

## A KEY TIME FOR QUI TAM: THE FALSE CLAIMS ACT AND ALABAMA\*

*The False Claims Act targets the  
“world’s second oldest profession . . . stealing.”*<sup>1</sup>

### I. INTRODUCTION

In a time where the prosecution of corporate fraud has taken center stage in the national media, the federal False Claims Act (FCA) has become “the primary vehicle by which the [g]overnment prosecutes civil fraud.”<sup>2</sup> Total FCA recoveries amount to over \$20 billion since its revision in 1986,<sup>3</sup> and studies estimate that the fraud deterred thus far by its qui tam provisions amounts to hundreds of billions of dollars.<sup>4</sup> Moreover, the effectiveness of the FCA has begun to usher in a new era of accountability for all those who do business with the government: “Instead of encouraging or rewarding a culture of deceit, corporations now spend substantial sums on sophisticated and meaningful compliance programs. That change in the corporate culture—and in the values-based decisions that ordinary Americans make daily in the workplace—may be the law’s most durable legacy.”<sup>5</sup> The success of the FCA in the fight against fraudulent claims has prompted numerous states to enact their own version of the FCA, and these states have already begun to achieve substantial success.<sup>6</sup>

Recently, false claims legislation has been proposed in the Alabama legislature<sup>7</sup> at a time when the state has filed suit against numerous pharmaceutical companies alleging massive fraud against the state for more than a decade.<sup>8</sup> These events give rise to many questions concerning the advisability of passing such an act and warrant a close examination of whether such

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1. 132 CONG. REC. H22,339 (daily ed. Sept. 9, 1986) (statement of Rep. Bedell).
2. *Id.* at H22,335 (statement of Rep. Glickman).
3. Taxpayers Against Fraud Education Fund, Statistics, <http://www.taf.org/statistics.htm> (last visited Apr. 30, 2007).
4. Taxpayers Against Fraud Education Fund, Why the False Claims Act?, <http://www.taf.org/whyfca.htm> (last visited Apr. 30, 2007) (quoting the statement of Sen. Charles Grassley & Rep. Howard Berman).
5. *Id.*
6. *See infra* Part III.
7. H.R. 348, 2005 Reg. Sess. (Ala. 2005).
8. *See infra* notes 115-125 and accompanying text.

legislation would benefit Alabama in its attempt to fight fraud, or whether passage of a false claims act would plunge the state back into “Tort Hell”<sup>9</sup> by encouraging frivolous lawsuits.

This Comment analyzes the various policy considerations regarding whether the State of Alabama should pass its own equivalent of the FCA. Part II provides an overview of the FCA and presents both its historical background as well as the procedural elements of filing a qui tam suit under the Act. Part III presents an overview of the states that have currently adopted their own version of the FCA and examines the effectiveness of these state statutes. Part IV presents the benefits and addresses the primary concerns regarding the passage of a false claims act by the State of Alabama. Though specifically tailored to Alabama, this analysis is pertinent to any state that is debating whether to pass a false claims act.

## II. OVERVIEW OF THE FCA

### A. Historical Background

The historical origins of the FCA<sup>10</sup> can be traced back to the early qui tam<sup>11</sup> provisions of Roman law.<sup>12</sup> Under Roman criminal law, private citizens, known as “delatores,” were granted prosecutorial power and were commonly rewarded a share of the defendant’s property for a successful prosecution.<sup>13</sup>

Laws containing private qui tam enforcement provisions could also be found in Anglo-Saxon England.<sup>14</sup> In 635 A.D., Wihtred, the King of Kent, issued a law prohibiting all work on the Sabbath, which contained the following qui tam provision: “If a freeman works during the forbidden time, he shall forfeit his *healsfang*, and the man who informs against him shall have half the fine, and [any profits created due to] the labour.”<sup>15</sup>

During the Middle Ages, the use of qui tam statutes increased dramatically in England, and they were utilized in a wide variety of areas, from regulating economic activity to aiding in the enforcement of noneconomic social mandates.<sup>16</sup> During this time, the “[l]egislation important to the na-

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9. Michael Freedman, *The Tort Mess*, FORBES, May 13, 2002, at 90.

10. 31 U.S.C. §§ 3729-3733 (2000).

11. “Qui tam” is derived from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates, “who pursues this action on our Lord the King’s behalf as well as his own.” Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. 939, 942 (2002) (quoting *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000)) (internal quotation marks omitted). For a discussion of the FCA qui tam provision, see *infra* Part II.B.

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

13. *Id.*

14. *Id.* at 567.

15. THE LAWS OF THE EARLIEST ENGLISH KINGS 27 (F.L. Attenborough ed. & trans., 1963). “Healsfang” was a fine paid to avoid punishment. 6 THE OXFORD ENGLISH DICTIONARY 1050 (2d ed. 1989) (defined under “halsfang” / “healsfang”).

16. See Beck, *supra* note 12, at 567-72.

tional sovereign was not always a high priority to local officials.”<sup>17</sup> The ever present conflict of interest between local and national officials,<sup>18</sup> coupled by the lack of an organized police force,<sup>19</sup> generated the need to empower individuals through qui tam provisions in order to ensure that the national laws would be enforced.<sup>20</sup>

Qui tam actions also existed in colonial America and became commonplace following the American Revolution.<sup>21</sup> For example, at least ten of the fourteen penal statutes enacted by the First Continental Congress contained qui tam provisions.<sup>22</sup> The proliferation of qui tam provisions in the country’s early laws is reflected in Chief Justice John Marshall’s opinion that “[a]lmost every fine or forfeiture under a penal statute[] may be recovered by an action of debt [brought by the qui tam plaintiff] as well as by information [brought by the government].”<sup>23</sup>

Urged by President Abraham Lincoln,<sup>24</sup> Congress passed the FCA in 1863 in an attempt to combat widespread fraud by contractors who were providing the Union army with defective supplies.<sup>25</sup> The original act authorized both criminal and civil penalties against those who submitted fraudulent claims to the federal government.<sup>26</sup> The central feature of the Act was the qui tam provision that allowed private individuals to file suit alleging fraud against the federal government, essentially “empower[ing] . . . ordinary citizens to act as private attorneys general.”<sup>27</sup> If the suit proved to be successful, the qui tam plaintiffs (known as the “relators”<sup>28</sup>) received a share of the government’s recovery.<sup>29</sup> The relator was not required to have been personally harmed or affected by the defendant’s conduct, as his constitutional standing rested “on the theory that the federal government, as the real injured party, may assign its right to sue to a private plaintiff.”<sup>30</sup>

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17. *Id.* at 567.

18. *See id.*

19. Marc S. Raspanti & David M. Laigaie, *Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act*, 71 TEMP. L. REV. 23, 23-24 (1998).

20. *See id.*

21. Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 HOUS. L. REV. 905, 909 (2002).

22. Raspanti & Laigaie, *supra* note 19, at 24.

23. *Adams v. Woods*, 6 U.S. 336, 341 (1805) (involving a qui tam action alleging illegal slave trading by defendant).

24. 132 CONG. REC. H22,339 (daily ed. Sept. 9, 1986) (statement of Rep. Berman).

25. *See* S. REP. NO. 99-345, at 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273.

26. Bucy, *supra* note 11, at 945. These penalties were separated within the Code in 1874, and today the statute regarding criminal fraud can be found at 18 U.S.C. § 287 (2000). Bucy, *supra* note 11, at 945.

27. Christopher C. Frieden, *Protecting the Government’s Interests: Qui Tam Actions Under The False Claims Act and the Government’s Right to Veto Settlements of Those Actions*, 47 EMORY L.J. 1041, 1041 (1998).

28. 1 JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS 1-4 (3d ed. Supp. 2007).

29. James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Act*, 80 TUL. L. REV. 465, 470 (2006).

30. *Id.* at 471; *see* *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000). For a further discussion of the constitutionality of qui tam actions, *see* Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989).

Despite Lincoln's belief that "the private bar would enforce a false claims statute vigorously,"<sup>31</sup> few qui tam claims were brought during the years following the Civil War.<sup>32</sup> In addition, the failure of the Attorney General to concomitantly pursue civil remedies under the FCA allowed private individuals to file qui tam actions based solely on information gleaned from criminal indictments.<sup>33</sup> Known as "parasitic lawsuits," these actions took advantage of the FCA qui tam provisions and subsequently resulted in the relators receiving a percentage of the government's recovery without providing the government with any new information.<sup>34</sup>

In *United States ex rel. Marcus v. Hess*,<sup>35</sup> Morris Marcus allegedly copied information directly from the criminal indictments of several electrical contractors charged with bid rigging into his own FCA civil complaint. The federal government argued that Marcus was not entitled to any recovery under the Act because he did not assist the government by providing any new information regarding the alleged fraud.<sup>36</sup> The Supreme Court held that, based on the language of the statute, Marcus was allowed to recover even if he "contributed nothing to the discovery of this crime."<sup>37</sup>

In response to the *Marcus* decision, Congress amended the FCA in 1943 in an effort to limit the role of the qui tam relator and curtail any further parasitic lawsuits.<sup>38</sup> To this end, the amendments reduced the relators' share of the recovery<sup>39</sup> and granted the Department of Justice (DOJ) the ability to take over the prosecution of any qui tam action.<sup>40</sup> In addition, jurisdiction was denied to any qui tam actions "based upon evidence or information in the possession of the United States . . . at the time such suit was brought."<sup>41</sup> Though successful in eliminating parasitic suits, the amendments greatly weakened the qui tam provisions of the FCA to the point that they were rarely utilized.<sup>42</sup>

By the 1980s, fraud against the government had reached alarming levels within the United States. The Justice Department estimated that fraud was draining between one and ten percent of the national budget each year.<sup>43</sup>

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31. Raspanti & Laigaie, *supra* note 19, at 24.

32. *Id.*; Frieden, *supra* note 27, at 1045.

33. Raspanti & Laigaie, *supra* note 19, at 24-25 n.11.

34. Frieden, *supra* note 27, at 1045.

35. 317 U.S. 537 (1943).

36. *Id.* at 545.

37. *Id.*

38. Frieden, *supra* note 27, at 1046.

39. Act of Dec. 23, 1943, ch. 377, sec. 1, § 3491(c), 57 Stat. 608.

40. *Id.* § 3491(E)(1), (2).

41. *Id.* § 3491(C). This amendment particularly limited the ability of the relator to bring a qui tam claim, as courts interpreted this provision to bar recovery when the relator's information was imparted to the government before he filed suit, even if the government would not have obtained the information otherwise. Frieden, *supra* note 27, at 1046-47; *see, e.g.*, *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984); *Pettis ex rel. U.S. v. Morrison-Knudsen Co.*, 577 F.2d 668 (9th Cir. 1978).

42. Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 45 (2002).

43. *Hearings on the Departments of State, Justice and Commerce before the Subcomm. on the Departments of State, Justice and Commerce, the Judiciary and Related Agencies of the H. Comm. on Appropriations*, 96th Cong., 2d Sess. (1980).

Furthermore, efforts to crack down on fraud were proving to be highly ineffective: “For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the Government often does pay.”<sup>44</sup> Prompted by the pervasiveness of fraudulent claims, Congress set out to overhaul the FCA with the goal of recruiting more qui tam relators to assist the federal government in combating fraud.<sup>45</sup>

The 1986 amendments successfully reshaped the FCA into a more potent weapon against government fraud. Among the many changes to the FCA, the amendments increased the total amount a relator could recover<sup>46</sup> and set a guaranteed minimum recovery;<sup>47</sup> expanded the statute of limitations;<sup>48</sup> relaxed the necessary mens rea;<sup>49</sup> clarified that the burden of proof in FCA actions is not “clear and convincing” but rather a preponderance standard;<sup>50</sup> and established a cause of action for any employee who is “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment” due to involvement in a qui tam suit.<sup>51</sup>

In addition, the amendments modified the restrictive jurisdictional bar to recovery established by the 1943 amendments to allow a relator to file a qui tam action based on evidence or information within the government’s possession, as long as the relator is the “original source” of this information.<sup>52</sup> This move represented Congress’s attempt to balance the “almost unrestrained permissiveness” of the FCA prior to 1943, which allowed a relator to file a qui tam action based on public information, and “the restric-

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44. COMPTROLLER GENERAL, U.S. GEN. ACCOUNTING OFFICE REPORT TO CONGRESS, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED?, cover (1981).

45. Raspanti & Laigaie, *supra* note 19, at 27.

46. Damages were increased from double to treble, and penalties were increased from \$2,000 per false claim to \$5,000-\$10,000 per false claim. 31 U.S.C. § 3729 (2000).

47. The relator is guaranteed a minimum recovery of 15%-25% of the judgment when the government intervenes in the litigation and 25%-30% if the government does not choose to intervene. *Id.* § 3730(d)(1), (2). The relator’s recovery may be reduced to 10% if the FCA claim is founded upon additional information not provided by the relator. *Id.* § 3730(d)(1).

48. *Id.* § 3731(b)(1), (2).

49. The FCA required that a violation be committed “knowingly” but did not define “knowingly” prior to the passage of the 1986 amendments. Subsequently, some courts had strictly interpreted the term as requiring proof of specific intent to commit the violation. *See, e.g.,* United States v. Aerodex, Inc., 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970); United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962); United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959) (holding that “knowingly” under the FCA requires proof of “guilty knowledge of a purpose on the part of [the defendant] to cheat the Government”). The 1986 Amendments defined “knowingly” to include: “(1) . . . actual knowledge of the information; (2) . . . deliberate ignorance of the truth or falsity of the information; or (3) . . . reckless disregard of the truth or falsity of the information,” and further specified that “no proof of specific intent to defraud is required.” 31 U.S.C. § 3729(b); *see Bucy, supra* note 11, at 946 n.46.

50. 31 U.S.C. § 3731(c).

51. *Id.* § 3730(h).

52. *Id.* § 3730(e)(4)(A), (B) (defining “original source” as follows: “[A]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.”).

tiveness of the post-1943 cases, which precluded suit even by original sources.”<sup>53</sup> The success of these amendments is illustrated by the fact that before their enactment only six qui tam cases were filed per year,<sup>54</sup> but following the passage of the amendments, by the end of the fiscal year 2005, 5,129 qui tam actions had been filed under the FCA, resulting in the recovery by the federal government of over \$9.6 billion.<sup>55</sup>

### *B. Qui Tam Practice and Procedure Under the FCA*

The FCA establishes a unique procedure for filing qui tam actions.<sup>56</sup> Individuals who believe they can prove that other individuals or organizations (“any persons”<sup>57</sup>) have submitted false claims to the federal government may bring a qui tam action under the FCA in federal court.<sup>58</sup> Once the suit has been filed, it remains under seal for sixty days or more<sup>59</sup> and is not brought to the defendant’s attention.<sup>60</sup> In addition, the relator provides a copy of the suit to the federal government (in care of the Department of Justice), along with “all material evidence and information” that the relator possess in regard to the matter.<sup>61</sup> During this time period, the government conducts its own investigation of the matter and determines whether it would like to intervene as a co-plaintiff in the action.<sup>62</sup>

If the DOJ chooses to join in the suit, it takes “primary responsibility for prosecuting the action.”<sup>63</sup> In this case, the relator remains a co-plaintiff but his role is more limited.<sup>64</sup> But even in this diminished role, the relator may

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53. U.S. *ex rel.* Stinson, Lyons, Gerlin, & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154 (3d Cir. 1991).

54. Bucy, *supra* note 11, at 948.

55. U.S. DEP’T OF JUSTICE, CIVIL DIVISION, FRAUD STATISTICS—OVERVIEW, OCTOBER 1, 1986 - SEPTEMBER 31, 2005 (2005), available at <http://www.taf.org/fcastatistics2006.pdf>.

56. Bucy, *supra* note 42, at 49.

57. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court held that states and state entities are not “persons” subject to qui tam liability under the FCA. *Id.* at 783-84. In the concurring opinion, Justice Ginsburg noted that the Court’s opinion does not answer the question as to whether the term “persons” includes states or state entities when the federal government (rather than a relator) brings the FCA suit. *Id.* at 788-89 (Ginsburg, J., concurring). Also, the opinion does not resolve whether other government entities have sovereign immunity from FCA liability. Bucy, *supra* note 42, at 49 n.281. Lower courts have struggled with this issue, before and after the *Stevens* decision. *Id.*; see, e.g., U.S. *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 244 F.3d 486, 491 (5th Cir. 2001) (noting that a municipal entity has immunity under the Eleventh Amendment); U.S. *ex rel.* Graber v. City of N.Y., 8 F. Supp. 2d 343, 349 (S.D.N.Y. 1998) (asserting that under the FCA a municipality has immunity because it is immune from punitive damages and, based on the reasoning of *Stevens*, the FCA is a punitive statute).

58. 31 U.S.C. §§ 3729(a)(A), 3730(b) (2000).

59. The government may request an extension of the time the suit remains under seal. *Id.* § 3730(b)(3). Extensions are commonly granted and can result in the suit remaining under seal for two years or more. See Pamela H. Bucy, *Games and Stories: Game Theory and the Civil False Claims Act*, 31 FLA. ST. U. L. REV. 603, 609 (2004).

60. 31 U.S.C. § 3730(b)(2).

61. *Id.*

62. *Id.*

63. *Id.* § 3730(c)(1).

64. *Id.*

recover a percentage of the judgment.<sup>65</sup> If the government chooses not to intervene as a co-plaintiff, the relator may continue with the suit as a private citizen.<sup>66</sup> Even if the DOJ does not join the relator as a co-plaintiff, it retains the authority to impact the suit in multiple ways: the DOJ may intervene at any time during the case;<sup>67</sup> the DOJ may dismiss or settle the suit notwithstanding the relator's objections, as long as the relator has been granted the opportunity to be heard by the court;<sup>68</sup> and the DOJ can move to limit the relator's role in the case<sup>69</sup> or pursue alternative remedies against the defendant in lieu of the relator's suit.<sup>70</sup>

*United States ex rel. Johnson-Pochardt v. Rapid City Regional Hospital*<sup>71</sup> illustrates how the FCA works. During the early 1990s, the Rapid City Regional Hospital (RCRH) Cancer Care Institute (CCI) leased 400 square feet of office space to defendants Dr. Larry Ebbert and Oncology Associates (OA).<sup>72</sup> Under the original lease, Dr. Ebbert paid RCRH \$19,000 per year in rent while receiving from RCRH a \$20,000 medical director fee and the use of various hospital services such as supplies, equipment, and staff in operating OA.<sup>73</sup> At the conclusion of the three-year lease, CCI moved into a new, expanded facility.<sup>74</sup> Despite the significant facility upgrade, Dr. Ebbert's rent, salary, and access to hospital services and supplies remained the same.<sup>75</sup>

In 1996, Karen Johnson-Pochardt became the director of CCI.<sup>76</sup> Within a year of her arrival, Johnson-Pochardt became aware of the potential illegality of RCRH's lease arrangement with Dr. Ebbert.<sup>77</sup> Johnson-Pochardt addressed this issue with Dr. Ebbert's practice consultant, and shortly thereafter Dr. Ebbert wrote a letter to Johnson-Pochardt's supervisor suggesting that she be demoted.<sup>78</sup> When her supervisor refused to limit Johnson-Pochardt's responsibilities, both Johnson-Pochardt and her supervisor received numerous insults from Dr. Ebbert and his wife.<sup>79</sup>

Johnson-Pochardt next spoke with RCRH's CEO and vice president and voiced her concern that RCRH was in violation of the Stark Law and the Anti-Kickback statute by accepting payment from Dr. Ebbert and OA that was far below the fair market value of the space and services they were re-

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65. *Id.* § 3730 (c), (d).

66. *Id.* § 3730(b)(4).

67. *Id.* § 3730(c)(3).

68. *Id.* § 3730(c)(2)(A)-(B).

69. *Id.* § 3730(c)(2)(C).

70. *Id.* § 3730(c)(5).

71. 252 F. Supp. 2d 892 (D.S.D. 2003).

72. *Id.* at 894.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

ceiving.<sup>80</sup> Though they assured her that the parties were in the process of negotiating a new lease, Johnson-Pochardt subsequently performed her own analysis and concluded that in 1997 OA paid \$19,000 in return for receiving space and services worth \$136,441.06.<sup>81</sup>

Johnson-Pochardt eventually turned to outside legal consultants who advised RCRH in 2000 to take immediate action to remedy any improprieties.<sup>82</sup> Furthermore, in February 2000, Johnson-Pochardt presented RCRH's CEO with a report illustrating how RCRH had subsidized OA in excess of \$1 million.<sup>83</sup> Despite these numerous warnings, RCRH took no action to amend the lease.<sup>84</sup>

In October of 2000, Johnson-Pochardt received from the CEO's secretary the files relating to the original formation of CCI.<sup>85</sup> From these documents, Johnson-Pochardt learned that RCRH was intentionally subsidizing OA and that RCRH's CEO and vice president personally orchestrated the questionable lease.<sup>86</sup> Realizing the futility of seeking an internal solution, Johnson-Pochardt filed a *qui tam* suit under the FCA in March of 2001 and submitted a detailed disclosure statement to the DOJ.<sup>87</sup>

Immediately following Johnson-Pochardt's disclosure, the DOJ began an investigation to determine whether it should intervene in the action.<sup>88</sup> During this time, the government filed and received several extensions of the time to intervene.<sup>89</sup> Over this two year period, Johnson-Pochardt and her attorneys assisted the DOJ in its investigation through numerous interviews and by providing documents showing that OA was "upcoding"—billing Medicare for more expensive services than were actually provided.<sup>90</sup>

The complaint was revealed to RCRH and OA in February 2002, alleging that the parties were engaged in an improper financial relationship that resulted in the submission of false claims and that OA was committing Medicare fraud due to their overbilling.<sup>91</sup> The government began negotiations with the defendants, and the day before the government officially exercised its right to intervene in the suit, the parties reached a settlement.<sup>92</sup> Per the written settlement, RCRH agreed to pay the United States \$6 million.<sup>93</sup> Johnson-Pochardt received 24% of this settlement due to the significant information she provided the government about the fraud.<sup>94</sup>

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80. *Id.*

81. *Id.*

82. *Id.* at 895.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 896.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 905.

## III. STATE QUI TAM PROVISIONS

Most states have historically utilized various types of statutes in order to prosecute fraud against the state government; however, a growing interest in enacting legislation modeled after the FCA has emerged in the wake of the 1986 amendments.<sup>95</sup> As of April 2007, seventeen states—California, Delaware, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, Nevada, Tennessee, Texas, Virginia—and the District of Columbia had passed state false claims statutes containing qui tam provisions.<sup>96</sup> California was the first state to pass a false claims act, enacting its statute in 1987, but the greatest concentration of state false claims acts have been passed since the year 2000.<sup>97</sup>

Though each state false claims act contains its own unique provisions,<sup>98</sup> the statutes retain many of the key procedural elements found in the FCA. For example, all eighteen statutes provide that qui tam complaints are filed and remain under seal while the state attorney general investigates the claims in secret and determines whether the state will intervene in the case.<sup>99</sup> In addition, each statute allows the state government to intervene in the case and serve as a co-plaintiff with the relator.<sup>100</sup> Furthermore, every statute permits the state government to monitor the relator's suit, even if it does not choose to intervene in the case,<sup>101</sup> and prohibits an individual from filing suit based on public information.<sup>102</sup> The statutes, however, allow the relator to pursue the claim if the information in the complaint is public knowledge—as long as the relator was the “original source” of the information.<sup>103</sup> Lastly, under all eighteen statutes, any recovery obtained by the state government is to be shared with the relator.<sup>104</sup>

Prior to the enactment of its own state false claims statute, only five of the states had filed suit against defendants who had submitted false claims.<sup>105</sup> Even among the states that had attempted to recover for fraudulent claims, based on various statutes and general theories of fraud, few

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95. 2 BOESE, *supra* note 28, at 6-3. Municipal versions of the False Claims Act have also been enacted in San Francisco, Chicago, and New York. *Id.* at 6-75 to 6-80.

96. Taxpayers Against Fraud Education Fund, State False Claims Acts, <http://www.taf.org/statefca.htm> (last visited Apr. 30, 2007). In addition, Georgia has passed a Medicaid False Claims Act that is awaiting the governor's signature. *Id.*

97. Barger et al., *supra* note 29, at 479.

98. *See, e.g.*, NEV. REV. STAT. ANN. § 357.040(1)(h) (LexisNexis 2002) (holding beneficiaries of “inadvertent” false claims liable if they fail to disclose the false claims to the government within a “reasonable time”); VA. CODE ANN. § 8.01-216.3(B) (Supp. 2006) (requiring the losing defendants to pay the attorneys' fees of both the relator and the state).

99. *See, e.g.*, CAL. GOV'T CODE § 12652(c)(7)(C) (West 2005).

100. *See, e.g.*, DEL. CODE ANN. tit. 6, § 1203 (2005).

101. *See, e.g.*, FLA. STAT. ANN. § 68.084 (West 2005).

102. *See, e.g.*, 740 ILL. COMP. STAT. 175/4 (West 2002).

103. *See, e.g., id.*

104. *See, e.g.*, NEV. REV. STAT. ANN. § 357.210 (LexisNexis 2002).

105. Barger et al., *supra* note 29, at 484. This study does not include data from Indiana, New Hampshire, Michigan, Montana, or New York.

suits were ever brought.<sup>106</sup> Though recoveries under state false claims statutes have yet to reach the robust verdicts and settlements found under the FCA, in light of the fact that the statutes are much smaller in scope, state false claims acts have led to significant recoveries for state governments. For example, Illinois has recovered approximately \$6 to \$7 million per year since the passage of its false claims act in 2000 through the fall of 2004,<sup>107</sup> and Florida has collected more than \$28 million in Medicaid fraud recoveries alone as of June 2001.<sup>108</sup> In California, one 1998 settlement netted a recovery of more than \$187 million,<sup>109</sup> while the State of Texas recovered almost \$45 million in a 2004 settlement.<sup>110</sup> And the overwhelming majority of the attorney generals' offices in these states believe that their false claims statutes will lead to even greater recoveries in the future.<sup>111</sup>

#### IV. THE FALSE CLAIMS ACT IN ALABAMA

Though false claim legislation has been proposed in Alabama on two occasions,<sup>112</sup> the state has yet to adopt its own false claims act. Left to pursue fraudfeasors under theories of common law fraud, the Alabama Attorney General's office must attempt to combat false claims without the aid of the relator, whose inside knowledge greatly aids in the detection, prevention, and prosecution of fraud. Moreover, Alabama is not able to efficiently partner with the federal government in suits involving both state and federal funds initiated under the FCA, particularly in the area of healthcare fraud. But recent federal legislation now makes it the opportune time for Alabama to enact its own false claims act and reap the benefits of generous financial incentives and increased fraud protection.

##### *A. Inside Informers*

The key feature that has led to the effectiveness of the FCA is that it promotes the use of "inside information" in the government's fight against fraudulent claims.<sup>113</sup> Due to the complex nature of economic fraud, evidence of any wrongdoing may be "hidden within an organization" and "buried in paper trails and electronic messages."<sup>114</sup> In addition to the intentional concealment of evidence, the diffuse nature of the corporate environment itself hinders the outside detection of economic fraud, as countless employees may have unknowingly participated in the illegal activity as it traveled

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106. *Id.* Massachusetts is the one primary exception, as it regularly utilized its more general fraud statutes. *Id.* app. B, at 484 n.147.

107. *Id.* app. B, at 507.

108. 2 BOESE, *supra* note 28, at 6-6.

109. *Id.*

110. *See* Barger et al., *supra* note 29, at 485.

111. *Id.* app. B, at 508-09 (answering Question IV(d) of the survey).

112. S. 64, 2001 Reg. Sess. (Ala. 2001); H.R. 348, 2005 Reg. Sess. (Ala. 2005).

113. *See* Bucy, *supra* note 21, at 940.

114. *Id.*

through the intricate layers of corporate structure.<sup>115</sup> Effective detection and deterrence, therefore, can only be made possible by recruiting those who are already familiar with the inner workings of the scheme.<sup>116</sup> Inside relators can not only alert government officials to the existence of ongoing wrongdoings, but they may also provide information that leads to the prevention of future crimes.<sup>117</sup>

During the initial investigation, the relators can assist the government by identifying “key records and witnesses, interpret[ing] technical or industry information collected during an investigation, provid[ing] expertise, and explain[ing] the customs and habits of the business or industry.”<sup>118</sup> By helping the government to recognize the most important and relevant evidence in building its case, the relator can greatly minimize both the time and cost of the investigation.<sup>119</sup> The relator would also be able to help the government maneuver through any attempts by the organization to cover-up the fraud.<sup>120</sup> By enlisting the relator, the state government would thus be able to more effectively uncover and prosecute the filing of false claims.

### *B. The False Claims Act and Health Care Fraud*

At both the state and federal level, the majority of qui tam cases are related to health care fraud,<sup>121</sup> and it is in this area that the passage of an Alabama false claims act would create the greatest impact. The State of Alabama’s health care program for low income individuals, Medicaid, receives mixed funding from a combination of state and federal dollars<sup>122</sup> and covers approximately 900,000 Alabama citizens.<sup>123</sup> As the FCA only applies to fraud against the federal government, its aggressive provisions do not cover the states’ percentage of Medicaid losses.<sup>124</sup> In 2004, Alabama spent more than one billion dollars of state funds on the Medicaid program.<sup>125</sup> As national studies have revealed that between three and ten percent of a state’s Medicaid expenses are due to fraudulent claims,<sup>126</sup> this equates to anywhere between \$31 million and \$104 million of funds that Alabama could pursue under its own false claims act each year. In addition, successful prosecution

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115. *Id.*

116. *Id.* at 940.

117. *Id.*

118. *Id.* at 943-44.

119. *Id.* at 944.

120. *Id.*

121. *See* Barger et al., *supra* note 29, at 483.

122. *See* ALA. MEDICAID AGENCY, FY 2004 ANNUAL REPORT 11 (2004), [http://www.medicaid.alabama.gov/documents/Resources/4J-4\\_Annual%20Reports/4J-Medicaid.AR2004.pdf](http://www.medicaid.alabama.gov/documents/Resources/4J-4_Annual%20Reports/4J-Medicaid.AR2004.pdf).

123. *Id.* at 14.

124. *See* Joseph E.B. White, Taxpayers Against Fraud Education Fund, *Background to MODEL STATE FALSE CLAIMS ACT 3, 3* (2006), <http://www.taf.org/modelstatefca.pdf>.

125. *Cf.* ALA. MEDICAID AGENCY, *supra* note 122, at 11 (quantifying the state funds received by the Alabama Medicaid Agency).

126. *See, e.g.*, Press Release, Mich. Attorney Gen., Governor Signs Medicaid Whistleblower Protection Legislation (Jan. 3, 2006), *available at* [http://www.michigan.gov/ag/0,1607,7-164-34739\\_34811-133348--,00.html](http://www.michigan.gov/ag/0,1607,7-164-34739_34811-133348--,00.html).

under an Alabama false claims act would also result in the recovery of statutory damages and penalties valued in excess of three times the amount of restitution.<sup>127</sup> As Alabama stands as one of the poorest states in the country, such a windfall could provide great relief for the budget constraints facing Medicaid and other state programs.<sup>128</sup>

In addition to the inherent benefits of enacting a false claims statute, recent federal legislation now provides Alabama and other states additional financial incentives to pass their own version of the FCA. In an effort to close the FCA loophole and provide state Medicaid dollars with the same level of antifraud protection as under the FCA, Congress, in February 2006, enacted section 6031 of the Deficit Reduction Act of 2005.<sup>129</sup> This Act, which amended the Social Security Act by adding section 1909(b), offers states a ten percentage point increase in the share of any damages recovered under a qualifying state false claims act.<sup>130</sup> Currently, the federal to state funding ratio for the Alabama Medicaid program is approximately 70/30;<sup>131</sup> therefore, the State of Alabama would receive 30% of any compensatory damages recovered from a fraudfeasor.<sup>132</sup> However, by enacting a qualifying false claims act, Alabama's share of the recovery would increase by ten percentage points to 40%—an overall increase of 33%.

A recent example illustrates the potential benefit that the State of Alabama would receive by enacting a false claims act. On January 27, 2005, Alabama Attorney General Troy King announced that the state had filed suit against seventy-nine pharmaceutical companies due to years of massive fraudulent overcharges to the Alabama Medicaid Agency.<sup>133</sup> Containing counts of fraudulent misrepresentation, fraudulent suppression, wantonness, and unjust enrichment, Alabama's complaint alleged that the drug companies had fraudulently misreported and inflated the prices charged for prescription drugs under a practice known as the "average wholesale pricing scheme."<sup>134</sup>

State Medicaid offices determine the reimbursement rate paid to doctors and pharmacies based on information provided by the pharmaceutical companies purporting to represent the average wholesale price of the medicines.<sup>135</sup> Under this scheme, by reporting an average wholesale price that is considerably higher than what the health care providers actually pay for the

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127. See 31 U.S.C. § 3729 (2000).

128. See generally TERESA A. COUGHLIN, THE URBAN INST., MEDICAID AND THE 2003-05 BUDGET CRISIS—A LOOK AT HOW ALABAMA RESPONDED (2005), <http://www.kff.org/medicaid/upload/State-Case-Study-Medicaid-and-the-2003-05-Budget-Crisis-A-Look-At-How-Alabama-Responded-Report.pdf>.

129. White, *supra* note 124, at 3.

130. *Id.*

131. ALA. MEDICAID AGENCY, *supra* note 122, at 11.

132. See White, *supra* note 124, at 3.

133. News Release, Ala. Attorney Gen., A.G. King Sues 79 Drug Companies for Dishonest Pricing Scheme (Jan. 27, 2005), available at [http://www.ago.state.al.us/news\\_template.cfm?Item=879](http://www.ago.state.al.us/news_template.cfm?Item=879).

134. See Complaint at 38-42, State of Alabama v. Abbott Labs, No. CV-05-219 (Cir. Ct. Montgomery Co., Ala. Jan. 11, 2006).

135. News Release, *supra* note 133.

medicines, a “spread” is produced—the difference between the average wholesale price provided to the Medicaid offices and the substantially lower price that doctors and pharmacies actually pay for the medicines.<sup>136</sup> Therefore, Medicaid unknowingly reimburses health care providers at a much higher rate than the actual cost of the drugs, at times as high as 54,000%.<sup>137</sup>

Though the complaint does not allege a specific amount of compensatory damages sought, Alabama Medicaid Commissioner Carol Herrmann asserted that: “Even at conservative estimates, we believe Medicaid has lost hundreds of millions of dollars over the last ten years due to the pricing scheme . . . .”<sup>138</sup> Assuming *arguendo* that the state seeks an even more conservative estimate of \$100 million in compensatory damages under current Alabama law, it would stand to recover \$30 million while the federal government would recover the balance. In order for punitive damages to be awarded, the state would have to prove that the “defendant[s] consciously or deliberately engaged in oppression, fraud, wantonness, or malice” by the heightened “clear and convincing” standard.<sup>139</sup> Even if this standard was met, any punitive damages would be capped at three times the amount of recovery.<sup>140</sup> However, had the suit been filed under a qualifying state false claims act, Alabama would stand to recover an additional \$10 million in compensatory damages.<sup>141</sup> Moreover, the state would not have to prove punitive damages by the heightened evidentiary standard but would automatically receive statutorily provided treble damages, bringing its total recovery to approximately \$160 million plus additional statutory penalties of \$5,000 to \$10,000 for each false claim submitted over the ten year period that the fraud allegedly occurred.<sup>142</sup>

In order to qualify for the increased recovery under section 1909(b), Alabama’s false claims act would have to contain the following requirements:

- (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a).
- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.

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136. *Id.*

137. *Id.*; Complaint, *supra* note 134.

138. News Release, *supra* note 133.

139. ALA. CODE § 6-11-20(a) (2005); *see also* Hamme v. CSX Transp., Inc., 621 So. 2d 281 (Ala. 1993); Senn v. Ala. Gas Corp., 619 So. 2d 1320 (Ala. 1993).

140. *See* ALA. CODE § 6-11-21.

141. *See supra* text accompanying notes 112-114.

142. *See* 31 U.S.C. § 3729 (2000).

(3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.

(4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code.<sup>143</sup>

To assist and encourage states to draft a false claims act that meets the above requirements, organizations such as Taxpayers Against Fraud have provided model statutes that state legislatures may use when drafting their own act.<sup>144</sup>

### C. Criticism of Whistleblower Statutes

The primary criticism of statutes that encourage whistleblower suits—such as the FCA and its state equivalents—is that the possibility of a generous recovery increases the number of frivolous suits and leads to the creation of a hostile business environment.<sup>145</sup> Though the validity of such assertions should be closely scrutinized, especially in light of the fact that the organizations who traditionally face the most liability—major health care providers—are the loudest critics of whistleblower suits,<sup>146</sup> these claims should not be lightly dismissed due to Alabama's recent judicial history.

With a supreme court lead by a former president of the Alabama Trial Lawyers' Association and the prevalence of excessive and unchecked punitive damage awards, Alabama became known as a "Tort Hell" during the early nineties.<sup>147</sup> Over the next decade, various tort reform measures and changes in the composition of the court began to move the state toward shedding its reputation as a dangerous environment for corporate defendants.<sup>148</sup> However, "the road back from a bad reputation is a long one indeed,"<sup>149</sup> and while Alabama has not been included in the American Tort Reform Foundation's list of "judicial hellholes" for four consecutive years,<sup>150</sup> the U.S. Chamber of Commerce's 2007 opinion survey ranked

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143. Deficit Reduction Act, S. 1932, 109th Cong. § 6031 (2005).

144. See MODEL STATE FALSE CLAIMS ACT, *supra* note 124.

145. See Mark Green, Op-Ed, *Fraud Busting Begins at Home*, N.Y. TIMES, Jan. 29, 2006, at 9.

146. *Id.*

147. See Gregory Jaynes, *Where the Torts Blossom: While Washington Debates Rules About Litigation, Down in Alabama, the Lawsuits Grow Thick and Wild*, TIME, Mar. 20, 1995, at 38; Michael DeBow, *The Road Back from "Tort Hell": The Alabama Supreme Court, 1994-2004*, WHITE PAPERS (The Federalist Soc'y for Law & Pub. Policy Studies), Oct. 15, 2004, at 2, available at [http://www.fed-soc.org/doclib/20070325\\_alabama2004.pdf](http://www.fed-soc.org/doclib/20070325_alabama2004.pdf).

148. See DeBow, *supra* note 147, at 1-6.

149. *Id.* at 9.

150. See AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2006, at iv (2006), <http://www.atra.org/reports/hellholes/report.pdf>; AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2005, at 3 (2005), <http://www.atra.org/reports/hellholes/2005/hellholes2005.pdf>; AMERICAN TORT REFORM FOUND., JUDICIAL HELLHOLES 2004, at 3 (2004), <http://www.atra.org/reports/hellholes/2004/hellholes2004.pdf>; AMERICAN TORT REFORM ASS'N, JUDICIAL HELLHOLES 2003, at 3 (2003), <http://www.atra.org/reports/hellholes/2003/report.pdf>.

Alabama as having the fourth most unfair litigation system in the country.<sup>151</sup> As corporations are understandably hesitant to do business in an environment that is perceived as being overly litigious and unfair, the Alabama legislature should carefully examine the ramifications of encouraging litigation by enlisting private citizens to combat fraud via a false claims act. Though an issue of considerable weight, the unique characteristics of the FCA, however, effectively deter the abuse of whistleblower suits and prevent the emergence of a hostile business climate.

The first major check on the filing of frivolous whistleblower claims is the enormous expense that inherently accompanies litigation under the FCA. For example, prosecuting one case under the FCA required six law firms to devote forty lawyers and incur over \$1 million a month in expenses.<sup>152</sup> In another recent case, the relator's counsel was required to manage and organize 7,000 banker boxes of documents produced by the defendant that required over 5,000 square feet of storage space, even after the boxes were stacked seven feet high.<sup>153</sup> Additionally, the whistleblower in a complex health care fraud case spent thirteen years pursuing his suit, and the lead law firm in the case invested more than 85,000 hours.<sup>154</sup> As false claims actions usually involve complex fraudulent schemes that have developed over an extended period of time, the expense of litigating such a claim can be staggering, and the risk of floating the cost on a contingent basis is not fiscally attractive to any plaintiffs' lawyer who does not believe that he has a viable case.

In addition to the level of deterrence brought about by the sheer expense of prosecuting a claim under the FCA, the most effective means of controlling frivolous litigation can found within the provisions of the statute itself. First, whether as an active co-plaintiff or as a passive monitor, the state attorney general—or the DOJ in federal cases—ensures a degree of quality control over the suit.<sup>155</sup> The attorney general, as an elected member of the state government, has a vested interest in not creating a hostile business environment due to frivolous suits. Moreover, as opposed to an attorney in private practice, an attorney general's judgment is not potentially influenced by the hopes of personal financial gain. The attorney general, therefore, can properly ensure that only meritorious claims are continued, while frivolous suits are dismissed even before they become public, regardless of whether the relator objects.<sup>156</sup> Furthermore, the FCA provides that relators who file

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151. U.S. CHAMBER OF COMMERCE, INST. FOR LEGAL REFORM, LAWSUIT CLIMATE 2007: RATING THE STATES 6 (2007), [http://www.instituteforlegalreform.org/lawsuitclimate2007/pdf/Climate\\_Report.pdf](http://www.instituteforlegalreform.org/lawsuitclimate2007/pdf/Climate_Report.pdf).

152. See Barger et al., *supra* note 29, at 477.

153. *Id.*

154. See Taxpayers Against Fraud Education Fund, <http://www.taf.org> (last visited Apr. 30, 2007) (scroll down to "Fast Facts About the FCA" in far left column).

155. See Barger et al., *supra* note 29, at 477.

156. See 31 U.S.C. § 3730(c)(2)(A)-(B) (2000); see also Green, *supra* note 145.

frivolous actions may be held liable for the defendant's attorney's fees and expenses:

If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.<sup>157</sup>

When considered alongside the enormous financial risk in prosecuting a claim under the FCA, the internal mechanisms of the statute effectively deter the filing of frivolous suits.

#### V. CONCLUSION

As evidenced by recent litigation, the State of Alabama has taken a firm stance against fraud in an effort to protect and vindicate the rights of its taxpayers, yet it continues to fight this battle without the most effective weapon available—a false claims act. Through its unique use of the *qui tam* relator, the FCA and its state equivalents have been able to greatly reduce fraud against the government and provide both federal and state governments with windfall recoveries, without increasing frivolous lawsuits that would chill business development. Moreover, current federal legislation provides the State of Alabama further monetary incentive to enact its own false claims act and join the other states that are already enjoying the benefits of increased fraud protection. Most importantly, enactment of a false claims act takes great steps toward deterring fraudulent behavior throughout the state and sending a clear message that: “Alabama is a good place to do business. It is a very bad place, however, to take advantage of her people.”<sup>158</sup>

*R. Harrison Smith*

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157. 31 U.S.C. § 3730(d)(4).

158. News Release, *supra* note 133.