://www.boston.com/business/articles/2004/12/31/healthsouth._agrees_to_pay_325m_to_us/?rss_id=boston+Globe+—+Business+News (quoting the U.S. Attorney for the Western District of Texas, Johnny Sutton, who notes that the "settlement should send a strong message that the government will be persistent in pursuing those who engage in fraud and making sure that they pay a high price for their misdeeds") (on file with the *St. Mary's Law Journal*). One thing highlighted by this report is that "[o]ne of the whistle-blowers will receive $8.1 million of the settlement, with

"to pay $325-million (U.S.) to settle charges it over billed the government[ ],"[8] and of this $325 million, the relators have a specific property interest.[9]

The FCA sets out the damages and the interest held by relators; it "provides for liability for triple damages and a penalty from $5500 to $11,000 per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States."[10] The action may be brought either by a relator (the whistleblower) on behalf of the United States, or by the Attorney General.[11] The relator prosecuting the

---

others receiving lesser amounts." *Id.* This amount constitutes the statutorily created property interest that the whistleblower holds in turn for bringing the action and information concerning fraud to the government's attention. *Id.* Under the FCA, this amount is separate and distinct from expenses, attorneys' fees, and costs. *See* 31 U.S.C. § 3730 (1994) (distinguishing between the proceeds and other expenses that the relator may be entitled to); *HealthSouth to Pay $325 Million Settlement*, WASH. TIMES, Dec. 30, 2004, http://www.washingtontimes.com/upi-breaking/20041230-053347-9612r.htm (reporting that HealthSouth allegedly submitted false claims under the Department of Defense TRICARE program and Medicare, some of which claims included "unallowable costs [such as] lavish entertainment") (on file with the *St. Mary's Law Journal*).

8. Laurence Arnold & Kristen Hallam, *Over-Billing Case to Cost HealthSouth $325-Million*, BLOOMBERG NEWS, Dec. 31, 2004, http://www.theglobeandmail.com/serv/et/story/lac.20041213.IBHEALTH31/BNPRINT (announcing the HealthSouth Corp. settlement terms) (on file with the *St. Mary's Law Journal*).

9. *See* 31 U.S.C. § 3730(d)(2) (1994) (stating that the specific interest in the outcome held by the relator is "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement").

10. Memorandum from the United States Attorney's Office to Dep't of Justice Employees, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited July 24, 2005) (on file with the *St. Mary's Law Journal*); *see also* 31 U.S.C. § 3729(a) (1994) (explaining the liability for any person who files a false claim against the United States government); Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 122 n.1 (2003) (stating why damage amounts have been increased following the Inflation Adjustment Act). Although the FCA on its face provides for up to treble damages and a penalty from $5500 to $10,000, it is clear that the Legislature has recognized other factors such as inflation and cooperation when determining damages. *Id.* It has adjusted for inflation and allowed the treble damages to be reduced to double in the case of a cooperative defendant. *Id.*; *cf.* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 5, 104 Stat. 891 (1990) (noting that one of its purposes is to "allow for regular adjustment for inflation of civil monetary penalties").

11. 31 U.S.C. § 3730(a) (1994); *see also* Memorandum from the United States Attorney's Office to Dep't of Justice Employees http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited July 24, 2005) (describing the "detailed process for the filing and pursuit of these claims") (on file with the *St. Mary's Law Journal*). The complaint is filed under seal for at least 60 days, copies are only given to the Department of Justice, and the case is placed on a secret docket by the Clerk of the Court. *Id.* The government must then investigate the allegations thoroughly and at the conclusion of the investigation elect either to intervene, decline to intervene, or move to dismiss the complaint. *Id.* The Department of Justice may also settle the action with the defendant before making one of the

case is entitled to "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement."[12] Furthermore, the relator is entitled to attorneys' fees, reasonable expenses, and to be made whole (if there is any retaliation against him)—all damages awarded against the defendant.[13] If the Attorney General assumes the action brought by the relator, the relator is still entitled to "at least 15 percent but not more than 25 percent of the proceeds of the action or settlement."[14] This intentionally creates a strong incentive for possible relators to step forward and report fraud, and explains why the "lure of *qui tam* actions appears to be irresistible"[15]—because it is meant to be.

Congress intentionally created this "lure" in the legislation.[16] The reasons for the Act's creation become even clearer in historical context. First enacted in 1863 under President Abraham Lincoln, Congress designed the law to combat war time profiteering.[17] During that era, the government faced individuals who were shipping sawdust in place of guns, selling the same cavalry horses multiple times, and selling moth-

---

above elections. *Id.* If the government intervenes, they file a notice of intervention and a motion to unseal the *qui tam* complaint; ordinarily the government also files its own complaint. *Id.* After the complaint is unsealed, the relator has 120 days to serve each named defendant. *Id.*

12. 31 U.S.C. § 3730(d)(2) (1994).

13. *Id.*

14. *Id.* § 3730(d)(1).

15. Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 871 (1997).

16. *See* S. REP. NO. 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266-67 (encouraging individuals who know of fraud to bring that information forward and increasing the incentives for private individuals to bring actions on behalf of the United States). The Senate Committee realized how sophisticated and widespread fraud against the government had become and that the only way to combat this fraud would be through orchestrating an attack by both the government and private citizens. *Id.* To begin this offensive, the Senate sought to increase the incentives offered to citizens willing to participate in the fight. *Id.*

17. S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. It is noted that the FCA has been used more than any other act to protect the Treasury against fraud. *Id.* The FCA is even used more readily than common law contract remedies also available to the government, because the FCA provides a stronger deterrent to fraud. *Id.*; *cf.* Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 871 (1997) (describing the strength of the FCA); Phillips & Cohen LLP, *The False Claims Act*, http://www.all-about-qui-tam.org/fca_history.shtml (last visited July 26, 2004) (emphasizing the history of the FCA and its strengths) (on file with the *St. Mary's Law Journal*). Phillips & Cohen is one of the 800-pound gorillas in FCA litigation, and has returned more than $2 billion to the Treasury through FCA litigation. *Id.* In fact, founding partner John R. Phillips worked with the Senate and helped to formulate the 1986 amendments to the FCA along with Senator Chuck Grassley and Congressman Howard Berman, helping to revitalize the Act, making it a formidable weapon against fraud.

infested blankets.[18] The Act survived many emasculating attacks through the years, often burdened by restrictive interpretation, but re-emerged in the 1980s when the government again faced rampant fraud, waste, and abuse.[19] In 1983, the Merit System Protection Board (MSPB) surveyed approximately 5000 federal employees and its report was astonishing: Sixty-nine percent of those who reported to have firsthand knowledge of fraud failed to give that information to the appropriate authorities, and when asked why they failed to come forward, fifty-three percent reported a belief that there would be no corrective action, and thirty-seven percent feared retaliation.[20]

During hearings before the Senate, one relator explained what happened to him when he broke the code of silence among government contractors. He stated that his "'ethical principles' were tested to the limit when faced with . . . either keeping quiet . . . or risking the loss of his

---

18. *E.g.*, Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 870-71 (1997) (discussing the various types of fraud against the government during the formative era of the Act); Phillips & Cohen LLP, *The False Claims Act*, http://www.all-about-qui-tam.org/fca_history.shtml (last visited July 24, 2005) (describing the historical context of the FCA and the fraud giving rise to its existence) (on file with the *St. Mary's Law Journal*).

19. *See* S. REP. NO. 99-345, at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269 (stating that the problems surrounding the creation of the Act involved unscrupulous contractors seeking to perpetuate a fraud against the Treasury); Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 872 (1997) (focusing on the changes made to the FCA when Congress attempted to eliminate parasitic claims, which in turn had a chilling effect on FCA cases); Phillips & Cohen LLP, *The False Claims Act*, http://www.all-about-qui-tam.org/fca_history.shtml (last visited July 24, 2005) (describing the emasculation of the FCA by barring claims based on information the government already possessed unless the relator was the original source of that information) (on file with the *St. Mary's Law Journal*). Note that the expense of pursuing a FCA claim skyrocketed after the Act started undergoing restrictive interpretation; because few attorneys could bare the risk involved, the changes had a substantial chilling effect on the Act. *Id.*

20. U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS 24 (1984) (on file with the *St. Mary's Law Journal*); *see also* S. REP. NO. 99-345, at 4-5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269-70 (citing the U.S. Merit Systems Protection Board findings). The 1980 study was conducted with fifteen government agencies and departments and over 13,000 surveys were distributed. The 1983 study involved 7563 randomly selected employees throughout the entire executive branch. Both studies had about a sixty-five percent return rate. U.S. MERIT SYS. PROT. BD., BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT: A COMPARATIVE ANALYSIS OF 1980 AND 1983 SURVEY FINDINGS 4 (1984) (on file with the *St. Mary's Law Journal*). In both studies, the most significant problem observed was the perceived waste of government funds by poorly managed federal programs. *Id.* at 5. The Board also concluded that the legal protections offered to employees who acted as whistleblowers were not sufficient to meet the congressional intent to impact fraud. *Id.* at 7.

job."[21] When he attempted to confront his employer, they did nothing and the confrontation resulted in a campaign of harassment that ended with his discharge.[22] Congress, aware of this admission and other corroborating testimony, followed the findings of the Senate Subcommittee on Administrative Practice and Procedure, which recommended changes that would effectively end the code of silence.[23] By implementing the changes, Congress empowered the FCA in an effort to encourage and enlist the citizenry in the government's fight against fraud.[24] Following the Subcommittee's advice, the 1986 amendments to the FCA permitted relators, who were the original sources exposing the fraud, to bring a *qui tam* action, even if some of that information was previously available to the government; however, the amendments still precluded non-original sources from bringing suit.[25]

The 1986 amendments were an effort to set aside past court rulings that followed a restrictive view of who could bring suit, and were designed to encourage *qui tam* actions, which directly attacked the "code of silence" problem.[26] The Senate noted that the purpose of the statute was remedial and intended to "protect the [T]reasury against the hungry and unscrupulous . . . and should be construed accordingly. . . . [O]ne of the least

---

21. *See* S. REP. NO. 99-345, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5270 (discussing the hearing on Senate Bill 1562, known as the False Claims Reform Act, before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Congress, 1st session, Sept. 17, 1985).

22. *See id.* at 5-6, *reprinted at* 5270-71.

23. *See id.* at 6, *reprinted at* 5271 (illustrating the recommendations and findings of the Senate Subcommittee on Administrative Practice and Procedure). Realizing that audits were generally ineffective because everyone would "straighten up their act" when the auditor came along, the Subcommittee sought to end this code of silence that it observed to be widespread throughout government contractors and employees. *Id.*

24. *See, e.g.*, Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 873 (1997) (discussing the 1986 amendments and the greater opportunities provided to those with information concerning fraud to come forward with an expectancy of proceeds, and outlining changes that had a substantial impact on ending the chilling effect that had prevailed for so many years).

25. *See id.* (analyzing the effects on the FCA of the 1986 amendments).

26. *See* Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 873 (1997) (discussing the change of interpretation and the desire to spur more action that culminated in the 1986 amendments to the FCA); *see, e.g.*, United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) (denying the State of Wisconsin's right to bring an action as a relator in Medicaid fraud case because other statutes required it to report such violations of fraud to the United States). *Dean* serves as a relatively recent example of the chilling effect on FCA litigation, following previous revolts, such as *United States ex. rel. Marcus v. Hess*, 317 U.S. 537 (1943). *Hess* is symptomatic of the problem that led to courts taking a restrictive view of who has standing to bring *qui tam* actions. In *Hess*, the Court permitted a relator who was not the original source of information to maintain a *qui tam* action. *Hess*, 317 U.S. at 545-48.

expensive and most effective means of preventing fraud[ ] . . . is to make the perpetrators . . . liable to actions by private persons acting . . . under the strong stimulus of . . . hope of gain."[27] This purpose indicates that Congress sought to "increase[ ] incentives, financial and otherwise, for private individuals [bringing] suits on behalf of the [g]overnment."[28]

Since 1986, when Congress endowed the FCA with more muscle, there have been recoveries totaling over $12 billion in *qui tam* actions.[29] Additionally, in 2003, the Department of Justice (DOJ) reported a seventy-five percent increase in recoveries over the previous year.[30] Of these recoveries, relators' statutory shares since 1986 amounted to $1.48 billion.[31] Given the tremendous growth in the number of federal *qui tam* suits arising under the FCA,[32] and the continuing lure to step forward with infor-

---

27. *Hess*, 317 U.S. at 541 n.5 (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885)).

28. S. REP. NO. 99-345, at 2, 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267, 5276. *But see* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 783 n.12 (2000) (arguing that the 1986 Senate Committee misunderstood some aspects of the Act's history). Here the Court is attempting to disembowel the dissent's reliance on the legislative history of the 1986 amendments, which changed the modifier word of person from "a" to "any." *Id.* By dismissing the legislative history to the 1986 amendments as "utterly irrelevant," the Court cleared yet another obstacle to its finding that a state could not be a "person" sued under the FCA. *Id.*

29. Press Release, U.S. Dep't of Justice, Justice Dep't Civil Fraud Recoveries Total $2.1 Billion for FY 2003, False Claims Act Recoveries Exceed $12 Billion Since 1986, http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm (Nov. 10, 2003) (on file with the *St. Mary's Law Journal*).

30. *Id.*

31. *Id.*; *see also* Taxpayers Against Fraud (TAF), False Claims Act and *Qui Tam* Statistics, http://www.taf.org/statistics.htm (last visited July 24, 2005) (comparing the growth of *qui tam* actions and breaking it down categorically) (on file with the *St. Mary's Law Journal*). As reported by the Department of Justice, relators' shares in the proceeds for fiscal year 2004 was approximately $109 million. *Id.* In cases declined by the Department of Justice, the claims were $373 million to date. *Id.* The total FCA cases filed to date are 4704. *Id.*

32. *See* Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 870 (1997) (reporting the tremendous growth in *qui tam* suits from 1987 to 1995); Press Release, U.S. Dep't of Justice, Justice Dep't Civil Fraud Recoveries Total $2.1 Billion for FY 2003, False Claims Act Recoveries Exceed $12 Billion Since 1986 http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm (Nov. 10, 2003) (reporting a seventy-five percent increase in recoveries from 2002 to 2003, and discussing the major settlements of the year) (on file with the *St. Mary's Law Journal*); *see also* Taxpayers Against Fraud (TAF), False Claims Act and *Qui Tam* Statistics, http://www.taf.org/statistics.htm (last visited July 24, 2005) (comparing the growth of *qui tam* actions and breaking it down categorically) (on file with the *St. Mary's Law Journal*); Fried Frank, Qui Tam FCA Statistics, http://www.ffhsj.com/quitam/fcastats.htm (last visited July 24, 2005) (reporting recoveries pursued by the Department of Justice and recoveries pursued by relators through 2003) (on file with the *St. Mary's Law Journal*). Changes in *qui tam* claims since 1987 are as follows: the number of cases filed increased from thirty-two in 1987 to 326 in 2003, and

mation, at some point courts will have to address other issues that remain unclear; mainly, does the action survive the death of the relator and what happens to the relator's interest in the proceeds upon their death?

Imagine that you were not only an employee-witness of fraud, but that you subsequently initiated a *qui tam* action, and the government assumed the action or you prosecuted the action on the government's behalf. As such, you have invested thousands of hours into the action. Furthermore, after years of litigation, you have developed a life-threatening illness and the possibility exists that you will not survive to see the action settled or prosecuted to its successful end. This Comment focuses on this threshold issue: What should happen to the relator's share of proceeds from the settlement or successful prosecution of the *qui tam* action when the relator dies before conclusion of the suit, or before the realization of the award?

Several court decisions complicate the problem by holding that a *qui tam* action will not even survive the death of the relator. There is no clear consensus among the courts directly addressing this issue, but it is quite feasible that somewhere there is a relator who has or will put it all on the line by blowing the whistle, who because of age, infirmity, or accident may not survive to see and benefit from their statutory share of the proceeds.

This Comment proposes that the FCA create a statutory future interest, owned by the relator and contingent upon either a successful prosecution or settlement of a *qui tam* action.[33] Additionally, this Comment asserts that the statute guarantees this interest, and it is not subject to divestment by the government under normal circumstances.[34] Following the modern trend, such future interests are generally divisible upon death.[35] This future interest is wholly separate from other entitlements

---

recoveries in cases declined by the Department of Justice increased from $35,431 in 1988 to $362,309,397 in 2004. *Id.*

33. *Cf.* 31 U.S.C. § 3730(d) (1994) (stating the prerequisites or contingencies for recovery that the relator must satisfy in order to recover). While the Act does not discuss the nature of the proceeds as a property interest, one can infer from the context of the Act that they are a future interest contingent on either successful prosecution or settlement of the action. *Id.*

34. *See* Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (stating that "[t]he Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' including statutory entitlements." (citations omitted)).

35. *See* T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 516-17 (2003) (finding that, as of 2003, "forty of the fifty common-law jurisdictions in the United States [had] abolished the inalienability rule, thus making contingent interests fully transferable"); 9 GERRY W. BEYER, TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS

created in the FCA, such as reasonable attorneys' fees, costs and expenses, and any required restitution aimed at making the relator whole.[36] Finally, this Comment also proposes that *qui tam* actions may survive the death of relators by substitution of the estate of the relator, assumption by the government, or by allowing a continuance of the action in cases involving multiple relators.[37]

Allowing a *qui tam* action to continue is in the best interest of the public and serves the intent of the Act—to stop fraud by empowering citizens with information. Following modern principles concerning property and assignment of interests, as well as good policy, equity dictates recognition of the *qui tam* action's survivable nature and the divisible nature of the relator's share of the proceeds. Failure to follow this approach would further frustrate the government's fight against fraud, is an inefficient allocation of resources, digresses from the legislative intent underlying the Act, and unfairly denies the relator's heirs a portion of the estate owned by the relator through assignment and principles of quantum meruit.

Accordingly, this Comment begins by laying a foundation, which establishes who can qualify as a relator under the FCA. In doing so, it examines limitations and restrictions on potential relators contained in the Act, and the nature of the information the relator must possess. It then discusses the specific rights and interest guaranteed to those who qualify as relators, as found in the Act. Finally, this Comment discusses the specifics of the property interest created by the Act and then focuses on a determination of whether a *qui tam* action can survive the relator's death.

II. BACKGROUND

A. *Who Can Bring a Qui Tam Action?*

For clarification, the FCA refers to two different classes of "persons": the person who makes the false and fraudulent claim, and the person who

---

§ 13.3, at 300 (3d ed. 2002) (stating that "[a]ll vested and contingent interests, whether real or personal, including present and future interests may be devised"); *see also* 23 AM. JUR. 2D *Descent and Distribution* § 27 (2005) (discussing further the nature of future interests in modern law); 23 AM. JUR. 2D *Descent and Distribution* § 95, at 707 (2005) (stating that "[u]nder modern statutes in most jurisdictions future interests pass on the death of their owners intestate, to the persons who, under the statutes of descent and distribution, are the heirs or distributees of such owners").

36. *See* 31 U.S.C. § 3730(d) (1994) (noting that other costs and expenses are not included in the proceeds awarded to the relator, but are separate entitlements awarded against the defendant).

37. *See* FED. R. CIV. P. 25(a)(1) (allowing substitution of parties "[i]f a party dies and the claim is not thereby extinguished"); United States *ex rel.* Semtner v. Med. Consultants, Inc., 170 F.R.D. 490, 493 (W.D. Okla. 1997) (substituting the estate of a relator in a *qui tam* action when the relator has died, allowing the action to survive).

reports the false and fraudulent claim.[38] Just who falls within each respective class of persons has been a matter of much debate in the court system.[39] The class of persons discussed in this Comment are those persons bringing the action (i.e., blowing the whistle) and seeking to qualify as the relator. Just who can this person be and what limits does the Act place on this person?

In 1 U.S.C. § 1, the rules of construction provide that the word "person" includes individuals as well as corporations, associations, and partnerships; presumably this definition leaves the door wide open.[40] Apparently, some courts have even found jurisdiction when states bring the *qui tam* action. This ability to bring the action creates a paradox in the sense that states cannot be *qui tam* defendants under *Vermont Agency*

---

38. *Compare* 31 U.S.C. § 3729(a) (1994) (permitting a private "person" to bring a civil action for false claims), *with* 31 U.S.C. 3730(b) (1994) (defining certain acts that a "person" can commit, which constitute a false claim to payment under the Act).

39. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 787 (2000) (holding that states and state agencies do not qualify as persons when a private relator initiates the action, but not deciding whether the same applies when the federal government brings the action); United States v. United Mine Workers of Am., 330 U.S. 258, 275 (1947) (stating that the Supreme Court does not generally construe the statutory use of the phrase "persons" to include the sovereign); *cf.* Ohio v. Helvering, 292 U.S. 360, 370 (1934) (discussing state and political entities as persons for purposes of a liquor taxation statute); United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993) (determining that when information has been publicly disclosed, the plaintiff must have "played some part" in the disclosure; thus, the court added another requirement for qualifying as a "person" eligible to bring an action); Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992) (discussing who is an original source of information for publicly disclosed allegations, and thus an eligible "person"); Dhawan *ex rel.* United States v. New York City Health & Hosp. Corp., No. 95 Civ. 7649, 2000 U.S. Dist. LEXIS 15677, at *11-12 (S.D.N.Y. Oct. 27, 2000) (holding that the FCA barred the court from having jurisdiction when relators base claims on publicly disclosed information, disclosed before the relator files the complaint, which is a requirement unless the relator qualifies as the original source); S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 (stating that the Senate felt that states and their agencies could qualify as persons to be sued). *But see* Georgia v. Evans, 316 U.S. 159, 161 (1942) (stating that "[w]hether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment," and noting that there is no concrete rule of exclusion, but that the subject matter, purpose, legislative history, context, and executive interpretation of the statute are aids that will help show the legislative intent behind the statute and bring states within the statute's scope).

40. *See* 1 U.S.C.A. § 1 (West 1994) (applying the definition of "person" from the rules of construction); S. REP. NO. 99-345, at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 (stating that legal business entities qualify as persons and postulating that the term person is broad). *But see Stevens*, 529 U.S. at 782 (determining that the statute cannot include a state as a person, but that corporations are presumptively covered by the word person in the statute).

of Natural Resources v. United States ex. rel. Stevens,[41] but they may be plaintiffs.[42] Justice Stevens, dissenting in *Stevens*, pointed out that "the National Association of Attorneys General adopted a resolution urging Congress to make it easier for States to be relators," and thus included states within the definition of person for bringing suit.[43] Congress subsequently followed this recommendation and enacted § 3730(e)(4)(A) of the FCA.[44] Now that it is clear who can bring a *qui tam* action, what other requirements does the FCA place on would-be relators?

1. Limits and Restrictions Set on the Relator

The FCA further restricts the relator with several provisions. First, if the court determines that the relator has unclean hands (i.e., the person planned or initiated the violation), the court "may . . . reduce the share of the proceeds . . . which the person would otherwise receive."[45] If, however, the relator is convicted of a criminal offense related to the pertinent violation, the Act dismisses the person from the action and bars the relator from a share of the proceeds.[46] Second, the Act limits actions brought by members of the U.S. Armed Forces, and against members of Congress, members of the judiciary, or senior executive branch officials.[47] Third, a person may not bring an action, if there is already an ongoing action based on the allegation "in which the Government is already a party."[48] Finally, if an action is based on a publicly disclosed matter (an exclusive list of methods for disclosure appears in the statute), the person bringing the action must be the original source of the information.[49] As stated in the statute, the person must have "direct and independent knowledge of

41. 529 U.S. 765 (2000).

42. *See Stevens*, 529 U.S. at 787 (holding that states cannot be *qui tam* defendants (persons) when a private relator brings the action); United States *ex rel.* Woodard v. Country View Care Ctr., Inc., 797 F.2d 888, 893-94 (10th Cir. 1986) (recognizing the State of Colorado as a *qui tam* plaintiff); United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1102-03 n.2 (7th Cir. 1984) (noting that the United States filed a statement expressing its view that the State of Wisconsin was a qualified relator); United States *ex rel.* Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 630-31 (N.D. Ill. 1992) (holding that the State of Illinois qualified as a person and was capable of being the relator).

43. *Stevens*, 529 U.S. at 795.

44. *Id.* at 794 n.6.

45. 31 U.S.C. § 3730(d)(3) (1994).

46. *Id.*

47. *Id.* § 3730(e)(1)-(2).

48. *Id.* § 3730(e)(3).

49. *See id.* § 3730(e)(4)(A) (describing actions brought on the basis of publicly disclosed information).

the information . . . and [have] voluntarily provided [it] to the [g]overnment before filing an action . . . based on [that] information."[50]

2. Split in the Courts As to Who Qualifies As an Original Source

There is a split in the courts concerning the requirement that the relator be an original source of information, particularly an original source when the information has been publicly disclosed.[51] The Ninth Circuit has held that the relator must have been involved in the public disclosure to bring the action.[52] Other courts have gone further, and considered allegations of fraud and false claims relevant in prior proceedings as public disclosures and again, requiring that the relator was the original source of the information in those prior proceedings.[53] In *United States ex rel. Siller v. Becton*,[54] the Fourth Circuit held that the FCA's definition of an original source was the only valid definition.[55] Under this interpretation, the court did not require that the original source-relator be the instigator of the public disclosure of information underlying the allegation.[56] The requirement that the relator be an original source of information goes to the standing of the relator; if a person is not the original source of infor-

---

50. 31 U.S.C. § 3730(e)(4)(B); *see also* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499 (11th Cir. 1991) (stating that the list of public disclosure, as contained in § 3730(e)(4)(A), is exclusive, meaning that the only types of public disclosure that will trigger the rule are disclosures "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").

51. *See* JOHN COSGROVE MCBRIDE ET AL., 2 GOVERNMENT CONTRACTS: CYCLOPEDIC GUIDE TO LAW, ADMINISTRATION AND PROCEDURE § 14.70, at 14-30 to -31 (Matthew Bender ed., 2005) (1963) (identifying the split in the circuit courts concerning original sources of information).

52. *See* United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 410 (9th Cir. 1993) (requiring relator involvement in the initial public disclosure); Wang v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1992) (requiring relator involvement in the initial public disclosure).

53. *See* Dhawan *ex. rel.* United States v. New York City Health & Hosp. Corp., No. 95 Civ. 7649, 2000 U.S. Dist. LEXIS 15677, at *10 (S.D.N.Y. Oct. 27, 2000) (stating that disclosures made in prior proceedings are included in public disclosures, and as a result, the relator must have been the source of the previous proceeding's disclosure to qualify); JOHN COSGROVE MCBRIDE ET AL., 2 GOVERNMENT CONTRACTS: CYCLOPEDIC GUIDE TO LAW, ADMINISTRATION AND PROCEDURE § 14.70, at 14-31 (Matthew Bender ed., 2005) (1963) (discussing courts' expansion upon the original disclosure doctrine).

54. 21 F.3d 1339 (4th Cir. 1994).

55. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1351 (4th Cir. 1994).

56. *See id.* (finding that the Act's definition of an "original source" does not require the relator be "a source to . . . the 'entity that publicly disclosed the allegations'" on which the relator based his suit).

mation, the person may not bring an action under the FCA. This standing requirement may present a problem when arguing for substitution of the estate once the relator has died, because under the Act, the estate could not be the original source of information. Thus, a possible conflict arises between the Federal Rules of Civil Procedure regarding substitution of parties and the FCA.[57]

Briefly reviewing, a court will look at the extent of the relator's involvement in the fraudulent activity and also the nature and source of the relator's information to determine the relator's eligibility to bring the *qui tam* action. With this foundation laid as to who may qualify as a relator, what are the specific rights and entitlements of those who do qualify as relators, once the person has brought the action?

B. *What Is the Relator Entitled to?*

Congress crafted the FCA to lure and encourage those with information concerning fraud against the government to come forward. To accomplish this disclosure of information, Congress gave these people assurances of compensation and restitution for their efforts in fighting the fraud. For example, the FCA contains many specific provisions assigning entitlements to relators and assuring them of specific rights; essentially, it constitutes a contract between the government and those that qualify as relators.

1. Rights of the Relator

The 1986 amendments to the FCA guarantee that the relator would still keep an interest in the action, even if the government assumed the action.[58] The Act provides that the relator "shall have the right to continue as a party to the action"[59] and monitor the government's actions regarding the case to ensure that the government does "not neglect evidence, cause unduly delay, or drop the false claims case without legitimate reason."[60] Before the 1986 changes in the FCA, the relator could reassume the case if the government failed in "prosecuting the [action]

57. *Compare* FED. R. CIV. P. 25(a)(1) (allowing substitution of parties upon death if the claim is not extinguished), *with* 31 U.S.C. § 3730(e) (1994) (stating that a person must have "*direct* and independent knowledge of the information on which the allegations are based and [have] voluntarily provided the information to the [g]overnment" (emphasis added)).

58. *Cf.* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 11:18 (2005) (acknowledging that the relator still retains an interest in the action in cases where the government assumes responsibility for its prosecution).

59. 31 U.S.C. § 3730(c)(1).

60. S. REP. NO. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291.

with reasonable diligence."[61] In fact, the Senate Judiciary Committee considered keeping this provision in the amended version, but the Committee eventually dropped it from the final enacted version.[62]

The intent behind allowing the relator to maintain an interest stems from a recognition of the relator's great personal and financial risks formed by bringing the *qui tam* action, as well as Congress's lack of faith in the government's ability to confront the problem of fraud.[63] As mentioned previously, either the government may assume responsibility for prosecuting the case or it may decline to prosecute the case and allow the relator to bring the action on behalf of the government.[64] If the government does not assume the case, this fact is not admissible to show a lack of merit in the case.[65] There are many reasons for the government to decline assumption of a *qui tam* action. For example, in the age of budget crunches, the government may simply lack the manpower to prosecute the case and the relator may be perfectly capable of successfully managing the suit.[66] In any event, the 1986 amendments ensured that relators

---

61. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 11:18 n.2 (2005).

62. *See id.* (discussing the Senate Judiciary Committee's consideration of the issue of whether a relator should be allowed to reassume a case that the government failed to diligently prosecute); *see also* S. REP. NO. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291 (containing the considerations of the Committee).

63. *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 11:18 (2005) (noting the financial and personal hardships endured when a whistleblower undertakes an action). These risks are increased due to a general lack of faith in the government's fraud fighting abilities. *Id.* The 1986 improvements ensured that the government would no longer neglect, delay, or drop allegations of false claims without having good cause. *See* S. REP. NO. 99-345, at 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291 (stating the above intent and considerations of the Committee).

64. 31 U.S.C. § 3730(b)(1); U.S. DEP'T OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS 1, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited July 24, 2005) (on file with the *St. Mary's Law Journal*).

65. *Cf.* United States *ex rel.* Chandler v. Cook County, 277 F.3d 969, 974 n.5 (7th Cir. 2002) (stating that there are many reasons the government would allow the relator to pursue the action, such as confidence in the relator's attorney and lack of resources, and that the government's declination to prosecute is in no way a comment on the merits of the case), *aff'd on other grounds*, 538 U.S. 119 (2003); United States *ex rel.* Bidani v. Lewis, No. 97 C 6502, 2002 WL 31103459, at *2 (N.D. Ill. Sept. 19, 2002) (denying the plaintiff's attempt to allude that, because he is pursuing the action, he has the sanction of the government, and stating that the plaintiff must not lead the jury to believe the government has any position on the merits of a *qui tam* case simply because it allowed the relator to prosecute the action).

66. *See Chandler*, 277 F.3d at 974 n.5 (alluding to the fact that there may be many reasons for the government not to pursue the action, and thus allowing the relator to prosecute it); CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 11:18 (2005) (discussing reasons the government may allow the relator to proceed

would maintain an interest in the actions, regardless of who prosecuted the case—the amendments guarantee this right.[67]

2. The Relator's Share

The FCA provides the relator with three types of monetary interest in the action. First, it gives the relator a percentage of the total recovery, generally ranging from fifteen to thirty percent.[68] Second, it grants reasonable expenses, reasonable attorneys' fees, and costs to the relator who proceeds with the action.[69] Third, if the relator (or any employee involved in the action) has been "discharged, demoted, suspended, threatened, harassed, or . . . discriminated against . . . by his or her employer because of lawful acts done . . . in furtherance of [the] action," he or she is entitled to "all relief necessary to make [the relator] whole."[70]

The Senate Judiciary Committee considered the award of a guaranteed minimum percentage of the FCA recovery to be a "finder's fee" for bringing the fraud forward.[71] While no such minimum percentage was

---

with the action and acknowledging that the Act allows the government to not join some meritorious cases).

67. *See* 31 U.S.C. § 3730(c)(1) (1994) (stating that such persons "shall have the right to continue as a party to the action," subject to certain exceptions set forth by the Act); CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 11:18 (2005) (providing that the relator remains involved in the action and that this function is a critical component of the Act).

68. 31 U.S.C. § 3730(d) (1994). The Act breaks down the various percents as follows: no more than ten percent when based on specific information disclosed relating to a Government Accounting Office audit, hearing, report, or from the news media; no less than fifteen percent and no more than twenty-five percent when the government assumes the action, with the specific amount in that range based on the contribution of the relator to the prosecution; no less than twenty-five percent and no more than thirty percent when the relator proceeds with the action. *Id.*

69. *Id.* Note that this provision only applies to the relator who prosecutes the case, not to those instances where the government assumes the action. *Id.* The Act also limits this award to those expenses "necessarily incurred." *Id.*

70. *Id.* § 3730(h). This protection is extended to any employee (presumably including the relator) of the plaintiff who participates in the *qui tam* action on behalf of the government or relator, "including investigation for, initiation of, testimony for, or assistance [with]" the action. *Id.* It also includes reinstatement to the same seniority status, twice the amount of back-pay including interest, and special damages which includes litigation costs and attorneys' fees. *Id.* This relief, however, is not a part of the *qui tam* action's proceeds and is a separate action. *Id.*

71. *See* S. REP. NO. 99-345, at 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293 (describing the percentage as a finder's fee); U.S. Dep't of Justice Relator's Share Guidelines (1996), *reprinted in* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT app. C-2 (2005) (framing the minimal percent requirement as a finder's fee); *see also* United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1331-32 & n.29 (M.D. Fla. 2001) (sharing the view that the minimal percent is gener-

ultimately adopted, several factors control the relator's percentage, including whether the government assumes the action and the weight of the relator's contribution to the case.[72] If the government assumes the action, the Act sets the recovery between fifteen and twenty-five percent, again subject to the relator's level of contribution.[73] If the relator prosecutes the action, the recovery is between twenty-five and thirty percent.[74] If publicly disclosed information is the principal basis of the action, the recovery percentile is an amount the court finds appropriate, but not more than ten percent.[75] Payment of these recoveries comes from the proceeds of the action or settlement;[76] however, what constitutes proceeds has been a matter of conflict.[77] The FCA distinguishes the statutory percentage of proceeds from reasonable expenses, reasonable attorneys' fees, and costs, which it also awards against the defendant.[78]

The adjustable nature of the percent of the proceeds belonging to the relator allows courts to have some discretion, while not frustrating the intent of the Act. The Department of Justice has issued some basic guidelines directing courts' decisions in these matters.[79] To consider an increase in the percentage, a court should take into account the following: Whether (1) the relator promptly reported the fraud; (2) the relator at-

---

ally regarded as a finder's fee and additional amounts serve as further incentive for those with information concerning fraud to step forward and take action). *But see* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772 (2000) (pointing out that the statute makes this much more then a mere finder's fee, but "an interest *in the lawsuit*, and not merely the right to retain a fee"). The Court acknowledges that at first glance it appears the relator "is simply the statutorily designated agent of the United States" and any proceeds promised to the relator are merely the fee he receives for his efforts, but that the language of the Act precludes this conclusion. *Id.* It is clear that a more concrete interest is created in the relator—a property interest. *Id.*

72. 31 U.S.C. § 3730(d)(1); JOHN COSGROVE MCBRIDE ET AL., 2 GOVERNMENT CONTRACTS: CYCLOPEDIC GUIDE TO LAW, ADMINISTRATION AND PROCEDURE § 14.70, at 14-29 (Matthew Bender ed., 2005) (1963).

73. 31 U.S.C. § 3730(d)(1).

74. *Id.* § 3730(d)(2).

75. *Id.* § 3730(d)(1).

76. *Id.* § 3730(d).

77. *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 8:19 (2005) (noting the conflict that exists in determining what constitutes proceeds of the *qui tam* action).

78. 31 U.S.C. § 3730(d)(1).

79. *See* U.S. Dep't of Justice Relator's Share Guidelines (1996), *reprinted in* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT app. C-2 (2005) (noting the possible considerations that the court may use in determining the percentage of the proceeds the relator is entitled to). The Department of Justice also points out that the minimum percentage of each category of *qui tam* suit should be considered a finder's fee, or a starting point for the courts; this practice is in accordance with the legislative history of the Act. *Id.*

tempted to stop the fraud; (3) the action caused the fraud to stop; (4) the complaint notified the government of a significant safety issue; (5) the fraud was practiced on a large scale (nation-wide); (6) the relator had firsthand information; (7) the government had no prior knowledge; (8) the relator provided substantial assistance; (9) the action went to trial; and (10) the FCA recovery was relatively small.[80] When considering a decrease in the percentage awarded, a court may factor in whether: (1) the relator participated in the fraudulent act; (2) there was a delay in reporting the fraud; (3) the relator violated FCA procedure; (4) mere suspicion or public information is the basis of the complaint; (5) the government had some knowledge of the fraud; (6) the relator was not extremely helpful to the case; (7) there was a quick settlement; or (8) there was a large FCA recovery.[81] These lists are not exhaustive, but merely serve as a foundation for courts to base their determinations.[82]

The plain language of the FCA indicates that Congress intended to further the fight against fraud by creating specific rights and entitlements in the hands of those who qualify as relators. This right to a statutory share of proceeds can often be quite substantial. For example, in the settlement agreement involving HealthSouth, discussed previously, one of the relators will be receiving an $8.1 million share of the proceeds, with others receiving lesser amounts.[83] This amount is even more significant when one considers that it does not take into consideration reasonable expenses and reasonable attorneys' fees.[84] With such potentially large interests at stake, and the statutory language ensuring the relator's compensation, does the statutory entitlement to proceeds found in the FCA rise to the level of a divisible property interest, and if so, what becomes of it upon a relator's quietus?

---

80. *Id.*

81. *Id.*

82. *See id.* (noting that these are just many of the factors that a court should consider when making a determination of the award to the relator).

83. *HealthSouth Agrees to Pay $325m to US, Action Settles Fraud Allegations*, BOSTON GLOBE, Dec. 31, 2004, http://www.boston.com/business/articles/2004/12/31/healthsouth_agrees_to_pay_325m_to_us/?rss_id=boston+Globe+—+Business+News (highlighting the fact that "[o]ne of the whistle-blowers will receive $8.1 million of the settlement, with others receiving lesser amounts") (on file with the *St. Mary's Law Journal*). *See generally* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT app. D (2005) (containing a comprehensive breakdown of *qui tam* recoveries from 1986 through 2003).

84. *See* 31 U.S.C. § 3730(d) (1994) (stating that reasonable expenses and attorneys' fees are separate from the proceeds amount but are also awarded against the defendant).

III. ANALYSIS

Answering the ultimate question of this Comment—determining what happens to the proceeds if the relator dies—requires an initial analysis of whether, and to what extent, a property interest exists in the proceeds. After this initial determination, a second issue of great importance must necessarily follow, one debated among several courts: Whether the *qui tam* action even survives the death of the relator. This analysis will show that a property interest does in fact exist, that it is divisible, and that there is a possibility of the action's survival beyond the death of the relator, something that is in both the government's and the public's interest. After allowing survival of the action, divesting the relator's heirs of their rights to the proceeds earned by and assigned to the relator would be against principles of contract, property, and public policy. Specifically, to hold otherwise would ignore principles of property rights, contractual assignment of interest, and quantum meruit. Dismissal of *qui tam* actions simply because a relator dies would be a serious waste of resources, would ignore the intent of the Act, and would actually further fraud against the government.

A. *Does the False Claims Act Create a Property Interest?*

The statutory award of the specified minimal percentage of the proceeds, to the successful *qui tam* plaintiff, as outlined earlier, is not optional, but mandatory.[85] The Act creates both a specific interest in the proceeds and an award against the defendant, but are these property interests? In *Fuentes v. Shevin*,[86] the United States Supreme Court stated that the Fourteenth Amendment's protection of property was to be "read broadly to extend protection to 'any significant property interest,' . . . including statutory entitlements."[87]

The Supreme Court in *Stevens* also addressed this issue in its discussion of standing of the relator.[88] The Court acknowledged that the statute specifically gave the "relator himself [not just on behalf of the government] an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery."[89] Additionally the Court asserted that the relator is not merely an agent of the government who performs the function of

85. *See id.* (noting the use of the word "shall" in connection with the awards).

86. 407 U.S. 67 (1972).

87. Fuentes v. Shevin, 407 U.S. 67, 86 (1972) (citation omitted).

88. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 772-74 (2000). The Court recognized that this was not just a finder's fee as some earlier courts had phrased it, but much more because "the statute gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery." *Id.* at 772.

89. *Id.*

prosecutor of the action.[90] It stated that the bounty a *qui tam* relator will receive if the suit is successful is a "concrete private interest."[91] The Court, adopting Blackstone, noted that "'no particular person . . . has any right, claim or demand, in or upon [the bounty], till after action brought,' and that the bounty constituted an 'inchoate imperfect degree of property . . . [which] is not consummated till judgment.'"[92] The Court then added to the nature of this bounty under modern law; the FCA creates a "partial assignment of the Government's damages claim"[93] and essentially makes the relator a partial assignee of the United States.[94]

The information brought by the relator acts as consideration for the assignment of the government's property interest in damages, and the relator's percentage entitlement is partly dependant on the value of that information to the prosecution of the action. To understand the importance of the assignment, one must distinguish between an assignment and a delegation. An assignment occurs when a party transfers their rights under a contract to a third person.[95] A delegation occurs when a party appoints a third person to perform their duties or responsibilities under the contract.[96] Under this basic definitional structure, the FCA clearly establishes much more than a mere delegation of authority, but also a contractual assignment of the government's property interest in the proceeds.

Courts construe a cause of action as a form of property.[97] The *qui tam* plaintiff may not own the cause of action, but the plaintiff becomes the "de facto assignee of the government's cause of action pursuant to a stat-

---

90. *Id.*

91. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992)). This private interest would be the equivalent to a personal interest in the property.

92. *Id.* at 773 n.3 (alteration in original) (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES *437).

93. *Stevens*, 529 U.S. at 773.

94. *Id.* at 773 n.4.

95. BLACK'S LAW DICTIONARY 119 (6th ed. 1990).

96. BLACK'S LAW DICTIONARY 426 (6th ed. 1990).

97. *See* Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 354 (3d Cir. 1986) (acknowledging that a cause of action is construed as a form of property), *aff'd*, Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987); LaBarbera v. Angel, 95 F. Supp. 2d 656, 662 (E.D. Tex. 2000) (adopting the concept that "a cause of action is a form of property"); 4 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW § 3, at 10 (9th ed. 1990) (stating that a cause of action is property, whether in contract or tort). Since the FCA creates a unilateral assignment of the government's interest, the cause of action would be sufficient to fall within this form of property, although it may only be a partial assignment. *See Stevens*, 529 U.S. at 773 n.4 (declaring that the FCA constitutes a partial assignment of the government's claim toward damages).

utory 'enforceable unilateral contract.'"[98] Here, the money generated by the successful relator is clearly property, contingent on two things: (1) the plaintiff must successfully prosecute the case or settle; and (2) the defendant must part with the money.[99] In a divorce proceeding out of California, the court held that a *qui tam* action created a contingent future interest assigned to the *qui tam* relator by the government.[100]

1. Assignment of Contract Rights and Causes of Action

The general rule concerning assignment of causes of action is that courts allow the transfer of any property, unless a statute or public policy expressly prohibits the assignment.[101] There is a presumption of validity for the right to assign a contract or cause of action unless stated other-

---

98. Biddle v. Biddle, 60 Cal. Rptr. 2d 569, 571 (Cal. Ct. App. 1997); *see also* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 748 (9th Cir. 1993) (stating that the FCA assigns the government's claims to the relator who then pursues the action based on injury to the Treasury). This is how courts establish standing for the *qui tam* relator, because the relator and the government have entered into an enforceable unilateral contract which is accepted when the relator begins the action. *Id.* at 749. *See also* D. B. v. K. B., No. 01-03-00062, 2004 WL 1794720, at *2 (Tex. App.—Houston [1st Dist.] Aug. 12, 2004, no pet. h.) (recognizing that a contingent interest exists in potential *qui tam* fees and that such interest "[u]nder appropriate circumstances . . . may qualify as community property").

99. *Biddle*, 60 Cal. Rptr. 2d at 571. This decision developed because of community property laws existing in California, where the court had to decide if the relator's interest, which accrued during marriage, should be subject to the marital community's interest. *Id.*

100. *Id.*

101. *See* Coronado Paint Co., Inc. v. Global Drywall Sys., Inc., 47 S.W.3d 28, 31 (Tex. App.—Corpus Christi 2001) (holding that an assignment of a cause of action can be disregarded if it was against public policy), *pet. denied, improvidently granted*, 104 S.W.3d 538 (Tex. 2003). Assignments of causes of action violating public policy include:

> (1) an assignment of a cause of action that works to collude against an insurance carrier; (2) an assignment of a legal malpractice claim; (3) an assignment that creates a Mary Carter agreement; (4) an assignment of the plaintiff's cause of action to a joint tortfeasor of the defendant; and (5) an assignment of interests in an estate that distorts the true positions of the beneficiaries.

Id. (citations omitted); *see also* CAL. CIV. CODE § 1044 (West 1982) (stating that in general, "[p]roperty of any kind may be transferred"). Section 1044 discusses future and contingent estates and states, among other things, that whether a future interest is contingent or vested, it is still transferable. *Id.*; *cf.* Lindsay *ex rel.* Lindsay v. S. San Antonio Indep. Sch. Dist., 983 S.W.2d 778, 779-80 (Tex. App.—San Antonio 1998, no pet.) (stating that a cause of action—here for breach of contract—survives the death of either party). The court stated that determining whether a cause of action survived was based on either statute or common law. *Id.* at 779. In the absence of a statutory provision on point, the court looked to the common law where "the test most commonly used to determine survivability is whether or not the cause of action may be assigned." *Id.* (quoting Traver v. State Farm Mut. Auto. Ins., 930 S.W.2d 862, 867 (Tex. App.—Fort Worth 1996), *rev'd on other grounds,* 980 S.W.2d 625 (1998)). The issue is not whether the contract is assignable, but whether or not the cause of action is assignable. *Lindsay*, 983 S.W.2d at 779-80.

wise.[102] In determining an assignment, a court should look to the statute for specific guidance, but in the absence of specific statutory language, the court may look to the common law for a determination of both assignability and survivability.[103] In *Lindsay ex rel. Lindsay v. South San Antonio Independent School District*,[104] Justice Paul W. Green, writing for the Texas Fourth Court of Appeals, stated that a determination of survivability does not hinge on whether the contract is assignable, but whether the cause of action is assignable.[105] In FCA actions, the statute specifically assigns the cause of action to the relator,[106] and the United States Supreme Court has postulated that the interest is, at a minimum, a partial assignment of the government's interest.[107] The FCA certainly created a property interest, but what specific form of property did Congress create when it enacted the FCA and what is the extent of this property right?

2. Law of Future Interests

From the language of the FCA, this property interest becomes more readily identifiable. It is a guaranteed interest in the proceeds of an action, pending either successful prosecution or settlement.[108] Courts classify this type of interest in property law terminology as a contingent future interest. Indeed, as stated previously, one California court came to this same conclusion in *Biddle v. Biddle*,[109] when it held that the FCA

---

102. *See* Hutchings v. Bates, 393 S.W.2d 338, 343-44 (Tex. Civ. App.—Corpus Christi 1965) (noting that at common law a cause of action based on contract will survive the death of either the plaintiff or the defendant), *aff'd*, 406 S.W.2d 419 (Tex. 1966); State v. Stone, 271 S.W.2d 741, 748 (Tex. Civ. App.—Beaumont 1954, no writ) (holding that at common law a contractual cause of action survives death of a party and further, that actions based on quasi and constructive contracts also survive the death of either party in the same manner as express or implied contracts would); *cf.* MOLLY BUCK RICHARD ET AL., TEXAS PRACTICE GUIDE: BUSINESS TRANSACTIONS §§ 10:4-10:5 (2005) (stating that causes of action are freely assignable but that the courts may invalidate them if they offend public policy, and that this right is presumed unless stipulated otherwise); 1 AM. JUR. 2D *Abatement, Survival, and Revival* § 63 (2005) (allowing stockholder derivative actions to survive in equity, as long as a court can still grant effective relief).

103. *Cf. Lindsay*, 983 S.W.2d at 779 (stating that the court will look to the statute first and then to common law when determining whether an action survives).

104. 983 S.W.2d 778 (Tex. App.—San Antonio 1998, no pet.).

105. Lindsay *ex rel.* Lindsay v. S. San Antonio Indep. Sch. Dist., 983 S.W.2d 778, 779-80 (Tex. App.—San Antonio 1998, no pet.).

106. *See* 31 U.S.C. § 3730(c) (1994) (discussing guidelines involving when an action can be maintained by the relator or assumed by the government).

107. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 n.4 (2000) (stating that a *qui tam* action is at least a partial assignment).

108. 31 U.S.C. § 3730(d).

109. 60 Cal. Rptr. 2d 569 (Cal. Ct. App. 1997).

created a contingent property interest formed by a unilateral contract, and in dicta, equated the property to an interest in future royalties.[110] The modern trend has been to allow contingent interests to be fully alienable, moving away from the old common law rules; most jurisdictions have followed suit, making contingent interests fully alienable in the same manner as present interests.[111] Just as the government's present interest

110. Biddle v. Biddle, 60 Cal. Rptr. 2d 569, 571 (Cal. Ct. App. 1997).

111. *See* ARIZ. REV. STAT. ANN. § 33-221(B) (2000) (providing that "[e]states in expectancy are descendable, devisable and alienable as estates in possession"); CAL. CIV. CODE § 699 (West 1982) (codifying future interests' transferability just as present interests' transferability); D.C. CODE ANN. § 42-515 (2001) (providing that future estates are "alienable in the same manner as estates in possession"); GA. CODE ANN. § 44-5-40 (West 1991 & Supp. 2002) (providing that future interests are just as descendible as present estates); IDAHO CODE ANN. § 55-109 (2000) (providing that future interests are just as transferable as present interests); MASS. GEN. LAWS ANN. ch. 184, § 2 (West 1991 & Supp. 2002) (permitting the sale, assignment, or devise of contingent interests and other expectant estates); MICH. COMP. LAWS ANN. § 554.35 (West Supp. 2002) (providing that future estates may be devised in the same manner as present estates); MINN. STAT. ANN. § 500.16 (West 2002) (stating that expectant estates and present estates are equally alienable); MONT. CODE ANN. § 70-1-326 (2001) (stating that future interests and present interests are equally transferable); NEB. REV. STAT. § 76-107(1) (1996) (stating that, in general, the conveyability of a future interest is not dependant on it being contingent); N.Y. EST. POWERS & TRUSTS LAW § 6-5.1 (McKinney 2002) (providing that future interests and present interests are equally alienable and are both conveyed in the same manner); N.D. CENT. CODE § 47-02-18 (1999) (stating that future interests and present interests are transferable in the same manner); OHIO REV. CODE ANN. § 2131.04 (West 1994) (stating that contingent remainders and other expectant interests are descendible in the same way as present estates); OKLA. STAT. ANN. tit. 60, § 30 (West 1994) (providing that contingent remainders are alienable); R.I. GEN. LAWS § 34-4-11 (1995) (stating that contingent interests "may be disposed of by legal conveyance or will"); S.D. CODIFIED LAWS § 43-3-20 (1997) (allowing the transferability of future interests "in the same manner as present interests"); WIS. STAT. ANN. § 700.07 (West 2001) (permitting transferability of future interests in the same manner as present interests); Rogers v. Hartford-Conn. Trust Co., 165 F. Supp. 116, 119 (D. Conn. 1958) (holding that vested and contingent future interests "would apparently be recognized as transferable today"); Richardson v. Holman, 33 So. 2d 641, 644 (Fla. 1948) (announcing that all restraints pertaining to the alienation of future interests in Florida have been removed by statute); Crescent City Motors, Ltd. v. Nalaielua, 31 Haw. 418, 424 (1930) (holding that contingent remainders may be voluntarily conveyed); Kuhn v. Kuhn, 385 N.E.2d 1196, 1200 (Ind. Ct. App. 1979) (determining that "future interests are valuable property rights [and] may be freely conveyed"); Ott v. Pickard, 237 S.W.2d 109, 112 (Mo. 1951) (illustrating that contingent future interests are alienable); Merchants Nat'l Bank v. Curtis, 97 A.2d 207, 213 (N.H. 1953) (stating that the "common law rule that future contingent interests were not alienable" is not the majority rule any longer); Gottwald v. Warlick, 125 S.W.2d 1060, 1061 (Tex. Civ. App.—San Antonio 1939, no writ) (declaring that "expectancy of inheritance, or remainder of a defeasible estate, may be assigned, and a regular conveyance thereof is valid and will be upheld, unless fraudulently procured"); 9 GERRY W. BEYER, TEXAS PRACTICE SERIES: TEXAS LAW OF WILLS § 11.7, at 287-89 (3d ed. 2002) (citing T. ATKINSON, LAW OF WILLS § 131 (2d ed. 1953)) (stating that the present rule is

in the cause of action is alienable (assignable), so would the relator's future interest in the proceeds be alienable (divisible) upon death.

With this strong argument—that the FCA establishes a divisible property interest in the hands of the relator—a corollary issue must be addressed: Can the action even survive the death of the relator? If it cannot survive, then the action must be dismissed; there can be no proceeds for the heirs of the relator to grasp for and the contingent requirements of the interest could no longer be realized. If, however, the action can survive through substitution of the estate,[112] assumption of the action by the government (following the good cause requirement),[113] or by simply allowing a continuance in cases with multiple relators, the divisible nature of the future interest could remain intact and the law governing future interests would control the relator's heirs' claims of the expected share of the proceeds, reasonable expenses, and attorneys' fees.[114]

B. *Does the Qui Tam Action Survive the Death of the Relator?*

The FCA gives no clear determination or guidance as to whether a *qui tam* action survives the death of the relator, and this issue certainly does not have significant coverage in case law. There is, however, a large body of case law concerning whether certain actions survive the death of a *defendant*, dating back to the 1884 decision, *Schreiber v. Sharpless*.[115] In *Schreiber*, the Supreme Court found that a penal action for violations of copyright law did not survive the defendant's death.[116] At common law, penal actions generally did not survive the death of the defendant. However, the death of the defendant was not an end-all. Survivability was

---

that "the [future] expectancy of the apparent heir, or the intended devisee or legatee, is assignable in equity").

112. *See* FED. R. CIV. P. 25(a)(1) (allowing substitution of parties "if a party dies and the claim is not thereby extinguished"); United States *ex rel.* Semtner v. Med. Consultants, Inc., 170 F.R.D. 490, 493 (W.D. Okla. 1997) (substituting the estate of a relator in a *qui tam* action when the relator has died, allowing the action to survive).

113. 31 U.S.C. § 3730(c)(3) (noting that after a person proceeds with an action, the court can nevertheless allow the government to intervene at a later date for good cause, under which the death of the relator would presumably qualify).

114. *See* T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 515-17 (2003) (outlining the present state of future interest jurisprudence and recognizing that generally contingent interests are fully transferable).

115. 110 U.S. 76 (1884).

116. Schreiber v. Sharpless, 110 U.S. 76, 80 (1884); *see also* Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 876 (11th Cir. 1986) (holding that remedial actions survive whereas penal actions do not); *cf.* James v. Home Constr. Co. of Mobile, 621 F.2d 727, 729-30 (5th Cir. 1980) (recognizing that remedial actions survive the death of the plaintiff whereas penal actions do not). Note that this concerns the death of the plaintiff which is wholly separate and distinct from the death of the defendant. *Id.*

also determined by the "nature of the cause of action"—was it penal in nature or remedial, and to what degree? If it was found to be remedial, the action could still survive the death of the defendant.[117]

Again, this body of case law is not to be confused with determining whether the cause of action survives the death of the relator who is on the other side of the "v."[118] It is important to realize that courts at common law were "more concerned with assuring that penal actions [did] not survive than identifying whether an action is remedial or penal."[119] In fact, *Schreiber* in no way engaged in a penal–remedial assessment, but simply stated that "at common law actions on penal statutes do not survive."[120] Nevertheless, this is the case most often cited as the basis for all survivability cases and thus, it is where this analysis must begin.

Whether or not a *qui tam* action continues upon the death of the relator is still an open question, but given the growing trend of *qui tam* actions, statistically speaking, it will need to be more clearly addressed in the foreseeable future.[121] For this determination, it is necessary to break

---

117. *Schreiber*, 110 U.S. at 80; *see also Semtner*, 170 F.R.D. at 493 n.2 (discussing the nature of the common law of survivability). The court pointed out that in penal actions:

> [O]nce the defendant has died it is no longer possible to fully accomplish a statute's retributive or deterrent goals. Yet, a plaintiff continues to be deserving of remedial compensation from a defendant or her estate . . . while the survival of the plaintiff is irrelevant to whether the defendant continues to be worthy of punishment.

Id. Under this, it is much easier to understand "a rule of abatement that accounts for [and accommodates] the position of the decedent [as plaintiff or defendant] . . . than the present party-neutral rule." *Id.*

118. *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.08(G), at 4-186.2 (2d ed. Supp. 2002) (differentiating between the death of the relator and the death of the defendant). An observation that grows from this point is that the death of the defendant in *qui tam* actions would not generally be possible, in that *qui tam* actions are mostly against entities (unless the business was the alter ego of an individual and the relator was able to pierce the corporate veil). *Id.* The *qui tam* action is separate from any criminal case that might be made, and often is brought against the individual wrongdoers, where their death would certainly end the criminal trial. *Id.*

119. *Semtner*, 170 F.R.D. at 495.

120. *Schreiber*, 110 U.S. at 80; *cf. Semtner*, 170 F.R.D. at 495-96 (discussing the Supreme Court's holding in *Schreiber*).

121. *See* Anna Mae Walsh Burke, *Qui Tam: Blowing The Whistle for Uncle Sam*, 21 NOVA L. REV. 869, 870 (1997) (reporting the tremendous growth in *qui tam* suits from 1987 to 1995); Taxpayers Against Fraud (TAF), False Claims Act and Qui Tam Statistics, http://www.taf.org/statistics.htm (last visited July 24, 2005) (reporting the growth of *qui tam* suits and analyzing recoveries in these suits) (on file with the *St. Mary's Law Journal*); CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT app. D (1996) (containing a comprehensive breakdown of *qui tam* recoveries from 1986 through 2003); Press Release, U.S. Dep't of Justice, Justice Dep't Civil Fraud Recoveries Total $2.1 Billion for FY 2003, False Claims Act Recoveries Exceed $12 Billion Since 1986 (Nov. 10, 2003), http://www.usdoj.gov/opa/pr/2003/November/03_civ_613.htm (reporting an increase in re-

qui tam actions into two distinct categories. This will be important both in determining survivability, and in analyzing the proceeds of the action. The first category contains those actions reported to the government by the relator, in which the government decides to prosecute the action. The second category contains those actions where the government does not take over and the relator is left to pursue the action—a true *qui tam*!

1. When the Government Assumes the Action, Either Initially or at Some Point Later in Time

According to § 3730(a), when the Attorney General receives information, it is his duty to diligently investigate the allegations of fraud or false claims.[122] He "may" then bring a civil action against that person.[123] To recap, if the Attorney General proceeds with the action, it is his duty to prosecute it, but the relator remains a party to the action.[124] Under this circumstance, if the relator dies, it is clear that the action would survive, as the government is prosecuting the case.[125] Even if the government does not initially assume the action, the court may "permit the [g]overnment to intervene at a later date upon a showing of good cause."[126] Perhaps the death of the relator could constitute the "good cause" requirement of the FCA and allow the government to assume prosecution of the action, thereby allowing its survival. Under this approach, where the government has assumed the action upon a showing of good cause, the relator is still entitled to a statutory share of the proceeds, albeit a smaller percentile than if the relator was pursuing the action independently.

It would go against reason to block the government from assuming the action and require its dismissal if the relator dies, given that the Act spe-

---

coveries from 2002 to 2003) (on file with the *St. Mary's Law Journal*); Taxpayers Against Fraud (TAF), False Claims Act and Qui Tam Statistics, http://www.taf.org/statistics.htm (last visited July 24, 2005) (reporting the growth of *qui tam* suits and analyzing recoveries in these suits) (on file with the *St. Mary's Law Journal*). With the ever growing number of *qui tam* actions, the increasing longevity of the population, and the ever increasing age of America's workforce, it is conceivable that the average age of relators could increase, and given the length of time it often takes to prosecute or settle any matter, it follows that death because of age, tragedy, illness, or accident could more often come into play with *qui tam* actions.

122. 31 U.S.C. § 3730(a) (1994).

123. *Id.*

124. *Id.* § 3730(c).

125. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.08(G), at 4-186.4 (2d ed. Supp. 2001).

126. 31 U.S.C. § 3730(c)(3).

cifically provides for such an event.[127] It is clear that when the government is pursuing its cause of action, the relator's death would not be grounds for dismissal. To hold so would be an enormous waste of resources and would again go directly against the Legislature's intent in establishing and maintaining the FCA. Why would the outcome be any different when the relator has brought the action? The case is still brought in the name of the United States, and it is still the same act of fraud being challenged. It is still the same underlying cause of action, although pursued through a different channel. The purpose of the FCA was to lure citizens into the fight against those who deal dishonestly with the public—thus, it specifically provides for their direct participation.[128]

2. When the Relator Pursues the Action on Behalf of the Government

When a relator brings a civil action against a violator of the FCA, the relator becomes a private attorney general, still bringing the action in the name of the United States.[129] Here, because of the service to the public, the relator receives an even greater statutory share of the proceeds.[130] It would be consistent with the Legislature's intent and with public policy regarding the active fight against fraud and efficient allocation of resources, that anytime a relator pursuing a successful *qui tam* action passes away, the government would have an inherent interest in the action continuing either by substitution of the estate or by assuming the case under § 3730(c)(3). As clear as that concept appears to be, past jurisprudence has created a murky environment in which the Act is now understood.

a. Finding Survival of the Action Under *United States v. NEC Corp.* and *United States ex rel. Semtner v. Medical Consultants, Inc.*

Under federal law, whether a claim survives the death of a party is determined by either interpretation of the applicable federal statute giving rise to the claim or, in the absence of expressed statutory intent, federal common law.[131] In *United States v. NEC Corp.*,[132] the United States

127. *See id.* (permitting government intervention in cases where good cause is present).

128. *See id.* § 3730(b) (establishing that private persons "may bring a civil action" against individuals who file a false claim against the government, as provided in § 3729).

129. *Id.*

130. *See id.* § 3730(d)(2) (providing that the relator's share is no less than twenty-five percent and no more than thirty percent of the proceeds, exclusive of expenses, attorneys' fees, and costs).

131. *See* Sinito v. U.S. Dep't of Justice, 176 F.3d 512, 513 (D.C. Cir. 1999) (stating "[t]hat Congress failed to include a specific clause in the statute providing that the action

Court of Appeals for the Eleventh Circuit dealt with precisely this issue.[133] The relator had provided information to the government and the government had settled with the *qui tam* defendant.[134] The relator brought a *qui tam* action against the government for his statutory claim of the settlement proceeds, which was dismissed by the district court.[135] While on appeal, the relator died and the government, not wanting to pay, moved to have the *qui tam* action dismissed.[136] The estate of the relator applied for substitution and the court—applying federal common

---

should survive the death of the original party does not necessarily mean that Congress intended the action to abate upon the party's death"); United States v. NEC Corp., 11 F.3d 136, 137 (11th Cir. 1993) (holding that in the absence of clear intent, survival of a *qui tam* action is determined by federal common law, and noting that neither the FCA text nor its legislative history contain anything remotely construed as intent concerning survivability); Smith v. Dep't of Human Servs., 876 F.2d 832, 834 (10th Cir. 1989) (stating that "[t]he question of the survival of an action grounded in federal law is governed by federal common law when, as here, there is no expression of contrary intent"); James v. Home Constr. Co. of Mobile, Inc., 621 F.2d 727, 729 (5th Cir. 1980) (stating that "the question of survival of a federal cause of action has usually been described as a question of federal common law, in the absence of an expression of contrary intent"); Smith v. No. 2 Galesburg Crown Fin. Corp., 615 F.2d 407, 413 (7th Cir. 1980) (stating, "[g]enerally speaking, the question of survival of a federal statutory cause of action is one of federal common law, in the absence of a specific federal statutory directive"), *overruled on other grounds by* Pridegon v. Gates Credit Union, 683 F.2d 182, 194 (7th Cir. 1982); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE-CIVIL § 25.11 (Matthew Bender ed., 3d ed. 2005) (citing Hardy v. Kaszycki & Sons Contractors, Inc., 842 F. Supp. 713, 718 (S.D.N.Y. 1993)) (holding that when intent is not specific, federal common law determines if a federal statutory action survives death of a party).

132. 11 F.3d 136 (11th Cir. 1993).

133. United States v. NEC Corp., 11 F.3d 136, 139 (11th Cir. 1993) (holding that the *qui tam* action survived the death of the relator). *But see* United States *ex rel.* Harrington v. Sisters of Providence, 209 F. Supp. 2d 1085, 1086, 1089 (D. Or. 2002) (holding that at common law a penal action does not survive the plaintiff's death, and that the *qui tam* action at issue is penal in nature). The court here relied on its interpretation of *Stevens*, which held that a state or its agency could not be sued as a *qui tam* defendant under the FCA because the state was not a person, as the Court interpreted the statute. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784-85 (2000). In reaching this conclusion, *Stevens* determined that a *qui tam* action was punitive in nature as against a state (applying sovereign immunity concepts). *Id.* This language was then exploited by the court in *Harrington* and used to justify its holding that the action ceased when the relator died, even though in this instance the defendant was not a state or state agency. *Harrington*, 209 F. Supp. 2d at 1087-89 (relying on *Stevens* to find that a *qui tam* action was penal, even as against the relator, which meant that the action did not survive the death of the relator).

134. *See NEC Corp.*, 11 F.3d at 137 (noting that the government exercised its option to settle with the defendant, but that this would not divest the relator of his interest in the settlement proceeds, which is the reason he filed suit against the government).

135. *Id.*

136. *Id.*

law—found that the action was remedial in nature and survived the death of the relator.[137] The relator, and subsequently his estate, were "blowing the whistle" on the government's violation of the FCA provisions, assigning to them a right to the settlement proceeds.[138] Federal common law is applicable to FCA survivability cases because there is a complete lack of guidance in the Act and legislative history of the FCA concerning what occurs upon the death of the relator.[139]

Under federal common law, the survivability question once again falls back to *Schreiber* and depends on whether the recovery is found to be penal or remedial in nature.[140] A remedial recovery will survive, whereas a penal recovery will not.[141] In determining whether an action is remedial or penal, the court should infer "from a reading of the relevant statute and its history."[142] Despite this requirement, courts often rely first on the widely recognized three-prong test found in *Murphy v. Household Finance Corp.*[143] to determine whether a recovery is more remedial or penal.[144] The three *Murphy* factors are:

---

137. *Id.*; *cf.* FED. R. CIV. P. 25(a)(1) (allowing substitution in these situations).

138. *NEC Corp.*, 11 F.3d at 137. Note that another possible remedy for a relator in this situation would be to file suit under breach of contract, quantum meruit, or other contractual remedy, as the FCA essentially establishes a right to the proceeds, and even an assignment of some of the government's interest, which is a transfer of property. *See Stevens*, 529 U.S. at 773 & n.4 (stating that the FCA constitutes a contractual assignment of the government's interest in proceeds, which would seem to open the door to other common law contract remedies outside of the FCA, in that the FCA does not provide otherwise). It is still questionable in this case how the relator and his estate could bring a *qui tam* action against the sovereign, without it being immediately dismissed, but that is how the published opinion reads.

139. *See NEC Corp.*, 11 F.3d at 137 (stating that the Act lacks intent to determine whether the action should survive the death of the relator); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE-CIVIL § 25.11 n.8 (Matthew Bender ed., 3d ed. 2005) (discussing the matter of survival and the lack of intent from the Act).

140. Schreiber v. Sharpless, 110 U.S. 76, 80 (1884); *see also NEC Corp.*, 11 F.3d at 137 (discussing the common law and *Schreiber*).

141. *Cf. Schreiber*, 110 U.S. at 80 (stating that a penal act will not survive the death of a party). While *Schreiber* makes no attempt to determine the nature of a remedial action, it has been the guidepost for most courts in determining survivability, and it is credited with the birth of the remedial-penal survivability analysis.

142. *See* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE-CIVIL § 25.11 (Matthew Bender ed., 3d ed. 2005) (stating that a court is required to read the statute and its history to determine the nature of the action (citing Smith v. Dep't of Human Servs., 876 F.2d 832, 835 (10th Cir. 1989))).

143. 560 F.2d 206 (6th Cir. 1977).

144. Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir. 1977); *see NEC Corp.*, 11 F.3d at 137 (citing *In re* Wood, 643 F.2d 188, 190-91 (5th Cir. 1980)) (applying the three *Murphy* factors "in deciding whether a statute is penal or remedial").

> 1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; 2) whether recovery under the statute runs to the harmed individual or to the public; and 3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.[145]

Applying this test, the court in *NEC Corp.* determined that the cause of action and the recovery were more remedial than penal in nature.[146] The court held that the FCA was remedial in relation to the government and the relator alike.[147] The relator suffered substantial harm for which the FCA provisions were meant to act as a remedy, and the government and the relator were entitled to the proceeds as compensation for such damages.[148] The court also noted that given the substantial harm to the relator, the recovery was not disproportionate.[149] Then returning to the familiar inference requirement, "from a reading of the relevant statute and its history,"[150] the court found that the "underlying purpose of the FCA [would] best be served by allowing *qui tam* actions to survive the death of the relator."[151]

The court in *NEC Corp.* also noted that a statute could be "remedial as to one party, yet penal as to another."[152] The court was referring to Justice Gray's opinion in *Huntington v. Attrill*,[153] where he identified the problem of distinguishing penal laws from remedial ones.[154]

> [T]he words "penal" and "penalty" have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws. But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. They

---

145. *Murphy*, 560 F.2d at 209.

146. *NEC Corp.*, 11 F.3d at 137.

147. *Id.* at 137-38.

148. *Id.* at 138.

149. *Id.*

150. Smith v. Dep't of Human Servs., 876 F.2d 832, 834-35 (10th Cir. 1989); *see also* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1503 n.15 (11th Cir. 1991) (noting that Congress intended to "[e]ncourage more *qui tam* suits by expanding the universe of potential relators" (quoting Erickson v. Am. Inst. of Biological Sci., 716 F. Supp. 908, 918 (E.D. Va. 1989)) (describing congressional intent to encourage relators to bring actions, the historical purposes behind such intent, and construing the statute accordingly))).

151. United States v. NEC Corp., 11 F.3d 136, 139 (11th Cir. 1993).

152. *NEC Corp.*, 11 F.3d at 137 n.1.

153. 146 U.S. 657 (1892).

154. Huntington v. Attrill, 146 U.S. 657, 667-68 (1892).

> are so elastic in meaning as even to be familiarly applied to cases of private contracts, wholly independent of statutes, as when we speak of the "penal sum" or "penalty" of a bond. . . .
>
> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, *but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal* . . . .
>
> [A] qui tam action to be brought by any other person for threefold the amount, has been held to be *remedial as to the loser, though penal as regards the suit by a common informer*. . . . "[i]t has been held in many instances that, where a statute gives accumulative damages to the party grieved, it is not a penal action."[155]

From this, there are two noteworthy observations: (1) the classification of an action as penal or remedial is not at all a recent development; and (2) it is not a cut and dry determination. Relying on *NEC Corp.*, and Justice Gray's opinion above, the court in *United States ex rel. Semtner v. Medical Consultants, Inc.*[156] applied the three-prong *Murphy* test and determined that the relator's claim did not "fit within the definition of either penal or remedial, and therefore, the only rational characterization of the relator's claim must be derived from the underlying claim of the government."[157] Here the *qui tam* cause of action was considered merely an enforcement mechanism available to the government, and the relator's share of proceeds were part and parcel of the government's claim.[158] Under this approach, the court held that the *qui tam* action survived the death of the relator because, while it was neither penal nor remedial, it was "derivative of the remedial claims of the government," either by substitution of the relator's estate or through assumption by the government.[159]

---

155. *Id.* (emphasis added) (internal citations omitted) (quoting Read v. Chelmsford, 33 Mass. (1 Pick) 128, 132 (1834)).

156. 170 F.R.D. 490 (W.D. Okla. 1997).

157. United States *ex rel.* Semtner v. Med. Consultants, Inc., 170 F.R.D. 490, 493 (W.D. Okla. 1997).

158. *Id.* at 495.

159. *Id.* at 496.

b. Potential Roadblocks to Survival of the Action: Overcoming *Hughes Aircraft Co. v. Schumer* and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*

Although both *NEC Corp.* and *Semtner* found that the *qui tam* action survived the death of the relator, two recent Supreme Court decisions could be used by *qui tam* defendants to cloud interpretation of the FCA in lower courts.[160] First, following *Hughes Aircraft Co. v. Schumer*,[161] penultimate *qui tam* expert John T. Boese argued that *Semtner* should be reassessed in light of the Court's decision in *Stevens*.[162] *Semtner* recognized that allowing the action to survive was consistent with the legislative intent to encourage *qui tam* actions, and that to hold otherwise would abate actions in which the government did not join and thus, lead to a continuing plague of ineffective enforcement and policing of federal dollars.[163]

Boese asserts that *Hughes Aircraft Co.* changes the determination in *Semtner*; that the Court found that the relator had a "new and different cause of action."[164] Boese interprets this to mean that the cause of action of the relator could no longer be considered, as held in *Semtner*, derivative of the government's underlying cause of action, thus quashing the *Semtner* court's finding that the *qui tam* action was remedial under federal common law and therefore survivable.[165] This interpretation works against the purpose of the *qui tam* action, but fortunately, *Hughes Aircraft Co.* is easily distinguishable and not explicitly determinative of survivability.

---

160. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 783 (2000) (finding that a state cannot qualify as a *qui tam* defendant); Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 941-42 (1997) (determining that the 1986 amendments to the FCA were not retroactive against pre-1986 actions and thus, trumped the 1982 version's source of information requirements, thereby allowing the action to survive).

161. 520 U.S. 939 (1997).

162. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.08(G), at 4-186.4 n.668 (2d ed. Supp. 2001) (asserting that *Semtner* should be reassessed); *cf.* Fried Frank, John T. Boese, Resume, http://www.ffhsj.com/bios/boesejo.pdf (containing Boese's vitae and qualifications) (on file with the *St. Mary's Law Journal*). "Mr. Boese is a nationally recognized expert on the civil False Claims Act and *qui tam* actions. His book, *Civil False Claims and Qui Tam Actions* . . . is the leading treatise on this subject and is routinely cited as authority by federal . . . courts, as well as practitioners and academics." *Id.*

163. *Semtner*, 170 F.R.D. at 496.

164. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.08(G), at 4-186.4 n.668 (2d ed. Supp. 2001) (citing Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 941-42 (1997)).

165. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.08(G), at 4-186.4 n.668 (2d ed. Supp. 2001).

A careful contextual read of the Supreme Court's opinion in *Hughes Aircraft Co.* reveals that the Court did not address survivability at all, but rather focused solely on determining whether the 1986 amendments to the FCA were retroactive against pre-1986 actions previously disclosed to the government.[166] The Court held that it was not retroactive, and in dictum, countering the relator-respondent's contentions that it should be retroactive, the Court systematically shot down each argument stating that the respondent-relator had "misread" the Court's prior opinions.[167]

What the Court found in *Hughes Aircraft Co.* was that the 1986 amendments had closed a defense previously available to the *qui tam* defendant under the 1982 Act.[168] Prior to the 1986 amendment, if the defendant had made any disclosure to the government concerning its claim submissions, a relator was barred from bringing the action because it was held that the government already had the information.[169] The 1986 Amendment "revived" the relator's cause of action and subjected defendants to *qui tam* actions even with prior disclosure, "essentially creat[ing] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued."[170] However, this "new" cause of action would still be part and parcel of the government's cause of action because only one suit under the FCA can be held at any given time, using the information that is the basis of the allegations. Moreover, as the Court acknowledged in *Hughes Aircraft Co.*, the government has the ability to intervene in the case or dismiss the action.[171]

---

166. *See Hughes Aircraft Co.*, 520 U.S. at 945-46 (stating that certiorari was granted to address the sole issue of whether the 1986 amendments to the FCA were applicable to prior actions, or if the general presumption against retroactive legislation should apply). Here, the relator was grasping at straws. He had already conceded that if the 1982 Act controlled, he could not bring the action because the government already had knowledge of the information regarding the false claims. However, under the 1986 amendments a new door was opened and provided that a *qui tam* action could still be brought, even if the government already had that information. *Id.* at 948-50. This, however, leads back to the previously identified problem concerning whether the 1986 amendments require the relator to be the original source of previously disclosed information. *See* United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 409 (9th Cir. 1993) (holding that the relator must have been the original source of the information); Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992) (stating that under the 1986 amendments the relator must be the original source of prior public disclosure). *But see* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1355 (4th Cir. 1994) (holding that the original source was not required to be the instigator of the public disclosure of information underlying the allegation).

167. *Hughes Aircraft Co.*, 520 U.S. at 947.

168. *Id.* at 950.

169. *Id.*

170. *Id.*

171. *See id.* at 943 n.2 (holding that the government could intervene or dismiss this action under the FCA); *cf.* 31 U.S.C. § 3730(a) (1994) (stating that the Attorney General

Even with the 1986 amendments allowing the relator "new" channels in which to bring suit under the FCA, the suit is still brought on behalf of the government. It is important to understand that a "[*q*]*ui tam* is not a cause of action, it is a means of pursuing the government's cause of action."[172] While it may be true that the "relator's interest and the Government's [interest] do not necessarily coincide" in all points, and that relators "[a]s a class of plaintiffs" are motivated by different incentives than is the government,[173] these underlying interests and incentives are not at issue when determining the survivable nature of the action. Rather, it is their common objective in seeing the fraud stopped and compensation paid that make up the cause of action used under federal common law to determine survivability.[174] Even acknowledging *Hughes Aircraft Co.* and the Court's statements that a "new" cause of action was created by the 1986 amendments,[175] this does not change *Semtner* because even this new cause of action belongs to the government first and foremost.[176]

Instead of understanding "new" in the *Hughes* context as being like a brand new car, perhaps it is clearer to understand it as adding a new set of rims and tires to the same old car to get you to your destination. Therefore, *Hughes Aircraft Co.* has no detrimental impact on *Semtner*'s holding that in determining whether a *qui tam* action survives the death of the relator, courts should look to the common cause of action which belongs to the government; and this cause of action is generally remedial in nature.[177]

---

can bring the suit); 31 U.S.C. § 3730(b) (1994) (stating that if the Attorney General does not bring suit, the "person" can); 31 U.S.C. § 3730(c) (1994) (stating that if the government proceeds, it has primary responsibility for the action); 31 U.S.C. § 3730(c)(3) (1994) (stating that if the government does not proceed with the action, the relator has the right to prosecute the action).

172. *See* United States *ex rel.* Semtner v. Med. Consultants, Inc., 170 F.R.D. 490, 495 (W.D. Okla. 1997) (pointing out this often misunderstood distinction).

173. *See Hughes Aircraft Co.*, at 949-50 & n.5 (acknowledging the different natures and interests of the government and the relator).

174. *Id.* at 949-50 (clarifying that *qui tam* relators are primarily motivated by the prospects of obtaining a monetary award).

175. *See id.* (discussing how the 1986 amendments opened up a new door of opportunity to the relator, and how this functions as a new cause of action).

176. *See Semtner*, 170 F.R.D. at 496 (discussing how the cause of action belongs ultimately to the government); *cf.* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 & n.4 (2000) (stating that it is only a partial assignment of the government's interest at most, and therefore the cause of action would still belong for the most part to the government).

177. *See Semtner*, 170 F.R.D. at 493 (asserting that the underlying cause of action upon which the relator operates is remedial, and therefore the action would survive his death).

Second, the Supreme Court held in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, that in determining whether a *qui tam* action could be brought by a private person (relator) against a state agency, the damages imposed by the FCA were essentially punitive in nature and state liability would be inconsistent with the presumption of sovereign immunity.[178] As soon as the Court stated that the damages were "essentially punitive in nature," lower courts (and more likely *qui tam* defendants) took that phrase and engaged in a hasty generalization, leading to the confusion existing in courts today.[179] This type of fallacy occurs when courts and parties take opinions of the Supreme Court out of context. The Court in *Stevens* was answering the narrow question of whether a private person could bring an action against a state agency.[180] The Court held they could not and relied on several different rationales, one of which was that the FCA created damages that were punitive *as to* the state's interest and that this was too close to imposing punitive damages on a sovereign government entity.[181]

Some courts have misconstrued the holding in *Stevens* to mean that all *qui tam* actions are essentially punitive in nature, which leads to one possible conclusion—if the relator dies, the action does not survive.[182] This conclusion, however, goes against the Legislature's intent to open the door to *qui tam* actions and against the government's inherent interest in prosecuting fraudulent defendants. Just because damages are essentially punitive to a state agency does not imply that damages are "essentially punitive" to all other potential parties. Recall that damages under a statute could be "remedial as to one party, yet penal as to another."[183]

The basis for finding the FCA provisions "essentially punitive" to states was based in part on the 1986 amendments that allowed treble damages while permitting only double damages for cooperative defend-

---

178. *Stevens*, 529 U.S. at 784-85.

179. *See* United States *ex rel.* Harrington v. Sisters of Providence, 209 F. Supp. 2d 1085, 1087 (D. Or. 2002) (interpreting the holding in *Stevens* to apply to all *qui tam* cases, not just actions against states and their agencies). The court held that the death of the relator ended the action by relying on the *Stevens*'s statement that FCA damages were essentially punitive in nature, and that at common law a penal action could not survive the plaintiff's death. *Id.*

180. *Stevens*, 529 U.S. at 768.

181. *Id.*

182. *See Sisters of Providence*, 209 F. Supp. 2d at 1089 (finding that when the relator died, the action ended and was grounds for dismissal and denial of a motion to substitute the estate of the relator as plaintiff).

183. United States v. NEC Corp., 11 F.3d 136, 137 n.1 (11th Cir. 1993); *see* Huntington v. Attrill, 146 U.S. 657, 667 (1892) (noting an action can be both penal against some while remedial as to others).

ants.[184] In *Stevens*, the Court stated that while the double damages prior to 1986 were remedial, the addition of treble damages changed that.[185] The conclusion that merely increasing damages from twofold to threefold changes the nature of a suit from remedial to penal is not a necessary conclusion and may not take into consideration the effects of inflation on the proceeds awarded by the FCA. For example, in 1863, the "Lincoln Law" (then the equivalent of the FCA) provided damages up to $2000 and double the amount of damages sustained by the United States.[186] Two thousand dollars in 1863 would be equivalent to $35,198.68 in 2003 dollars, and in 1986 it would have been equivalent to $21,588.22.[187] Clearly, even increasing the civil penalty to $11,000 and providing treble damages does not make up for the rate of inflation, and actually comes up short.

For example: assume an $11,000 penalty and five offenses committed ($11,000 x 5 = $55,000), then add in the treble damages ($55,000 x 3) = $165,000. Compare this to the inflation-adjusted rate of the original FCA: ($35,198.68 x 5 = $175,993.40). Note that this does not take into account the 1863 provision for double damages sustained by the United States. Adjusting for inflation, the 1863 provision clearly provided for more damages than the 1986 amendments, and would still be considered remedial under *Stevens* because it only provided for "double damages."

Suppose that Congress simply increased the penalty upwards to $22,000 or even $35,000 and permitted double damages in place of treble. With such semantic-trickery, it could escape any threat of "penalty" that courts could contrive under *Stevens*. This illustrates that merely adding treble damages in the 1986 amendments cannot alone change the *qui tam* cause of action from remedial to penal—something more is needed. In particular, the test to determine whether an action is remedial or penal should be directed at the specific party in question, and should take into account the nature of the suit's damages toward them. When determining whether a *qui tam* action survives the death of the relator, courts should not just hold it does not survive because it is penal to the defendant. The relator's position is relevant in this matter, and so it must be determined whether the action is remedial or penal as to the relator.

---

184. 31 U.S.C. § 3729(a)(7) (1994) (explaining the liability a person faces by filing a false claim against the government).

185. *Stevens*, 529 U.S at 785.

186. Thirty-Seventh Congress, Sess. III, ch. 59-61, 67 § 3 (1863) (on file with the *St. Mary's Law Journal*).

187. Consumer Price Index, Inflation Calculator, http://www.bls.gov/cpi/ (on file with the *St. Mary's Law Journal*); NASA Consumer Inflation Calculator, http://www.jsc.nasa.gov/bu2/inflateCPI.html (on file with the *St. Mary's Law Journal*); Westegg Inflation Calculator, http://www.westegg.com/inflation/infl/cgi (on file with the *St. Mary's Law Journal*).

c. Refining the Remedial Nature of the Action: *Cook County v. United States ex rel. Chandler*

Following *Stevens*, the Supreme Court was recently confronted with determining whether a local government (municipality or county corporation) could be held within the scope of "person" in order to be a *qui tam* defendant.[188] In *Cook County v. United States ex rel. Chandler*,[189] the Supreme Court held that a local government, municipality, and their corporations were persons and could be held accountable under the FCA.[190] This decision is significant for two reasons. First, it specifically limits the scope of the *Stevens* decision to a determination of whether a state agency can qualify as a *qui tam* defendant. Second, it is important because the Court clarifies the remedial-penal tension caused by the *Stevens* holding. The Court concluded that the FCA provisions are still remedial in nature, and its reasoning follows much of the reasoning recited above.[191]

The Supreme Court recognized that treble damages have an inherent "compensatory side, serving remedial purposes in addition to punitive objectives," and that the FCA damages multiplier has a clear compensatory as well as a punitive purpose.[192] The Court noted that the most obvious indication of the remedial purpose is the up to thirty percent interest created in the relator, and that it clearly serves not to punish, but to create an incentive for the private plaintiff "to quicken [their] self interest."[193] The Court also noted that the treble damages provision is really a substitute for the lack of a prejudgment interest provision (generally essential in compensation claims) and a consequential damages provision—dropped in the adopted version of the Act—even though consequential damages are inherent with any other fraud recovery.[194] The Court also mentioned that the statutory penalties had been "adjusted upward for

188. Cook County v. United States *ex rel.* Chandler, 538 U.S. 119, 122 (2003).

189. 538 U.S. 119 (2003).

190. *See Chandler*, 538 U.S. at 128 (holding that municipalities are persons under the FCA, and that they "may not be susceptible to every statutory penalty, but that is no reason to exempt them from remedies that sensibly apply").

191. *Id.* at 130.

192. *Id.*; *see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635-36 (1985) (holding that treble damages are in fact remedial in nature under the Clayton Act, 15 U.S.C. § 15 (1914), and therefore they may also be remedial under the FCA); *see also* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 151 (1987) (finding threefold damages to be remedial).

193. *Chandler*, 538 U.S. at 131.

194. *Id.*; S. REP. NO. 99-345, at 37, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5302 (showing that the Senate proposed consequential damages in addition to treble damages); H.R. REP. NO. 99-660, at 20 (1986) (showing that the House version proposed consequential damages plus double damages).

inflation,"[195] following the Federal Civil Penalties Inflation Adjustment Act of 1990, showing that inflation is something to be taken into consideration—similar to the earlier discussion concerning inflation since 1863.[196]

The decision in *Chandler*, just as in *Stevens* and in *Hughes Aircraft Corp.*, does not directly address the issue of survivability of a *qui tam* action upon the death of the relator, but it does effectively close the door on such carte blanche dismissals found following *Stevens*, and leads us back to a reliance on the three-prong *Murphy* test and the federal common law's inference of intent.[197] With survival of the *qui tam* action upon the death of the relator, a personal representative of the relator's estate could be substituted in and permitted to continue the action, or in the alternative, either the government could assume the case under the "good cause" provision or, in the case of an action being pursued by multiple relators, the action could simply continue its normal course.[198]

IV. CONCLUSION

When determining whether an action is remedial or penal in nature, it must be remembered that an action can be remedial as to one party and penal as to another. Additionally, when determining if a *qui tam* action survives the death of the relator, it is the nature of the action as it relates to the relator that is of focus—is it remedial or penal to the relator? The relator's cause of action is tied directly to the government's as it is a "partial assignment" of the government's interest under *Stevens*.[199] The interest of the government is generally remedial in nature, and so following *Semtner*, the *qui tam* action could survive the death of the relator because

---

195. *Chandler*, 538 U.S. at 131.

196. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 5, 104 Stat. 890, 891 (1990) (codified as amended in scattered sections of 28 U.S.C.) (increasing the amount of damages to account for inflation); 28 C.F.R. § 85.3(a)(9) (2002) (containing the Inflation Adjustment Act); Memorandum from the United States Attorney's Office to Dep't of Justice Employees, http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited July 24, 2005) (stating the new adjusted amounts) (on file with the *St. Mary's Law Journal*). The 1986 Act gives the range from $5000 to $10,000, but under this Act the penalty is increased to $5500 to $11,000. *Id.*

197. *See* Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir. 1977) (originating the three-prong test for survivability of an action under common law).

198. *See* 31 U.S.C. § 3730(c)(3) (permitting the government to reassume an action at any time upon a showing of good cause, including the death of the relator in an ongoing action); United States v. NEC Corp., 11 F.3d 136, 139 (11th Cir. 1993) (allowing the action to survive); United States *ex rel.* Semtner v. Med. Consultants, Inc., 170 F.R.D. 490, 496 (W.D. Okla. 1997) (substituting the estate of the relator and allowing the action to survive).

199. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 & n.4 (2000).

the relator's interest goes to the underlying cause of action of the government. Additionally, by applying the three-prong *Murphy* test, it is possible to find a relator's interest to be remedial in nature.[200] Under federal common law, a remedial action will survive the death of the defendant, giving rise to a claim against their estate, and will also survive the death of the plaintiff, if a suitable substitute can be found and the claim is not extinguished.[201]

By allowing the *qui tam* action to survive, a court acts in harmony with the Legislature's intent to fight fraud and to lure forward persons with information, endowing in them the authority to take action against the alleged defrauder, with the promise of a generous share of the proceeds as well as assurances of restitution for any harm that might befall on them for stepping forward and blowing the whistle. This fulfills the purpose of the False Claims Act—to create a citizen army of fraud-watchers, protecting the government's and the public's interest. It serves as a strong deterrent to those who would sell the government moth-infested blankets, sawdust in place of rifles, or in today's age, to pharmaceutical companies that would pay doctors illegal kickbacks to prescribe expensive medication paid for by taxpayers, or bill Medicaid or Medicare for procedures not performed and supplies never ordered.

Understanding that the *qui tam* action survives either by the government assuming the action or the court substituting the estate of the relator, if the action is successful through settlement or prosecution, the FCA creates a contingent future interest that would be subjected to state laws governing descent and distribution. "If there is any general rule, it is that contingent [interests] . . . are transferable inter vivos or by will and that they will pass by intestate succession in the same way as present and vested interests."[202]

---

200. *NEC Corp.*, 11 F.3d at 137.

201. 31 U.S.C. § 3730(c)(3); *see* FED. R. CIV. P. 25(a)(1) (containing a provision allowing substitution of parties because of death if the cause of action is not extinguished); Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) (holding that penal actions do not survive, which has been interpreted by courts to mean that remedial actions do survive); *Semtner*, 170 F.R.D at 493 (discussing how an estate can be properly substituted into an action, thus allowing an action to survive because it is remedial in nature).

202. LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTEREST 102 (2d ed. 1956) (noting that this section in particular is applicable to future interests in real property). Despite the differences in real property and personal property both inherent and historic, there is a "tendency in modern law" to bring the law as it pertains to real and personal property together—to treat future interests in real property the same as personal property. LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS 355 (3d ed. 2002). *See* 23 AM. JUR. 2D *Descent and Distribution* § 27 (2004) (discussing further the nature of future interests in modern law); 23 AM. JUR. 2D *Descent and Distribution* § 95 (2004) (stating that "in most jurisdictions future interests pass on the death of their owners

Allowing devise of the proceeds to the heirs of the relator is an acceptable and logical conclusion for several reasons. First, it allows the relator's work and effort in bringing the action to be recognized, and follows the underlying principles of quantum meruit. Second, it upholds the Legislature's intent to induce individuals with information concerning fraud to come forward, knowing that they or their heirs will ultimately be compensated for the valuable information, even upon death. Without this

---

intestate, to the persons who, under the statutes of descent and distribution, are the heirs or distributees of such owners"); *cf.* ARIZ. REV. STAT. § 33-221 (2000) (providing that "[e]states in expectancy are descendable, devisable and alienable as estates in possession"); CAL. CIV. CODE § 699 (West 1982) (codifying future interest's transferability just as present interest's transferability); D.C. CODE ANN. § 42-515 (2001) (providing that future estates are "alienable in the same manner as estates in possession"); GA. CODE ANN. § 44-5-40 (1991 & Supp. 2002) (providing that future interests are descendible in the same manner as present estates); IDAHO CODE ANN. § 55-109 (2000) (providing that future interests are as equally transferable as present interests); MASS. GEN. LAWS ANN. ch. 184, § 2 (West 1991 & Supp. 2002) (permitting the sale, assignment, or devise of contingent interests and other expectant estates); MICH. COMP. LAWS ANN. § 554.35 (West Supp. 2002) (providing that future estates may be devised in the same manner as present estates); MINN. STAT. ANN. § 500.16 (West 2002) (stating that expectant estates and present estates are equally alienable); MONT. CODE ANN. § 70-1-326 (2001) (stating that future interests and present interests are equally transferable); NEB. REV. STAT. § 76-107(1) (1996) (stating that, in general, the conveyability of future interests is not dependant on whether they are contingent); N.Y. EST. POWERS & TRUSTS LAW § 6-5.1 (McKinney 2002) (providing that future interests and present interests are equally alienable and are both conveyed in the same manner); N.D. CENT. CODE § 47-02-18 (1999) (stating that future interests and present interests are both transferable in the same manner); OHIO REV. CODE ANN. § 2131.04 (West 1994) (stating that contingent remainders and other expectant interests are descendible in the same way as present estates); OKLA. STAT. ANN. tit. 60, § 30 (West 1994) (providing that contingent remainders are alienable); R.I. GEN. LAWS § 34-4-11 (1995) (stating that contingent interests "may be [devised and] disposed of by legal conveyance or will"); S.D. CODIFIED LAWS § 43-3-20 (1997) (allowing the transferability of future interest "in the same manner as present interests"); WIS. STAT. ANN. § 700.07 (West 2001) (permitting transferability of future interests in the same manner as present interests); Rogers v. Hartford-Conn. Trust Co., 165 F. Supp. 116, 119 (D. Conn. 1958) (holding that vested and contingent future interests "would apparently be recognized as transferable today"); Richardson v. Holman, 33 So. 2d 641, 644 (Fla. 1948) (announcing that all restraints pertaining to the alienation of future interests in Florida have been removed by statute); Crescent City Motors, Ltd. v. Nalaielua, 31 Haw. 418, 424 (1930) (holding that contingent remainders may be voluntarily conveyed); Kuhn v. Kuhn, 385 N.E.2d 1196, 1200 (Ind. Ct. App. 1979) (determining that "future interests are valuable property rights [and] may be freely conveyed"); Ott v. Pickard, 237 S.W.2d 109, 112 (Mo. 1951) (illustrating that contingent future interests are alienable); Merchants Nat'l Bank v. Curtis, 97 A.2d 207, 213 (N.H. 1953) (stating that the "common law rule that future contingent interests were not alienable" is not the majority rule any longer); Gottwald v. Warlick, 125 S.W.2d 1060, 1061 (Tex. Civ. App.—San Antonio 1939, no writ) (declaring that "expectancy of inheritance, or remainder of a defeasible estate, may be assigned, and a regular conveyance thereof is valid and will be upheld, unless fraudulently procured").

reassurance, what would induce a potential relator facing a catastrophic illness to come forward? Third, it recognizes that a unilateral contract exists between the government and the relator, and honors the terms contained in the FCA, which is a partial assignment of the government's interests to the relator.[203] Finally, it is consistent with modern property law, which recognizes such contingent future interests as more then just a hope of interest, but as an interest that can be owned, transferred, and devised.

This makes the False Claims Act a more powerful tool in the government's fight against fraud and more effectively ends the "code of silence" that often exists within corporate environments. It allows the Act to further "protect the Treasury against the hungry and unscrupulous"[204] by holding perpetrators of fraud accountable, ensuring that they "pay a high price for their misdeeds."[205]

V. PROPOSAL

As has been shown, determining whether a *qui tam* action survives the death of the relator has not been an easy determination in the past. Arguments exist both for and against survival, but there has still been minimal jurisprudence in this specific area. Most of the authority cited is either borrowed or adopted from other areas of law, or generalized to apply to the specific needs of the case. Whenever a court has to deal with alleged fraud and death, both wrapped up in the intricacies and red tape of government, you can rest assured that you will have a hard case with tough issues. As has been said by many a law professor, "hard cases make bad law."[206]

While it is difficult to navigate the murky environment enveloping *qui tam* survival issues, it is still possible to reach an ultimate conclusion that the action survives. Yet, it would be better for Congress to reassert its authority in this area by reaffirming its legislative intent that the False Claims Act is remedial in nature, and as to the relator, add language to

---

203. *See* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 & n.4 (2000) (acknowledging the interest is a partial assignment).

204. S. REP. NO. 99-345, at 2, 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267, 5276 (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885)).

205. *HealthSouth Agrees to Pay $325m to US, Action Settles Fraud Allegations*, BOSTON GLOBE, Dec. 31, 2004, http://www.boston.com/business/articles/2004/12/31/healthS._agrees_to_pay_325m_to_us/?rss_id=boston+Globe+—+Business+News (quoting U.S. Attorney Johnny Sutton) (on file with the *St. Mary's Law Journal*).

206. *See* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (stating, perhaps for the first time, that "hard cases make bad law"); Moore v. Greer, No. 02-0455, 2005 WL 1186334, at *4 (Tex. May 20, 2005) (Hecht, J., concurring) (stating the good old chestnut).

the Act indicating that the action is to survive the death of the relator. Doing so would end any judicial reliance on federal common law and more clearly indicate the property interest in proceeds created by the Act.

This could all be accomplished, for example, by the addition of a simple provision, most appropriately located in § 3730(c), stating that upon death of the relator in an ongoing *qui tam* action, the estate of the relator should be properly substituted, allowing the action to continue, or in the alternative, the government should assume the action. Proceeds may be adjusted accordingly if the government assumes the action under § 3730(d), but if the estate is substituted and pursues the action, the estate is entitled to the ordinary proceeds as if the original relator was prosecuting the action. Any claims to the proceeds and expenses (including costs and attorneys' fees) incurred prior to death, realized through settlement or successful prosecution, run to the estate of the relator and are awarded against the defendant. Any adjustment to this amount must be in accordance to the methods established within this Act.

Such a provision would resolve the problems discussed above. It would clarify and preserve the intent behind the FCA and provide for uniformity of its application across federal courts.