STATE AND LOCAL GOVERNMENT DOCUMENTS AS "PUBLIC DISCLOSURES" UNDER THE FALSE CLAIMS ACT: WALKING THE TIGHTROPE BETWEEN PARASITIC LITIGATION AND LEGITIMATE CLAIMS

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I. INTRODUCTION

As an accountant for a small Montana hospital, James Alderson never suspected that by relentlessly following his moral compass, he would eventually serve as the catalyst for the largest Medicaid fraud investigation in history.[1] During the course of Alderson's employment with North Valley Hospital, the company managing the hospital's affairs asked Alderson to submit grossly inflated cost reports to the federal government.[2] When Alderson refused, he was fired and forced to relocate his family from their comfortable home to a small apartment in a neighboring town.[3] He later obtained documents proving his former employer defrauded the government while filing suit against the hospital for wrongful termination.[4] A former colleague informed Alderson that based upon those documents, he could potentially sue the hospital's management company for fraud on behalf of the federal government.[5] Alderson took this advice to heart, making his suit "a second full-time job" for nearly six years.[6] After the government joined Alderson's suit, a district court found North Valley Hospital's management company, which managed various hospitals throughout the United States,

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1. *See* All-About-Qui-Tam.org, Whistleblowers' Stories: James Alderson, http://all-about-qui-tam.org/stories_alderson.shtml (last visited March 25, 2008); Kurt Eichenwald, *He Blew the Whistle, and Health Giants Quaked*, N.Y. TIMES, Oct. 18, 1998, at 12.
2. Eichenwald, *supra* note 1, at 12.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

defrauded the federal government to the tune of tens of millions of dollars.[7] For his role in uncovering the fraud and initiating the suit, the court awarded Alderson 24% of the government's $85.7 million recovery.[8]

Alderson's triumph over the health care heavyweights came about due to the False Claims Act (FCA).[9] Through the FCA, Congress created a unique mechanism permitting private individuals to bring suit against government contractors who attempt to defraud the federal government, and thereby taxpayers, by overcharging the government for their services.[10] The FCA permits informants, or "relators," to bring forth allegations of fraud against any publicly funded program or contract, with the single exception of tax fraud.[11] However, in order to avoid "parasitic lawsuits," the FCA restricts an individual's right to bring suit by barring actions based on "publicly disclosed" information.[12] This public disclosure bar thus avoids a flood of frivolous claims by requiring individuals to possess personal knowledge of contractor fraud.[13] Unfortunately, the line between limiting unnecessary litigation and encouraging legitimate whistleblowers like James Alderson to come forth is somewhat blurred. While the FCA's public disclosure bar clearly restricts suits based upon information disclosed via documents produced by the federal government, courts disagree as to whether the bar also limits suits based upon information found in documents produced by state governments. Through this debate, courts must ultimately decide which harm is more dangerous: allowing government contractor fraud to go undetected or

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7. United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323 (M.D. Fla. 2001).

8. *Id.* The court remarks that where a person "carefully develops all the facts and supporting documentation necessary to make the case required by law, and where that person continues to play an active and constructive role in the litigation that leads ultimately to a successful recovery to the United States Treasury, the Court should award a percentage substantially above 15% and up to 25%." *Id.* at 1332. In determining what exact percentage a plaintiff should receive, courts should consider three factors: (1) the significance of the information provided to the government by the qui tam plaintiff; (2) the contribution of the plaintiff to the result; and (3) whether the information in the suit provided by the relator was previously known to the government. *Id.* Given Alderson's participation in both the discovery of the fraud and the initiation of the lawsuit, the court awarded Alderson at the higher end of the recovery spectrum. *Id.*

9. *See* 31 U.S.C. § 3729 *et seq.* (2000).

10. *Id.* § 3729 *et seq.*

11. Tax Payers Against Fraud, The False Claims Act Legal Center, Why the False Claims Act is Important, http://www.taf.org/whyfca.htm (last visited Mar. 25, 2008).

12. 31 U.S.C. § 3730(e)(4)(A). Note that the public disclosure bar did not apply to Alderson in his suit against the hospital management company because the documents on which Alderson based his cause of action were never available to the public prior to the initiation of his lawsuit. *See generally Alderson*, 171 F. Supp. 2d 1323.

13. 31 U.S.C. § 3730(e)(4)(A).

permitting the overcrowded federal dockets to bear the burden of increased superficial claims.

This Comment examines the advantages and disadvantages of including state government documents as "public disclosures" pursuant to the FCA. The FCA's public disclosure bar essentially attempts to prevent private citizens from using easily accessible information as a means to jump on the litigation bandwagon while simultaneously encouraging whistleblowers to report the misdeeds of fraudulent government contractors. Given both goals, the question becomes whether the FCA's public disclosure bar may simultaneously encompass some state government documents for the sake of heading off parasitic litigation while excluding others in order to allow justified relators access to the FCA. While no clear answer exists within the public disclosure bar's current statutory language, synthesis of existing federal court of appeals case law provides a potential solution.

Section II of this Comment provides a brief overview of the FCA and the historical background of qui tam actions needed to comprehend the public disclosure bar, which is discussed in detail in section III. Section IV then discusses recent shifts in judicial attitude involving state government documents and their inclusion within the public disclosure bar. Section V then analyzes the varying views discussed in section IV and discusses whether a reconciliation between the two central views is possible.

II. OVERVIEW OF THE FCA

The FCA essentially permits individuals to bring forth "qui tam" suits against government contractors who file false claims for payment against the federal government. "Qui tam," or, in full, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, literally means "who as well for the king as for himself sues in this matter."[14] In the modern sense, qui tam actions serve as incentives to smoke out fraud against the government by awarding those reporting the fraud a share of the loss recovered.[15] Part A below examines the history of qui tam actions necessary to understand the modern FCA's development and limitations. Part B focuses on the origin and operation of today's FCA. Together, these sections provide the foundation for a clear understanding of the central issue of this Comment, the FCA's public disclosure bar in relation to documents produced by state and local governments.

14. BLACK'S LAW DICTIONARY 943 (8th ed. 2004).
15. 31 U.S.C. §§ 3370–3733 (2000).

A. Ancient Rome and Beyond: Historical Roots Underlying the FCA

The birth of qui tam actions occurred in ancient Rome around 43 B.C.[16] During that time, Rome sought to strengthen enforcement of its criminal statutes by rewarding citizens who reported criminal misdeeds with a portion of the accused's property in the event of a successful prosecution.[17]

Several hundred years later in Anglo-Saxon England, similar legislation arose. Around 695 A.D., a law banning work on the Sabbath was passed, which included a provision awarding private citizens who inform the government of violations half the fine collected from the accused as well as half of the profits from the accused's illegal labor.[18] In centuries following the inception of qui tam actions in Britain, the areas of public regulation increased to include incentives for public informants who report violations of religious duties, public safety, environmental regulation, alcohol consumption, and statutory duties of public officials.[19]

Although qui tam laws sustained through the better part of twelve centuries in Britain, the qui tam enthusiasm eventually gave way to annoyance on the part of both the public and government. Extortion, fraudulent or malicious prosecution of innocent defendants, and mob violence are common reasons underlying Parliament's 1951 decision to abolish all qui tam statutes.[20]

B. Qui Tam in the United States: The Birth and Subsequent Development of the FCA

In the United States, the development of qui tam actions starkly contrast with the qui tam abatement in Britain. Virtually nonexistent prior to the mid-nineteenth century, qui tam first appeared on the American legislative landscape during the Civil War in response to widespread fraud by Union Army suppliers.[21] Originally, the FCA imposed harsh penalties upon

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16. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 566 (2000).
17. *Id.*
18. *Id.* at 567.
19. *Id.* at 600.
20. *Id.* at 548–49. As to mob violence, Professor Beck offers as an example the 1837 Charles Dickens classic *The Pickwick Papers*, in which Pickwick and a friend are "mistaken for informers and are physically assaulted by their cab driver, only narrowly escaping further indignities at the hands of a mob." *Id.* at 548 n.96.
21. All-About-Qui-Tam.org, History of the False Claims Act, http://www.allaboutquitam.org/fca_history.shtml (last visited February 17, 2007). Given the era in which it was passed, the FCA was known as the "Lincoln Law" during the early years of its enactment. *Id.*

violators, including double damages and a $2,000 fine per false claim submitted.[22] As a reward, public informants received half of the amount the government recovered.[23]

Since its inception in 1863, the FCA has undergone two major overhauls, discussed in further detail below in section III. The present day FCA, though more restrictive than the 1863 version, still maintains the goal of uncovering fraud against the federal government through private citizens. Evolving from the Civil War era FCA, today's version requires parties hoping to file successful claims to meet several criteria. First, the relator plaintiff's claim must include a "complaint and written disclosure of substantially all material evidence and information the person possesses."[24] Such materials and information are then examined by the court in camera and held under seal while the Justice Department investigates and decides whether to intervene in the matter.[25]

In addition to personal possession of the relevant materials and information, Justice Department involvement in FCA claims is often crucial to their survival. The Justice Department's involvement is a highly determinative matter for the relator for two key reasons. First, Justice Department involvement directly fixes the percentage the relator can obtain from the proceeds of the claim.[26] If the Justice Department takes over the primary responsibility of the relator's claim, the relator receives 15% to 25% of the settlement.[27] However, if the Justice Department declines involvement and the relator opts to pursue the claim alone, the range of recovery jumps to a range of 25% to 30%.[28] Perhaps most importantly, the Justice Department's decision whether to intervene alleviates the relator's financial burden in pursuing the claim in its entirety. Where the Justice Department declines intervention, the relator is responsible for the entire cost of litigation.[29] The

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22. *Id.*
23. *Id.*
24. 31 U.S.C. § 3730(b)(2) (2000).
25. 31 U.S.C. § 3730 (b) through (c).
26. 31 U.S.C. § 3730(d)(1).
27. 31 U.S.C. § 3730(d)(1). The exact percentage recovered turns on "the extent to which the person substantially contributed to the prosecution of the action." *Id.* § 3730(d)(1). Courts may also take into consideration attorneys fees and reasonable expenses incurred. *Id.* § 3730(d)(1).
28. 31 U.S.C. § 3730(d)(2). As with section 3730(d)(1), the relator may also recover for reasonable expenses and attorneys fees. *Id.* § 3730(d)(2).
29. *See* Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135 (2006) (providing an in-depth analysis of the financial implications involved with FCA claims). On average, the costs of bringing average FCA claims are roughly $250,000 to $500,000, and trends show an increase in more complex cases costing in excess of $10 million. Jonathan T. Brollier, Comment, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Action Brought Under the False Claims Act,* 67 OHIO ST. L.J. 693, 706 (2006).

Justice Department intervenes in roughly 20% of FCA claims; in 38% of the cases where the Justice Department declined involvement, the FCA claims were either abandoned or thrown out by the court.[30] While this statistic partially suggests a number of frivolous claims were removed from litigation for lacking merit,[31] it also indicates a number of claimants simply give up in the face of mounting legal fees during periods of lengthy litigation.[32]

III. THE PUBLIC DISCLOSURE BAR

Though access to claims under the modern FCA is restricted by Justice Department refusal to intervene and failure of a relator to personally possess necessary evidentiary support, the main restriction that separates today's FCA from its Civil War era ancestor is the public disclosure bar. Found in section 3730(e)(4)(A) of the FCA, the public disclosure bar curbs frivolous claims based upon evidentiary documents either (1) already in the federal government's possession or (2) made public via media reports.[33] The public disclosure bar's impact is best understood through its historical evolution. Thus, part A below explores the development of the bar through time. Part B then focuses on the present form of the bar and how it operates to simultaneously discourage frivolous claims and encourage legitimate relators to come forth.

30. Depoorter & De Mot, *supra* note 29, at 142.
31. Aside from a relator opting to drop his or her FCA claim due to lack of funds, FCA claims may be dismissed by the government over the objection of the relator if the Justice Department provides the relator with notice and a hearing on the government's motion to dismiss." 31 U.S.C. § 3730(c)(2)(A).
32. *See* Taxpayers Against Fraud, The False Claims Act Legal Center, Why the False Claims Act is Important, http://www.taf.org/whyfca.htm (last visited February 17, 2007) (listing numerous financial perils involved with pursuing FCA claims without the Justice Department's involvement, including (1) the fraud failing to reach an amount worthy of the relator risking his or her career or the law firm risking the enormous time and expense; (2) the defendant declaring bankruptcy in the face of the triple damages levied under the FCA; and (3) the risk of a court finding a FCA claim frivolous and levying the cost of the defendant's attorneys fees upon the relator).
33. *See* 31 U.S.C. § 3730(e)(4)(A).

A. Historical Evolution of the Public Disclosure Bar: 1863 to Today

In the past century, the public disclosure bar has evolved more so than any other provision of the FCA.

1. Limitless and Abused: The Original 1863 FCA's Lack of a Public Disclosure Bar

In the beginning, anyone could file FCA claims, creating "'a race to the courthouse between the Government's civil lawyers and private parties.'"[34] Thus, the original FCA placed no limit on relators' ability to infringe upon the Attorney General's role in controlling government fraud actions.[35] Further, relators could latch on to information already in the government's possession to bring suit and, ultimately, reap financial profits, even though no new information was brought to the government's attention. Despite the easy access to FCA monetary rewards, after its initial inception in 1863, the FCA remained unamended for 80 years, due primarily to an initial lack of use.[36] However, once government spending began to increase during the New Deal era, fraud became more widespread, and the FCA became a crucial device in uncovering deceitful contractor claims.[37] Unfortunately, parasitic claims by relators soon outweighed the FCA's utility as a fraud detector, as informants began filing suit against government contractors based solely upon information obtained by the government.[38] In other words, informants reaped financial benefits from a contractor's fraud even though the informant had not put any personal effort into unearthing the misdeeds.[39]

United States ex rel. Marcus v. Hess[40] is but one example of a freeloading relator bringing forth an egregious FCA claim. In *Marcus*, a

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34. J. Morgan Phelps, Comment, *The False Claims Act's Public Disclosure Bar: Defining the Line Between Parasitic and Beneficial*, 49 CATH. U. L. REV. 247, 252 (1999) (quoting False Claims Amendments Act of 1986, S. REP. NO. 99–345, at 10–11, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273).

35. *Id.* at 252.

36. James Roy Moncus III, Comment, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?*, 55 VAND. L. REV. 1549, 1554–55 (2002).

37. United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 679 (D.C. Cir. 1997).

38. *See*, *e.g.,* United States *ex rel.* Martin v. Hess, 317 U.S. 537 (1943) (where the Supreme Court held a qui tam action valid even though the informant had obtained all his information about the accused government contractor via the government itself, thereby making no personal contribution to uncovering the contractor's crime).

39. George S. Mahaffey Jr., *Taking Aim at the Hydra: Why the "Allied-Party Doctrine" Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 REV. LITIG. 629, 640 (2004).

40. 317 U.S. 537.

relator brought suit against a group of electrical contractors for rigging the bidding process for Public Works Administration contracts, forcing the government to pay higher sums to the winning bidder.[41] The U.S. Supreme Court held the relator's suit valid, even though the relator solely relied upon the same information used by the government itself in an earlier criminal suit for fraud against the same defendants for the same fraudulent behavior at issue in *Marcus*.[42] *Marcus*' holding alerted Congress to two unintended results of the original FCA: (1) the Attorney General's lack of control over government fraud actions and (2) the potential for parasitic litigation. Thus, mere months after the Court decided *Marcus*, Congress created the public disclosure bar to prevent individuals with no role in uncovering corruption from reaping the FCA's relator rewards through information that was available to the government itself as well as the public at large.[43]

2. Restrictive and Ignored: The Initial 1943 Public Disclosure Bar

In response to *Marcus*, the ease in filing qui tam claims halted in 1943 when Congress amended the original FCA by (1) drastically reducing the informant's reward, thereby reducing the incentive to report, and (2) eliminating qui tam actions when the government already possessed the relevant information of the fraud, even if the government was not actively investigating the matter.[44] The second change, the prohibition of FCA actions where the federal government already possessed the evidentiary documents on which a relator's claim was based, became known as the "public disclosure bar."

As it originally read in 1943, the public disclosure bar prohibited courts from hearing FCA suits "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[45] While the original FCA was overly broad regarding which relators could bring suit, the initial public disclosure exception from 1943 made the FCA too restrictive to potential informants, as the average number of claims following the addition of the exception dropped to six per

41. *Id.* at 539.
42. *Id.*
43. "In Congress' view, a relator is not helping the government much (at least not enough to share in the judgment of the lawsuit) if the government already knows about the fraud the relator is disclosing." Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 47 (2002).
44. *See* Act of Dec. 23, 1943, ch. 377, 57 Stat. 608, 609 (1943) (codified as amended at 31 U.S.C. § 232 (1976)).
45. Act of Dec. 23, 1943, ch. 377, at § 3491(c), *amended by* 31 U.S.C. § 3730(e)(4)(A) (2000).

year.[46] This drop can be attributed to the post-1943 FCA's refusal to permit any claim where the federal government already possessed knowledge of fraud prior to the relator filing suit, even if the government's information came from the relator himself.[47] For example, in *United States ex rel. Wisconsin v. Dean*, the State of Wisconsin's FCA claim against a physician committing Medicaid fraud was barred because the federal government already possessed the information Wisconsin used as the basis for its claim.[48] Bound by the statutory language of the FCA, the Seventh Circuit refused to permit Wisconsin's claim even though Wisconsin was the sole reason the federal government possessed the information, as Wisconsin, pursuant to federal law, submitted its findings to the U.S. Department of Health and Human Services shortly before filing its FCA claim.[49]

Dean is but one of many examples of how the initial 1943 version of the public disclosure bar severely limited successful FCA claims. Overall, suits brought under the FCA were few and far between until Congress' radical intervention in 1986.[50]

3. Clarified and Utilized: The 1986 Public Disclosure Bar

The mid-1980s saw a rapid influx of public outcry regarding attempts to defraud the federal government. Reports of $640 toilet seats and $7,600 coffee pots[51] and scandals involving dishonest defense contractors[52] spurred Congress to re-examine the FCA, which had remained essentially dormant since its "emasculation" in 1943.[53] In 1986, Congress passed a series of radical amendments to the FCA, causing an immense increase in the amount of claims brought each year.[54] Specifically, as a result of the unjust outcomes

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46. Bucy, *supra* note 43, at 48.
47. *See* Act of Dec. 23, 1943, *amended by* 31 U.S.C. § 3730(b)(4) (2000).
48. 729 F.2d 1100, 1103 (7th Cir. 1984).
49. *Id.* at 1106–07 (noting, "If the State of Wisconsin desires a special exemption to the False Claims Act because of its requirement to report Medicaid fraud to the federal government, then it should ask Congress to provide the exemption").
50. All-About-Qui-Tam.org, *supra* note 21.
51. *See, e.g.,* Bill Keller, *Navy Pays $660 Apiece for Two Ashtrays*, N.Y. TIMES, May 29, 1985, at A14.
52. *See, e.g.,* William Proxmire, *Cleaning up Procurement: Why Military Contracting Is Corrupt*, N.Y. TIMES, Dec. 15, 1985, at 3.
53. All-About-Qui-Tam.org, *supra* note 21.
54. Moncus, *supra* note 36, at 1557 (noting "while the decade before the enactment of the 1986 amendments saw the filing of only twenty qui tam FCA suits, relators filed nearly 1,100 suits in the decade after the 1986 amendments").

in cases such as *Dean*[55] and *United States ex rel. Weinberger v. Florida*,[56] Congress sought to change the public disclosure bar by attempting to create a delicate balance between preventing frivolous suits from overzealous relators and permitting legitimate suits from those with personal knowledge of government fraud. In doing so, Congress lifted the so-called "jurisdictional bar" set in place by the 1943 amendments.[57] While the 1986 amendment to section 3730(e)(4) did not remove the public disclosure bar to the FCA, it did provide an exception to the bar by allowing a relator to bring suit based upon public information when the relator was the original source of the information.[58]

Found in section 3730(e)(4) of the FCA, the original source exception to the public disclosure bar states:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, *unless . . . the person bringing the action is an original source of the information*.[59]

The FCA goes on to define an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."[60] With the original source provision in place, the FCA became much friendlier to relator plaintiffs, as evidenced by the number of annual FCA claims jumping from an average of 6 per year before 1986[61] to 382 in 2006.[62] Once weak and under-utilized, the FCA now provides a significant source of

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55. 729 F.2d 1100.
56. 615 F.2d 1370, 1371 (5th Cir. 1980) (where the court refused to permit a relator's claim against the Florida Department of Commerce because he first submitted evidence of Florida's wrongdoings to the U.S. Attorney General before filing suit).
57. 31 U.S.C. § 3731(e)(4) (2000). *See also* Bucy, *supra* note 43, at 47.
58. The public disclosure bar and the original source provision are discussed in greater detail below in section II.B.
59. 31 U.S.C. § 3730(e)(4)(A) (emphasis added).
60. 31 U.S.C. § 3730(e)(4)(B).
61. Bucy, *supra* note 43, at 48 (citing Steve France, *The Private War on Pentagon Fraud*, 76 A.B.A. J. 46, 47 (1990)).
62. U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, FRAUD STATISTICS-OVERVIEW 1 (2006), http://www.taf.org/stats-fy2006.pdf .(last visited March 25, 2008).

revenue for the federal government: In 2006, the Department of Justice reported a record $3.1 billion in FCA settlements and judgments.[63]

B. Application of the Public Disclosure Bar

While courts have varying interpretations of the public disclosure bar, they generally agree that its application turns on three factors.[64] First, a disclosure is affected by the FCA's public disclosure bar if the disclosure was made by or in one of the sources Congress listed in section 3730(e)(4)(A).[65] Second, if the relator's claim is based upon the public disclosure, the bar prevents courts from hearing the claim.[66] Finally, in the event that a court finds the previous two factors exist, a third factor is considered: whether the relator is an original source of the information upon which his or her claim relies.[67] If so, the bar will not prohibit the relator's claim from going forward.[68]

1. Defining "Public" Disclosures

Section 3730(e)(4)(A) lists several sources that immediately bar FCA claims where the relator is not an original source of the information relied upon in his or her complaint.[69] These sources are best placed into one of the following three categories: (1) "'a criminal, civil, or administrative hearing;'" (2) "'a congressional, administrative, or Government Accounting Office report;'" and (3) "'the news media.'"[70]

Under the first category, courts interpret "criminal, civil, or administrative hearings" broadly, often including written discovery materials, complaints, and criminal indictments.[71] For example, in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, the D.C. Circuit found "hearing" to include "informal, 'paper' proceedings" rather than formal proceedings open

63. Press Release, Department of Justice, Justice Department Recovers Record $3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (November 21, 2006) (available at http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html).
64. United States *ex rel.* Hays v. Hoffman, 325 F.3d 982, 987 (8th Cir. 2003).
65. *Id.*
66. *Id.*
67. *Id.*
68. *See* 31 U.S.C. § 3730(e)(4)(A).
69. *Id.* at § 3730(e)(4)(A).
70. United States *ex rel.* Bly-Magee v. Premo, 470 F.3d 914, 917 (9th Cir. 2006) (quoting 31 U.S.C. § 3730(e)(4)(A)).
71. 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, 30 (1998).

to the public.[72] Courts justify the broad interpretation of "hearing" based on the fact that courts often use the term to refer to formal as well as informal written proceedings.[73] Further, reading "hearing" broadly prevents relators from repeating the scenario in *Marcus*[74] and freeloading off of existing criminal or civil proceedings, the exact concern which propelled Congress to add the public disclosure bar to the FCA in 1943.[75]

Conversely, the second category of disclosures, congressional, administrative, or Government Accounting Office reports, have traditionally been interpreted narrowly.[76] Thus, information from a Government Accounting report is publicly disclosed, as is anything gleaned from a congressional hearing.[77] However, as discussed in section IV of this Comment, recent developments regarding state and local reports have lead some courts to interpret this category of documents broadly, while others adhere to the tradition of narrow interpretation.

The final category, the news media, encompasses "newspaper accounts, television stories, and other types of media reports."[78] Given the clear plain meaning of section 3730(e)(4)(A) regarding the "news media," courts interpret this category quite literally.[79]

In sum, scholars as well as courts find that because Congress chose to enumerate specific categories of documents as public disclosures, "Congress intended that only certain types of disclosures should potentially disqualify a qui tam relator."[80]

2. *Defining "Based Upon"*

The public disclosure bar only applies when the relator bases his or her claim on publicly disclosed information.[81] However, the circuits of the Federal Court of Appeals are split as to whether "based upon" means "derived from" or "substantially similar to."[82]

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72. 14 F.3d 645, 652 (D.C. Cir. 1994).
73. *Id.*
74. *Marcus*, 317 U.S. 537.
75. *Quinn*, 14 F.3d at 652.
76. Raspanti & Laigaie, *supra* note 71, at 31.
77. *See* United States *ex rel.* Fine v. Sandia Corp., 70 F.3d 568, 572 (10th Cir. 1995).
78. Raspanti & Laigaie, *supra* note 71, at 30.
79. *See, e.g.,* Wang *ex rel.* United States v. FMC Corp., 975 F.2d 1212 (9th Cir. 1992) (holding newspaper articles about defective vehicles constituted public disclosures pursuant to the FCA).
80. Raspanti & Laigaie, *supra* note 71, at 32.
81. 31 U.S.C. § 3730(e)(4)(A) (2000).
82. Phelps, *supra* note 34, at 264.

Courts finding "based upon" equates with "derived from" hold that the public disclosure bar only applies when the relator "actually derives his information straight from that disclosure."[83] Thus, when a realtor relies upon information that is highly similar or identical to information already in the federal government's possession, he is not barred from filing suit unless he gathered his information directly from the government source.[84] Such a reading, as employed by the Fourth Circuit in *United States ex rel. Becton Dickinson & Co.,*[85] assumes that because the relator did not actually use the same information already possessed by the government to state his or her claim, he or she is not engaging in parasitic litigation.[86]

On the other hand, courts defining "based upon" as "substantially similar to" extend the public disclosure bar to "qui tam actions when the relator has not brought any significant independent information to the suit."[87] Many courts consider this stricter view as necessary to curtail parasitic litigation and to avoid rendering the original source provision useless.[88] In the eyes of these courts, under the "derived from" view, a news report may alert a relator to existing government fraud, and, in response, the relator may subsequently conduct his or her own investigation in order to avoid the public disclosure bar.[89]

The U.S. Supreme Court, while silent as to the meaning of "based upon" within the context of the FCA, has noted in interpreting a different statutory federal jurisdictional bar that "a claim was 'based upon' conduct only if that conduct formed the 'basis' or foundation' of the claim."[90]

3. *Defining "Original Source"*

Section 3730(e)(4)(B) of the FCA defines "original source" as "an individual who has direct and independent knowledge of the information on

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83. *Id.*
84. *Id.* at 265.
85. 21 F.3d 1339 (4th Cir. 1994). In *Beckton*, the Fourth Circuit used Webster's Third International Dictionary to define "based upon" as "to use as a basis for" rather than turning to the legislative history behind the FCA's public disclosure bar. *Id.* at 1348 (citing *Webster's Third New International Dictionary* 180 (1986)).
86. Phelps, *supra* note 34, at 265.
87. *Id.*
88. *See*, *e.g*., United States *ex rel* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 683 (D.C. Cir. 1997) (noting that the FCA "requires that a relator have "'direct and independent' knowledge of the alleged fraud or some of its components, and have voluntarily provided the information to the government, in order to benefit from the 'original source' exception to the jurisdictional bar" (citing 31 U.S.C. § 3730(e)(4)(B)).
89. Phelps, *supra* note 34, at 266.
90. Moncus, *supra* note 36, at 1570 (citing Saudi Arabia v. Nelson, 507 U.S. 349 (1993)).

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."[91] Thus, under this exception to the public disclosure bar, if the relator is the original source of the publicly disclosed information, his or her claim will not be barred. Like virtually every element of the FCA's public disclosure bar, courts interpret the original source provision to varying degrees.

The Second and Ninth Circuits require the original source actually make the initial disclosure to the public to ensure a relator comes forth with a claim as soon as possible.[92] The Fourth Circuit takes the opposite position by not requiring relators to either disclose the information to the public or bring the allegation to the federal government's attention prior to the information reaching the general public.[93] Finally, the Sixth and D.C. Circuits adopted a hybrid of the other two views, holding "an original source does not have to provide information to the disclosing entity, [but] the [relator] does have to come forward before the information is publicly disclosed."[94]

IV. RECENT DEVELOPMENTS

In December 2006, the Ninth Circuit Court of Appeals weighed in on whether documents resulting from audits performed by a state government entity qualify as public disclosures under the FCA.[95] Finding that a published audit report produced by the California State Auditor amounted to a "public disclosure" for purposes of the FCA,[96] the Ninth Circuit's decision furthered the trend started by the Eighth Circuit that the public disclosure bar encompassed state audit documents.[97]

The Eighth and Ninth Circuits reject the view expressed by the Third Circuit in 1997 that state audit documents do not fall under the label of "public disclosures" for purposes of invalid FCA claims.[98] In other words, under the new "majority" rule of the federal circuits, if a relator's claim is based upon document from an audit procured by a state government, that

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91. 31 U.S.C. § 3730(e)(4)(B).
92. Wang v. FMC Corp., 975 F.2d 1412, 1414 (9th Cir. 1992); United States *ex rel*. Dick v. Long Island Lighting Co., 912 F.2d 13, 17 (2d Cir. 1990).
93. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1355 (4th Cir. 1994).
94. Phelps, *supra* note 34, at 270–71 (citing United States *ex rel* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 688-89 (D.C. Cir. 1997); United States *ex rel.* McKenzie v. Bellsouth Telecomms., Inc., 123 F.3d 935 (6th Cir. 1997)).
95. *See* United States *ex rel* Bly-Magee v. Premo, 470 F.3d 914 (9th Cir. 2006).
96. *Id.* at 917.
97. *See* Hays v. Hoffman, 325 F.3d 982 (8th Cir. 2003).
98. *See* United States *ex rel.* Dunleavy v. County of Delaware, 123 F.3d 734 (3d Cir. 1997).

claim is barred as a public disclosure, and unless the relator is an original source of the documentation, the relator cannot allege a FCA claim.

V. ANALYSIS

After the FCA laid dormant for decades, Congress reinvented the public disclosure bar through the addition of the original source provision in order "to encourage any individual knowing of Government fraud to bring that information forward."[99] Like Congress, the U.S. Supreme Court has also honored the remedial character of the FCA, refusing "to accept a rigid, restrictive reading"[100] and instead favoring a broad, remedial interpretation.[101] Yet, regardless of the rampant fraud against the federal government, the simple truth remains that today's federal dockets are crowded due in part to suits filed by overzealous parties ready to jump on the litigation bandwagon. Thus, interpreting the FCA's public disclosure bar requires courts to walk a fine line between "enhanc[ing] the Government's ability to recover losses sustained as a result of fraud against the Government"[102] and preventing frivolous or politically motivated actions.[103]

Though the public disclosure bar clearly encompasses federal government documents, including state and local government documents as "public documents" for purposes of the bar opens up a proverbial can of worms in terms of discouraging parasitic litigation while simultaneously encouraging whistleblowing. Restricting suits based on such documents closes a potential loophole for relators hoping to latch onto actionable information they had no role in uncovering. Conversely, prohibiting FCA claims based upon state government documents fails to take into account instances where the state government entity is the party attempting to defraud the federal government or where a document produced by a state government fails to reach both the federal government or the general public's attention. The remainder of this Comment examines each side of the dilemma surrounding state and local government documents and proposes a compromise that alleviates this debate from becoming a statutory Catch-22. Part A below discusses the potential arguments in favor of including state and

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99. False Claims Amendments Act of 1986, S. REP. NO. 99–345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266–67.
100. United States v. Neifurt-White Co., 390 U.S. 228, 232 (1968).
101. Moncus, *supra* note 36, at 1579–80 (citing *Nelson*, 507 U.S. 349).
102. False Claims Amendments Act of 1986, S. REP. NO. 99–345, at 1, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.
103. False Claims Amendments Act of 1986, S. REP. NO. 99–345, at 16, *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5281.

local government documents within the purview of the public disclosure bar. Part B addresses the opposite argument, the exclusion of state and local government documents from the public disclosure bar. Finally, part C proposes a solution to the debate consistent with the dual purposes of the FCA.

A. Extending the Public Disclosure Bar to Documents Created by State and Local Governments

Because the public disclosure bar includes a wide range of disclosures, from judicial hearings to news media reports,[104] state and local government documents logically fall within its reach. Like the forms of public disclosure clearly enumerated in the public disclosure bar's statutory language, documents from state and local governments also possess potential exposure to the public. Thus, barring their use as the basis for FCA claims is a necessary roadblock against parasitic litigation. The FCA's statutory construction, discussed below in section V.A.1, supports such a contention. Further, general policy considerations, as addressed in section V.A.2, provide additional support for the inclusion of state and local government documents within the public disclosure bar.

1. Statutory Construction

Barring FCA claims based upon state and local government documents logically extends from two aspects of the FCA's statutory language. First, had Congress intended to include only federal government documents within section 3730(e)(4)(A)'s listed sources, it could have simply stated, for example, "federal administrative report" rather than simply "administrative report."[105] Yet, Congress tellingly chose not to do so. Rather, section 3730(e)(4)(A) bars disclosures based upon "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation."[106] As the Ninth Circuit points out, a comma separates each word, and the conjunction "or" is placed within the phrase.[107] This indicates "each word may be read as a separate modifier for the nouns that follow."[108] As a result,

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104. 31 U.S.C. § 3730(e)(4)(A).
105. United States *ex rel* Bly-Magee v. Premo, 470 F.3d 914, 918 (9th Cir. 2006).
106. 31 U.S.C. § 3730(e)(4)(A).
107. *Bly-Magee*, 470 F.3d at 918.
108. *Id.*

"administrative" does not infer "federal administrative" from the other words, "congressional" and "Government Accounting Office," within the phrase.

Beyond looking to section 3730(e)(4)(A)'s use of grammar, a second means of statutory support for including state and local government documents within the public disclosure bar involves looking to the meaning of "administrative" within other categories of public disclosures within the FCA. As previously stated, section 3730(e)(4)(A) specifically lists three categories of public disclosures: (1) "a criminal, civil, or administrative hearing"; (2) "a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation"; and (3) "the news media."[109] Pursuant to the Ninth Circuit's holding in *A-1 Ambulance Service, Inc. v. California*, state and local administrative hearings qualify as public disclosure sources under the first category.[110] In *A-1 Ambulance*, the Ninth Circuit extended the public disclosure bar to state administrative hearings because "[t]he unambiguous text of the first category of public fora described in section 3730(e)(4)(A) does not contain any federal limitation."[111] Because the statutory language, "criminal, civil, or administrative hearing," does not include any "federal" correlation, the *A-1 Ambulance* court included state-level administrative hearings within the public disclosure bar.[112] Though the second category of public disclosures involving administrative audits, reports, and hearings does mention two federal references, "congressional" and "Government Accounting Office," little difference exists between this category's "administrative . . . hearings" and the first category's "administrative hearings." Thus, statutory interpretation supports inclusion of state government documents within the public disclosure bar's jurisdiction.

2. Public Policy Considerations Supported by Legislative Intent

Aside from the statutory language support for inclusion of state and local government documents within the public disclosure bar, additional validation for this argument exists via public policy. At the forefront of any policy considerations involving the FCA is the idea that Congress enacted the FCA to avoid frivolous claims and to prevent relators with no personal involvement in uncovering fraud from collecting a portion of the government's recovery.[113] Therefore, an accurate examination of public policy considerations regarding

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109. 31 U.S.C. § 3730(e)(4)(A).
110. 202 F.3d 1238, 1244 (9th Cir. 2000).
111. *Id.*
112. *Id.*
113. Phelps, *supra* note 34, at 259 (citing 31 U.S.C. § 3729(a)(7)).

the interpretation of the public disclosure bar closely follows both of the aforementioned goals intended by Congress.

The first of Congress' dual purposes underlying the public disclosure bar, encouraging of legitimate FCA claims, remains intact despite a broader interpretation of the bar. Including documents procured by state and local governments does not overextend the public disclosure bar to the point that legitimate claims are also barred. The logic behind this conclusion stems from the fact that in order for the bar to be triggered, the publicly disclosed information must be substantial enough that it "constitute[s] *allegations or transactions*."[114] For example, in *Quinn*, the D.C. Circuit held pay vouchers and telephone records illustrating fraud against the federal government, though publicly disclosed via a prior civil hearing, were not barred as public disclosures because they constituted "ordinary information" rather than "allegations or transactions."[115] The D.C. Circuit's holding is but one illustration of the causal link between "'the allegation of fraud and all information proving the allegation'" courts require before the public disclosure bar applies.[116] Thus, state or local government reports that include scattered information regarding fraud but lack specific conclusions or allegations based upon that information do not constitute public disclosures that bar potential, legitimate FCA claims; rather, only when a state or local government document includes clear allegations and supporting evidence will it bar FCA claims from individual relators. Therefore, when the bar does apply, only opportunistic relators hoping to benefit from the fruits of state or local government's investigatory labor are prohibited from filing suit.

In addition to the goal of encouraging legitimate claims, Congress also aimed the FCA's public disclosure bar at reducing opportunistic litigation. Extending the bar to state and local government documents achieves this goal. Since the public disclosure bar includes reports from the news media and reports and documentation produced by the federal government, justification exists to extend the bar to state and local government documents, which, like federal government documents, may or may not reach the attention of the general population. Simply because a relator must put forth more effort in sifting through little-noticed state or local government reports than he or she would by simply watching the nightly news or reading a newspaper does not render that relator any less parasitic; the true test for parasitic FCA claims is the relator's role in uncovering evidence supporting contractor fraud: Since

114. Moncus, *supra* note 36, at 1570 (emphasis added) (internal quotations omitted).
115. United States *ex rel* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994).
116. Moncus, *supra* note 36, at 1571 (quoting Ann M. Lininger, *The False Claims Act and Environmental Law Enforcement*, 16 VA. ENVTL. L.J. 577, 592 (1997)).

the FCA encourages whistleblowing and discourages "opportunistic" behavior,[117] the relator must actually engage in revealing something covert.[118] A relator who files a FCA claim based upon fraud alleged in a state or local government document does not inform the federal government of "covert" information; instead, the relator simply acts as a middleman by alerting the federal government of fraud uncovered by a state or local government entity. This mirrors the "race to the courthouse" between federal attorneys and parasitic relators that the original 1863 FCA created,[119] the only difference being that under a modern FCA that excludes state and local government documents from the public disclosure bar, the race is now between state and local governments and opportunistic individuals. While the state or local government made the effort to uncover the fraud, the individual may profit from the investigation simply because he or she won the race to litigate the claim, since as an individual, the parasitic relator may act faster than a state or local government bureaucracy.

Statutory interpretation, legislative intent, and public policy provide strong arguments for a broader reading of the public disclosure bar. Yet, including all state and local government documents within the bar's purview may not provide a perfect balance between Congress' desired goals of simultaneously limiting parasitic litigation and encouraging legitimate claims. As a result, several arguments also exist opposing the broader interpretation of the public disclosure bar.

B. Exempting State and Local Government Documents from the Public Disclosure Bar

On the surface, state and local government documents appear to set off the same alarms regarding parasitic suits as federal government documents. However, the Third Circuit's holding in *Dunleavy* illustrates the two key differences between federal government documents and state and local government documents.[120] First, Congress clearly intended federal documents to qualify as public disclosures, as the federal government's possession of its own documents obviously insinuates the government is, in some capacity,

117. *Quinn*, 14 F.3d at 649 (noting that by amending the FCA, Congress essentially sought "the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own").

118. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 1345 (9th ed. 1987) (defining "whistleblower" as "one who reveals something covert or informs against another").

119. *See* Phelps, *supra* note 34, at 252.

120. United States *ex rel* Dunleavy v. County of Delaware, 123 F.3d 784 (3d Cir. 1997).

aware of a contractor's fraud to the same degree as the relator. Therefore, unless the relator qualifies as an original source, he or she fails to bring new information to the table, thereby making any suit by that relator superfluous. Second, state and local governments are frequently defendants in FCA suits.[121] Thus, any information submitted by a state or local government entity may be used by that entity to invoke the public disclosure bar to further conceal the fraud.[122] Given these two factors, state and local government documents deserve different treatment under the public disclosure bar than federal government documents. Section V.B.1 provides support for this assertion by examining the FCA's statutory construction, while section V.B.2 asserts exempting state and local government documents from the public policy bar is consistent with public policy.

1. Statutory Construction

Statutory construction permits the exclusion of state and local government documents from the public disclosure bar on two grounds. First, the absence of expansive phrases such as "for example" and "for instance" indicates Congress intended its three categories of public disclosures to be exhaustive.[123] In drafting legislation, Congress extensively considers the grammar, word choices, and overall structure it uses to enunciate its desired goals.[124] Moreover, when the Supreme Court has questioned the statutory construction of the FCA, it "consistently refused to accept a rigid, restrictive reading, even at the time when the [FCA] imposed criminal sanctions as well as civil."[125] The Court also justifies broad remedial interpretation of the FCA's provisions due to its aim of recovering stolen funds for the federal government.[126] Thus, coupled with the Court's preference for relator-friendly FCA interpretation, the exclusion of expansive phrases is not accidental. Viewed as an exhaustive list of public disclosures, the bar fails to refer to *non-federal* administrative documents, meaning such documents are not barred.

121. *See*, *e.g.*, Dunleavy, United States *ex rel* Dunleavy v. County of Delaware, 123 F.3d 734 (3d Cir. 1997); United States *ex rel.* Stevens v. State of Vermont Agency of Natural Res., 162 F.3d 195 (2d Cir. 1998).
122. *See Dunleavy*, 123 F.3d at 745.
123. *Id.* at 744 (citing United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499–1500 (11th Cir. 1991); United States *ex rel.* Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1004 (10th Cir. 1996)).
124. *See generally* Flora v. United States, 362 U.S. 145 (1960) (using grammar as a factor in statutory interpretation).
125. Moncus, *supra* note 36, at 1579 (citing *Neifert-White Co.*, 390 U.S. at 232).
126. *Id.* at 1579–80 (citing *Neifert-White Co.*, 390 U.S. at 233).

The statutory canon of *noscitur a sociis*[127] also lends support for exclusion of state and local government documents from the public disclosure bar. Under this canon, courts treat a single word "as one which 'gathers its meaning from the words around it.'"[128] Using this interpretation, the phrase in debate, "administrative," must apply only to federal documents, since the phrases accompanying it, "congressional" and "Government Accounting Office," are federal government entities. The Third Circuit supports this interpretation, noting "We find it hard to believe that the drafters of this provision intended the word 'administrative' to refer to both state and federal reports when it lies sandwiched between modifiers which are unquestionably federal in character."[129]

As previously stated, the argument for inclusion of state and local government documents within the public disclosure bar pays special attention to the first category of public disclosures, documents procured from "a criminal, civil, or administrative hearing,"[130] emphasizing the lack of federal connotations within the phrase indicates the second category of disclosures, which includes "administrative . . . reports,"[131] also lacks federal limitation. Two weaknesses erupt from this argument. First, if Congress intended to extend coverage under the second category to state and local government documents, it would not have placed "administrative" in between "congressional" and "Government Accounting Office," two categories, as noted above, that are exclusively federal. Second, criminal, civil, and administrative hearings at the state and local level are more public in nature than administrative documents produced by state and local governments. Thus, the risk of parasitic litigation resulting from criminal, civil, and administrative hearings is greater than via administrative documents that may never reach the public realm.

2. Public Policy Considerations Supported by Legislative Intent

A decision in favor of excluding state and local government documents from the public disclosure bar must also be argued in light of the two aims of the FCA, encouraging legitimate claims of government fraud coupled with limiting opportunistic claims by parasitic relators.

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127. In Latin, *noscitur a sociis* literally translates to "it is known by its associates." Black's Law Dictionary 1087 (8th ed. 2004).

128. United States *ex rel* Dunleavy v. County of Delaware, 123 F.3d 734, 745 (3d Cir. 1997) (quoting Jareki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961)).

129. *Id.*

130. 31 U.S.C. § 3730(e)(4)(A).

131. *Id.* at § 3730(e)(4)(A).

While the federal government documents provision of the public disclosure bar is a logical extension of Congress' intention to prohibit litigation freeloaders from profiting off government contractor fraud, state documents present different concerns. Documents procured by state and local entities are not guaranteed to land in the hands of either the public or the federal government. Information garnered through state audits or reports, unlike data gained via hearings, may be buried under mountains of red tape. Unlike news media reports, state government reports do not necessarily reach the masses. Though every report formed by the federal government does not always reach the general population, such reports qualify under the public disclosure bar because they are already within the government's control. State and local government reports, however, are not. In the context of the public disclosure bar, "parasitic claims" are those that either rely upon allegations and transactions within the public realm or stem from allegations or transactions already within the federal government's realm of knowledge.[132] If a state or local government document never reaches the public realm, it cannot inspire the widespread risk of parasitic litigation Congress feared when enacting the public disclosure bar.

Federal government documents need not be assessed in a similar light, because regardless of their exposure to the public, they are still within the federal government's control. Rewarding relators who bring a claim based on fraud allegations already within the federal government's possession is ludicrous; doing so clearly constitutes the exact "parasitic litigation" Congress intended to prohibit. On the other hand, state or local government documents indicating fraud against the federal government have not reached the federal government's attention. If the state or local government entity opts not to report this fraud to the federal government, the fraud remains indefinitely hidden. Thus, the mere existence of state- or local-government-produced documentation of fraud against the federal government does not equate to public disclosure. State and local government documents, separate and potentially unreviewable and undetectable by the federal government, run a substantial risk of being "filed away without the receiving agency being put on notice that there is any reason to give them close attention."[133] The separate and distinct nature of state and local government documents thus raises a red flag for courts deciphering their status as "public disclosures."

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132. *See* Tammy Hinshaw, Annotation, *Construction and Application of "Public Disclosure" and "Original Source" Jurisdictional Bar Under 31 U.S.C.S. § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. FED. 263, 263 (1994).

133. *Dunleavy*, 123 F.3d at 746.

The wrong interpretation would ultimately result in severely limiting legitimate relator claims under the FCA.

C. Resolution to the FCA's Statutory Catch-22

As the above arguments indicate, a bright-line interpretation of the public disclosure bar that either completely encompasses or entirely excludes state and local government documents cannot succeed without serious consequences. By including state and local government documents in the bar, courts run the risk of limiting access to legitimate claims of fraud against the federal government. Conversely, refusing to include any state and local government documents within the bar's reach opens the floodgates to parasitic litigation. Because Congress cannot compile an exhaustive list of each specific document that may constitute a public disclosure, courts must walk the tightrope between both aims of the FCA in examining state and local government documents. Unfortunately, the current statutory language of section 3730(e)(4)(A) does not currently permit merging both of the aforementioned interpretations. Thus, the courts must adopt the approach that best encompasses the FCA's goals of curbing opportunistic claimants and encouraging the filing of legitimate suits, even if the chosen interpretation is not a perfect balance between those goals.

While including state and local government documents in the public disclosure bar may ultimately curb a small portion of legitimate claims, it strikes a superior balance between the FCA's dual goals than the competing approach, which altogether excludes such documents. If courts refuse to recognize that the FCA bars publicly disclosed state or local government documents, the federal court dockets would buckle under the pressure of increased superfluous claims. While certainly some state or local government documents are buried under mountains of red tape, the simple fact remains that Congress did not design the FCA to weed out every instance of fraud against the government. Rather, it is a mechanism to encourage legitimate whistleblowers to come forward with their claims. Though excluding state and local government documents from the public disclosure bar would give state and local government bureaucracies a metaphorical nudge in uncovering fraud against the federal government and ignore less evidence of fraud, the accompanying consequence of massive litigation, similar to that seen during the pre-1943 era of the FCA, is not worth the incentive.

By including state and local government documents in the public disclosure bar, courts will best balance legitimate claims with Congress' stance against parasitic litigation. Despite their disconnection from the federal government, state and local government documents still remain accessible by the public. States employing Freedom of Information Acts allow access to the public of the majority of state documents; a resourceful relator looking for monetary opportunity need only search long enough before he or she uncovers a litigation jackpot. Further, states and local municipalities are increasing the online availability of agency reports, allowing opportunists access to evidence of government contractor fraud at the click of a mouse.

Given the increased access and ease information is shared via statutory provisions and modern technology, the FCA must include state and local government documents within its public disclosure bar. The creation of the original source provision allows enough leeway for those who uncover and bear witness to fraud against the federal government to reap well-earned rewards. Taken together, these points illustrate the necessity to encompass state and local government documents within the FCA. Any other interpretation tips the balance in favor of parasitic, overzealous claimants.

VI. CONCLUSION

The FCA rewards relators for blowing the whistle on the fraud they uncover with their own eyes. Thus, "[a] whistleblower sounds the alarm; he does not echo it."[134] While the FCA is at its core a remedial statute, it cannot risk overly broad interpretation that would allow for abuse in the form of frivolous or parasitic litigation. The only viable interpretation includes documents procured by state and local governments within the public disclosure bar. While some legitimate claims may fail under this interpretation, the alternative risks blatant exploitation of the FCA by litigation-happy opportunists.

As evidenced by the legislative evolution of the FCA, Congress has historically intended the FCA to reward only those that play a role in smoking out fraud against the federal government. By adopting state and local government documents as public disclosures, whistleblowers will have proper access to claims under the FCA. Conversely, widespread misinterpretation of the public disclosure bar in relation to state and local government documents could result in another faulty reconstruction of the FCA, similar to the over-restrictive amendments of 1943. In order to protect those with legitimate claims, courts must adopt a broader interpretation of the public disclosure bar. Doing so will simultaneously discourage unworthy litigators while protecting the integrity of the FCA and preserving it for those worthy of its rewards.

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134. Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1475 (9th Cir. 1996).