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Critical Legal Issues: WORKING PAPER SERIES

THE CASE FOR A CLEAR-AND-CONVINCING BURDEN OF PROOF FOR FALSE CLAIMS ACT *QUI TAM* RELATORS

By

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The Case for a Clear-and-Convincing Burden of Proof for False Claims Act *Qui Tam* Relators

INTRODUCTION

The evolution of the False Claims Act, 31 U.S.C. §§ 3729-3733 (FCA), reflects Congress' perception of the relative importance of fighting fraud against the government and the adequacy of existing measures. The law came into being during the Civil War to deter fraud perpetrated by Union Army suppliers. A key feature, then and now, is a mechanism for private parties to sue in the name of the United States (called *qui tam* actions), the reward for which was a share in the recovery.

In 1943, in reaction to "parasitic" lawsuit abuses, Congress amended the law to significantly restrict private enforcement actions. In 1986, Congress amended the law again, this time to undo many of the restrictions adopted in 1943 and greatly expand incentives for private actions against alleged fraudsters. Since 1986, Congress has enhanced the incentives for private attorneys-general to bring claims under the FCA. These private plaintiffs, called "relators," and federal prosecutors have persuaded the courts to adopt new theories of liability. *See, e.g., Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) (approving liability for implied

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false certifications of compliance with federal requirements).[1]

As a consequence of these enhanced incentives and expanded theories, the number of FCA lawsuits has increased dramatically. The increase comes overwhelmingly from private actions brought under the law's *qui tam* provisions. Notably, however, most of the *qui tam* claims in which the government chooses not to intervene are either dismissed at the pleading stage (voluntarily or not) or result in summary judgment for defendants. Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 PUB. CONT. L. J. 813, 826 (2012). That fact suggests the increase in filings is a product of neither fraud nor better forensic techniques. Rather, the increase in *qui tam* actions is likely driven by the incentivizing features of the statutory scheme. These increased filings impose significant transactional costs that in no way benefit the government or taxpayers. In addition, those claims that survive dispositive motion practice (certainly those that survive summary judgment) are often settled, as defendants seek to avoid catastrophic monetary awards, not to mention the possible successive imposition of draconian administrative sanctions. This outcome, too, arguably fails to advance the principal objectives of the FCA—to compensate the government for its losses and to deter fraud.

[1] This theory holds that in submitting a claim for payment, a defendant impliedly certifies that it is in compliance with applicable contract terms and regulations. Liability arises when, in submitting a claim, the defendant knows it is not in compliance with a material term and fails to disclose it. *See Universal Health Services, Inc.*, 136 S. Ct. at 1995-96.

While the history of the law shows federal lawmakers reacting to abuses by either expanding or restricting incentives for private actors, it does not appear that Congress plans to address the above concerns any time soon. Indeed, major legislation passed during the first term of the Obama Administration included provisions that were even more accommodative of *qui tam* relators. Now, with the Supreme Court's approval of liability for implied false certification of contractual and regulatory compliance, there is a perception among many on the defense side that the playing field is no longer level. With no expectation of congressional action to address the *qui tam* filings, it is left to the courts to restore some measure of balance, where reasoned arguments exist. One such measure, which authority and logic support is a rule requiring *qui tam* relators to meet a more rigorous standard of proof—that of clear and convincing evidence.

This argument begins with the Supreme Court's *Graham County Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005). In this case, the Court considered a provision of the 1986 amendments that stated that FCA claims would be subject to a preponderance of the evidence standard. The Court noted that the provision, as drafted, was limited to actions brought by the United States (as opposed to relators). The *Graham County* decision did not address whether a different burden of proof should govern claims by *qui tam* relators. Prior to the 1986 amendments, several circuits required claims to be proved by clear and convincing evidence. That,

too, was the standard generally applicable to fraud claims at common law. Given the absence of a statutory mandate applicable to relators, as clarified in *Graham County*, and in light of the current state of *qui tam* litigation, imposition of a clear-and-convincing-evidence standard as to relators' claims may promote policy objectives more cost-effectively.

Subjecting relators' claims to a clear-and-convincing standard might discourage the less meritorious ones. For those claims that survive pleading-stage motion practice, the higher burden might also lead to more summary dispositions. This result would restore a degree of balance with respect to the greatest volume of FCA cases filed, avoid negatively affecting claims brought by the government, and consequently reduce the costs to all parties involved.

I. BACKGROUND

In 1943, Congress enacted the first significant FCA amendments since the law's initial passage in 1863, mainly altering the *qui tam* sections of the law largely as a result of a Supreme Court decision in *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943). In *Hess*, the relator alleged that contractors were involved in collusive bidding on government contracts. Those same defendants, however, had been criminally indicted prior to the filing of the relator's *qui tam* action. The Court nevertheless permitted the suit to proceed, holding that even though the relator was piggybacking on the criminal proceeding—plagiarizing the indictment, in fact—the suit

nevertheless promoted the FCA's ends by allowing the government a greater recovery than it would receive solely from the imposition of a criminal penalty. *See id.* at 545.

Shortly after this decision and as a consequence of it, at least in part, Congress amended the law to restrict the rights of *qui tam* relators. *See U.S. ex rel. Newsham v. Lockheed*, 722 F. Supp.607, 609 (N.D. Cal. 1989). These amendments included a reduction in the relator's percentage recovery to a maximum of 10 percent in the event the government participated in the case or 25 percent if it did not, and an outright prohibition on *qui tam* suits based on evidence or information already in the possession of the federal government. *See* 31 U.S.C. § 233(c), later codified at 31 U.S.C. § 3730(c); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 650 (D.C. Cir. 1994) ("*Hess* inspired public outcry over the liberality of the *qui tam* provisions that prompted speedy congressional response."). What is more, if the government elected to intervene, the relator's participation in the case came to an end. These changes significantly reduced the number of *qui tam* actions.

By the 1980s, Congress had come full circle and eventually took up amendments aimed at re-empowering both government and private plaintiffs. Increasing reports of fraud on the government, mainly in the area of federal defense procurement, as well as a perception that the 1943 amendments had been too restrictive, led to amendment of the FCA in 1986. *See Springfield Terminal*, 14 F.3d at 650-51 (discussing unfairness of court decision dismissing *qui tam* action because

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government was already in possession of the information even though the relator was the original source). The recoverable damages increased from double to treble the government's losses, while statutory penalties increased from $2,000 per false claim to a range from $5,000 to $10,000 per false claim.[2] 31 U.S.C. § 3729(a), later codified at 31 U.S.C. § 3729(a)(1)(G). In addition, the amendments increased the relator's share of recovery to a maximum of 25 percent in cases where the government intervened and 30 percent in cases where the government elected not to intervene. 31 U.S.C. § 3730(d)(1)-(d)(2). A provision was added to permit relators to recover their attorneys' fees and costs. 31 U.S.C. § 3730(d)(1). The 1986 amendments also permitted the relator to continue as a party to the action in cases where the government intervened, even though the government would assume primary responsibility for prosecuting the action. 31 U.S.C. § 3730(c)(1). Finally, the amendments relaxed the prohibition on a relator's recovery where the government already knew the underlying facts. As long as the relator was the original source of the information, the relator's claim was not barred. 31 U.S.C. § 3730(e)(4)(A).

Congress' liberalizing efforts were not finished in 1986, however. The FCA has been amended in subsequent years to make it even easier for *qui tam* relators to

[2] In 1999, these penalties were increased to $5,500 to $11,000 per false claim. 64 Fed. Reg. 47104 (Aug. 30, 1999). They increased significantly again on August 1, 2016. As part of the Bipartisan Budget Act of 2015, Congress directed the Justice Department to increase civil penalties to account for inflation. On June 30, 2016, the Department announced an interim final rule essentially doubling per claim penalties under the FCA to a minimum of $10,781 and a maximum of $21,563. *See* Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,501 (June 30, 2016). These penalties apply to violations occurring after November 2, 2015.

pursue these claims. In 2009, Congress passed the Fraud Enforcement and Recovery Act (FERA). FERA renumbered the liability provisions of § 3729(a) and expanded several of them.[3] The 2010 passage of the Patient Protection and Affordable Care Act (ACA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) led to further refinements in the FCA. The ACA modified the public-disclosure/original-source limits on the FCA. The government now has power to veto dismissal of a *qui tam* suit, despite public disclosure, where it opposes dismissal. *See* 31 U.S.C. § 3730(e)(4)(A). Dodd-Frank modified the provisions pertaining to retaliation. Now the FCA protects relators engaged in "lawful acts" as well as "other efforts to stop 1 or more violations" of the FCA. 31 U.S.C. § 3730(h). This protection also extends to employees, contractors, and agents covered by this section, as well as "associated others." *Ibid.*

These amendments encourage more claims, as the Justice Department's own data demonstrate. *See* United States Department of Justice, Civil Division, Fraud Statistics—Overview, Oct. 1, 1987-Sept. 30, 2015.[4] These statistics show material

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[3] For example, FERA expanded liability for retaining or avoiding an obligation to pay money to the government (known as a "reverse false claim"), § 3729(a)(1)(G), and eroded the presentment requirement of § 3729(a)(1)(A). This presentment requirement stems from the notion that falsehoods in themselves are not actionable, absent presentment of a claim—a call on the federal fisc. *Hopper v. Solvay Pharm., Inc.,* 588 F.3d 1318, 1325 (11th Cir. 2009). Notably, FERA also codified a materiality requirement that previously existed as part of the common law surrounding the statute. This requirement was defined very broadly, however, as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *See* 31 U.S.C. § 3729 (b)(4).

[4] https://www.justice.gov/opa/file/796866/download. For example, 30 *qui tam* cases were filed in 1987, 433 in 2009, and 714 in 2014. 2015 saw a decrease in *qui tam* filings to 632, but that hardly represents a trend, and, if not sustained, is likely to be seen as an outlier.

increases in the filing of *qui tam* cases over time, and particularly after major amendments (*e.g.*, the 2009 FERA amendments) to the law. The dramatic increase in *qui tam* filings would represent a positive development if all or even most of these cases were grounded in fraud and resulted in the recovery of funds wrongly paid out by the government. That is not the case, however.

The government intervenes in a relatively small percentage of *qui tam* claims; recent data suggest the rate is just over 1 in 5. *See* Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. CHI. L. REV. 1559, 1563-64 (2015). Of those non-intervened cases, relators achieve a favorable outcome a mere *six percent* of the time. *See* U.S. Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63, (Oct. 2013).[5] That is, only a small percentage of these non-intervened *qui tam* claims result in trial verdicts or settlements, suggesting that many of these claims, perhaps 70% or more, lacked merit from the outset. *See, e.g.,* Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 975 (2007) (reviewing data suggesting more than 70% of *qui tam* cases are "frivolous.") These numbers strongly suggest that the promise of a windfall outcome—up to 30% of the recovery of treble damages *and* five-figure per-claim penalties *plus* attorneys' fees and costs—leads relators to bring many unmeritorious claims.

[5]http://www.instituteforlegalreform.com/uploads/sites/1/The_New_Lawsuit_Ecosystem_pages_web.pdf.

In addition, these relators are often former employees motivated not just by monetary gain, but by personal animus toward their one-time employers:

> The problem here lies in the Act's *qui tam* provisions. Anyone who spends a bit of time with the FCA case law will be struck by the proportion of FCA actions that appear in employment disputes. ... But the Ab-Tech [implied certification] rule's reduced pleading requirements make it much easier to attach a colorable FCA claim to what is essentially a suit for wrongful discharge or other employment-related action. Because the FCA claim is more likely to survive a motion to dismiss, it will impose costs on the government contractor and the court system whether or not it ultimately succeeds—again increasing the costs of contracting with the Federal Government.

Gregory Klass and Michael Holt, *Implied Certification under the False Claims Act*, 41 PUBL. CONT. L.J. 1, 42 (2011).[6]

The filing, prosecution, and defense of these weak or non-meritorious claims impose significant costs on litigants, the judicial system, and taxpayers. Even cases dismissed at the pleading stage typically require multiple motions to obtain a final order of dismissal with prejudice. The cost to defendants (not to mention plaintiffs) can easily run into several hundred thousand dollars per case. Of the cases that survive pleading challenges, discovery and summary judgment motion practice can easily multiply the pleading stage costs several fold.

[6] The authors assert that the implied certification theory imposes costs insofar as it lowers the pleading bar, allowing less meritorious claims to survive beyond the pleading stage, and it extends liability under the FCA to conduct that is more effectively policed by administrative means. Klass and Holt, *Implied Certification*, at 3-4. In the latter instance, the theory actually interferes with administrative regulatory mechanisms, particularly in the healthcare sector. *Id.* at 40-43.

The FCA's generous financial incentives have led to other dubious consequences. In recent years, firms claiming *qui tam* specialization are filing an increasing number of these cases. This professional *qui tam* bar actively advertises and solicits new cases and whistleblowers. *The New Lawsuit Ecosystem*, at 71-73. While some have suggested that this expertise might reduce the number of non-meritorious filings, *see, e.g.,* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation,* 112 COLUM. L. REV. 1244, 1257-59 (2012), the numbers do not seem to support that hypothesis. There is no empirical data to suggest that these firms are better at weeding out the bad cases from the good.[7] They have also more frequently joined forces with repeat whistleblowers, in effect a professional "relator class." These persons rely not on first hand observation of fraudulent practices (as the FCA arguably intended), but on independent research using Freedom of Information Act requests and other procedures to gather evidence of alleged fraud. *See id.* at 1279-81.

All of this suggests that corrective changes in the law pertaining specifically to *qui tam* claims would alleviate some of the wasted costs and resources without adversely impacting the government's efforts to recover funds fraudulently obtained.

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[7] There is logic to the author's assertion. Yet, surely not all professional FCA relators' counsel are equally adept at screening potential FCA claims. The author also discusses the possibility that specialized relators' counsel may have incentives to pursue the less meritorious FCA claims due, *inter alia*, to reduced marginal costs of investigating and filing suit. *Id.* at 1260. In addition, unlike tort cases, the outsized incentives under the FCA may distort screening mechanisms that exist in the usual plaintiffs' counsel referral system common in tort litigation.

II. THE STANDARD OF PROOF AT COMMON LAW AND THE 1986 AMENDMENTS

Prior to the 1986 FCA amendments, several courts imposed a clear-and-convincing standard of proof upon FCA claimants, whether the government or a *qui tam* relator prosecuted the action. *See, e.g., United States v. Milton*, 602 F.2d 231, 233 (9th Cir. 1979); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 101 (2d Cir. 1971); *United States v. Ueber*, 299 F.2d 310, 314 (6th Cir. 1962); *Hageny v. United States*, 215 Ct. Cl. 412, 428 (1978). The statute sounded in fraud, which demanded a higher proof standard:

> 'Fraud is not to be presumed and the burden of establishing it was upon appellees. They were not required to establish it beyond a reasonable doubt but something more is required than the mere weight, or preponderance, of the evidence. It is essential that the evidence should be clear, unequivocal, and convincing.' We do not think that because this case involves a statutory cause of action under the False Claims Act, the government is relieved from meeting the burden applicable to any fraud action, statutory or common law.

Ueber, 299 F.2d at 314-15 (quoting *United States v. Johnson*, 81 F.2d 543 (6th Cir. 1936) (citations omitted)).

This same standard historically prevailed over fraud claims at common law. *See, e.g., Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970-71 (2d Cir. 1987) (all elements of claim of fraud under the common law must be proved by clear and convincing evidence); *Sompo Japan Ins. Co. v. Alliance Trans. Grp. LLC*, 627 F. Supp. 2d 897, 901 (N.D. Ill. 2009) (clear and convincing evidence required to prove common law

fraud); *Knudson v. Weeks*, 394 F. Supp. 963, 973 (W.D. Okla. 1975) (common law fraud must be proved by clear, strong, and convincing evidence). Since the text of the FCA mirrored common law fraud (*i.e.*, knowingly using a false record or knowingly submitting a false claim), and since the statute was otherwise silent, application of the familiar common law standard of proof was only logical. Some courts, however, rejected this heightened burden, emphasizing the purported remedial nature of the law and its goal of compensating the federal government for wrongdoing. *See Federal Crop Ins. Corp. v. Hester*, 765 F.2d 723, 727-28 (8th Cir. 1985); *United States v. Thomas*, 709 F.2d 968, 971-72 (5th Cir. 1983).

As part of the 1986 amendment to the law, Congress debated the standard of proof applicable to FCA claims. In the final Senate Report on the bill, the incorporation of a provision establishing a preponderance of the evidence standard was explained as follows:

> Traditionally, the burden of proof in a civil action is by a preponderance of the evidence. However, this point is not expressly addressed in the current act, and the caselaw is fragmented and inconsistent. Inasmuch as False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages, the Committee believes that the appropriate burden of proof devolving upon the United States in a civil False Claims Act suit is by a preponderance of the evidence. Some courts have required that the United States prove its case by clear and convincing, or even by clear, unequivocal and convincing evidence, which is the functional equivalent of a criminal standard. ... This line of authority ... is predicated on its premise that the civil False Claims Act is penal in nature. The Supreme Court's rejection of the underlying premise in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), necessarily carried with it the repudiation of that conclusion as the

> burden of proof . . . .
>
> The 'preponderance of the evidence' standard of proof in S. 1562 is, according to the Justice Department, the standard applied in most civil and administrative litigation. The Eighth Circuit recently held in *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985) that 'preponderance of the evidence' is the appropriate standard for the False Claims Act, stating: 'Because the Act neither requires a showing of fraudulent intent nor is punitive in nature, we find no justification for applying a burden of proof higher than a preponderance of evidence.'

False Claims Amendments Act of 1986, S. Rep. No. 99-345, sec. 3, at 31.

The Committee's report fails to note that *Hess* was decided when liability led to double, not treble, damages, penalties were capped at $2,000 per false claim, and relators had no opportunity to recover of fees and costs. Even more, *Hester* wrongly assumed the FCA imposed liability for negligent conduct, *Hester*, 765 F.2d at 727-28, and thus should not have been cited as authority for rejecting a clear-and-convincing standard.[8] Nevertheless, Congress adopted a preponderance-of-the-evidence standard of proof under the 1986 amendments, codified at 31 U.S.C. § 3731(c).[9] This provision states as follows: "In any action brought under section 3730, the United

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[8] Notably, during this period of legislative debate over the 1986 amendments, the Justice Department expressed concern that the damages and penalties may extend beyond the purely compensatory:

> [T]his crucial principle—that a civil False Claims Act prosecution is remedial and not punitive—may be jeopardized by proposals to increase greatly the penalties which may be recovered. We have found that where judges perceive the penalties which may be assessed under the Act to be grossly disproportionate to the wrongdoing, they will rule against the government outright or subtly engraft criminal standards and procedural hurdles onto the civil portion of the Act.

False Claims Reform Act, Hearing on S. 1562 Before the S. Subcomm. on Admin. Prac. and Proc. of the S. Comm. on the Judiciary, 99th Cong. 36-37 (Prepared statement of Jay B. Stephens, Dep. Assoc. Attorney General).

[9] This section was later recodified at 31 U.S.C. § 3731(d).

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States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence."

III. *GRAHAM COUNTY SOIL & WATER CONS. DIST. v. UNITED STATES EX REL. WILSON*

In *Graham County Soil & Water Cons. Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005), the Supreme Court resolved a dispute over which limitations period governed a *qui tam* relator's statutory retaliation claim under 31 U.S.C. § 3730(h) (titled "Relief from Retaliatory Actions"). Section 3730(h) was intended to protect so-called whistleblowers from adverse employment action for reporting FCA violations. The relator argued that the six-year statute of limitations set forth in § 3731(b)(1) governed retaliation claims insofar as it stated that "a civil action under section 3730" may not be brought "more than 6 years after the date on which the violation of section 3729 is committed." The relator claimed that the statutory language was unambiguous because the retaliation claim arose under § 3730. The Supreme Court rejected this argument, however. The Court held that the six-year statute of limitations set forth in § 3731(b)(1) did not apply to retaliation actions under § 3730(h), and only applied to violations of the FCA prosecuted by the United States under § 3730(a) (filed initially by the United States) or under 3730(b) (*qui tam* actions in which the United States intervened).

In so holding, the Court found support, *inter alia*, in the language of § 3731(c). The Court noted that § 3731(b)(1) had to be limited to actions either filed by the

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United States (§ 3730(a)) or in which the United States intervened (§ 3730(b)); otherwise, if the limitations provision were read as the relator urged, the burden of proof provision, § 3731(c), which used nearly identical language, would impose on the United States an obligation to prove the elements of all claims under § 3730, including a retaliation action under § 3730(h), which would make no sense because the United States is not a party to a relator's claims for unlawful retaliation brought against a defendant.

None of the parties in *Graham County*, not even the United States appearing as *amicus curiae*, disagreed with this construction of the burden of proof section. Justice Breyer, in his dissent, while taking issue with the majority's construction of the limitations provision, nonetheless agreed emphatically with the majority's limited application of the burden of proof section:

> [A]ny limitation on § 3731(c)'s application comes from different words, namely, 'the United States.' These latter words make clear not that the phrase 'under section 3730' has a different *meaning* than in [3731] (b), but that [3731] (c) comes into play only in cases in which the United States is a party (and *only* in such cases, *cf. ibid*). Because it is these words—the subject of the subsection, 'the United States'—that determines whether (c) has application in any given case, there is nothing in § 3731(c) that would make it 'reasonable,' *ibid,* to read the phrase 'action under section 3730' *in § 3731(b)(1)* to apply, as the Court concludes, to only 'two out of three actions under section 3730.'

Graham County, 545 U.S. at 424 (emphasis in original).

All members of the Supreme Court and the parties in *Graham County* agreed that the statutory preponderance standard of proof is limited to actions brought by

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the United States or in which the United States intervened, leaving open the question of what standard should govern proof of a relator's FCA claims. If Congress intended a different result, that the burden applicable to relator's fraud claims should also be a preponderance of the evidence, it could easily have said so in the statute.

Since *Graham County*, Congress has had multiple opportunities to amend the statute to clarify the burden of proof issue and has not done so. It adopted significant FCA amendments in 2009 and in 2010. More importantly, Congress amended the statute to clarify the specific ambiguity the *Graham County* Court addressed—the limitations period applicable to retaliation claims bought under § 3730(h). In the 2010 Dodd-Frank amendments to the FCA Congress incorporated a three-year limitations period for retaliation claims, commencing on the date of the retaliation, thereby superseding the *Graham County* holding. 31 U.S.C. § 3730(h)(3). Yet, Congress made no amendment to the burden of proof provision to clarify that it applied to all actions, not merely those prosecuted by the government. Given the *Graham County* Court's extensive discussions of § 3731(c) and its clear and unanimous statement that the burden of proof provision was limited to actions in which the government was directly involved, subsequent congressional inaction suggests Congress intended to ease the burden of proof only with respect to the government, not private *qui tam* relators.

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IV. *ESCOBAR*: RESORT TO THE COMMON LAW IN CONSTRUCTION AND APPLICATION OF THE FCA

No provision in the FCA scheme addresses the burden of proof applicable to private *qui tam* relators. To date, no post-*Graham County* court has addressed the issue of a heightened burden of proof for relators—one way or the other. Some commentators have raised the issue, suggesting that the decision in *Graham County* supports an argument for a clear-and-convincing standard. *See* John T. Boese, *Civil False Claims and* Qui Tam *Actions*, § 5.08[A][2] (4th ed. 2013) (arguing that in the face of non-intervention, policy supports making certain fraud has been committed before imposing punitive damages and penalties under FCA).

In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court repeatedly relied upon the common law to inform its construction of the FCA, resolving a dispute over whether the law permitted claims for impliedly false certifications. The Court resorted to the common law to define "false or fraudulent" since the statute lacks any such definition. *Escobar*, 136 S. Ct. at 1999 ("Congress did not define what makes a claim 'false' or 'fraudulent.' But '[i]t is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses.'") (alteration in original). Because misrepresentations by omission were actionable at common law, the Court concluded they were actionable under the FCA's use of the terms "false or fraudulent." *Ibid.* The Court also looked to the common law in establishing the materiality standard to be

applied to FCA claims. *See id.* at 2002-03.

Perhaps most importantly, the Court noted that the elements of common-law fraud are retained unless the statutory text indicates otherwise. *See id.* at 1999, n. 2 ("The False Claims Act abrogates the common law in certain respects. ... But we presume that Congress retained all other elements of common-law fraud that are consistent with the statutory text because there are no textual indicia to the contrary."). The Court also relied upon its decision in *Neder v. United States*, 527 U.S. 1 (1999), as further support for this proposition. In *Neder*, the Court considered the defendant's conviction on mail, wire, and bank fraud charges. Defendant argued that the district court erred in not instructing the jury on the element of materiality, despite the lack of any mention of a materiality requirement in the relevant statutes. The Supreme Court reversed the conviction in part, holding that even though the statutes were silent on the issue of materiality, because it was part of the common law of fraud, and as long as it was not inconsistent with the statutory text, the court must presume that Congress intended to incorporate it. *Neder*, 527 U.S. at 23-24.

This analysis provides support for the argument that claims by *qui tam* relators must be proved by clear and convincing evidence. At common law, fraud was never presumed and had to be proved by clear and convincing evidence. This principle is as much a part of the common law of fraud as the requirement of materiality. Incorporating this requirement into FCA claims brought by *qui tam* relators is in no

way inconsistent with the language of the statute. The one statutory provision that speaks to the burden of proof has been held to apply only to actions in which the government takes an active part, and the statute is otherwise silent on the burden of proof applicable to relators, just as the mail fraud statute in *Neder* was silent on the requirement of materiality. Requiring relators to prove their claims with a greater quantum of proof has no bearing on the burden of proof imposed on the government.[10]

V. DUE PROCESS

Any discussion of the burden of proof would be incomplete without some discussion of the demands of due process, since the burden of proof is, after all, grounded in due-process considerations. In other words, would a clear-and-convincing-proof standard comport with due process? The Supreme Court has examined the requirements of due process in numerous contexts, both civil and criminal, and has described its bearing on proof in terms of interests affected and risk of error:

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the

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[10] Adopting a clear-and-convincing-proof standard as to relator's claims would also be consistent with pertinent rules of statutory construction, namely, that statutes in derogation of the common law must be strictly construed and statutes that abrogate the common law must be clear in their intention to do so. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 359 (2005) ("Statutes which invade the common law … are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *Stiles v. International Bioresources, LLC*, 726 F. Supp. 2d 944, 950 (N.D. Ill. 2010) (Illinois whistleblower law did not abrogate common law retaliatory discharge claim).

> factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Santosky v. Kramer, 455 U.S. 745, 754-55 (1982) (quoting *Addington v. Texas*, 441 U.S. 418 (1979)); *see also Mathews v. Eldridge*, 424 U.S. 319, 332 (1975) (due process generally requires consideration of private interest that will be affected, the risk of erroneous deprivation of such interest through procedures used, and government's interest, including the fiscal and administrative costs that additional or alternative procedural requirements entail). In present-day FCA litigation, a defendant's liberty and property interests are implicated.

Prior to the 1986 amendments, the statute imposed double damages for violations, and penalties capped at $2,000 per false claim. This measure of damages and penalties was seen as necessary to adequately compensate the government: "We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it." *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943).[11]

[11] The Supreme Court acknowledged further that the imposition of penalties and double damages may indeed be seen as punitive: "It is true that 'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned,' but this is not enough to label it as a criminal statute. We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. ... The inherent difficulty of choosing a proper specific sum which would give full

Later, however, the Supreme Court acknowledged the punitive nature of multiple damage and penalty awards in its 1989 decision in *United States v. Halper* that a civil sanction is punitive when it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either a retributive or deterrent purpose[ ]." 490 U.S. 435, 448 (1989), *abrogated by United States v. Hudson*, 522 U.S. 93 (1997). The Court has also acknowledged that treble damages contain a punitive component. *See Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003) ("To begin with it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.").

As the law evolves to become more punitive, due-process concerns intensify and the rationale for a preponderance standard weakens. The notion that remedies under the FCA are purely compensatory or remedial is no longer credible, if it ever was credible in the post-double-damages era. Under the prevailing version of the statute, any damages awarded are trebled by operation of law. 31 U.S.C. § 3729(a)(1)(G). Even if treble damages could be justified as due compensation, what compensatory effect derives from awarding the plaintiff a third helping of the damages proved? Add a statutory right to attorneys' fees and costs, and the aggregate effect surely extends beyond compensation to deterrence and retribution.

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restitution was a problem for Congress." *Hess*, 317 U.S. at 551-52 (quoting *Brady v. Daly*, 175 U.S. 248, 157 (1889)).

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And this, of course, says nothing about the effect of statutory *per claim* penalties of between $10,781 and $21,563. In a given case, statutory penalties can easily dwarf any damages the government might claim.[12] It should go without saying, therefore, that the more defendants' monetary assets are at risk, the greater the impact on property interests. *See, e.g., Mahers v. Halford*, 76 F.3d 951, 954 (8th Cir. 1996) (due process required before inmate-plaintiffs can be deprived of their money by administrative procedure aimed at forced restitution). Given that FCA claims affect a defendant's property interest, and extend well beyond compensation to include punishment and deterrence, due-process concerns are rightly implicated.[13]

The FCA raises additional due process concerns beyond property interests, however. The Supreme Court in *Santosky* also noted that it has mandated a clear-and-convincing-proof standard where the "proceedings threaten the individual involved with 'a significant deprivation of liberty' or '*stigma.*'" 45 U.S. at 756 (quoting *Addington*, 441 U.S. at 425) (emphasis added). Many courts have recognized that

[12] Penalties in FCA cases have recently begun to reach unconstitutional proportions. In some cases, where the assessed penalties dramatically eclipse damages, courts have vacated or refused to impose penalties because they violate the Excessive Fines Clause of the Eighth Amendment. *See, e.g., United States ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, 764 F.3d 699, 702 (7th Cir. 2014). In *Absher*, the jury returned a verdict of $3 million in damages and $19 million in penalties. The trial court trebled the damages verdict, but vacated the entire penalty award as violative of the Excessive Fines Clause. *Id.* at 705.

[13] It is for these very reasons that punitive damages often require proof by more than a preponderance of the evidence. In at least half of the states, punitive damages are required to be proved by clear and convincing evidence, either by statute or common law. Doug Rendleman, *Common Law Punitive Damages: Something for Everyone?*, 7 U. St. Thomas L. J. 1, 3 (2009). Even where a clear-and-convincing standard is not a requirement, due process still imposes limits on punitive damage awards. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

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allegations of fraud, in general, and FCA claims, in particular, subject a defendant to the stigma of immorality and deceit. *See, e.g., United States ex rel. Keeler v. Eisai, Inc.*, 568 Fed. Appx. 783, 801, n. 23 (11th Cir. 2014) (FCA complaints can damage a defendant's goodwill and reputation); *United States ex rel. Clausen v. Laboratory Corp. of America,* 290 F.3d 1301, 1313, n. 24 (11th Cir. 2002). The mere act of having an FCA complaint filed against a company can stain that company's reputation sufficiently to impair its opportunities for business with the government. A verdict of liability can be devastating for defendants who may depend heavily on those opportunities. Beyond that, a verdict of liability can lead to severe, even permanent administrative sanctions such as exclusion or debarment. *See* 42 U.S.C. § 1320a–7 ("Exclusion of certain individuals and entities from participation in Medicare and State health care programs."). Thus, the fallout from a single FCA prosecution can be harsh, even threatening a defendant's livelihood.

The due-process analysis requires comparison of these private interests to the affected public interests, to include the interests of *qui tam* relators. To begin with, relators have no liberty interest at risk, and their monetary stake is limited to a minority share of any recovery plus fees and costs of suit. Relators' interests, therefore, appear significantly outweighed by the interests of defendants. The government arguably has more at stake in (monetary) property interests, to say nothing of its aim to police fraud and restore what was unlawfully taken from

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taxpayers. Although relators may claim that they champion, and thus share, the same interests as the government, non-intervened actions are fundamentally different from those prosecuted by the government. Most notably, relators' chief objective is to maximize their monetary recovery. Any other forms of relief are marginal considerations at best. In cases the government prosecutes, however, it typically emphasizes not only monetary, but other remedies and policy interests. Therefore, courts should distinguish between the government and relators with respect to the burden of proof.

And a clear-and-convincing burden of proof in *qui tam* cases should not adversely affect the government's recovery of losses due to fraud, given the high percentage of *qui tam* actions that are dismissed well short of trial. Meritorious claims should proceed to discovery and trial, even in the face of a stricter proof standard. Indeed, to the extent a clear-and-convincing proof standard deters the filing or prosecution of baseless or speculative *qui tam* actions, the government would benefit from the reduction of the number of the actions that previously burdened finite judicial resources. Theoretically, the costs of doing business with the government (and thus the cost to taxpayers) would also decline. *See* Klass and Holt, *Implied Certification*, at 42. In addition, to the extent prevailing defendants currently seek to recover their costs in defending *qui tam* actions, those costs could be reduced if the heightened proof standard deters meritless claims. *See* 48 C.F.R. § 31.205-33

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(“Professional and consultant service costs”); 48 C.F.R. § 31.205-47 (“Costs related to legal and other proceedings.”).

It is worth noting that a clear-and-convincing burden of proof would likely not deter the *filing* of *qui tam* actions, simply because the burden of proof is not likely to be a factor in the whistleblower’s pre-suit calculus. Overwhelmingly, a whistleblower’s primary pre-suit objective is to persuade the government to intervene. Rather, once the government has declined intervention, the clear-and-convincing standard would then loom much larger in the decision of the relator to proceed with the suit. Logically, a higher proof hurdle should be a factor that would dissuade some relators and their counsel from pursuing marginal claims beyond the declination of intervention.

The magnitude of a defendant’s exposure in a given case to the range of FCA damages and penalties also raises concerns about the risk of error. The preponderance standard reflects a more or less equal distribution of the risk of error. *Santosky*, 455 U.S. at 755 (“[A] ‘fair preponderance of the evidence’ standard indicates both society’s ‘minimal concern with the outcome,’ and a conclusion that the litigants should ‘share the risk of error in roughly equal fashion.’”) (quoting *Addington*, 441 U.S. at 423). However, as statutory and administrative remedies compound and more private interests are implicated (property, stigma, administrative sanctions), fairness requires liability to be underpinned with greater certainty. To the extent relators’

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claims are more speculative and less certain than those pursued by the government, the preponderance standard becomes harder to justify.

VI. RELATOR'S BURDEN OF PROOF AND THE GOVERNMENT'S DECISION TO INTERVENE

One final consideration is whether raising the proof standard on relators will force the government's hand in some cases, increasing pressure on it to intervene where it otherwise would not. The underlying logic is that where a relator faces certain hurdles, procedural or substantive, that do not confront the government, the government might be more inclined to intervene in a case. To answer this question it is necessary to consider the factors that influence the government's intervention decisions:

> [W]e don't typically give public explanations of why we don't intervene. Sometimes it's because the dollar amount is small. Sometimes it's because … we think that the relator is capable of handling the case himself, or the relator's counsel. Sometimes we do decline to intervene, because we're skeptical of the merits of a case. But even in those situations, it could be that we agree with the relator's theory and simply don't know whether the facts could be proved. ... The only other thing I would say is that our decisions about whether to intervene in particular cases would be skewed if we believed that courts would draw from our failure to intervene an adverse inference as to our views on the legal theory. If we felt that we would be made to seem skeptical of the implied certification by not intervening, we'd feel pressured to do it.

Transcript of Oral Argument at 48-49, *Escobar*, 136 S. Ct. 1989 (2016) (Remarks of Deputy Solicitor General Malcolm Stewart).[14]

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[14] https://www.supremecourt.gov/oral_arguments/argument_transcripts/15-7_6537.pdf.

Since the government typically declines to reveal its reasons for not intervening, no empirical government data on non-intervention is publicly available. Deputy Solicitor General suggests that (1) the relative merits of the case, (2) the amount at stake (damages and penalties), (3) the competence and experience of relator's counsel, and (4) the availability of resources in the DOJ and the local U.S. Attorney's office are factors that influence the government's intervention decision in any *qui tam* case. *See also* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013) (using regression analysis to identify the factors that influence intervention decisions).[15] Other government representatives have also stressed the importance of case merit:

> [T]he Department continues to actively support the *qui tam* provisions of the Act by dedicating the resources necessary to investigate allegations to the fullest extent, by litigating the meritorious cases vigorously, and by ensuring that settlements reflect both the gravity of the violations and the loss to the Treasury. ... And although the Department has declined to intervene in 75 to 80 percent of the *qui tams* that have been filed, only 2.6 percent of total recoveries since 1986 under the Act, or $520 million, has been recovered in those cases where we have declined or otherwise not participated. This latter

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[15] The author takes a scholarly approach using regression techniques to analyze and measure the determinants of government intervention. The model evaluates variables such as resource constraints, political influences, relator experience, relator's counsel's experience, and defendant's size/resources. Nonetheless, the one variable the model was not suited to evaluate was case merit: "To be sure, the regression findings should be viewed with caution. The most obvious problem is omitted variable bias: because we cannot directly observe case quality, estimates of the marginal effect of various covariates on DOJ intervention may be biased." Engstrom, *Public Regulation*, 107 NW. U. L. REV. at 1736-37. Despite this qualification, the author ultimately concludes that DOJ bases its intervention decisions to a meaningful degree on merit. *Id.* at 1749 ("[T]he evidence presented above suggests that DOJ has the capacity to screen cases on merits grounds, even at the margins.").

> statistic reveals that the Department has been appropriately judicious in its review of *qui tam* matters and has been highly successful in intervening in those cases that have *true merit.*[16]

In other words, between 1986 and the end of 2007, more than 97% of all FCA recoveries came from either the *qui tam* cases in which the government intervened or those FCA claims the government initiated—a stunning statistic. *See also* Engstrom, *Public Regulation*, 107 NW. U. L. REV. at 1720, 1722 (90% rate of recovery in intervened cases, 10% rate in non-intervened cases; cases prosecuted by government generated 94% of all monies recovered under FCA between 1989 and 2011).

These types of statements and the numbers behind them do little to dispel the notion that the government tends to pass on cases that it deems lacking in merit. *See, e.g., United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 331 (5th Cir. 2011) ("The arbitrariness of Jamison's selection of defendants is indicated by the fruits of his suit. After a lengthy investigation, the government chose to intervene against only the seven defendants named in this appeal, out of the almost 450 defendants. The cases against the others presumably lacked merit, which would be consistent with the inference that Jamison selected them arbitrarily."). In a sense, the relator's burden of proof could conceivably have a bearing on the government's assessment of the merit or strength of a case, insofar as a given quantum of proof will present an arguably stronger (easier to prove) case under a preponderance standard.

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[16] Statement of Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Before the United States Senate Committee on the Judiciary, Feb. 27, 2008 at 8, http://www.friedfrank.com/files/QTam/testimony_hertz.pdf (emphasis added).

Any increased pressure on the government is speculative, however, and lessened by a few considerations. First, intervention declinations are revocable. That is, having passed on a case initially, the government retains the right, upon a showing of good cause, to intervene at a later time. *See* 31 U.S.C. § 3730(c)(3). So, if the government elects to leave the relator to her own devices, it can always seek to intervene later (with leave of court) if it perceives a need to protect its interests.

Second, even where a relator's case is dismissed with prejudice, any dismissal order typically provides that the dismissal is without prejudice as to the United States, in cases in which it has not intervened. Put differently, the government's rights are usually not finally adjudicated in a case that it neither prosecuted nor controlled.[17]

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[17] *See, e.g., Urquilla-Diaz v. Kaplan Univ*. 780 F.3d 1039, 1057 (11th Cir. 2015) (judgment dismissing *qui tam* action with prejudice modified to indicate that order was without prejudice as to the United States); *United States ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 456 (5th Cir. 2005) (dismissal with prejudice as to relator, but without prejudice as to United States which had not intervened in case); *United States ex rel. Newsham v. Lockheed Missiles & Space Co*., 190 F.3d 963, 967 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000) (relator's action dismissed with prejudice based on public disclosure, but without prejudice as to United States).

Often the government will file a "Statement of Interest" in cases in which it has not intervened setting forth its position that any dismissal should be without prejudice as to the United States. *See, e.g., United States ex rel. Olsen v. Lockheed Martin Corp.*, No. 1:09-cv-03083-JEC, 2010 WL 1786606 at *2 (N.D. Ga. February 1, 2010). The government's "Statement" filed in the *Olsen* matter provided as follows:

> In this case, on May 12, 2009, the United States notified the Court and all parties that the government was not prepared to make an intervention decision. Subsequently, Relator's allegations were revised in Relator's August 5, 2009, amended complaint. Relator's revised allegations merit further investigation. Accordingly, the United States continues to reserve its right to seek leave to intervene in this matter, or file a separate suit, at a later date. Thus, in the event that this Court dismisses, in whole or in part, Relator's amended complaint on the grounds that relator failed to satisfy Rule 9(b), the United States requests that such dismissal be without prejudice to the United States.

Id. at *3. Note also that in *Olsen*, the government decided not to make an election regarding intervention—another option, not expressly provided for in the statute, of which it has availed itself

Another factor that should make prosecutors more sanguine about a heightened burden of proof for relators is the government's use of the civil investigative demand (CID) to thoroughly investigate potential claims. *See* 31 U.S.C. § 3733. The CID is the government's one-way discovery device affording access to the defendant's documents and witnesses, as well as information in the possession of third parties, to better inform the government's intervention decision. The 2009 amendments to the FCA granted the Attorney General the power to delegate the authority to issue CIDs. The 2009 amendments also permitted essentially unfettered sharing of information obtained through CIDs with relators and their counsel. 31 U.S.C. § 3733 (a)(1)(D) ("Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.").

With these amendments, the government need no longer depend on information provided by relators or government sources and may avail itself of the opportunity for collaboration with relators during the investigation phase of the

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more frequently of late. *See* D. Grayson Yeargin and Conor S. Harris, *Government's Increased Use of Noncommittal Intervention Filings Complicates* Qui Tam *Proceedings Under the False Claims Act*, Apr. 18, 2013, http://www.nixonpeabody.com/files/156465_GIWC_Alert_Qui_Tam_Proceedural_Developments_18APR2013.pdf [*sic*]. As with intervention post-declination, the government may invoke this tactic as a means to observe from the sidelines, preserving an option to intervene if circumstances require it, while continuing to investigate claims pursued by the relator.

case.[18] As it concerns intervention, CID discovery arguably gives the government a more complete knowledge base with which to exercise its intervention option, thereby reducing the likelihood of an erroneous decision in the first instance.

CONCLUSION

The 1986 and later amendments to the FCA have made it easier and more lucrative for private actors to bring suit in the name of the United States. Enhanced incentives and expanded theories of liability have produced a dramatic increase in *qui tam* filings, many pursued by repeat whistleblowers represented by lawyers specializing in FCA claims. The data on FCA case dispositions shows that many of these claims should never have been brought or never pursued past the government's declination of intervention. These non-meritorious claims add to the cost of doing business with the government, the cost to litigants, as well as the cost to taxpayers, and they produce no corresponding benefit.

Support exists in recent Supreme Court precedent, logic, and due-process analysis for imposing the common-law clear-and-convincing standard of proof upon *qui tam* relators, when the government has declined intervention. This standard

[18] After the 2009 amendments, government issuance of CIDs mushroomed. In FY 2011, for example, DOJ authorized 888 CIDs, more than 10 times the number issued in the two-year period prior to the implementation of the delegation authority granted in the 2009 amendments. *See* DOJ Press Release, "Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and *Qui Tam* Enforcement," (June 7, 2012), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-stuart-f-delery-speaks-american-bar-association-s-ninth. Note that defendants may seek to preclude sharing the fruits of CID discovery with relators by moving for a form of protective order. Even so, the government now has the ability to be in a better position to evaluate the merits of a case before it must decide whether to rely on a relator facing a clear-and-convincing burden of proof.

should promote the prosecution of only the more meritorious claims that involve fraud, leading to greater fairness, reduced cost, and enhanced certainty of outcome.