

**THE PUBLIC DISCLOSURE BAR TO QUI TAM ACTIONS UNDER  
THE CALIFORNIA FALSE CLAIMS ACT OF 1987,  
AND THE IRRELEVANCE OF SUBSEQUENT FEDERAL COURT DECISIONS  
UNDER THE FEDERAL FALSE CLAIMS ACT AMENDMENTS OF 1986.**

**By George W. Wolff\***

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**Introduction**

Rather than creating their own False Claims laws from scratch, many states - the first of which was California - used language from the Federal False Claims Act Amendments of 1986 and converted them into state False Claims statutes, with some state-specific changes.

Among the provisions excerpted by most states is the so-called “Public Disclosure Jurisdictional Bar” to Qui Tam actions.

State Courts therefore often look to the much more plentiful Court of Appeals jurisprudence in interpreting their own versions of the Federal statute.

However sound such an approach otherwise might be as to some provisions of their statutes, in the case of the Public Disclosure Bar - because it uses language depriving Federal Courts of “jurisdiction” if there has been a public disclosure, and because Federal Courts are of constitutionally limited jurisdiction - the Federal decisions apply rules of statutory construction which construe federal jurisdiction narrowly.

The effect of this has been broad interpretations of the bar in Federal Courts hostile to Qui Tam actions, so as to restrict Qui Tam actions more than the Congress said it intended to do.

This article reviews the basis for and logic of the Federal decisions, and argues that - particularly in California - state courts of general jurisdiction should not be bound by the Federal case law, and should interpret state acts as their own Legislatures intended, without using restrictive and retrogressive Federal rules of construction.

## THE FEDERAL FALSE CLAIMS ACT

Because the California False Claims Act was derived in large part from the 1986 Amendments to the Federal False Claims Act and had similar purposes as the Federal Act, it is appropriate to review the Legislative History and Intent of the Federal Act and the various interpretations given to certain provisions of that Act by the various Federal Circuit Courts of Appeals, both before and after the 1986 Amendments to the Federal Act..

The Federal False Claims Act [now codified as 31 U.S.C. § 3729-3733<sup>1</sup>] was originally a Civil War era statute to allow the government - and private plaintiffs Qui Tam, on behalf of the United States - to file actions against government contractors for fraudulent pay requests on government-funded projects.

The terms “claim” or “false claim” are interpreted broadly and consistent with the intent of the Congress in the 1986 Amendments to the Act, so as to reach “all fraudulent attempts to cause the government to pay out sums of money”. *United States v. Neifert-White Co.* (1968) 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061, 1065-1066.(Emphasis added) (violations of regulations limiting amount of loan)(earlier version of statute)<sup>2</sup>

False Claims Act liability is not limited to facially false or fraudulent claims for payment, but is “intended to reach all type of fraud, without qualification, that might result in financial loss

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Sometimes referred to hereinafter as the “FFCA”.

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Section 4 of the Fraud Enforcement and Recovery Act of 2009 (Pub. L. 111-21, 123 Stat. 1617), signed May 20, 2009 and made effective on the date of enactment, amended some of the definitions of “claims” and many other provisions of the False Claims Act , titling them as “Clarifications to the False Claims Act to Reflect the Original Intent of the Law”, but which expand the definitions of and liability for False Claims and related conduct, such as retaliation against whistleblowers and others.

to the Government." *United States v. Neifert-White Co.*, supra, 390 U.S. at 232.

The terms "claim" or "false claim" interpreted broadly, so as to reach "all fraudulent attempts to cause the government to pay out sums of money". *United States v. Neifert-White Co.* (1968) 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061, 1065-1066.(emphasis added) (violations of regulations limiting amount of loan)(earlier version of statute)

"[E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim" (emphasis added).

S. Rep. No. 99-345, at p. 9 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274. (Hereinafter, "S. Rep. No. 99-345")

"The principles embodied in this broad construction of a 'false or fraudulent claim' have given rise to two doctrines that attach potential False Claims Act liability to claims for payment that are not explicitly and/or independently false: (1) false certification (either express or implied); and (2) promissory fraud. See *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999)." (*Emphasis added*)

*United States v. Univ. of Phoenix* (9th Cir. 2006) 461 F.3d 1166, 1170-1171, cert. den. (2007).

Defendants may also be liable for making "a false record or statement material to a false or fraudulent", conspiring to violate the Act, and - now - avoiding an obligation to transmit money to the Government, such as inadvertent overpayments and the like. 31 U.S.C. § 3729(a)(1)(A)-(G)..

Under case law before the 2009 "clarifications", liability under the Act also attached "when a contract was originally obtained based on false information or fraudulent pricing." *Harrison v. Westinghouse Savannah River Co.* (4th Cir. 1999) 176 F.3d 776, 787-788 (emphasis added); *U.S. ex rel. Hagood v. Sonoma County Water Agency* (9th Cir. 1991) 929 F.2d 1416, 1420.

In other words, the payment claim itself need not be false, but only need be underpinned by some other fraud. *Ibid*; *San Francisco Bay Area Rapid Transit Dist. v. Spencer*

(N.D.Calif)(December 5, 2006) U.S. Dist. LEXIS 88022, slip op. at p. 50.

“The principles embodied in this broad construction of a ‘false or fraudulent claim’ have given rise to two doctrines that attach potential False Claims Act liability to claims for payment that are not explicitly and/or independently false: (1) false certification (either express or implied); and (2) promissory fraud. See *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).” (*Emphasis added*)

*United States v. Univ. of Phoenix*, supra, 461 F.3d at 1170-1171.

Under promissory fraud or the “Fraud-in-the-Inducement” theory of False Claims, when the contract was originally obtained through false statements, false promises or fraudulent conduct, then “each claim submitted under the contracts constituted a false or fraudulent claim. . . .” 461 F.3d at 1173.

In other words, all subsequent claims [or applications for payment on the Contract are automatically] false because of the original fraud (whether a certification or otherwise).” *United States v. Univ. of Phoenix*, supra, 461 F.3d at 1173 (emphasis added); *United States ex rel. Marcus v. Hess* (1943), 317 U.S. 537, 542, 63 S. Ct. 379, 87 L. Ed. 443; *U.S. ex rel Main v. Oakland City University* (7<sup>th</sup> Cir. 2005) 426 F.3d 914, 916-917; *U.S. rel. Tyson v. Amerigroup Illinois, Inc* (N.D. Ill 2007) 488 F.Supp.2d 719, 726; *United States v. Eghbal* (C.D. Cal. 2007) 475 F. Supp. 2d 1008, 1015.

No further fraud or falsity is required in a payment claim or otherwise.

“False Claims liability attaches because of the fraud surrounding the efforts to obtain the contract or benefit status, or the payments thereunder. *Harrison*, 176 F.3d at 788 (emphasis added). That the theory of liability is commonly called false certification" is no indication that "certification" is being used with technical precision, or as a term of art; the theory could just as easily be called the false statement of compliance with a government regulation that is a precursor to government funding theory. . . .” (All emphasis added)

*Univ. of Phoenix*, supra, 461 F.3d at 1172.<sup>3</sup>

As the Fourth Circuit stated in *Harrison v. Westinghouse Savannah River Co.*, supra, 176 F.3d at 788, in cases where "the work contract was actually performed to specifications at the price agreed," false claims act liability may still attach "because of the fraud surrounding the efforts to obtain the contract or benefit status, or the payments thereunder."

In other words, even if the government ultimately receives the benefits of the contract, this fact does not shield defendants from liability for false statements made in connection with negotiating or securing that contract.

An express or implied false statement, assertion or certification in an application for payment under the contract thus can also constitute "a false record or statement to get a false claim paid" was under case law prior to the 2009 "clarifications - and is still under the 2009 amendments - also actionable under the Federal False Claims Act.

An application for payment is tantamount to an assertion that the contractor had complied with the contract and thus was entitled to payment for its performance under the contract; and where there was no compliance with those contract terms, then there is a material "false record" and a "false claim". See, *Shaw v. AAA Engineering & Drafting, Inc.* (10<sup>th</sup> Cir. 2000) 213 F.3d 519, 531-533 (citing *Ab-Tech Constr. v. United States* (1994) 31 Fed. Cl. 429, 433-434, aff'd 57 F.3d 1084).

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"[The promissory fraud or fraud-in-the-inducement of contract] theory, rather than specifically requiring a false statement of compliance with government regulations, is somewhat broader. It holds that liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct" See, e.g., *Harrison v. Westing House Savonah River Co.* (4<sup>th</sup> Cir.1999) 176 F.3d 776, 787; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542, 63 S. Ct. 379, 87 L. Ed. 443 (1943)." (*Emphasis added*) *United States v. Univ. of Phoenix*, supra, 461 F.3d at 1173; *United States ex rel. Main v. Oakland City Univ.* (7th Cir. 2005) 426 F.3d 914, 916, cert. denied.

"FCA liability under § 3729(a)(1) may arise even absent an affirmative or express false statement by the government contractor." *Ibid.* at 532 (emphasis added); *United States ex rel. Holder v. Special Devices, Inc.* (C.D. Cal. 2003) 296 F. Supp. 2d 1167, 1176.(compliance with laws)(distinguishing *United States ex rel. Hopper v. Anton* (9th Cir. 1996) 91 F.3d 1261); *United States ex rel. Plumbers & Steamfitters Local Union No. 38. v. C.W. Roen Constr.* (9<sup>th</sup> Cir. 1999)183 F.3d 1088, 1092 (false certification re payment of Davis-Bacon Act wages).

In *Ab-Tech* the court had held that payment requests constituted an implied certification that the contract provisions, including minority hiring provisions, had been complied with. And - since that implied statement or record was false - the payment voucher was a false claim.

That is, if a party submits a claim for payment under a government program with requirements for participation, that claim is taken as an implied certification that the party was in compliance with those program requirements, whether they be a statute, regulation, contract clause or other requirement. *Ab-Tech Constr., Inc. v. United States*, supra, at 434; *United States ex rel. Plumbers & Steamfitters Local Union No. 38. v. C.W. Roen Constr.* (9<sup>th</sup> Cir. 1999)183 F.3d 1088, 1092 (false certification re payment of prevailing wages per Davis-Bacon Act); *United States v. Veneziale* (3<sup>rd</sup> Cir. 1959) 268 F.2d 504, 505. (false certification loan was to be used for purposes required by law)

All these interpretation of the FFCA are consistent with the intent of congress, discussed below, that the act be broadly interpreted and applied.

## **THE “GOVERNMENT KNOWLEDGE” JURISDICTIONAL BAR UNDER**

## THE FEDERAL FALSE CLAIMS ACT AMENDMENTS OF 1943

In 1943, after the case of *United States ex rel Marcus v. Hess* (1943) 317 U.S. 537, 63 S.Ct. 379, which upheld a recovery by a Qui Tam Relator who - while recovering substantial sums for the government due to collusive bidding by subcontractors - had based his False Claims allegations upon the same allegations made by the government in an indictment of the same Defendants, Congress adopted the “Government Knowledge Bar” to the Act [Act of December 23, 1943, 57 Stat. 608], which absolutely barred Qui Tam cases “based on evidence or information in the possession of the United States . . . before the claim was brought”.

“[T]he court shall have no jurisdiction to proceed with any such suit brought under . . . this section or pending suit brought under this section whenever it shall be made to appear that such suit was 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 . . . .”

31 U.S.C. § 232(B) (1943)<sup>4 5</sup>

The original intent of the 1943 changes was to bar suits by such “parasitic” relators who used the government as “host” source of allegations, and “who brought no information of his own to the suit”, and who thus did not serve the Act’s purposes encourage private parties to dig up, discover and expose government contract fraud. See, Thompson, A Critical Analysis of Restrictive Interpretations Under the False Claims Act’s Public Disclosure Bar: Reopening the Qui Tam Door,

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Recodified in 1982 to the same section numbers used currently. Pub. L. 97-258, 96 Stat. 877 (1982).

<sup>5</sup> Under the 1943 Amendments, apparently because of the wording of the statute that the court lacks “jurisdiction to proceed” only “whenever it shall be made to appear” that the suit was derived from information in possession of the U.S., the Courts did not then place the burden on a Qui Tam relator to allege or prove the absence of Government knowledge as part of its complaint or proof, and the Government knowledge bar was treated as more akin to an affirmative defense. See e.g., *United States v. Rippetoe* (4<sup>th</sup> Cir 1949) 178 F.2d 735, 736.

27 Pub. Cont. L. J. (1997-1998), pp. 673-676<sup>6</sup>; S. Rep. No. 99-345, at 12-13, 1986 U.S.C.C.A.N. at 5275.

One might have thought, given the plain meaning of this language and the fact that the ruling in *United States ex rel. Marcus v. Hess* served as the springboard for its adoption, that only where the allegations of the Qui Tam Complaint matched the Government's own allegations (as in *U.S. ex rel. Marcus v. Hess*) or other public information would a Qui Tam case be barred.

However, the Courts thereafter interpreted the bar much more broadly so as to bar cases even where there is not a complete overlap between the Governments' allegations and those of the Qui Tam, plaintiff such as where the Qui Tam case includes additional allegations based on information not known to the Government.

In one of the early Court of Appeal cases on the 1943 Amendments, the Court explained its rationale for expanding the bar beyond a strict construction or plain reading of the language in that statute:

“To require that the evidence and information possessed by the United States be a mirror image of that in the hands of the qui tam plaintiff would virtually eliminate the bar. On the other hand, to permit the bar to be invoked when the United States possesses only rumors while the qui tam plaintiff has evidence and information would be to permit the bar to repeal effectively much of the False Claims Act. Between these extremes lies the answer.”

“More precisely, the answer rests in that area where it is possible to say that the evidence and

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In footnote 33 the Court distinguished its conclusion on this point from other District Court cases which had applied the Government Knowledge standard to bar those cases where there was much more “evidence” or information available regarding the frauds, such as where:

“the evidence and information upon which relators' suits were based was in the possession of the United States prior to the initiation of the suits. All of the evidentiary material which relators are able to identify specifically seems to have been gleaned from sources in the news media which received widespread public attention” (Emphasis added)

*United States ex rel. Thompson v. Hays* (D.D.C. 1976) 432 F. Supp. 253, 256

information in possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute. Obviously to refer to an ‘area’ rather than a ‘point’ lacks definiteness; but prudence requires this sacrifice . . . .” (Emphasis added)  
*Pettis ex rel. United States v. Morrison-Knudsen Co.* (9<sup>th</sup> Cir. 1978) 577 F.2d 668, 674.<sup>7</sup>

Other Courts of Appeals followed this expansion of the “government knowledge bar” without much independent analysis. See, *United States ex rel. Weinberger v. Florida* (5th Cir. 1980) 615 F.2d 1370, 1371; *United States ex rel. Wisconsin v. Dean* (7th Cir.1984) 729 F.2d 1100, 1103-1104.

In *United States ex rel Wisconsin*, the Court attempted to rationalize the expanded interpretation of the bar in *Pettis ex rel. United States* by arguing the plain meaning of the statute required such a result:

“Congress enacted the jurisdictional bar at issue here in reaction to *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943), in which the Supreme Court held that a qui tam action was not barred merely because the qui tam plaintiff may have obtained the information for his complaint from an indictment or other public record and thus may have contributed nothing to the discovery of the fraud upon the government. Although Congress's immediate concern in enacting the 1943 amendment was to do away with the ‘parasitical suits’ allowed by Hess, the language and effect of the 1943 amendment in fact is much broader. The amendment itself was the result of a compromise between very different remedies proposed in each House of Congress.”

*United States ex rel. Wisconsin v. Dean*, supra, 729 F.2d at 1104.

This broad standard or interpretation was elaborated upon somewhat in a case in the District of Columbia, where a Qui Tam action that was brought based upon claims that a Senator’s aide had performed personal services for the Senator while on the U.S. payroll, where the Court’s jurisdiction was challenged because just some of the information in the Qui Tam action was already in the possession of the Government prior to suit.

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The Ninth Circuit affirmed the dismissal of the relator’s suit, even though Mr. Pettis was apparently the only source of the Government’s prior information on the fraud.

In attempt to discuss what quantum of Government information would bar such a suit, the Court said - following *Pettis ex rel United States* - that the issue was whether the information possessed by the Government: :

“could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing; quite obviously it could have had no such effect. The designation, filed in accordance with then Senate Rule 43(1), n32 revealed only that Sobsey was authorized to solicit and handle campaign contributions. And because Sobsey could have discharged this function without neglecting his official duties in any way, the Rule 43 filing by itself cannot be deemed to have adequately informed the Government of possible wrongdoing by either Senator Cannon or his aide. Only when combined with appellant's allegation that Sobsey completely disregarded his duties as the Senator's administrative assistant does any possibility of a cause of action emerge. This case thus differs radically from those where the Government possessed comprehensive and crucial evidence prior to initiation of a Section 231 suit. n33 Since the information the Government derived from the Senator's designation was innocuous by itself, we conclude that Section 232(C) does not apply and that the District Court improperly predicated its dismissal of count one upon that provision.” (Emphasis added)

*United States ex rel. Joseph v. Cannon* (D.C. Cir. 1981) 642 F.2d 1373, 1377-1378<sup>8</sup>

The cases thus appear to have largely ignored the fact that the intent of this 1943 Amendment was to bar “parasitic” lawsuits, such as the one in *U.S. ex rel. Marcus v. Hess*, where the Qui Tam relator just “obtained the information for his complaint from an indictment or other public record”, and thus may have contributed nothing to the discovery of the fraud upon the government, although he “contributed much to one of the purposes for which the Act was passed.” by recovering

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In footnote 33 the Court distinguished its conclusion on this point from other District Court cases which had applied the Government Knowledge standard to bar cases only where there was much more “evidence” or information available to the Government regarding the frauds, such as where:

“the evidence and information upon which relators' suits were based was in the possession of the United States prior to the initiation of the suits. All of the evidentiary material which relators are able to identify specifically seems to have been gleaned from sources in the news media which received widespread public attention” (Emphasis added)

*United States ex rel. Thompson v. Hays* (D.D.C. 1976) 432 F. Supp. 253, 256

substantial monies for the Government. 317 U.S. at 545.

But the effect was that the Courts' overbroad, "extreme" interpretation of this "jurisdictional" bar, as discussed in the cases quoted above, lead to the "near eradication" of Qui Tam lawsuits. See, J. Helmer, False Claims Act: Whistleblower Litigation (5<sup>th</sup> Ed. 2007/)§ 5.5, p. 290.<sup>9</sup>

It also discouraged insiders, true "whistleblowers", and others who had discovered fraud from reporting that fraud to the government and bringing Qui Tam actions, as it would never be clear what the Government would be deemed to have "known"before.<sup>10, 11</sup> Helmer, Whistleblower Litigation, supra, § 5-5(a), p. 295; C. Sylvia, The False Claims Act: Fraud Against the Government (2004) § 2.9, p. 53.<sup>12</sup>

And sometimes the government would not prosecute meritorious claims that it knew about, whether for "lack of resources", being "overmatched" by large, profitable corporations, for political reasons, due to political pressure, for budgetary reasons, or otherwise, and consequently no one else could pursue that claim. S. Rep. No. 99-345, at 7-8, 12-13, 1986 U.S.C.C.A.N. at 5273-5274, 5277-

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Hereinafter, "Helmer, Whistleblower Litigation".

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Additionally, under the broad interpretation given the bar, an unscrupulous contractor could report just one fact or element regarding its actions - but not enough to reveal the scope of the fraud or permit a prosecution - to a low level government functionary, and then assert the "government knowledge" bar to any Qui Tam action. See e.g., Vogel, The Public Disclosure Bar Against Qui Tam Suits, (1995) 24 Pub. Cont. L. J. 477, 514. (Hereinafter, "Vogel, The Public Disclosure Bar")

<sup>11</sup> Even if the Qui Tam plaintiff was the sole source of the Government's "knowledge", his or her suit was still barred. See e.g., *United States v. Aster* (3<sup>rd</sup> Cir. 1960) 275 F.2d 281, 283.

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Hereinafter, "Sylvia, Fraud Against the Government".

5278.<sup>13</sup>

Also, “many fraud cases [had] gone undetected” by the Government under this standard, as the Government never really had the level of knowledge of fraudulent activity that had been fictitiously imputed to it by the Courts. H. Rep. No. 99-660, at 18.

**The 1986 Federal Amendments, the New “Public Disclosure” Jurisdictional Bar,  
and the Limited Jurisdiction of the Federal Courts**

In 1986 new Amendments to the Federal Act were consequently designed to “enhance the Government’s ability to recover losses sustained as a result of fraud against the Government”, to “make the statute a more useful tool against fraud in modern times”, and “encourage any individual knowing of Government fraud to bring that information forward”, by increasing “incentives, financial and otherwise, for private citizens to bring [Qui Tam] suits on behalf of the Government”. S. Rep. No. 99-345 , at 1-2, 1986 U.S.C.C.A.N. 5266 - 5267. See also, Brooker, The False Claims Act: Congress Giveth and the Courts Taketh Away (2002) 25 Hamline L. Rev. 374, 377- 384; Sylvia, Fraud Against the Government , supra, § 11:32, pp 637-638.

Congress desired to “expand the role of the *qui tam* plaintiff” and encourage private individuals to prosecute those claims, since “the Government may not know of a fraud, but for a *qui tam* suite [sic]” H. Rep. No. 99-660, at 17, 23.<sup>14</sup>

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It also noted, that in other areas such as antitrust and securities enforcement, “the number of private enforcement actions far exceeds those brought by the Government”, S. Rep. No. 99-345, at 8, 1986 U.S.C.C.A.N. at 5273.

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The statute finally adopted in 1986 differed somewhat from the specific bill considered by these Committees, but the need for the changes to the FFCA and the intent of the Congress to expand the role of Qui Tam relators is unmistakably evident in these Reports.

“[C]ongress amended the Act [in 1986] ‘to encourage any individual knowing of Government fraud to bring that information forward.’ S. Rep. No. 99-345, at 2. The effect of these amendments on the whole is to broaden the qui tam provisions. Congress wanted to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud. See id. at 14” (Emphasis added)

*United States v. Bank of Farmington* (7th Cir., 1999) 166 F.3d 853, 858.

In place of the “government knowledge” jurisdictional bar, the Congress adopted a “public disclosure” jurisdictional bar:

“(4) (A) 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 [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information” (Emphasis added)

31 U.S.C. § 3730(e).<sup>15</sup>

To prevail on this “Jurisdictional” defense, a defendant thus must prove all three of these elements:

- (1) that there was a “public disclosure” in a “hearing” or the news media,
- (2) that the public disclosure in the prior hearing etc. was of the same specific fraudulent “allegations or transactions” elements as are alleged in the current action, and

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A modified, more limited, government knowledge bar remains after 1986, but applies only where a Qui Tam suit is “based upon allegations or transactions” which are the “subject of” an active “civil suit” or pending proceeding brought by the Government. 31 U.S.C. § 3730(e)(3).

In deciding whether a Qui Tam lawsuit falls within or is “parasitic” under this bar:

“a court should look first to whether the two cases can properly be viewed as having the qualities of a host/parasite relationship . . . and ask whether the qui tam case is receiving ‘support, advantage, or the like’ from the ‘host’ case (in which the government is a party) ‘without giving any useful or proper return’” (Emphasis added)

*United States ex rel. S. Prawer & Co. v. Fleet Bank* (1st Cir. 1994) 24 F.3d 320, 327.

- (3) that the current action is “based upon” the same fraudulent “allegations or transactions” as were “publically disclosed” in the public record of the prior hearing.

If the answer to any one of these questions is “no”, then the inquiry ends, and the Qui Tam action may proceed. *Walburn v. Lockheed-Martin Corp.* (6<sup>th</sup> Cir. 2005) 431 F.3d 966, 974; *United States ex rel. Jones v. Horizon Healthcare Corp.*(6th Cir. 1998)160 F.3d 326, 330.

The difficulty with these 1986 amendments to the FFCA is that the words “public disclosure”, “allegations or transactions”, and “based upon” are nowhere defined in the statute, and their meanings - as they have later been interpreted by the Federal Courts - are neither consistent with the plain meaning of the language used, obvious from the words used, nor derived from the Legislative History or statutory intent to encourage Qui Tam actions.

“Virtually every court of appeals that has considered the public disclosure bar explicitly or implicitly agrees on one thing, however: the language of the statute is not so plain as to clearly describe which cases Congress intended to bar.” (Emphasis added)

*United States ex rel. Findley v. FPC-Boron Employees' Club* (D.C. Cir. 1997) 105 F.3d 675, 681.

“Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language.”  
*United States ex rel. Mistick PBT v. Housing Auth.* (3d Cir. 1999) 186 F.3d 376, 387 (Alito, J.)

As a consequence of the imprecision in the language used and the lack of definitions of the terms employed, “the resulting case law has become a complex and tangled web of doctrine” [Sylvia, The False Claims Act: Fraud Against The Government, supra, § 11:32, p. 639], one of the most difficult concepts for attorneys “due to the varied treatment Section 3730(e)(4)(A) receives from the circuit courts” [Androphy, Federal False Claims Act and Qui Tam Litigation (2009) §

10.06, p 10-13<sup>16</sup>], and consequently this Section is “the most frequently litigated issue” in Qui Tam actions due to the “imprecise and at times contradictory” language of this provision [2 J. Bose, Civil False Claims and Qui Tam Actions (3<sup>rd</sup> Ed. 2008), § 4.02[A], p. 4-47<sup>17</sup>], which is “notorious for its lack of clarity”. Helmer, Whistleblower Litigation, supra, § 5-5, p. 293.

As a further consequence,

“Neither potential *qui tam* plaintiffs nor defendants can make any knowledgeable predictions as to whether or not jurisdiction will be found in a case involving possibly public documents or information”.

Boese, Civil False Claims and Qui Tam Actions, supra, § 4.02(c)(1), p. 4-94.

As was the case with the Government Knowledge bar in the 1943 Amendments, the Federal Courts have also very broadly interpreted the terms of this section of the new statute, because it is phrased in terms of the limited Subject Matter “jurisdiction” of the Federal Courts themselves, rather than as a provision dealing with Standing to Sue, a removal of Standing under the circumstances stated therein, or as an affirmative defense to a cause of action by a private Plaintiff Qui Tam<sup>18</sup>.

It is beyond argument that, unlike State Courts - which are of general jurisdiction, and which are presumed to have jurisdiction - the District Courts of the United States are courts of Constitutionally limited subject matter jurisdiction. *Exxon Mobil Corp. v. Allapattah Servs., Inc.* (2005) 545 U.S. 546, 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502.

They possess only the jurisdiction authorized them by the United States Constitution and by

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<sup>16</sup> Hereinafter, “Androphy, Federal False Claims Act”

<sup>17</sup> Hereinafter, “Bose, Civil False Claims and Qui Tam Actions”

<sup>18</sup> For example, the Congress could have more clearly written the provision to read: “No Qui Tam action may be brought if it is based upon...,” or “No Qui Tam cause of action shall exist if it is based upon. . . “

federal statutes. *Bowles v. Russell* (2007) 551 U.S. 205, 127 S. Ct. 2360, 2365, 168 L. Ed. 2d 96.

"Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Kokkonen v. Guardian Life Ins. Co. of Am.* (1994) 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

"It is to be presumed that a cause lies outside this limited jurisdiction, *Turner v. Bank of North-America*, 4 U.S. 8, 4 Dall. 8, 11, 1 L. Ed. 718 (1799)" (Emphasis added)

*Kokkonen v. Guardian Life Ins. Co. of Am.* (1994) 511 U.S. 375, 377.

In federal courts, the Public Disclosure bar is consequently considered to be a "jurisdiction-removing provision", related to the Court's fundamental or Subject Matter Jurisdiction. *Rockwell Int'l Corp. v. United States* (2007) 549 U.S. 457, 468, 127 S. Ct. 1397.

Section "3730(e)(4) speaks to 'the power of a particular court'" in the Federal system to hear the case at all. *Ibid.*

Cases are, thus, always presumed to be outside of this jurisdiction.

Therefore, in construing the Federal False Claims Act, the U.S. federal courts are:

"Not only . . . governed by the plain language of the statute, we must also be mindful that 'statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.'" (Emphasis added)

*United States ex rel. Precision Co. v. Koch Indus.* (10<sup>th</sup> Cir. 1992) 971 F.2d 548, 552; *United States ex rel. McKenzie v. Bellsouth Telcoms.* (6th Cir. 1997) 123 F.3d 935, 938.

"Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction. . . Therefore, Precision, the party invoking federal jurisdiction in this case, must 'allege in [its] pleading the facts essential to show jurisdiction,' and 'must support [those facts] by competent proof.' *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936)" (Emphasis added)

*United States ex rel. Precision Co. v. Koch Indus.*, supra, 971 F.2d at 551.

”statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction,”(Emphasis added)

*United States ex rel. Findley v. FPC-Boron Employees' Club*, supra, 105 F.3d at 682, citing *United States ex rel. Precision Co. v. Koch Indus., Inc.* (10th Cir. 1992) 971 F.2d 548, 552, and other False Claims Act cases.

As a consequence, unlike what State courts might do when dealing with a similarly worded statute, Federal Courts must by their nature interpret “jurisdictional” statutes very strictly and narrowly, in light of their limited Article III jurisdiction under the Constitution of the United States.<sup>19</sup>

Thus, the Federal Courts have often decided to focus on a “broad construction of the public disclosure bar” to limit so-called “parasitic” Qui Tam actions [*Walburn v. Lockheed Martin Corp.*, supra, 431 F.3d at 975] on jurisdictional grounds, rather than effecting the stated purpose of the 1986 Amendments to “expand the role of the *qui tam* plaintiff” and encourage private individuals to prosecute those claims.<sup>20</sup>

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<sup>19</sup> Thus, it is typically held that Qui Tam plaintiffs “bear the burden of establishing subject-matter jurisdiction by a preponderance of the evidence”, and of proving a negative, that there has been no public disclosure. See e.g., *United States ex rel. Meyer v. Horizon Health Corp.* (9th Cir. Cal. 2009) 565 F.3d 1195, 1199.

As a practical matter, however, it is the defendant who usually knows whether there has been a public disclosure regarding it, and it is the defendant who raises lack of jurisdiction; the burden then is on the relator to establish either that the disclosure does not come within the bar or that he or she is covered by the “original source” exemption under 31 U.S. C. 3730(e)(4)(B).

<sup>20</sup> Paradoxically, even in cases in which the Courts have held that they lacked “subject matter jurisdiction” because of some purported “public disclosure” of some fact in the case, a few Courts have nevertheless held that they still did have subject matter jurisdiction to award attorneys fees to an otherwise guilty defendant under 31 U.S.C. § 3730(d)(4), due to the

Additionally, despite the fact that Federal Courts often apply the “plain meaning” rule, the various Federal Courts have not followed that rule in construing the “Jurisdictional” provisions of this statute, and have in most cases very expansively read and substantially broadened the meaning and reach of the all the elements or words Public Disclosure Bar.

The effect of these expansive constructions of the bar has been defeat the purpose of the congress in adopting the 1986 Amendments, to limit the number of Qui Tam cases which may be brought, even when the Government is not aware of the fraud, could not reasonably be said to have actionable evidence of the fraud, and/or is doing nothing to sue to recover for the fraud.

The various Federal Circuit Courts have expansively read each phrase in the public disclosure bar, though often in differing and conflicting ways.

### **“Based Upon”**

It would seem a simple matter to detis “based upon” previously public False Claim “allegations or transactions”, as that phrase is one commonly used and understood by most persons.

One presumably would just compare the allegations of FFCA violations in the Qui Tam case to the prior public allegations regarding the False Claims Act violations that were made public in a hearing or in the media, and check whether they are essentially the same allegations of fraud, and

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purported differences between Article III and Article I judicial jurisdiction. of the federal Courts, where the realtor’s claim that there was no public disclosure was allegedly “frivolous”. See e.g. *United States ex rel. Grynberg v. Praxair, Inc.* (10th Cir. 2004) 389 F.3d 1038, 1055-1058.

Obviously, having one’s Qui Tam action dismissed because of a very limited “disclosure” of some fact alleged in the complaint is discouraging enough to potential relators, but having to pay attorneys fees to an otherwise guilty defendant who has submitted False Claims and escaped liability only on such a vague technicality will greatly discourage Qui Tam actions, and further limit recoveries by the Government.

already changed this.<sup>21</sup>

However, the Federal Courts, in their efforts to limit their jurisdiction over Qui Tam actions, have mostly ascribed a “non-plain meaning” to this phrase, and substantially broaden its effect in

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<sup>21</sup> Courts in Copyright infringement cases have long engaged in such inquires, where the plaintiff must show both access to the prior work and substantial similarity, in the absence of evidence of direct copying of the prior work.

“Absent evidence of direct copying, ‘proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.'” See, e.g., *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000). . . .” (Emphasis added)

*Funky Films, Inc. v. Time Warner Entm't Co., L.P.* (9th Cir. 2006) 462 F.3d 1072, 1076-1077.

“The substantial-similarity test contains an extrinsic and intrinsic component. At summary judgment, courts apply only the extrinsic test; the intrinsic test, . . . examines an ordinary person's subjective impression. See *Shaw*, 919 F.2d at 1360-61 . . . ‘ ”.

“Extrinsic analysis is objective in nature. ‘[I]t depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed.’ *Krofft*, 562 F.2d at 1164. The extrinsic test focuses on ‘articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events’ in the two works. *Kouf*, 16 F.3d at 1045 (citations omitted). In applying the extrinsic test, this court ‘compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters.’ *Berkic*, 761 F.2d at 1293.” (Emphasis added). *Ibid* at 1077.

Obviously, some of these tests could be applied in a modified manner to a public disclosure analysis, and the results would likely differ from the much more easily satisfied substantial similarity test used by most Circuits in False Claims cases.

Since *U.S. ex rel. Marcus v. Hess* also focused on the claimed copying of prior allegations made by others, the use of some sort of analysis analogous to a Copyright infringement test would not be inappropriate, and would be consistent with the actual intent of the Congress.

In False Claims Act cases, Courts could also look into what sort of information was available to and what investigation was done by the relator before filing his or her complaint, to see if the information was obtained other than from some Government hearing, the news media, etc. In *Caremark RX*, for example, the relators had worked for the defendant and had discovery of defendant prior to the filing of their amended complaint, so it was not a suit which “‘both depends essentially upon publicly disclosed information and is actually derived from such information.’ *Feingold*, 324 F.3d at 497” *Caremark RX*, *supra*, 496 F.3d at 738.

barring Qui Tam cases.

Thus, the majority of Federal Circuits have effectively “rewritten”<sup>22</sup> the language and held that this phrase does not mean that the Qui Tam case is barred if it is “founded upon” or copied from or “derived from” the prior public allegations, but instead hold that it is barred if just some of its allegations are “very similar to” or “substantially the same as” any prior public allegations, regardless of whether the Qui Tam Plaintiff got the backup or support for its case from those “public” sources or not, and regardless of any material differences in scope or detail between the allegations publicly disclosed and the allegations made by the Qui Tam Plaintiff. See e.g., *United States ex rel Jones v. Horizon Healthcare* (6<sup>th</sup> Cir. 1998) 160 F.3d 326, 332-333; *United States ex rel Doe v. Joe Doe Corp.* (2<sup>nd</sup> Cir 1992) 960 F. 318, 325.

But,

“Congress did not say, ‘No court shall have jurisdiction under this section based upon the public disclosure of allegations or transactions or material that is the same or substantially the same as the public disclosure. . . .’” (Emphasis added)(Italics in original)

*United States ex rel. Fowler v. Caremark RX, L.L.C.* (7th Cir. 2007) 496 F.3d 730, 739.

A plain-meaning rendering of this phrase would required that the action must be actually “based upon”- or “taken from”, or “derived from” - the same previously public “allegations or transactions” regarding fraud on the Government.

Among other effects, this distorted construction of these words by most Federal Courts has effect of barring a Qui Tam action, even if the Qui Tam plaintiff was the one who first detected the

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<sup>22</sup> Helmer, Whistleblower Litigation, supra, § 5-7, p. 316.

fraud and disclosed the fraud to the media etc., and thus in a literal sense did not “base” his or her complaint on those public revelations, but on his or her own prior discovery of those facts. Vogel, The Public Disclosure Bar, supra, at 479.

Nevertheless, as we note below, the Courts in those cases illogically hold that the Realtor’s complaint was “based upon” her own public disclosures, even if those statements did not reveal that any False Claims had been submitted to the Government, or expose the fact that the Government had been defrauded!

Consequently, the Relator’s action is barred and is not permitted to recover for the fraud on behalf of the Government , even if the relator is the actual source of the information that was publically disclosed, and even if the Government as a practical matter is unaware from the limited public disclosure that it has been a victim of the submission of any False Claims<sup>23</sup>. See e.g., *Jones v. Horizon Healthcare Corp.*, supra, 160 F.3d at 333; *U.S. ex rel Biddle v. Board of Trustees of Leland Stanford Jr. University* (9<sup>th</sup> Cir. 1998) 161 F.3d 533, 539-540; G. Thompson, A Critical Analysis of Restrictive Interpretations, supra, at 700-701.

The effect of creating this expansive judicial rewriting or redrafting of the plain meaning of this phrase - along with that of other phrases in the bar - is to bar Qui Tam actions and to defeat the statutory purpose of encouraging them, even when just one element of or one fact comprising part of the violation was made “public”.

Consequently, all Qui Tam actions are barred, even if not enough information about the elements of the fraud has been made public to enable the Government to proceed against the

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<sup>23</sup> Unless he or she can prove to be the “original source” of the information on which the FFCA allegations are based under 31 U.S.C. § 3730(e)(4)(B).

perpetrator, and even if the Government could not reasonably have known from the limited information about the “allegations or transactions” that was purportedly made “public” that a fraud has actually been perpetrated upon it. See, Helmer, Whistleblower Litigation, supra, § 5.7, p. 318; Sylvia, Fraud Against the Government, supra, § 11:58, p. 6698-669;

Those courts ascribing this meaning to “based upon” have effectively concluded that their unsupported and extra-textual “threshold ‘*based upon*’ analysis is intended to be a “quick trigger” for the more exacting original source analysis” of 31 U.S.C. § 3730(e)(4)(A). See, *United States ex rel. Precision Co. v. Koch Indus.*, supra, 971 F.2d at 552.

In other words, most of the Federal Circuits have superimposed this “quick trigger” interpretation of the jurisdictional bar on the statute by their overbroad and non-plain meaning interpretations of the various words in or elements of the jurisdictional bar.

This effectively requires a Qui Tam relator to be the “original source” (under 31 U.S.C. § 3730 (e)(4)(B) of any publicly disclosed information in order to bring a suit of behalf of the Government, even if the relator’s allegations were not derived from immaterial part publicly disclosed information was not any part of the - or the primary - basis for the relator’s allegations. See e.g., Thompson, supra, A Critical Analysis of Restrictive Interpretations, at p. 698.

Others have strongly disagreed with this non-literal meaning ascribed to these words:

“I find that the interpretation rendered . . . to the effect that ‘based upon’ means ‘supported by,’ to be an unnatural contortion of the language to reach a result that is not fairly supported by the statute itself” (Emphasis added)

*Jones v. Horizon Healthcare Corp.*, supra, 160 F.3d at 336. (Gilman, J., concurring in result)<sup>24</sup>

The Fourth and Seventh Circuits - unlike other Federal Circuits - have applied a literal, “plain

meaning”, common usage or dictionary definition to the phrase “based upon”:

“[A] reading of ‘based upon’ as meaning ‘derived from’ is the only fair construction of the statutory phrase. Section 3730(e)(4)(A)'s use of the phrase ‘based upon’ is, we believe, susceptible of a straightforward textual exegesis. To ‘base upon’ means to ‘use as a basis for.’ Webster's Third New International Dictionary 180 (1986) (definition no. 2 of verb “base”). Rather plainly, therefore, a relator's action is ‘based upon’ a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his qui tam action is based. Such an understanding of the term “based upon,” apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed objective of preventing “parasitic” actions, see, e.g., *Stinson*, supra, at 1154, for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic”. (Emphasis added)

*United States ex rel. Siller v. Becton Dickinson & Co.*, supra, 21 F.3d at 1347-1348; *United States ex rel. Fowler v. Caremark RX, L.L.C.*, supra, 496 F.3d at 737-738.<sup>25</sup>

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Outside of its dissent, *Jones v. Horizon Healthcare* has been criticized, however, for misreading the cases which it relies on for its “similar to” or substantially similar” holding, reaching that holding “without a single word of analysis”, and raising the question as to whether the result was more influenced by the nature of the relator as being an attorney who used work done for his client as his source of his information for filing a Qui Tam suit as a relator in his own name. See, *United States ex rel. Siller v. Becton Dickinson & Co.* (4<sup>th</sup> Cor. 1994) 21 F.3d 1339, 1348 and fn. 8.

<sup>25</sup> In July 2009 a panel of the Seventh Circuit which included two of the same Judges that decided the *Caremark RX* case reversed itself in that case and *Bank of Farmington*, because it and the Fourth Circuit remained among the minority on this point, and because:

“[T]hat while the minority interpretation tends to resolve the jurisdictional inquiry at the ‘based upon’ stage, the Supreme Court recently implied in *Rockwell International Corp. v. United States*, 549 U.S. 457, 127 S. Ct. 1397, 167 L. Ed. 2d 190, that the main jurisdictional focus is on the ‘original source’ requirement. In *Rockwell*, the Court was asked to interpret the original-source requirement of § 3730(e)(4)(B). One of the

Consequently, if the Realtor obtained the information on his or her own, independent of the “public disclosure”, it is not barred as it was not “based upon” - nor “derived from” - the public disclosure. *United States ex rel. Siller v. Becton Dickinson & Co.*, supra, 21 F.3d at 1349; *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.* (4th Cir. 2008) 528 F.3d

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questions before the Court was whether the phrase ‘information on which the allegations are based’ in § 3730(e)(4)(B) refers to information on which the relator's allegations are based or information on which the publicly disclosed allegations that triggered the public-disclosure bar of § 3730(e)(4)(A) are based. The Court adopted the former interpretation and in doing so imagined a hypothetical relator who ‘has direct and independent knowledge of different information supporting the same allegation.’ The Court concluded that such a relator would be considered an original source. 549 U.S. at 471-72. Although Rockwell did not address the meaning of the phrase ‘based upon’ in § 3730(e)(4)(A), we think it significant that under our minority interpretation of the phrase, the hypothetical posited by the Court would be resolved at an earlier step of the jurisdictional inquiry without ever reaching the question of whether the relator was an original source. Yet given the sequential nature of the jurisdictional inquiry required by the statute, the Supreme Court's discussion assumes that its hypothetical relator is subject to the public-disclosure bar, for otherwise there would be no need to address the original-source exception at all. Id. at 467" (Emphasis added)

*Glaser v. Wound Care Consultants, Inc.* (7<sup>th</sup> Cir. 2009) 570 F.3d 907, 919.

However, this is the “quick trigger” analysis, which tends to conclude that the matter has been publicly disclosed, and effectively requires that all plaintiffs Qui Tam be the “original source” of all the allegations of its complaint whenever any small portion of those allegations were publically disclosed, even where that limited information is not - as a practical matter - sufficient to get to Government prosecutors or cause them to file any action to recover for a fraud which has not been adequately made public.

Thus, in an attempt to give meaning to the “original source” exemption to the public disclosure bar, the majority of Circuits have upended these two provisions of the bar and stood them on their heads, and allowed the exception to the bar to control the very scope of the bar itself, by distorting and greatly expanding the plain meaning of the phrase “based upon”.

The original source tail would henceforth wag and control the public disclosure dog.

This was not necessary, as even the Seventh Circuit concedes they could be harmonized:

“It is possible to imagine a handful of situations where the original-source exception might have independent meaning, such as if a lawsuit is ‘actually derived’ only in part from public disclosures. See *Mistick*, 186 F.3d at 399-400 (Becker, C.J., dissenting). But every circuit to have considered the position of the *Mistick* dissent has rejected its approach, and we agree with their conclusion. . . .” *Ibid* at 916, fn. 5.

This “plain meaning” approach is not just consistent with the plain meaning of the words of the statute, but also supports and fosters the intent and purposes of the 1986 Amendments to the FFCA, which was to encourage private Relators to supplement the Government’s ability to pursue False Claims, while at the same time preventing truly “parasitic” actions, which just used public information, and contributed nothing to exposing the fraud. See G, Whistleblower Litigation, supra, pp 704-705; Vogel, The Public Disclosure Bar, supra, at pp. 500 -501<sup>27</sup>; C. Sylvia, Fraud Against

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<sup>26</sup> Part of this decision is now on review in the United States Supreme Court as No. 08-304 as to the different issue of “whether an audit and investigation performed by a State or its political subdivision constitutes an ‘administrative . . . report . . . audit, or investigation’ within the meaning of the public disclosure jurisdictional bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A)”.

The Fourth Circuit had held that it did not, based on a literal reading of the language of the statute, disagreeing with the Ninth and Eleventh Circuits. 528 F.3d at 306-307.

Oral argument was heard by the Supreme Court on December 1, 2009.

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Vogel, supra, observes that the effect of the majority rule and other overbroad interpretations of all the words in the bar, is now that “based upon” has been given the same meaning as the phrase “the subject of” has in 31 U.S.C. § 3730(e)(3), despite the fact that § 3730(e)(4) and the Congress used very different phrases in these adjoining sections of the FFCA.. Vogel, A Critical Analysis of Restrictive Interpretations, supra, at p. 500-501.

In interpreting the former statute barring Qui tam cases which are “based upon allegations or transactions that are the subject of” a pending or prior Government suit, the First Circuit has held that “courts should proceed with caution before applying the statutory bar”, and that in determining whether to apply that bar the courts should consider whether there exists a “host/parasite” relationship between the allegations in the former suit and the Qui tam action, and whether the Qui Tam case former has the potential of providing "useful or proper return" to the government, and therefore is not "parasitic" of the former suit.

Where the Qui Tam “case is seeking to remedy fraud that the government has not yet attempted to remedy, it is, as a threshold matter, wholly unlike” the “parasitic” cases the Congress sought to preclude. *United States ex rel. S. Prawer & Co. v. Fleet Bank*, supra, 24 F.3d at 327-328.

Where the “allegations or transactions” in the prior suit did not concern fraud or false claims against the Government, the Qui Tam action alleging such logically should not be barred Ibid at 328; *Costner v. Urs Consultants* (8th Cir.1998) 153 F.3d 667, 676. (The prior action alleged violation of an environment cleanup contract, but did not allege FFCA violations related to that work, as the Qui Tam action did)

the Government, supra, § 11:59, p. 670; J. Helmer, Whistleblower Litigation, supra, § 5-7, pp. 318-319.

Other Circuit Courts have acknowledged the merit of the Fourth Circuit’s analysis, reasoning and holding, but decline to follow it because of prior contrary Circuit precedent, or because it supposedly would render the “independent knowledge” words of § 3730(e)(4)(B) “superfluous”.

“This interpretation strikes me as both linguistically correct and fully consistent with Congress's objective of preventing parasitic lawsuits. Id. (“Such an understanding of the term 'based upon,' apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed [sic] objective of preventing 'parasitic' actions . . .”) I find that the interpretation rendered by McKenzie and the other circuits cited in the majority opinion, to the effect that ‘based upon’ means ‘supported by,’ to be an unnatural contortion of the language to reach a result that is not fairly supported by the statute itself. See Id. at 1349 at 1349 (“We are unfamiliar with any usage, let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.'”)” (Emphasis added)

*United States ex rel. Jones v. Horizon Healthcare Corp.*, supra, 160 F.3d at 336 (Gilman, J., concurring)

“We agree with the Fourth Circuit that in ordinary usage the phrase ‘based upon’ is not generally used to mean ‘supported by.’” *United States ex rel. Mistick PBT v. Housing Auth.* (3d Cir. 1999) 186 F.3d 376, 387 (Alito, J.), and at 394-400 (Becker, C.J., dissenting)

#### **“Public Disclosure”**

For there to have been a “public disclosure” of the allegations, the allegations must have been made by certain statutorily enumerated means in certain limited fora:

“in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media” (Emphasis added)

The common thread among these means of or fora in which the allegations are publically

disclosed is that they all involve public allegations made by the Government, with the exception of allegations made in the news media, in which case the information would also presumably be widely published and readily available to the Government officials because of its presumably wide dissemination by the media.

Thus, this provision is analogous to 31 U.S.C. § 3730(e)(2) & (3), which also create Jurisdictional bars “based upon” prior government knowledge or government actions.

In ordinary usage, it is quite clear what “civil . . . hearing” was intended to mean.

“Hearing” to judges and lawyers or even members of the public would plainly mean a:

“Proceeding of relative formality, generally public, with definite issues of law or fact to be tried, in which the parties proceeded against [a] right to be heard, and is much the same as a trial . . . . “ Black’s Law Dictionary (4<sup>th</sup> Ed. 1951)

The obvious purpose of requiring “public disclosures” to be made in a “hearing” is that they are typically open to the public, sometimes reported by the media, and where such allegations are therefor otherwise readily accessible by the Government prosecutors, without an extensive investigation or without a search of numerous more obscure sources.

Throughout the FFCA, the words “civil action ” or just “action” are universally used when referring to the general proceedings in a civil court case. 31 U.S.C. § 3729(a)(2) & (a)(3); 31 U.S.C. § 3730(a), (b)(1) & (4)(A) & (B), (5), (c)(1) & (2)(A), (B) & ( C), (3), (4), (5), (d)(1), (2) & (3), (e)(1) & (2)(A), (3), (4)(A) & (B), (g), (h)(2).

Even within the “public disclosure” bar itself , the word “action” is used, clearly meaning a “civil action”. 31 U.S.C. § 3730(e)(4)(B).

Consequentially, “civil . . . hearing” must mean something other than “civil action”.

“The only interpretation of “civil hearings” that is consistent with the other enumerated means and with Congress’s objectives is that [those words apply to a proceeding ] in which the Government is a participant.” (Emphasis added)

Thompson, A Critical Analysis of Restrictive Interpretations, supra, at p. 697. But see, *United States ex rel. Siller v. Becton Dickinson & Co.*, supra, 21 F.3d at 1350.

However, despite a universal use throughout the law of the words “civil action” or “action” to refer to civil proceedings in open court, and despite the inclusion of the unambiguous word “hearing”, federal courts have interpreted “civil . . . hearing” to meaning “civil court pleadings and hearings”, and thus have again given even broader meaning to those two words than Congress certainly intended.<sup>28</sup>

Courts have thus also given this word as used in the False Claims Act a new meaning different than the ordinary usage, and have held that “for purposes of § 3730(e)(4)(A), ‘hearing’ is roughly synonymous with ‘proceeding.’” See, e.g., *United States ex rel. Springfield Terminal Ry. v. Quinn* (D.C. Cir. 1994) 14 F.3d 645, 653. (Emphasis added)

The rationale for giving such a broad and an out-of--the-ordinary meaning to the word “hearing” was that:

“It is clear from statutory context that the term ‘hearing’ was intended to apply in a broad context of legal proceedings under § 3730(e)(4)(A). Otherwise, the indictment in United

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Some of the varied - and , one should argue, unnecessarily overbroad - conflicting interpretations of what the different Circuits have held “public disclosure” to be, which are broader than as stated in or discernible from a clear reading of the statute, are summarized in Boese, Civil False Claims and Qui Tam Actions, supra, at § 4.02(B).

Given this diversity of these very expansive interpretations of “public disclosure” in the various federal Circuits, defendants in State False Claims actions will have a well-stocked market in which to shop for favorable decisions from among those Circuits, of state courts were to blindly adopt the federal jurisdictionally based precedent.

States ex rel. Marcus v. Hess, 317 U.S. 537, 87 L. Ed. 443, 63 S. Ct. 379 (1943), would not constitute public disclosure within the meaning of the new amendments, see United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1155 (3d Cir. 1991), a result that cannot reasonably be attributed to Congress.n.6 If court documents could be copied at will to provide the basis for qui tam suits, a half-century of precedent would be swiftly refuted without a flicker of recognition from Congress. . . .” (Emphasis added)

Ibid. The Court reached this conclusion despite its express acknowledgment (Ibid, at fn. 6), that there was nothing in the Legislative History of the 1986 Amendments which supporting its equating the term “hearing” with “proceeding”

The “half-century of precedent” the Court was referring to was the precedent under the by then-repealed “government knowledge” bar in the 1943 Amendments to the FFCA, that were intended to bar only situations like those in the decision in *United States ex rel. Marcus v. Hess*, supra, where the relator was alleged to have simply copied the same allegations as were found in a prior federal indictment. Indictments are typically at some point read in open court, unlike ordinary pleadings or filings in most civil actions<sup>29</sup>.

Although it was the express intent of Congress in 1986 to replace that “Government knowledge” bar and the restrictive cases decided under it with a new provision which would allow the filing of more Qui Tam actions and yield greater recoveries for the Government. Congress wanted to get rid of the results of that statute and the precedents under it, and replace them with policies that did not so restrict Qui Tam cases. Yet this interpretation of the word “hearing” continues and expands those precedents under the 1943 Amendments to the FFCA, despite the intent

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In *U.S. ex rel. Marcus v. Hess* the defendant had pled *nolo contendere* to the indictment, presumably in open court. The relator claimed he had not copied the indictment, but had done his own investigation. 317 U.S. at 545.

of the Congress to abolish those provisions and the limiting restrictive effect they and cases thereunder had on the filings of Qui Tam actions.

The Government does not typically- and likely could not financially afford to- monitor all filing in all civil actions - including those to which it is not a party- to see whether some public fraud has been alleged somewhere deep in a pleading file in some court someplace in the hinterlands.

Since such court filings are only rarely followed by the news media, in practice it is likely the Government might never learn of any alleged fraud contained in routine court filings. Thompson, A Critical Analysis of Restrictive Interpretations, supra.

Consequently, interpreting the word “hearing” words to equate it to “civil action” would thus mean the fraud would never be either actually discovered, nor ever pursued by the Government, and that it also could never be pursued by private Plaintiffs Qui Tams.

Some courts have even held that “civil . . . hearing” covers pleadings and other things filed with the Clerk of the Court, even though their contents may never become revealed in a public “hearing” . See, *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.* (3d Cir. 1991) 944 F.2d 1149, 1157; *United States ex rel. Siller v. Becton Dickinson & Co.* , supra, 31 F.3d at 1350-1351; *United States ex rel. Springfield Terminal Ry.*, supra, 14 F.3d at 652-653 .

It is questionable whether allegations merely filed in a complaint that are never the subject of a hearing in court and which are not reported on by the press could constitute a “civil . . . hearing” so as to bar any Qui Tam action to recover for that fraud, as its is extremely unlikely that the Government would ever become aware of those allegations, and the fraud would thus never be

pursued.

That could not logically have been the intent of the Congress in the 1986 Amendments, as the intent was to *increase* private enforcement of the FFCA and increase their recoveries for such fraud. See, Helmer, Whistleblower Litigation, supra, § 5-8(a)(1), p. 301.

Two Circuits have gone even further afield, so far as to hold that material obtained in discovery by the parties - even if never filed with the Clerk - was nevertheless “publically disclosed.” See e.g., *United States ex rel. Stinson v. Prudential Insurance Co.* (3<sup>rd</sup> Cir. 1991) 9444 F.2d 1149, 1158.

But this is a minority view among the Federal Circuits.

"[C]onjectural or speculative 'accessibility' to the information [does not] bar[] the plaintiff's qui tam action."

*United States ex rel. Ramseyer v. Century Healthcare* (10th Cir. 1996) 90 F.3d 1514, 1521, n5

“[B]arring actions based on information which was merely potentially but not actually opened up to view does not discourage parasitism. It only deters diligence in uncovering fraud.” (Emphasis added)

*United States v. Bank of Farmington*, supra, 166 F.3d at 860.

Thus, under the Federal case law, for there to have been a “public disclosure” of discovery materials in a court “hearing”, any discovery materials regarding the fraudulent payment claims must have at least been “*actually made public through filing*”, as opposed to being only unfiled material “only *theoretically* available upon the public’s request”. *U.S. ex rel Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 652-653.

However, even this is an unwarranted expansion of the term “civil...hearing” for beyond

what the Congress intended.

### **“Allegations or Transactions”**

The plain meaning of “Allegations” would be some prior charge of wrongdoing, of the same type as have been made in a current False Claims Act hearing before a Court.

“Transactions” apparently would mean some sort of revelation of wrongful dealing, in violation of the False Claims Act, of the same nature or extent as has subsequently been alleged in a pending Qui Tam action.

Using a “plain meaning” interpretation of this phrase, whether a Qui Tam action is based upon some previously publicly disclosed “allegations or transactions” could presumably be easily determined by comparing the allegations of the Qui Tam complaint to the prior public allegations in hearings, the media, etc. regarding FFCA violations, to see if they are essentially the same, and if the False Claims Act violations alleged that were derived from the prior public allegations.

“Courts sometimes speak loosely of barring a *qui tam* suit because it is based on ‘publicly disclosed information.’ But the Act bars suits based on publicly disclosed ‘allegations or transactions,’ not information.’ (Citations omitted) We too find a distinction between ‘allegations or transactions’ and ordinary ‘information’ as a matter of common usage and sound interpretation of the FCA.”(Emphasis added)

*United States ex rel. Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 653.

“The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit qui tam actions only when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.” (Emphasis added)

Ibid at 654.

The prior allegations must involve the same fraudulent application for payments from the Government.

“Fraud requires recognition of two elements: a misrepresented state of facts and a true state of facts. The presence of one or the other in the public domain, but not both, cannot be expected to set government investigators on the trail of fraud. In pertinent part, liability under the FCA is triggered when a person ‘knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval,’ 31 U.S.C. § 3729(a)(1) (emphasis added), or ‘knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government’, . . .”(Emphasis added)

Ibid at 655-656.

Where the prior allegations just provide general information on a party’s conduct, and do not reveal that the False Claims Act has been violated, the Qui Tam suit is not barred.

“Many potentially valuable qui tam suits would be aborted prematurely by a reading of the jurisdictional provision that barred suits when the only publicly disclosed information was itself innocuous. In terms of the mathematical illustration, when X by itself is in the public domain, and its presence is essential but not sufficient to suggest fraud, the public fisc only suffers when the whistle-blower's suit is banned. When X and Y surface publicly, or when Z is broadcast, however, there is little need for qui tam actions, which would tend to be suits that the government presumably has chosen not to pursue . . .” (Emphasis added)

Ibid at 654.

“[Q]ui tam actions are barred only when enough information exists in the public domain to expose the fraudulent transaction (the combination of X and Y), or the allegation of fraud (Z).” (Emphasis added)

Ibid at 654.

Consequently, the publically disclosed “allegations or transactions” should have been sufficient to reveal the elements of the False Claims Act violations, as anything less than that is “innocuous” and “mere information”, not amounting to “allegations” of fraud or a revelation of the “transactions” which violated the False Claims Act.

“The public disclosure of “mere information” relating to the claims is insufficient to trigger a jurisdictional bar to a False Claims suit; the “material elements of the allegedly fraudulent ‘transaction’” must be disclosed. A-1 Ambulance, 202 F.3d at 1243 (quoting

Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473 (9th Cir. 1996)).” (Emphasis added)

*United States ex rel. Bly-Magee v. Premo* (9th Cir. 2006) 470 F.3d 914, 919.

“[T]he courthouse doors do not swing shut merely because innocuous information necessary [but] though not sufficient to plaintiff 's suit has already been made public” (Emphasis added)

*United States ex rel. Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 657

For a suit to be barred, all of the “essential elements, both the alleged truth and the allegedly fraudulent statements, [must have been] publically disclosed”. *United States v. Catholic Healthcare W.* (9th Cir. 2006) 445 F.3d 1147, 1152.

”A 'public disclosure' exists under § 3730(e)(4)(A) when the critical elements exposing the transaction as fraudulent are placed in the public domain.” Feingold, 324 F.3d at 495 (citing *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 304 U.S. App. D.C. 347, 14 F.3d 645, 654 (D.C. Cir. 1994)).’ The point of public disclosure of a false claim against the government is to bring it to the attention of the authorities. . . .” (Emphasis added)

*United States ex rel. Fowler v. Caremark RX, L.L.C.* (7th Cir. , 2007) 496 F.3d 730, 736; *United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp.* (10th Cir. 2008) 540 F.3d 1180, 1185..

“No doubt when courts speak of “publicly disclosed information,’ they mean both the allegation of fraud and all information proving the allegation that has made its way to the public’.”(Emphasis added)

*Wang ex rel. United States v. FMC Corp.* (9th Cir.1992) 975 F.2d 1412, 1418.

Obviously, one essential allegation or element of any cause of action for all False Claims Act violations is that the defendant must have made a “*claim*” to the Government, as defined in the Act, which claim was “false”.

“ Not all fraudulent conduct gives rise to liability under the FCA. ‘The statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment,

but to the 'claim for payment.' *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995). Evidence of an actual false claim is 'the sine qua non of a False Claims Act violation.' *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002), cert. denied, 537 U.S. 1105, 154 L. Ed. 2d 774, 123 S. Ct. 870 (2003). Therefore, a defendant violates the FCA only when he or she has presented to the government a false or fraudulent claim, defined as 'any request or demand . . . for money or property' where the government provides or will reimburse any part of the money or property requested. 31 U.S.C. § 3729(c); see also *Harrison*, 176 F.3d at 785 ('The False Claims Act at least requires the presence of a claim - a call upon the government fisc - for liability to attach.')."(Emphasis added)

*United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*(1st Cir. 2004) 360 F.3d 220, 225.

For example, in the *Springfield Terminal* case, the Qui Tam relator had initiated prior civil litigation, and it was during discovery there that it obtained the documents on which it based the subsequent False Claims case.

The pay vouchers and telephone records obtained earlier in the prior case appeared to be innocuous discovery materials and - although they would be helpful in proving a violation of the False Claims Act - "were not in and of themselves sufficient to constitute 'allegations or transactions' of fraudulent conduct within the meaning of the FCA jurisdictional bar". *United States ex rel. Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 653.

The court thus concluded that because neither the fraud nor the critical elements of the fraudulent transaction had been in the public domain, the jurisdictional bar did not apply.

“[T]he courthouse doors do not swing shut merely because innocuous information necessary though not sufficient to plaintiff's suit has already been made public . . . .” (Emphasis added)

*Ibid* at 657.

However, despite giving lip service to these principles in their holdings, a number of

Federal courts have developed a much more expansive interpretation to the phrase “allegations or transactions”

Some Federal courts have even held that a Qui Tam action is barred if any of the factual allegations currently contained in a Qui Tam action was previously publicly disclosed, regardless of whether the prior public information revealed a fraud on the Government or not.

“The words fraud or allegations need not appear in the disclosure for it to qualify. Jones, 160 F.3d at 332. Nor does the allegation have to be exactly what Relators' allege. McKenzie, 123 F.3d at 940. So long as the government is put on notice to the potential presence of fraud, even if the fraud is slightly different than the one alleged in the complaint, the qui tam action is not needed.” (Emphasis added)

*Dingle v. BioPort Corp.* (6th Cir. 2004) 388 F.3d 209, 214-215.

“[I]n *United States ex rel. Precision Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992) *Co. v. Koch Indus.*, 971 F.2d 548 (10th Cir. 1992), cert. denied, 507 U.S. 951, 113 S. Ct. 1364, 122 L. Ed. 2d 742 (1993). . . the court interpreted ‘based upon’ to mean “supported by,” which includes any action based even partly upon public disclosures” (Emphasis added)

*United States ex rel. McKenzie v. Bellsouth Telcoms.* (6<sup>th</sup> Cir. 1997) 123 F.3d 935, 940.

“For a qui tam suit to be “based upon” a prior public disclosure, § 3730(e)(4)(A), the publicly disclosed facts need not be identical with, but only substantially similar to, the relator's allegations.” (Emphasis added)

*United States ex rel. Meyer v. Horizon Health Corp.*(9th Cir. 2009) 565 F.3d 1195, 1199.

In considering what amount or quantum of information must have been publicly disclosed in Court hearings or the media, etc., the federal Courts yet again fell back upon precedent under the 1943 Amendment’s “Government Knowledge” bar, and have very expressly cited and applied those very same cases and their very broad interpretation of when the Government has “knowledge” of a violation - without much critical analysis - to the “public disclosure” bar under the 1986 Amendments, despite the intent of the Congress to do away with those overbroad limits on Qui Tam

cases.

*Springfield Terminal*, for example, discussed its analysis of that phrase as follows:  
"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.' *Crandon v. United States*, 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997 (1990). Many potentially valuable qui tam suits would be aborted prematurely by a reading of the jurisdictional provision that barred suits when the only publicly disclosed information was itself innocuous. . . . The cogent analysis in *United States ex rel. Joseph v. Cannon*, 206 U.S. App. D.C. 405, 642 F.2d 1373 (D.C. Cir. 1981), cert. denied, 455 U.S. 999, 71 L. Ed. 2d 865, 102 S. Ct. 1630 (1982), construing the pre-1986 qui tam provisions, is instructive in illuminating this tension:

"To require that the evidence and information possessed by the United States be a mirror image of that in the hands of the qui tam plaintiff would virtually eliminate the bar. On the other hand, to permit the bar to be invoked when the United States possesses only rumors while the qui tam plaintiff has evidence and information would be to permit the bar to repeal effectively much of the False Claims Act. Between these extremes lies the answer. More precisely, .The question, properly, then, is whether the information conveyed [to the government] could have formed the basis for a governmental decision on prosecution, or could at least have alerted law-enforcement authorities to the likelihood of wrongdoing. . . . Id. at 1377 (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978))"

*U.S. ex rel Springfield Terminal Ry. v. Quinn* , supra, 14 F.3d at 654.

Consequently, the test in most Federal Courts as to whether there has been a sufficient prior public disclosure of or "allegations or transactions" describing the fraud on the Government for purpose of the 1986 Amendments thus has become:

" whether the information conveyed [to the government] could have formed the basis for a governmental decision on prosecution, or could at least have alerted law- enforcement authorities to the likelihood of wrongdoing" Ibid.

Some Court use more colloquial phrasing of this test as being whether the "publicly disclosed" "allegations or transactions" regarding the fraud is sufficient to:

“Put the government on the trail of the fraud”<sup>30</sup>, or “Alert the Government to the Fraud.”

Under this overbroad test “Alerted law enforcement authorities to the likelihood of wrongdoing” , does not mean “Alerted law enforcement authorities to the likelihood of [False Claims Act violations] by a party.

It just means that some of the factual allegations in the Qui Tam case are the same as some public information, even if the public information doesn’t reveal any fraud or False Claims.

This, of course, is - again - exactly the same test as used by the Courts under the now long repealed 1943 “Government Knowledge” bar. The *Springfield* court has even expressly relied upon the 1976 and 1981 cases of *United States er rel. Pettis v. Morrision-Knudsen Co.* and *United States er rel. Joseph v. Cannon* cases under the repealed 1943 law to interpret and apply the terms of the 1986 Amendments, despite the fact that the 1986 statute repealed that same 1943 bar because it had the effect of excessively discouraging or barring otherwise helpful Qui tam actions that would never have been brought, but for the plaintiff Qui Tam.

As a consequence, the Courts continued to be hostile to Qui Tam actions even after 1986, and have largely resurrected the “Government Knowledge” bar under the guise of interpreting the words of the new 1986 amendments, using the same test of “government knowledge” as under the repealed amendments.

*Springfield Terminal* is not the only case to apply this regressive interpretation or test to the 1986 Amendments, and in fact the use of these pre-1986 cases as still setting the standard after their effective Congressional repeal in 1986 is pervasive and has become part of law via a partial judicial

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See e.g., *United States ex rel. Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 655.

repeal of 1986 Amendments sur nom of statutory interpretation.<sup>31</sup> .

The obvious effect of applying these varying and very broad - pre-1986 - “quick trigger” interpretations of the “Public disclosure” jurisdictional bar in Federal Courts based upon decisions under the 1943 statute is to eliminate most Qui Tam actions brought on behalf of the Government, where even the smallest amount of any of the allegations that are made in the Qui Tam case.<sup>32</sup>

Qui Tam actions are sometimes barred even if the “public” “information” does not itself reveal the full extent of the wrongful conduct by the defendant, and even if the “publicly disclosed” information does not reveal that False Claims for payment have ever been made, and even if the “public” information does not reveal that the False Claims Act has been violated in any way, and even if the Qui Tam relator did not base his or her allegations on the prior information. and independently discovered the fraud through his or her own efforts.<sup>33</sup>

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<sup>31</sup> See e.g., *United States ex rel. Biddle v. Bd. of Trustees of Leland Stanford, Jr. Univ.* (9th Cir. 1998) 161 F.3d 533, 538

<sup>32</sup>

A simplified graphic summary of the some of the confusing, vast and conflicting splits among the various Federal Circuit Courts of Appeals over the breadth of some of the various terms or elements of the “public disclosure” bar, as well as the Courts’ similarly confusing differences over the narrowness of the “original source” exemption to that bar (which is also discussed briefly below) is found in Andropy, Federal False Claims Act and Qui Tam Litigation, supra, § 10.10[5], Tables 10-1 and 10-2.

<sup>33</sup> By contrast, in applying the jurisdictional bar of 31 U.S.C. 3730(e)(3), at least one court has interpreted the same phrase “allegations or transaction” much more narrowly:

“[W]hen it is not clear whether or not a qui tam action should be barred by the ambiguous provision precluding the action if it is ‘based upon transactions or allegations which are the subject of’ another suit or proceeding in which the government is a party, we think that a court should look first to whether the two cases can properly be viewed as having the qualities of a host/parasite relationship. In answering this question, we think it would be useful for the court to be guided by the definition of the word “parasite,” and ask whether the qui tam case is receiving “support, advantage, or the like’ from the ‘host’ case (in which the government is a party) ‘without giving any useful or proper return

Thus, Qui Tam actions are prevented even if it is highly improbable or absurd to believe - from the limited information “publicly disclosed” about some parts of the defendants conduct - that such public disclosure “would ever come to the attention of any Government officials - much less the Attorney General - that a False Claim Act violation of some type has occurred, much less cause the prosecuting arm to devote scarce resources to further investigate the facts on the odd chance it might find actual evidence of a False Claims Act Violation.

Meritorious Qui Tam actions where the relator has dug up most of the information on his own will be consequently barred, and the Government’s financial losses from frauds upon in most cases will go unrecovered.

Of course a Qui Tam plaintiff could possibly still prosecute a case if he or she could prove they are the “original source” - under 31 U.S.C § 3730(e)(4)(B) - of the “information on which the [False Claim Act] allegations are based”, based on his or her “direct and independent knowledge” of that information that derives other than from the publicly disclosed “allegations or transactions”.<sup>34</sup>

However, federal judicial interpretations of this clause - on “jurisdictional” grounds - have

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to the government (or at least having the potential to do so). See Random House Dictionary of the English Language 1409 (2d ed. unabridged 1987). . . . “  
”[C]ourts should proceed with caution before applying the statutory bar of § 3730(e)(3) in ambiguous circumstances.”  
*United States ex rel. S. Praver & Co. v. Fleet Bank* (1<sup>st</sup> Cir. 1994) 24 F.3d 320, 327-328; See also, *Costner v. Urs Consultants* (8<sup>th</sup> Cir. 1998) 153 F.3d 667, 676.

<sup>34</sup>

Where there has been no "public disclosure" within the meaning of section 3730(e)(4)(A), there is no need for a qui tam plaintiff to show that he is the "original source" of the information. See, *United States ex rel. Hagood v. Sonoma County Water Agency* (9th Cir. 1991) 929 F.2d 1416, 1419-20.

narrowed this exemption from the public disclosure bar, and those restrictive interpretations, not coincidentally, operate so as to narrow the number of Qui Tam actions that can be filed where almost any information at all about the defendant's conduct has been made public, even if that information does not by itself reveal that there has been a violation of the FFCA.

Like the "public disclosure" bar, the provisions of the original source requirements<sup>35</sup> have "been interpreted and defined - generally in conflicting ways - in a number" of Circuits and thus has also become the source of much "confusion", as there is at least a three way split among the Circuits over its meaning, and because "several appellate courts have unabashedly added clauses to the sentence which Congress did not put there". Helmer, False Claims Act: Whistleblower Litigation, supra, § 5.8; 1 Bose, Civil False Claims and Qui Tam Actions, supra, § 4.02[D].

As one example of such narrow readings, the recent case of *Rockwell Int'l v. United States ex rel. Stone*, supra, effectively held that if there has been a public disclosure then to qualify as an original source the relator's "direct and independent" knowledge must cover the full basis for his complaint, including the facts, what regulation was violated, and that false statements were made to the government, even though the publicly disclosed "allegations or transaction" need not be similarly as broad to bar a qui tam action

Several Circuits have effectively added a further requirement to the statute that the relator

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<sup>35</sup> The "original source" exemption states:

"(B) For purposes of this paragraph, 'original source' means 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" (Emphasis added)

31 USCS § 3730(e)(4)(B).

have witnessed the fraud “with its own eyes” [See, *U.S. ex rel. Kinney v. Stoltz* (8<sup>th</sup> Cir. 2003) 327 F.3d 671, 674] in order to have “direct” knowledge of the False Claim Act violation and qualify as an original source.

This added requirement effectively means that only co-perpetrators of or percipient witnesses to the False Claim conduct could be an “original source”.

Other Circuits have added an additional non-statutory requirement that to qualify as an original source, a realtor “must have had a hand in the public disclosure of allegations that are a part of one's suit.” See e.g., *Chen-Cheng Wang ex rel. United States v. FMC Corp.* (9<sup>th</sup> Cir. 1992) 975 F.2d 1412, 1418<sup>36</sup>

Broadly interpreting the “public disclosure” bar and very narrowly restricting its “original source” exception unquestionably revert the obstacles to Qui Tam recoveries on behalf of the Government to their pre-1986 level.<sup>37</sup>

## II.

### The California False Claims Act

Although California has had its criminal False Claims statute [Pen Code § 72] since 1872, California - like other states - only first adopted a civil False Claims Act after the 1986

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See the criticism of this “extra-textual requirement” in *United States ex rel. Siller v. Becton Dickinson*, supra, 21 F.3d at 1351;

<sup>37</sup> It appears that if the Attorney General intervenes in the case as allowed by 31 U.C. § 3730(d), then the public disclosure bar can be avoided.

“The elimination of [of the relator under section 3730(e)(4)] leaves in place an action pursued only by the Attorney General, that can reasonably be regarded as being ‘brought’ by him for purposes of § 3730(e)(4)(A).” *Rockwell Int'l Corp. v. United States*, supra, 549 U.S. at 478.

Amendments to the Federal False Claims Act.<sup>38</sup> Gov. Code §§ 12650 - 12656, Stats.1987, ch. 1420, § 1, p. 5237 (The “CFCA”)<sup>39</sup>

The CFCA was thus adopted well before any of the various restrictive, regressive interpretations of some of the FFCA “public disclosure” provisions of the 1986 FFCA Amendments began emanating from the his Courts of Appeals.<sup>40</sup>

Consequently, unlike the case in other states, which adopted False Claims Acts several -  
or

many - years after 1986, and where their Courts thus can logically:

“presume that, when our legislature passed the Act, it was aware of federal court opinions that had construed the False Claims Act” and thus “give weight to federal court opinions that interpreted the federal law before [the state False Claims Act] was passed” (Emphasis

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See, 2 Bose, Civil False Claims and Qui Tam Actions (3<sup>rd</sup> ed.) § 6.01; Helmer, Whistleblower Litigation, supra, Chptr. 22.

But California is the only state False Claim statute adopted immediately after the FFCA P.L. 99-562 was signed October 27, 1986; California’s A.B.1441 was introduced March 4, 1987, and signed September 30, 1987 as Stats. 1987, Ch. 1420.

The other state statutes were adopted more recently, some not until after the Deficit Reduction Act of 2005 (Pub. L. No. 109-171, § 6031(b), 120 Stat. 4, codified as 42 U.S.C. § 1396h) provided financial incentives for the states to enact False Claims Act “provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code”, meet other requirements, and that at least cover Medicare and Medicaid Fraud. 42 USCS § 1396h(b)(2) (Emphasis added)

Unlike the California Act, a number of the state acts are limited to just that sort of fraud, and were only adopted after 2006.

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The 1986 Amendments to the FFCA were “the model for California's law”, or most of it *Wells v. One2One Learning Foundation*, 39 Cal. 4th at 1197.(Cal. 2006)

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In 1993 California also adopted a very similar statute allowing recovery directly and through Qui Tam actions for False Insurance Claims. Ins. Code § 1871.7.

added)

*People ex rel. Levenstein v. Salafsky* (Ill.App. 2003) 789 N.E.2d 844, 849, one cannot logically “presume” that the California General Assembly intended to adopt or incorporate into California law any of the various and varying subsequent Federal Court constructions of the California Act’s similar language, as there were no such cases under the 1986 Amendments to the FFCA until well after the California Act was adopted in 1987.

Thus, it is appropriate to look first at the plain meaning, Legislative purposes and Legislative intent of the California Act, and not at any subsequent federal court interpretations of the FFCA rendered well after the CFCA was adopted.

The California Act also was not a duplicate copy of the Federal Act. The many differences from the 1986 FFCA Amendments, reflecting the General Assembly’s intent to make its own law and policy for California, and not just enact an exact reduplication of the Federal Act.

For example, the CFCA created a new type of False Claim violation in Gov. Code §12651(a)(8) against anyone who is:

“ a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.” (Emphasis added)<sup>41</sup>

*Wells v. One2One Learning Foundation* (2006) 39 Cal. 4th 1164, 1187; *Armenta ex rel. City of*

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Other states, apparently following California’s lead, have also included identical or similar provisions. See e.g., D.C. Code § 2-308.13(a)(8); Haw. Rev. Stat. § 661-21(a)(8); Mass. Ann. Laws ch 12, § 5B(9); Mont. Code Ann. § 17-8-403(1)(h); Nev Rev. Stat. Ann. § 357.040(1)(h); Tenn Code Ann.§ 4-18-103(a)(8).

*Burbank v. Mueller Co.* (2006) 142 Cal.App.4th 636, 647.<sup>42</sup>

The California Act provides for joint and several liability [Gov. Code § 12651(c)], whereas the FFCA does not. Also unlike the FFCA, where the Attorney General is the only public official allowed to bring False Claims action, California law allows a local District Attorney or “prosecuting authority” of a political subdivision to bring such an action. Gov. Code § 12652(a) &(b).

The California law also differs in that private Qui Tam plaintiffs may bring an action as a relator on behalf of the State or its political subdivisions, if local funds are involved in the False Claims. Gov. Code § 12652(c)<sup>43</sup>.

The California Act provides greater incentives to bring Qui Tam cases than the Federal provision, as it provides for the award to a relator of a potentially significantly larger percentage of

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“[L]iability may be imposed under section 12651, subdivision (a)(8), on third persons who did not submit the false claims themselves”(Emphasis added) Ibid.

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The California Act also establishes a much more elaborate procedure in Qui Tam cases for notification to the Attorney General and the local authorities, so that they may decide whether to intervene in a Qui Tam action, seek to settle or dismiss it for “good cause”, or allow the Qui Tam relator to prosecute it. Gov. Code § 12652(c)(4) - (8), & (e)(1) & (2), (f)(1) & (2); *Laraway v. Sutro & Co., Inc.* (2002) 96 Cal.App.4th 266, 273-274.

And the State statute, unlike the FFCA, allows the Attorney General or local prosecutor to later intervene in a Qui Tam case up to the time of judgment, even if they previously declined to do so. Gov. Code §12652(f)(2)(A).

These provisions by themselves would be sufficient to allow the State to control unduly “parasitic” Qui Tam actions on a case by case basis. Where the Government is unaware of the fraud or does not have the resources to prosecute all frauds upon it, even such purportedly parasitic actions serve a public purpose, as even in those cases the Government will get some recovery while expending little in cost or effort. See , *United States ex rel Marcus v. Hess*, supra, 317 U.S. at 545

Illinois has held that some similar provisions allowing Attorney General oversight of the Qui Tam there save the Constitutionality of that state’s Act from challenges that it infringed upon the power of the Illinois Attorney General under that state’s constitution. *Scachitti v. UBS Fin. Servs.* (Ill. 2005) 831 N.E.2d 544, 561

the proceeds than does the Federal law. Compare Gov. Code § 12652(g)(2) & (3) to 31 U.S.C. § 3730(d)(1) & (2).

Furthermore, California adopted broader and more extensive provisions protecting Qui Tam employee relators and others who bring or assist in California False Claim Act cases against or based on the conduct of their employers [Gov. Code § 12653], than does the Federal law, 31 U.S.C § 3730(h).

The statute of limitations in the FFCA differs, as it begins to run when the violation was "known or reasonably should have been known", whereas the limitations period under California Gov. Code § 12654(a) commences upon "discovery." *Debro v. L.A. Raiders* (Cal. App. 1st Dist. 2001) 92 Cal. App. 4th 940, 949.<sup>44</sup>

Among several additional differences from the FFCA are provisions added into the California Act and not found in the FFCA providing that:

“the provisions of the Act are not exclusive, and the remedies provided . . . shall be in addition to any other remedies provided for in any other law or available under the common law”,

and a special rule of construction stating:

“This article shall be liberally construed and applied to promote the public interest.”Gov Code §§ 12655 (a) & ( c). (Emphasis added)

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The California limitations provisions were also changed or clarified in 2009 by AB 1196, and the three years after discovery period is only triggered by discovery only by the Attorney General or by the local Prosecuting Authority with “jurisdiction” to bring a False Claims case, including a county counsel, city attorney or other official “charged with investigating, filing and conducting civil legal proceedings” on its behalf. See Gov. Code §§ 12650(b)(4) & 12654(a), as amended.

One might expect, however, that the general purposes of the California False Claims Act would be the same as the original purposes stated by the Congress in adopting the Federal Act, as the State statute was still generally patterned after the Federal Act and was adopted immediately after it. The U.S. Senate and House had published reports were available to California lawmakers when they were considering adoption of the California Act.

As discussed above, one of the original purposes of the FFCA was to “enhance the Government’s ability to recover losses sustained as a result of fraud against the Government”, “make the statute a more useful tool against fraud in modern times”, and “encourage any individual knowing of Government fraud to bring that information forward”, by increasing “incentives, financial and otherwise, for private citizens to bring [Qui Tam] suits on behalf of the Government”. S. Rep. No. 99-345 , at 1-2, in 1986 U.S.C.C.A.N. 5266 - 5267.

“[T]he ultimate purpose of the [CFCA] is to protect the public fisc.” *City of Hawthorne ex rel. Wohlner v. H & C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1677; accord, *Laraway v. Sutro & Co., Inc.* (2002) 96 Cal.App.4th 266, 274; *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 801; *Levine v. Weis* (1998) 68 Cal.App.4th 758, 765; *State of California v. Altus Finance* (2005) 36 Cal. 4th 1284, 1296-1297 (Cal. 2005); *State of California ex rel. Hindin v. Hewlett-Packard Co.*, (2007) 153 Cal. App. 4th 307; *Southern Cal. Rapid Transit Dist. v. Superior Court* (1994) 30 Cal.App.4th 713, 725

Vindication of this goal - to redress fraud against the government - constitutes an important right affecting an important societal interest. See, *State of California ex rel. Hindin v. Hewlett-Packard Co.*, supra, 153 Cal.App.4th 307, 320 [False Claims Act is "intended to reinforce public rights and enlightened public policy, by preventing the looting of the public fisc"].

The Legislative history of the State Act and precedents interpreting it, in fact, establish that encouraging private Qui Tam enforcement was an important purpose of the California Act.

The primary intent of California False Claims Act was to "supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities." *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494; § 12651(a).

The California Act was in part designed to promote or expand the role of Qui Tam relators in ferreting out fraud and supplementing government enforcement efforts, but at the same time it was also "intended to bar parasitic or opportunistic actions by persons simply taking advantage of public information without contributing to or assisting in the exposure of the fraud.", and who "simply copied allegations" that were only learned of "through public channels". *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal. App. 4th 24, 33. (Emphasis added)<sup>45</sup>

As was originally the case with the FFCA Amendments of 1986, the California Act was intended to "supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities." *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal. App. 4th 488, 494, n1; *American Contract Services v. Allied Mold & Die, Inc.* (2001) 94 Cal.App.4th 854, 858; *State of California ex rel. Hindin v. Hewlett-Packard Co.*, supra, 153 Cal. App. 4th 307.

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35 "The public disclosure jurisdictional bar is 'intended to bar 'parasitic or opportunistic actions by persons simply taking advantage of public information without contributing to or assisting in the exposure of the fraud'." *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.*, supra, 109 Cal. App. 4th 1677-1678.

“[In considering Assembly Bill 1441 in 1987] the Assembly Judiciary Committee heard testimony from David Huebner, representing the Center for Law in the Public Interest, which participated in drafting both the current federal and California false claims statutes. Huebner described the proposed California law as ‘deputizing citizens to join the fight to protect the public treasury.’ (Assem. Com. on Judiciary, Hearing on Assem. Bill No. 1441 (1987–1988 Reg. Sess.) May 6, 1987, testimony of David Huebner, p. 3, italics added (Huebner Testimony).)”

“Huebner explained that ‘the Justice Department and local prosecuting authorities do not have unlimited resources and should be able to benefit from additional non-governmental resources brought to bear on their behalf. The driving force behind the false claims concept is the providing of incentives for individual citizens to come forward with information uniquely in their possession and to thus aid the Government in [ferreting] out fraud. This false claims legislation provides a mechanism for harnessing such non-governmental resources, at no additional cost to the government.’ (Huebner Testimony, supra, p. 3, italics added.) Huebner noted, as one of the bill’s principal benefits, that ‘taxpayers see their elected representatives acting decisively and calling upon the source of the funds, the taxpayers themselves, for assistance.’ (Id., at p. 4, italics added.)

“Moreover, Huebner testified, “the False Claims bill before you encourages cooperation between state and local authorities by setting out a framework for deciding whether the state or local authorities have jurisdiction over particular cases involving mixed funds. Providing such a framework is essential to effective, efficient investigation and enforcement.” (Huebner Testimony, supra, pp. 3–4.). . . .

“The CFCA certainly seeks to induce private ‘whistleblowers,’ uniquely armed with information about false claims, to risk the failure of their qui tam suits in hopes of sharing in a handsome recovery if they succeed. Indeed, this prospect of reward may be the only means of inducing such private parties to come forward with their information. The statute further sweetens the deal by sanctioning qui tam actions that ‘jump the gun’ on the defrauded public agencies. . . .

“This carefully balanced scheme enlists ‘nongovernmental’ resources—informants acting partly in their own self-interest—in the battle to ferret out and prosecute public fraud. On the other hand, it costs the government nothing in time, resources, or money beyond what a defrauded entity might spend to investigate and prosecute on its own behalf.” (Emphasis added)

*State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal. 4th 1220, 1230-1232.

To achieve this purpose,

"[T]he False Claims Act creates substantial financial incentives for private 'whistleblowers' to help uncover and prosecute fraudulent claims made to the government."

*Rothschild v. Tyco Internat. (US), Inc., supra*, 83 Cal.App.4th at p. 494.) *d.* at p. 495.)

Section 12652 gives whistleblowers - or Qui Tam relators - statutory standing to sue in the name of the public entity, by assigning them a portion of the public entity's recovery, subject to certain conditions and restrictions. *Armenta ex rel City of Burbank v. Mueller Co.*, *supra*, 142 Cal.App. at 641-642.

The restrictions on that assignment - and their standing to sue - are contained in Section 12652 (e)(2), as well as other provisions imposing the need for approval by the Court of any settlement or dismissal of the Qui Tam's case. Gov. Code § 12652( c)(1).<sup>46</sup>

Encouraging private parties to bring False Claims Act cases based on fraud against the Government first revealed by them, so as to increase recoveries for contractual fraud against the Government, something was which heretofore was not provided for in California law.

"The California False Claims Act was enacted in 1987 'to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities.' (*Rothschild v. Tyco Internat. (US), Inc., supra*, 83 Cal.App.4th at p. 494.) '[T]he False Claims Act creates substantial financial incentives for private 'whistleblowers' to help uncover and prosecute fraudulent claims made to the government. . . . The primary purpose of the False Claims Act 'is to protect the public fisc.' (*LeVine v. Weis* (1998) 68 Cal.App.4th 758, 765" (Emphasis added)

*Wells v. One2One Learning Foundation* (2006) 39 Cal. 4th 1164, 1187

### **Violations of the Act**

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This latter provision was also very much strengthened in 2009 by AB 1196, in that the approval of both the Court and the Attorney General or local prosecuting authority are now required to dismiss a False Claims case, even if the public entity has elected not to intervene in the case. Nor can a private relator agree to the waiver or release of a False Claims Act violation, except under a Court-approved settlement.

Like the FFCA, the California Act "is intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.' [Citation.]" . *City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 802.

To that end, it is "liberally construed and applied to promote the public interest." Gov. Code, § 12655 (c); *Stacy & Witbeck v. City and County of San Francisco* (1996) 47 Cal. App. 4th 1, 11.

A "claim," for purposes of the California Act, includes "any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision . . . ." Gov. Code § 12650 (b)(1). A political subdivision includes a city, county, tax, or assessment district, or "other legally authorized local governmental entity with jurisdictional boundaries." Gov. Code § 12650(b)(3). *Debro v. L.A. Raiders* (2001) 92 Cal. App. 4th 940, 946.

Liability attaches when a claim presented to the government is inherently false, or when the underlying government contract is obtained through fraudulent or corrupt acts. See, *City of Pomona v. Superior Court*, supra, 89 Cal.App.4th at p. 802 [finding False Claims Act liability for claims made under a government contract "originally obtained based on false information or fraudulent pricing"]; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 741

The Act thus allows for "Fraud in the Inducement type False Claims similar to the FFCA, such as where a contractor obtained agency's approval for change orders based on false representation that additional work was required; when there has been such Fraud in the Inducement of an agreement, each subsequent request or application for a progress payment made under change

order agreement constitutes a false claim under False Claims Act. Ibid

Gov. Code §12651(a)(1), (2) and (8) make it a violation of the Act for anyone who:

- (1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval.<sup>47</sup>
- (2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision. . . .<sup>48</sup>
- (8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the false claim, and fails to disclose the false claim to the state or political subdivisions within a reasonable time after discovery of the false claim.”(Emphasis added)<sup>49</sup>

The term “claim” has been broadly defined and interpreted.

“(1) ‘Claim’ includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, . . . .”

Gov Code § 12650(b)(1)<sup>50</sup>

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This provision was broadened by the adoption of AB 1196 (Stats. 2009, Ch. 277) signed October 11, 2009 so as to delete the phrase “to the state or a political subdivision”, so as to track the changes or “clarifications” made to the FFCA by Section 4 of Fraud Enforcement and Recovery Act of 2009

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Effective January 2009, this provision will read “Knowingly makes, uses, or causes to be made a false record or statement material to a false or fraudulent claim”

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Effective January 2009, the phrase “to the state or a political subdivision” has been deleted from this language.

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The definitions of “claim” were also broadened in 2009 by the adoption of AB 1196, which was intended to overturn certain narrow constructions of that term by the Courts of Appeal.

Those new definitions allow a “claim” to include a request or demand for money property or services presented to a state agency or political subdivision, as well as those “made to a contractor, grantee, or other recipient” if the money is to be spent on some state or local program

## The California “Public Disclosure” Bar, and the “General Jurisdiction” of State Courts

The Public Disclosure provisions of the California Act are the substantially the same as in the 1986 Federal Act<sup>51</sup>, except that the public disclosures must have been made in State hearings or fora, rather than Federal ones:

“(A) No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision . . .” (Emphasis added)

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and is paid for by or if the contractor is reimbursed by the state or local entity. See, Gov. Code § 12650(b)(1)(B).

<sup>51</sup> Most states which have adopted False Claims Acts have also copied the jurisdiction bar verbatim, with some exceptions or modifications.

Montana and Wisconsin appear to have no express public disclosure bars but, like California, instead allow the Government to seek settlement or dismissal of a Qui Tam action. Mont. Code Ann. §§ 17-8-407, 17-8-413. The Wisconsin law allows a maximum recovery of ten percent by a relator if action is based “primarily” on a public disclosure. Wisc. Stat. § 20.913(11)..

The Deficit Reduction Act of 2005 does not require states to have a public disclosure bar in their own laws at all, as long as the law “contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code [31 USCS §§ 3730-3732]” and meets the other requirements. 42 U.S.C. § 1396h(b)(2).

Having no such bar would certainly render the state statutes “at least as effective” - or much more so - in “facilitating” and promoting Qui Tam recoveries as the Federal Act.

The Model State False Claims Act developed by the non-profit Taxpayers Against Fraud Education Fund in 2006 as a guide for states desiring to obtain the benefits of the Deficit Reduction Act of 2005 thus allows only the state Attorney General to move invoke the public disclosure bar (§ 3(e)(3)), and the bar itself is limited to public disclosures in the news media or in “a publicly disseminated governmental report”. The court only “may” - and is not required to - dismiss the case on such a motion, on “consideration of all the equities”. The “no court shall have jurisdiction” language in the FFCA is not included in this provision of the Model Act.

Gov Code § 12652(d)(3)(A).<sup>52</sup>

Despite the fact that the Public Disclosure bar is written in terms of “jurisdiction”,<sup>53</sup> unlike Federal Courts, California Courts are of General, and not Constitutionally Limited Jurisdiction. Calif. Const. Art. VI, sec 10; Code Civil Proc. § 410.10; 2 Witkin, California Procedure (5<sup>th</sup> Ed. 2008) Courts, § 208, p. 293.

Because the California Constitution does not contain limits on the jurisdiction of its Courts similar to Article III, sec. 2 of the Constitution of the United States , “California courts are not bound by anything similar to the ‘case or controversy’ requirement of article III of the United States Constitution, but instead are guided by ‘ prudential’ considerations” in ruling on challenges to a party’s standing to sue and like considerations”. *Bilafer v. Bilafer* (2008) 161 Cal. App. 4th 363, 370 See also, *National Paint & Coatings Assn. v. State of California* (1997) 58 Cal. App. 4th 753, 761; *Grosset v. Wenaas* (2008) 42 Cal. 4th 1100, 1117, fn. 13.<sup>54</sup>

In California - unlike the case in Federal courts - a plaintiff is not required to prove that the Court has subject matter jurisdiction at all phases of the case, as jurisdiction is presumed because the limits on true (or “fundamental”) State Court subject matter jurisdiction are few and rare; the

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<sup>52</sup> The Public Disclosure bar in Ins. Code § 1871.7(h)(2) is also identical.

<sup>53</sup> As also are other the bars in Gov. Code § 12652(d)(1) & (4).

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See also, Doggett, Note: “Trickle Down Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Law? (2008) 108 Col. L. Rev. 839, 871-880, arguing that Federal case law restrictions on the legislative conferral of standing on citizens to bring taxpayer, Qui Tam or like actions should not be imported into state law, because state constitutions typically lack “case or controversy” provisions , and because of other differences in the state and Federal Constitutions. See also, *Ibid* at 876.

burden thus is instead on the party attacking the court's subject matter jurisdiction to prove that fact.

See, *Craney v. Low* (1956) 46 Cal. 2d 757, 760; *Freeman v. McClung* (1963) 217 Cal.App.2d 31,

33. See also, Code Civil Proc. §§ 430.10(a); 438 (c)(1)(B)(i).<sup>55</sup>

“A court [of General Jurisdiction] does not necessarily act without subject matter jurisdiction merely by issuing a judgment going beyond the sphere of action prescribed by law. ‘Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction ... .’ (Abelleira, supra, 17 Cal.2d at p. 291.) The distinction is critical, because ‘[a]ction ‘in excess of jurisdiction’ by a court that has jurisdiction in the ‘fundamental sense’ (i.e., jurisdiction over the subject matter and the parties) is not void, but only voidable.”” (Emphasis added)

*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal. App. 4th 1093, 1100-1101;

*Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 288.

The use of the word “jurisdiction” does not always or even usually mean subject matter jurisdiction in the “fundamental” sense of the power of the Court to rule at all.

“The term ‘jurisdiction,’ [in California has been] ‘used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition.’ (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 287 [109 P.2d 942] (Abelleira).) Essentially, jurisdictional errors are of two types. Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.” (Id. at p. 288.) When a court lacks jurisdiction in a fundamental sense, an ensuing judgment is void, and ‘thus vulnerable to direct or collateral attack at any time.’ (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119 [101 Cal. Rptr. 745, 496 P.2d 817] (Barquis).)”

“However, ‘in its ordinary usage the phrase ‘lack of jurisdiction’ is not limited to these fundamental situations.’ (Abelleira, supra, 17 Cal.2d at p. 288.) It may also ‘be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no ‘jurisdiction’ (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural

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Lack of subject matter jurisdiction or standing to sue may also be raised as an affirmative defense in an answer to the complaint. *Greener v. Workers’ Comp. Appeal Bd.* (1993) 6 Cal. 4<sup>th</sup> 1028, 1036-1037; *Parrot v. Mooring Townhomes Ass’n.* (2003) 112 Cal.App.4th 873, 876.

prerequisites.' (Ibid.)”

*People v. American Contractors Indemnity Co.*(2004) 33 Cal. 4th 653, 660-661. See also, *County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal. App. 4th 656, 661; *Schwartz v. Labow* (2008) 164 Cal. App. 4th 417, 426; *People v. Williams* (2000) 77 Cal. App. 4th 436, 447<sup>56</sup>

State courts - but not federal courts - use the term “*jurisdiction*” in many different ways, and the fact that “*jurisdiction*” has “so many different meanings that no single statement can be entirely” made as to its meaning. See, *County of Los Angeles v. Harco National Ins. Co.* (2006) 144 Cal. App. 4th 656, 661; *Schwartz v. Labow* (2008) 164 Cal. App. 4th 417, 426; *People v. Williams* (2000) 77 Cal. App. 4th 436,447

Consequently, in California courts “the word ‘*jurisdiction*’ is ambiguous.” *People v. Green* (2004) 125 Cal. App. 4th 360, 370.

In California the term “*jurisdictional*” is often used to just mean that something is required, without meaning that a breach of that provision will deprive the Court of “*jurisdiction in the fundamental sense*” or render the proceedings void, rather than just voidable upon a proper objection. *Poster v. Southern California Rapid Transit District* (1990) 52 Cal.3d 266, 274-275.

When a court has personal and subject matter *jurisdiction*, but lacks the authority to act except in a particular manner, or to grant certain kinds of relief, or to proceed in the absence of certain procedural prerequisites, a judgment that does not comply with these limitations is not an

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Lack of “*jurisdiction*” in other than its “*fundamental sense*” thus can be waived: “When a court has fundamental *jurisdiction*, but acts in excess of its *jurisdiction*, its act or judgment is merely voidable. [Citations.] That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by ‘principles of estoppel, disfavor of collateral attack or *res judicata*.’ [Citation.]”

*People v. Medina* (2009)171 Cal. App. 4th 805, 816 (Cal. App. 1st Dist. 2009)

action taken “without jurisdiction”, but one in excess of or contrary to the manner in which a statute might require a Court to exercise its jurisdiction. *Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087-1088, disapproved on other gr’ds in *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 280.

An “Action ‘in excess of jurisdiction’ by a court that has jurisdiction in the ‘fundamental sense’ (i.e., jurisdiction over the subject matter and the parties) is not void, but only voidable. [Citations.]” *Ibid.* at p. 1088.<sup>57</sup>

Also, because California and other State Courts are not constitutionally required to interpret ambiguous “jurisdictional” statutes narrowly and against the existence of Subject Matter Jurisdiction “in the fundamental sense”, the Federal Court cases, policies, and rules of construction construing the “Public Disclosure” bar very broadly so as to defeat or narrow the situations in which Qui Tam actions may be brought are therefore not necessarily relevant or applicable to the issue of the meaning of the same words and phrases in the Public Disclosure provisions of the California statute.

The goal of statutory construction in California is not to narrow the general jurisdiction of the State’s Courts, or to construe narrowly the subject matter jurisdiction of the State’s courts.

And, specifically as to the California False Claims Act, its provisions otherwise must be “liberally construed and applied to promote the public interest.” Gov Code §§ 12655 (c). (Emphasis

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An objection that a Court has acted “in excess of jurisdiction” under a statute - other than as to the Court’s - “fundamental jurisdiction” - may be waived by consent or by a failure to timely object. See, *In re Jessie W.* (2001) 93 Cal.App.4th 349, 361; 1<sup>st</sup>; *People v. Williams* (1999) 77 Cal.App.4th 436, 447; *In re Marriage of Mansell* (1989) 217 Cal. App. 3d 219 , 230.; *In re Marriage of Goodarzirad* (1986) 185 Cal. App. 3d 1020, 1025 (Cal. App. 5th Dist. 1986)

added)

This presumably means, in the context of the Public Disclosure bar, that its provisions should not be broadly construed as the Federal “Quick Trigger” cases after 1986 have done, ”, and [all] doubts resolved against federal jurisdiction,” (Emphasis added) *United States ex rel. Findley v. FPC-Boron Employees' Club* , supra, 105 F.3d at 682.

Also, because the California statute was adopted long before the Federal cases which greatly restrict Qui Tam cases were ever even brought, argued, decided or published, it cannot be reasonably argued that the General Assembly intended the California Act to be interpreted as restrictively as those cases subsequently did.<sup>58</sup>

If those words were interpreted as they have been in the FFCA since the late 1980s - well *after* the adoption of the California Act - the unquestionable effect would be to defeat the General Assembly’s stated intent to “to induce private ‘whistleblowers’” and to “[enlist] ‘nongovernmental’ resources—informants acting partly in their own self-interest—in the battle to ferret out and prosecute public fraud.”

The goal of statutory construction in California is to ascertain, follow and effectuate the intent of the Legislature. *Hsu v. Abbara* (1995) 9 Cal. 4th 863, 871. Often, the words of the statute provide the most reliable indication of legislative intent. *Ibid*; *Fernandez v. California Dept. of Pesticide Regulation* (2008) 164 Cal. App. 4th 1214, 1228.

“The statutory language itself is the most reliable indicator [of the Legislature’s intent], so

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<sup>58</sup> However, because the Federal case law is largely the result of the application of uniquely federal rules of construction applicable to jurisdictional statutes and the limited jurisdiction of federal courts, even in states which adopted their acts long after 1986 the state courts should not feel constrained or bound by the more restrictive federal interpretations of this “jurisdictional” bar.

we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs. On the other hand, if the language allows more than one reasonable construction, we may look to such aids as the legislative history of the measure and maxims of statutory construction. In cases of uncertain meaning, we may also consider the consequences of a particular interpretation, including its impact on public policy. (E.g., *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 426 [30 Cal. Rptr. 3d 755, 115 P.3d 41]; *People v. Smith* (2004) 32 Cal.4th 792, 797–798 [11 Cal. Rptr. 3d 290, 86 P.3d 348].”

*Wells v. One2One Learning Foundation*, supra 39 Cal. 4th at 1190.

California thus applies the “plain meaning” of the statutory language in construing a law, unless the language is somehow “ambiguous”.

The Supreme Court recently reiterated these rules of statutory construction and interpretation.

“Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) We must look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal. Rptr. 2d 238, 828 P.2d 140].) The statute's plain meaning controls the court's interpretation unless its words are ambiguous.’ (*Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal. Rptr. 3d 390, 165 P.3d 118].) If the words in the statute do not, by themselves, provide a reliable indicator of legislative intent, ‘[s]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes. (*Woods v. Young* (1991) 53 Cal.3d 315, 323 [279 Cal. Rptr. 613, 807 P.2d 455].) (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 [39 Cal. Rptr. 2d 824, 891 P.2d 804].) ‘Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute ... ; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].’ [Citations.] (*People v. Shabazz* (2006) 38 Cal.4th 55, 67–68 [40 Cal. Rptr. 3d 750, 130 P.3d 519].) If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 738 [21 Cal. Rptr. 3d 676, 101 P.3d 563].)”(Emphasis added)

*People v. Gonzalez* (2008) 43 Cal. 4th 1118, 1125-1126.

The First District Court of Appeal, of course, has followed these same rules in construing

State statutes.

“In determining what the Legislature intended . . . , we must first look to the words of the statute ‘because they generally provide the most reliable indicator of legislative intent.’ (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 [39 Cal. Rptr. 2d 824, 891 P.2d 804].) If the statutory language is clear and unambiguous, our inquiry ends: ‘If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215 [69 Cal. Rptr. 2d 615, 947 P.2d 808]; see *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047 [80 Cal. Rptr. 2d 828, 968 P.2d 539]; *Ailanto*, supra, 142 Cal.App.4th at p. 582.)”

“In reading and interpreting statutory provisions, we are mindful that the words are to be given their plain and commonsense meaning. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal. Rptr. 115, 755 P.2d 299] (*Lungren*).) Only when the statute's language is ambiguous—susceptible of more than one reasonable interpretation—may the court turn to extrinsic aids to assist in interpretation. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94 [86 Cal. Rptr. 2d 893, 980 P.2d 441] (*Jefferson*).)”

*State of California ex rel. Hindin v. Hewlett-Packard Co.*, supra, 153 Cal. App. 4th at 314.

Determining the “intent of the Legislature so as to effectuate the purpose of the law . . . may involve up to three steps.” “[W]e first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.” , and “[courts] do not view the words of a statute in isolation, but construe them in context, keeping in mind the statutory purpose, interpreting legislation reasonably and attempting to give effect to the apparent purpose of the statute.” *Fernandez v. California Dept. of Pesticide Regulation*, supra, 164 Cal. App. 4th at 1228. (Emphasis added)

So, then, what does the word “jurisdiction” and the phrases “based upon” the “public disclosure” of “allegations or transactions” in a “criminal, civil, or administrative hearing” mean under the California statute, applying California rules of statutory interpretation and unhampered by Federal rules of construction and presumptions regarding Federal jurisdictional statutes?

### **“Jurisdiction”**

Because the meanings of the term “jurisdiction” in California are many and since it is not clear from the context of these words exactly what the California General Assembly meant this word to mean, following the guidance laid down in *Wells v. One2One* and *People v. Gonzalez* it is appropriate to turn to “extrinsic aids, including legislative history, the statute's purpose, and public policy”.

The purpose of the California Act, as discussed above, was “to induce private ‘whistleblowers’ and to “[enlist] ‘nongovernmental’ resources—informants acting partly in their own self-interest—in the battle to ferret out and prosecute public fraud”.

Thus, the statute does not appear to affect a Court’s subject matter jurisdiction in the “fundamental sense” of that term.

Rather the statute appears to only remove the standing - or statutory right - of Qui Tam plaintiffs to bring a cause of action on behalf of the State or its subdivisions, where there has been sufficient prior “public disclosure” by others of the same alleged violations of the defendants False Claims Act by particular defendants.

Instead of being a “jurisdiction removing” provision as under Federal law, under State law this provision just prevents a realtor from stating - or removes the right of Qui Tam Plaintiffs to bring - a cause of action for violation of the California False Claims Act.

In this sense, the “public disclosure” is more akin to an affirmative defense to a cause of action , than it is a removal of the Court’s actual power or jurisdiction over the case, in the fundamental sense. The introduction of evidence of an adequate prior “public disclosure” of the fraud gives the defendant a defense to the cause of action, and the right to have that cause of action dismissed in the same manner that any other affirmative defense - such as, statute of limitations,

capacity to sue, or standing to sue.

An “affirmative defense” is a defense which sets forth additional facts to those alleged in the complaint ( i.e., new matter”<sup>59</sup>) which facts - notwithstanding the truth of any of the allegations in a cause of action - defeat that cause of action, either generally or as to that defendant. See, *Salazar v. Maradeaga* (1992) 10 Cal.App.4th Supp 1, 5, quoting *Goddard v. Fulton* (1863) 21 Cal. 430, 436.

In those circumstances where a False Claim Act violation has been fully and publically disclosed then - because the public entities presumably have enough information about the actual False Claims Act violations from the media or other public hearings or proceedings - only they are allowed to bring a False Claims case regarding that fraud.

The statute was intended to, and does create stronger incentives for relators to bring Qui Tam actions by allowing them to beat public entities to the punch in filing suit when the allegations of fraud or the fraudulent transaction has not yet become public. Disallowing Qui Tam suits where the fraud has been fully and publically disclosed allows a more slow moving public agency<sup>60</sup> to maximize its recovery in such circumstances by bringing its own action.

However, where the public entity does not bring a case despite the full public disclosure of the fraud upon it - whether for lack of resources, political considerations, or otherwise - barring a Qui Tam plaintiff in such circumstances does not serve the public interest or the purposes of the statute, since in those circumstances a Qui Tam action will result in a cost-free net monetary

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<sup>59</sup> Code Civil Proc. § 431.30(b)(2)

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“Qui tam provisions are designed to set up incentives to supplement government enforcement, and at their best may ‘compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.’ *United States v. Griswold*, 11 SAWY. 65, 24 F. 361, 366 (D. Or. 1885).” *United States ex rel. Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 649 .

recovery for the Government, where otherwise it would have recovered nothing. See , *United States ex rel Marcus v. Hess*, supra, 317 U.S. at 545<sup>61</sup>.

Consequently, construing the terms of the Public Disclosure bar broadly - as the Federal Courts have done, for reasons largely related to their limited jurisdiction and reliance on precedents based on the repealed 1943 Amendments - will unjustifiably defeat the purpose of the California statute on unjustifiable an irrelevant terms, thereby erroneously limiting private enforcement and needed recoveries for the Government.

Unlike like Federal Courts, where the plaintiff bears the burden of proving the court's subject matter jurisdiction at every stage of the case, an affirmative defense such as standing is one raised by the defendant, and upon which the defendant has the burden of proof.

The "public disclosure" bar under the California Act consequently does not go to the jurisdiction of the State courts "in the fundamental sense", but is more in the nature of a provision which deprives a Qui Tam plaintiff of "standing to sue" (7 A.A. 1792) over CFCA violations if there has been a full prior public disclosure of the same "allegations"

Standing-to-sue requirements in California are often created by statute rather than created by Constitutional limitations on a Court's "fundamental jurisdiction" to render any relief at all as in the case in Federal Courts.

"Standing requirements vary from statute to statute, and must be assessed in light of intent of the statute at issue" (Emphasis added)

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If for some reason the public entity nevertheless still did not wish the Qui Tam action to continue to prosecute the case for legitimate policy reasons, the California statute - unlike the FFCA - still allows it to intervene at any stage of the case and seek its dismissal, upon a showing of good cause. Gov Code § 12652 & (e)(2)(A) &(B)

*Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal. App. 4th 798, 813.<sup>62</sup>

Instead of being a matter of “jurisdiction in the fundamental sense”, California Court “standing goes to the existence of a cause of action”. Ibid.<sup>63</sup> See also, *Oakland Municipal Improv. League v. City of Oakland* (1972) 23 Cal. App. 3d 165, 170

Where a particular plaintiff lacks standing under the statute to sue to seek the relief requested, “a general demurrer for failure to state a cause of action will be sustained” *Parker v. Bowron* (1953) 40 Cal. 2d 344, 351. (Emphasis added)

Therefore this statutory language - unlike federal statutes - is not required to be interpreted narrowly, and against the existence of “jurisdiction.”.

“Standing to sue” goes to the question of whether a cause of action exists in a particular plaintiff or class of plaintiffs, as to whether the particular plaintiff has the right to seek the relief sought. See, *Parker v. Bowron* (1953) 40 Cal.2d 344, 351; *Sacramento County Fire Protection Dist. V. Sacramento County Assessment Appeals Bd.* (1999) 75 Cal.App. 4<sup>th</sup> 327, 330 ; *Alternative*

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And, ““ ‘ “ [W]here the question is one of public right and the object . . . is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced . . . . ’ ” ” (Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 439" *Environmental Protection & Information Center v. California Dept. of Forestry* (2008) 44 Cal. 4th 459, 479.

<sup>63</sup>

In ruling on the question of statutory standing in the case before it, however, *Buckland* did analyze the standing question before it using Federal Article III jurisprudence, but only because Proposition 64 amended Bus. & Prof. Code § 17204 so as to expressly incorporate by statute the Federal “injury in fact” standing requirements into the Unfair Practices Act. Ibid at 812-813 and fn.6.

Prior to this change in the statute, "a private plaintiff who has himself suffered no injury at all [had standing to] sue to obtain relief for others." *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 561.

*Energy Partners II v. Windridge, Inc.* (1996) 42 Cal.App.4th 551, 559; *Oakland Municipal Improvement League v. City of Oakland*, supra, 23 Cal.App.3d at 170.

Standing requirements vary from statute to statute, and must be assessed and applied in terms of the intent of the statute at issue. *Buckhold v. Threshold Enterprises, Ltd.*, supra, 155 Cal.App.4th at 813.

Because standing to sue goes to the existence of a cause of action in the Plaintiff and can be viewed in California as an affirmative defense under the California False Claims Act, it would be unnecessary and unnecessarily onerous for State Courts to require - as in Federal Court - that the Qui Tam Plaintiff bear the burden of proving a negative, that there has been no prior “public disclosure” of its False Claim Act allegations.

“[A] defendant will always know where to find these public disclosures, even if it is inconceivable that the relator [or the Government] knew about them”

*Vogel, The Public Disclosure Bar*, supra, at p. 514.<sup>64</sup>

A Qui Tam plaintiff, on the other hand, would have to comb through years worth of historical records of every newspaper article, every television and radio broadcast, every Government hearing and trial transcript<sup>65</sup> that could even remotely have any chance of proving that there was no prior

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As Vogel notes, a broad interpretation of the public disclosure bar might encourage Government contractors to “plant” partial disclosures about a few elements of their own misconduct in various obscure but still theoretically “public” locations, so as to bar Qui Tam actions. Ibid at 514.

<sup>65</sup>

Or, if broad and extraordinary an upon-obvious meaning were given to the word “hearing”, the relator would have to search through millions of copies of pleading files in every Court in the State, including Federal Courts to so if any morsel of information related to the violation is found in some pleadings some whereas. Even in an age when some courts make their active casefiles accessible online, this would be a virtually impossible task and certainly not one the California Attorney General or local Public Counsel would ever under take on the long odds of possibly

public disclosure of the allegations in its False Claim complaint

### **“Based Upon”**

This phrase is obviously quite widely used in everyday speech and writing.

The California Act uses this phrase six times<sup>66</sup>, and nowhere in the Act is it defined or used in some context so as to indicate Legislative intent to give it a meaning other than its usual usage in everyday speech and discourse

More than one hundred other California statutes<sup>67</sup> also use the phrase “based upon”, and any fair reading of even a sampling of those other statutes reveals that this the intended meaning of that phrase is something akin to “founded on”, “built upon”, “used as a basis for”, in the sense of some prior or existing information, action or event leading to some later result flowing from or derived from the former things.

In construing this same phrase in two of those statutes - Code Civil Proc. § 364(a) & Civil Code § 3332.2 - the Supreme Court held that “in deciding whether an action is ‘based upon’ professional negligence, the test is whether it flows or originates from a healthcare provider’s negligent act or omission” *Preferred Risk Mut. Ins. Co. v. Reiswig* (1999) 21 Cal. 4th 208, 217. (All emphasis added)

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finding some fact that might form only part of the basis for a False Claims Action..

<sup>66</sup> Gov. Code § 12652( c)(10), and 12652(d)(1), (2), (3)(A) & (B) and (4).

<sup>67</sup> See e.g., Bus. & Prof. Code §§ 6149.5( c), 6735.5(a) & (b); Civil Code §§ 1692, 1693, 1812.121, 3294(b), 3426.7; Code Civil Proc. §§ 337, 340.2(a), 340.8(a), 364, 703.115; Gov. Code §§ 6257.5, 66490; Fam. Code §§ 7554, 17412; Food & Agr. Code § 587.87; Health & Saf. Code §§ 8301.5, 26125, 100185.5; Ins. Code § 779.36, Pub. Res. Code § 4582.5; Rev. & Tax Code §§ 485, 501; Street & Hwy. Code § 36628; Veh. Code § 40803; 40803; Water Code § 53340; Wlf & Inst. Code §§ 681, 15610.65, for a few examples of the pervasive use of this phrase in California statutes.

“Flows from” or “originals from” is equivalent to “caused by”, or “arising from”, or “derived from”.

Applying the rules of construction laid down by the California Supreme Court to “look to the statute's words and give them their usual and ordinary meaning”, it would be hard for someone other than a Federal Court or a desperate False Claims Act defendant to conclude that the “usual and ordinary meaning” of these words instead really is “similar to”, “substantially the same as”, or “the subject of”.

Rather, the everyday meaning of this phrase would be “founded upon” or “grounded upon”, or the Fourth Circuit’s “derived from”, (from its analysis of this same FFCA phrase in *U.S. ex rel. Siller v. Benton Dickinson & Co.*, supra, and its progeny).

A recent linguistic analysis of this phrase in the context it is used in the FFCA concludes that the minority federal rule originating from *U.S. ex rel. Siller* in fact reflects the true “plain meaning” of the phrase in the context of the sentence in which it is placed, and also “rests on policy, Congressional intent and linguistics”, and that “most of the policy goals [purportedly] furthered by the majority rule are better achieved through the minority rule”. See, Ursprung, Comment: Based Upon: Deriving Plain Meaning from the False Claims Act Jurisdictional Bar (2009) U. Pa. L. Rev. 923, 949-957.<sup>68</sup>

### **“Allegations or Transactions”**

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<sup>68</sup> The New York and New York City acts used the phrase “derived from”, rather than “based upon”, apparently to avoid the more restrictive decisions under the FFCA. N.Y. Fin. L. § 190(b); N.Y. Code § 7-804d.3.

The New York City code also adds the phrase “and likely to be seen by the city officials responsible for addressing false claims” after the description of the fora in which the disclosure may take place, and uses the term “primary source” instead of “original source”.

This is the least controversial of these phrases, with the plain meaning of “allegations” being obvious to the least unlearned reader as, meaning that someone is claiming another has done something wrongful.

In construing the word “transaction” in a contract, the California Supreme Court has held that:

“The word 'transaction' may imply something more than sale, lease or contract . . . It has been stated that said word embraces within its meaning ‘the doing or performing of any business’ (Bouvier's Law Dictionary); 'negotiation' ( United States v. Pan American Petroleum Co., 55 Fed. (2d) 753); 'negotiations affecting property rights, contracts, agreements, and the negotiations resulting in contracts and agreements and in the transfer of titles’”

*Wachs v. Wachs* (1938) 11 Cal. 2d 322, 326.

**“ Public Disclosure . . . in a Criminal, Civil, or Administrative Hearing”**

Starting with this last phrase first, the plain meaning of “civil . . . hearing” would presumably be some sort of judicial proceeding held in open court, open to the public and the news media.

“One legal dictionary defines the word hearing, ‘first, as a ‘proceeding . . . in which witnesses are heard and evidence is presented.’ (Black 's Law Dict. (6th ed. 1990) p. 721, col. 1; accord, *People v. Pennington* (1967) 66 Cal. 2d 508, 521 [58 Cal. Rptr. 374, 426 P.2d 942] [‘A 'hearing' is generally understood to be a proceeding where evidence is taken to the end of determining an issue of fact and a decision made on the basis of that evidence. [Citation.].’) This dictionary also observes, however: ‘[The word 'hearing'] is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without [a] jury at any stage of the proceedings subsequent to its inception . . . . [An administrative hearing] consists of any confrontation, oral or otherwise, between an affected individual and an agency decision-maker sufficient to allow [an] individual to present his [or her] case in a meaningful manner.’ (Black's Law Dict., supra, p. 721, cols. 1-2” (Emphasis added)

*Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1247.

Thus a “hearing” is - at least in California - considered to be an open public proceeding

before a decision-maker, at which arguments are made and evidence presented,

It would be a rather elastic stretching of the usual meaning of this word or phrase to contend that it also means “pleadings filed in a civil action or proceeding”, as most of the Federal Courts have done under the “Quick Trigger” cases discussed above.

Court filings are not usually reviewed by anyone but the parties and sometimes by the Court in an action, and they frequently may never become the subject of a “Civil . . . Hearing”.

Certainly, if the General Assembly wanted to bar actions based on information contained in pleadings filed in a “criminal or civil action or proceeding”, it knew how to say so and what words to use.

The words “civil action”, “in an action”, “an action” or “action” are used 52 times in Gov. Code §§ 12651-12654, and the words “in a criminal proceeding”, “in any proceeding”, or “a criminal or civil matter” are used in Gov. Code § 12656(a), 12654(d) 7& 12652(h), respectively.

Those words or phrases mean the proceeding as a whole, including the “hearings” portions or an action or proceeding, if there are any.<sup>69</sup>

A “hearing” is thus just a part of a civil or criminal “action” or “proceeding”, not the entire case ,and cannot mean records filed in the case on which a hearing is never even held.<sup>70</sup>

No public policy is promoted by giving this phrase an overbroad, unnatural meaning.

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See also Civil Code §§ 22-24. Section 22 defines an “action” as the entire proceeding where one person prosecutes another in a court.

<sup>70</sup> Apparently to avoid the overbroad meaning given to the term “hearing” under the FFCA, the Indiana statute requires that the disclosure be made in a “transcript of a civil hearing”. Ind. Code § 5-11-5.5-7(f).

It is highly unlikely that the Government would ever learn of allegations of public contract fraud buried somewhere in the files of a “civil action or proceeding”, as financially strapped Government prosecutors do not have the time, human resources or budget to comb through hundreds of millions of pages of State Federal or Administrative court filings every year on the odd chance that there might be some hint of one of the elements a False Claims Act violation being in some court’s files in some case, somewhere, someplace.

Obviously, matters discussed in the media, in a Government hearing, or a public hearing or trial are much more likely to come to the attention of the Government prosecuting authorities.

A broad construction of these terms only creates a windfall for the fraudulent, of prevents Government recompense in cases that are not even remotely or truly “parasitic” in the usual sense of that word, and provides perpetrators effective immunity for innumerable False Claims Act violations that would otherwise never have come to the attention of State or Local Government officials and never be prosecuted by the Government itself.<sup>71</sup>

“Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386–1387 [241 Cal. Rptr. 67, 743 P.2d 1323].) We must look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal. Rptr. 2d 238, 828 P.2d 140].) The statute's plain meaning controls the court's interpretation unless its words are ambiguous. (*Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal. Rptr. 3d 390, 165 P.3d 118].)...” (Emphasis added)

*People v. Gonzalez*, supra, 43 Cal. 4th 1118 at 1125.

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<sup>71</sup> Of course, should the Attorney General or local prosecuting authority elect to intervene in the action under Gov. Code § 12652( c)(5), (7)(B), (8)(B) or (f)(2)(A) before the case is finally dismissed under the bar, then presumably they would not be barred by the public disclosure , if the State courts follow the holding under the FFCA in *Rockwell Int'l Corp. v. United States*, supra, 549 U.S. at 478.

Where the words of the statute are clear, courts may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; *Cheek v. Superior Court* (2002) 103 Cal. App. 4th 520, 526.

### **California Case Law on "Public Disclosure"**

The first published California case to address the Public Disclosure provisions was a Second District decision in 2003 involving Ins. Code § 1871.7(h)(2).

In that case the Second District, while noting the California courts often look to decisions under similar federal statutes when interpreting parallel California laws, nevertheless - after a thorough review of the variety of conflicting decisions regarding the FFCRA among each of the Federal Courts of Appeals - observed that:

"Federal decisional authority is in hopeless conflict. (DeVecchio, Qui Tam Actions: Some Practical Considerations (2001) SG013 ALI-ABA 399, 405 [" There seems to be no unanimity both among and within individual circuits as to when claims are "based upon" public disclosures, what constitutes a public disclosure, when and under what circumstances a qui tam relator must first inform the government of the claims, the extent of the factual information that must be provided to the government . . . [,] when a qui tam action must be filed where there has been a public disclosure, what are the requisites to be classified as an "original source," when a claim is "primarily based upon" prior public disclosures and many other issues that arise under the statute,' " quoting *U.S. ex rel. Merena v. SmithKline Beecham Corp.* (ED. Pa. 2000) 114 F. Supp. 2d 352, 371]; Selden & Sharff, Jr., *Battling David and Goliath--Defending Qui Tam Lawsuits Brought Under the False Claims Act* (2001) 62 Ala. Law. 326, 329 ["the case law in this area is extensive and varies from circuit to circuit"]; Grimaldi & Manos, *Pretrial Motions Under The False Claims Act* (Summer 2000) 29 Pub. Cont. L.J. 693, 694 ["The law in this area is dynamic and rapidly changing, with splits among the federal appellate courts on virtually every imaginable issue"].)"(Emphasis added)

*People ex rel. All State Ins. Co. V. Weitzman* (2003) 107 Cal.App.4th. 534, 559-560.

The Second District then refused to adopt the law of any particular Federal Circuit, or to pick and choose among conflicting decisions from various U.S.Circuits, in interpreting and applying the similar language in the Insurance Code False Claims law:

“[T]his rule of statutory interpretation may be different if there are varying circuit approaches to a federal statute. Under those circumstances, California courts decline to always follow federal decisions when construing a state statute which is similarly worded to a federal law. ( *Richards v. CH2M Hill, Inc.*, supra, 26 Cal.4th at pp. 822-823.) . . . .”

“[G]iven the widely divergent views taken by the federal circuits, it is injudicious for us to begin assigning a particular legislative intent to the California Legislature. . . . Finally, there is no evidence of a legislative intent to adopt a particular circuit's perspective . . . , we decline to entirely rely on circuit court decisional authority construing the federal law.

“But we follow federal precedent with respect to the general purpose of the jurisdictional bar--that is, to prevent qui tam actions brought by persons who, like the relator in United States ex rel. Marcus v. Hess, supra, 317 U.S. at page 548, simply copied allegations from a criminal indictment on file, learned of the specific fraudulent conduct at issue through public channels, and who had not contributed or assisted in a material way in exposing the fraud. ( *United States v. Bank of Farmington, supra, 166 F.3d at p. 863; Wang v. FMC Corp., supra, 975 F.2d at pp. 1415-1417.*) The California Legislature, in adopting subdivision (h)(2), intended to bar parasitic or opportunistic actions by persons simply taking advantage of public information without contributing to or assisting in the exposure of the fraud. ( *United States ex rel. Doe v. John Doe Corp.*, supra, 960 F.2d at pp. 321-322; *Minnesota Ass'n of Nurse Anesthetists v. Allina, supra, 276 F.3d at pp. 1040-1042; cf. Rothschild v. Tyco Internat. (US), Inc.*, supra, 83 Cal.App.4th at p. 499.)”

*People ex rel. Allstate Ins. Co. v. Weitzman*, supra, 107 Cal. App. 4th at, 563-564.<sup>72</sup>

The *Allstate* court then determined that the Plaintiff's action was not “parasitic” or “based upon” newspaper accounts of an insurance ring run by certain attorneys and others because:

“Allstate's present action rests on and is supported by the facts and actions publicly disclosed in connection with the Financial proceeding only insofar as they may have alerted any person to the existence of an alleged fraud ring involving certain defendants, particularly the publicly named attorneys. The circumstantial evidence indicates the public disclosure of the alleged fraud ring may have prompted Allstate to investigate whether fraud was

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Subsequently, in determining whether School Districts or other local public entities were “persons” subject to being sued under the CFCA, the California Supreme Court also declined to follow U.S. Supreme Court precedent under the FFCA on that point, because the FFCA was “distinct from its California counterpart. Moreover, both [U.S. Supreme Court] cases apply federal principles of statutory construction that differ from those used in this state”. *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1997 (Cal. 2006) (Emphasis added)

perpetrated on it. But Mr. Wong's uncontradicted declaration demonstrates it was only through Allstate's own considerable efforts that the facts specific to frauds perpetrated on it came to light. . . . Allstate alone uncovered evidence of . . . 326 separate allegedly fraudulent insurance claims, none of which are involved in the [prior] suit. . . . To hold that Allstate's action is barred would be contrary to the legislative . . . goal of coordinated efforts by law enforcement agencies and insurers to deal with the serious and prevalent insurance fraud problem.” (Emphasis added)

Ibid at 565.

Thus *Allstate* appears to have adopted a plain meaning interpretation of the phrase “based upon” as being equivalent “rests on” or “supported by” it also appears to require that the prior allegation be more specific than under Federal case law

In the next case under the California False Claims Act, a third party sued a waste disposal company in 1996 alleging that for the years 1990 through 1995 it had fraudulently billed the City for increased dumping fees in addition to its usual contract charges, purportedly as a pass-through of increased costs charged by a dump. The relator had filed a similar suit as a Qui Tam plaintiff in 1998 and settled that case.

In 2001 a former City treasurer sued filed another Qui Tam action under the California False Claims Act alleging that the same company had wrongfully also added annual CPI increases to its billings to the City that were not authorized by the contract.

The Defendants claimed that two prior suits for overbilling on the same contract “publicly disclosed” the same allegations, and thus barred the current Qui Tam action regarding additional instances of overbilling in violation of the contract. The Superior Court then granted their Motion for Judgment on the Pleadings.

The Court of Appeal reversed, finding that the current action was not “based upon” or “derived from” the prior suits, because:

“[T]his action does not constitute a ‘parasitic’ lawsuit derived from the [prior lawsuits’] pleadings, rendering the public disclosure jurisdictional bar inapplicable.”

We reject H&C's argument that the [prior] litigation sufficiently alerted the government to the possibility that it might be engaging in the type of fraudulent practices at issue here. In effect, H&C contends the [prior] pleadings put the government on notice of every possible fraud in connection with H&C's contract with the City. H&C's approach would result in a windfall for the defendant in a qui tam action, and would impose upon the plaintiff in the initial lawsuit the heavy burden of alleging every imaginable theory at the risk of immunizing the defendant from any further liability. Such an interpretation of the public disclosure bar is broader than necessary to prevent parasitic or opportunistic suits and we reject it. “ (Emphasis added)

*City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.*, supra, 109 Cal. App. 4th at 1684-1685.

Following *Allstate*, supra, *City of Hawthorne* held that:

“Therefore, the public disclosure bar should be applied only as necessary to preclude parasitic or opportunistic actions, but not so broadly as to undermine the Legislature's intent that relators assist in the prevention, identification, investigation, and prosecution of false claims” (Emphasis added)

Ibid at 1683.

In reaching its determination as to the applicability of the bar in California, *City of Hawthorne* - as did *Allstate* - looked to the Legislative intent to promote Qui Tam actions, and then effectively adopted the plain meaning of the phrase “based upon”, as it only looked at whether the Qui Tam case “rests on and is supported by the facts and actions publicly disclosed in connection with the [prior] proceeding” (Emphasis added) Ibid.

The Court thus used the same interpretation of “based upon” as did the Fourth Circuit in *U.S. ex rel. Siller*, which uses the plain meaning of the words as being “derived from” . Ibid at 1684.

The 2001 action was not “based upon” nor “derived from” nor did it “rest. ... on”, nor was it “supported by the facts and actions publicly disclosed in” the prior actions, because “prior . . . lawsuits had revealed instances of fraud, but not the particular fraudulent conduct appearing in

[the] subsequently filed qui tam action.”, even though they all involved the same public contract. Ibid at 1685 (All emphasis added).

The Court indicated the Qui Tam action before the court was not barred because the two prior actions did not reveal “every possible fraud” that had been committed by the Defendants in connection with that same contract, and because - although the prior lawsuits “had revealed instances of fraud” on the Government - they did not allege “the particular fraudulent conduct” alleged in the qui tam action . Ibid.

Allowing a prior suit to bar a later Qui Tam action - where the first action did not reveal the full extent of the fraud on the Government - would “result in a windfall for the defendant in a qui tam action” and would effectively require the first suit to “allege every imaginable theory at the risk of immunizing the defendant from any further liability”, contrary to the purposes of the statute. Ibid at 1685<sup>73</sup>.

The Ninth Circuit has recognized, based on these cases, that:

“California courts have stated that ‘the public disclosure bar should be applied only as necessary to preclude parasitic or opportunistic actions, but not so broadly as to undermine the Legislature's intent that relators assist in the prevention, identification, investigation, and prosecution of false claims . . . .’” (Emphasis added)

*United States v. Johnson Controls, Inc.* (9th Cir. 2006) 457 F.3d 1009, 1022, citing *City of Hawthorne*, supra.

In the most recent California case to address these same issues, a lawyer knowledgeable in Qui Tam actions and with business experience in the telecommunications industry brought a Qui

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The Court found support for its holding in *U.S. ex rel. Found. Aiding the Elderly v. Horizon* (9<sup>th</sup> Cir. 2001) 265 F.3d 1011, 1015-1016, where the prior lawsuit “did not disclose the type of fraud” alleged in the Qui tam case.

Tam case for a “reverse” False Claim under the California Act<sup>74</sup> for the failure of certain telephone companies to pay - or “escheat” - to the State unused balances on prepaid phone cards , as required by state law. *State of California ex rel Grayson v. Pacific Bell Telephone* (2006) 142 Cal.App.4th 741<sup>75</sup>.

The Complaint affirmatively alleged that industry newsletters had previously publicized the fact that unused balances on phone cards were unclaimed property that the laws of various states required be escheated to the states. Ibid at 750, 752.<sup>76</sup>

Also, various published professional journals had generally discussed the fact that such unused card balances were required to be escheated to the various states.

In sustaining a demurrer to the complaint based on the plaintiff’s admissions in the complaint regarding the extent of public discussions on the need to escheat to the state (none of which apparently mentioned any of the defendants), the Third District Court of Appeal looked at only Ninth and District of Columbia Court of Appeal decisions, and did not focus on or attempt to resolve the differences in interpretations among the Circuits on “public disclosure “ issues, as had the Second District in the *Allstate* opinion..

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<sup>74</sup> Gov. Code § 12651(a)(7).

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This case thus alleged a so-called “reverse” False Claim under Gov. Code § 12651(a)(4) or (7).

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Apparently none of the trade publications ever revealed that any phone companies - or these particular defendants - failed to escheat any funds, as they appeared to only discuss the fact that unused card balances in general could be considered abandoned funds that all phone companies would be required to turn over to the government. 142 Cal. App. 4<sup>th</sup> at 750-751.

To the extent that *Grayson* alleged specific wrongdoing by these defendants that had not previously been disclosed publicly, his case likely should not have been barred.

The *Grayson* Court did simply note in passing that the District of Columbia Circuit in *U.S. ex rel. Finley v. FPC-Boron Employees Club*, supra, had rejected the Fourth Circuit’s plain meaning interpretation of the phrase “based upon” in *U.S. ex rel. Siller v. Becton-Dickinson & Co*, supra, , and observed - without analysis - that *U.S. ex rel. Finley* had:

“employed a broader construction of the jurisdictional bar ‘to encompass situations in which the relator’s complaint repeats what the public already knows, even though she had learned about the fraud independent of the public disclosures’ . . . .” (Emphasis added)

Ibid at 751-752.<sup>77</sup>

Later the Court cited and followed the adoption by a California District Court in *U.S. er rel. Hansen v. Cargill, Inc.* (N.D. Cal 2000) 107 F.Supp.2d 1172, of “two fundamental principles” of the District of Columbia Circuit’s interpretation of the FFCA public disclosure provisions in *U.S. ex rel. Finley* , that:

“a qui tam complaint is ‘based upon’ publicly disclosed allegations if it is ‘substantially similar’ to the publicly disclosed allegations, and that the fraud need not be specifically alleged to constitute a public disclosure . . . .” (Emphasis added)

Ibid at 752-753.<sup>78</sup>

The Third District Court of Appeal did not state why it chose to adopt the law of these two federal Circuits, and did not explain why it chose to use these very broad interpretations of the phrases “based upon” and “allegations or transactions” over that of other Circuits as being what the

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*U.S. ex rel. Finley*, supra, has been criticized elsewhere as one of the “most restrictive” - or broad - interpretations of the public disclosure bar. See e.g., G. Thompson, A Critical Analysis of Restrictive Interpretations, supra, at 681-685.

<sup>78</sup>

Of course, neither the FFCA and the California Act define “based upon” as meaning “substantially similar to”, nor do they say that the publicly disclosed “allegations or transactions” was meant to refer to something other than complete allegations claiming that there had been a submission of False Claims to the Government in violation of the CFCA.

General Assembly meant by those phrases.

And it did not discuss the holding in *City of Hawthorne* [109 Cal.App.4th at 1683] that “based upon” means “supported by or resting on”<sup>79</sup>, rather than “substantially similar to” or the “subject of”.

More remarkable is the fact that the Third District does not even discuss at all the analysis of the same “public disclosure” provisions by the Second District in *Allstate* and *City of Hawthorne*, supra.

Finally, the *Grayson* court went on to find that the relator’s claims were barred by the admissions in his complaint regarding the “public disclosures” of the law and industry practices, and held - although finding that the case presented a “closer issue” than the precedents on which both sides relied - that the case was barred because “the government was on notice of the fraud because of the similarity of the allegations contained in the news media” re the general duty to escheat unused card monies to the states Ibid at 756 (Emphasis added).

The Court held that *U.S. ex rel. Found. Aiding the Elderly v. Horizon* (9<sup>th</sup> Cir. 2001) 265 F.3d 1011 was distinguishable, and chose not to follow it, because there - although the defendants had been named in other lawsuits regarding their practices - the prior suits had not “alleged that the hospitals had defrauded the government by seeking reimbursement [from the government] for medical care that was not provided”, as had the Qui Tam Plaintiff, and because the prior suits “completely failed to disclose anything remotely similar to the fraud alleged” in the Qui Tam case

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Mr. Grayson’s brief on appeal cited this holding in *City of Hawthorne* (Appellant’s Reply Brief, p. 47) , but the Third Circuit failed to address that holding in its own Opinion.

Ibid at 753.(Emphasis added)

*Grayson* also distinguished what is likely the most cited federal “public disclosure” case - *U.S. ex rel. Springfield Terminal Ry. V. Quinn* , supra, - because the discovery documents filed in the prior action there<sup>80</sup> “were not in and of themselves sufficient to constitute ‘allegations or transactions’ of fraudulent conduct”<sup>81</sup>, as “neither the fraud nor the critical elements of the fraudulent conduct” had been made public in the prior action, because the information revealed in

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The materials disclosed in *Springfield* actually were very analogous to the level of the rather general disclosures in *Grayson*.

Thus, for example, in the *Springfield Terminal* case, the Qui Tam relator had initiated prior civil litigation, and it was during discovery there that it obtained the documents on which it based the subsequent False Claims case.

The pay vouchers and telephone records obtained earlier in the prior case appeared to be innocuous discovery materials and - although they would be helpful in proving a violation of the False Claims Act - “were not in and of themselves sufficient to constitute ‘allegations or transactions’ of fraudulent conduct within the meaning of the FCA jurisdictional bar”. *United States ex rel. Springfield Terminal Ry. v. Quinn*, supra, 14 F.3d at 653.

The court thus concluded that because neither the fraud nor the critical elements of the fraudulent transaction had been in the public domain, the jurisdictional bar did not apply.

“[T]he courthouse doors do not swing shut merely because innocuous information necessary though not sufficient to plaintiff 's suit has already been made public . . . .”  
(Emphasis added)

Ibid at 657.

In *Grayson*, while there had been prior public discussions of the duty to escheat, there were no prior allegations that the defendant had failed to do so.

As with *Springfield*, the prior allegations were merely “innocuous [general] information necessary though not sufficient to plaintiff 's suit”

*Grayson* also therefore serves to illustrate the relatively subjective nature of the determinations by the courts as to whether ““the government was on notice of the fraud” from a rather limited and incomplete “public disclosure” of just some of the facts alleged in a relator’s complaint. In some instances it almost seems as if the outcome turned on whether the Court deemed the relator or the defendant to be the more heinous, as often relators are persons who have had some prior dealings with the defendant through which they acquired knowledge of its operations, whether as former employee, competitor, business partner etc..

<sup>81</sup> Citing *Springfield*, supra, 14 F.3d at 653

the prior action “was more innocuous”. 142 Cal.App.4th at 753-754.

“In *Findley* and *Hansen*, the courts lacked jurisdiction because the qui tam actions echoed allegations already in the public domain. Because the qui tam complaints were substantially similar to the quantum of information available to the government, they did not further the FCA's purpose to expose undetected fraud. In *Foundation Aiding the Elderly and Springfield*, however, the information known to the public was more innocuous [A case is not barred w]hen a totally different species of fraud has been disclosed or when the facts and documents on their face do not expose the fraud [on the government], the qui tam complaint serves to alert the government to fraud it otherwise might never have discovered” (Emphasis added)

and thus the qui tam case is not barred. Ibid at 754.

The Third District held that *Grayson* was barred because - following *U.S. ex rel Finley*, supra - “the information in the public domain clearly alerted the government to defendant’s failure to either report or escheat [card] breakage”, and because “the government was aware of defendants’ practices [ in failing to escheat] and decided not to pursue” a claim. Ibid at 754.

These statements reveal that *Grayson* has effectively adopted the same standards for “public disclosure” as the pre-1986 “Government Knowledge” bar cases under the 1943 Amendments to the Federal Act, such as *Pettis ex rel. United States v. Morrison-Knudsen Co*, and its progeny, even though California never had a False Claims Act or similar body of case law before 1987.

*Grayson* is thus also notable for its unquestioning adoption of the broad “quick trigger” Ninth and D.C. Circuit cases, without any comment or analysis whatsoever, unlike the preceding Second District cases.<sup>82</sup>

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The decision also cited *Springfield* for its statement that “discovery material” in a case is publicly disclosed [Ibid at 753], but that case only found discovery material filed with the court was public, not all discovery material.

Finally, having adopted with little real analysis the holdings in the “quick trigger” Federal decisions on the “public disclosure” bar, so as to limit Federal Court jurisdiction and force the relator into an “original source” analysis under Gov. Code § 12652(e)(4)(B), *Grayson* then proceeds to also adopt without any analysis the very narrow “original source” analysis of the most restrictive holdings of certain federal cases, which effectively require the Qui Tam plaintiff to have been a “percipient witness” to the fraud, to have seen it “with his own eyes” , or otherwise has “firsthand knowledge of the fraud”. 142 Cal.App.4th at 755-757<sup>83</sup>.

This obviously would disqualify a plaintiff Qui Tam such as Allstate Ins. Co., which independently and “through its own investigation and expenditure of its own resources, uncovered” many instances of fraud and details of similar frauds that were never the subject of any public disclosure. *People ex rel. Allstate Ins. Co. v. Weitzman*, supra, 107 Cal. App. 4th at 566.<sup>84</sup>

*Grayson* also does not cite *Allstate Ins. Co.* on this point either.

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That analysis - derived from *U.S. ex. rel. Finley*, supra - has been criticized elsewhere as one of the “most restrictive” - or broad - interpretations of this language in the public disclosure bar, which “may . . . prevent qui tam lawsuits that may not be truly ‘parasitic’”. Vogel, The Public Disclosure Bar, supra at 681-685; Thompson, A Critical Analysis, supra at 706-714.

This interpretation effectively requires that an “original source” be a participant in or eyewitness to the commission of the fraud, or an accessory to or principal in the crime [See, Penal Code §§ 32, 32, 971], and bars any relator who learned of the fraud through its own investigation after the fact.. Obviously, such participating persons are unlikely to become relators absent a grant of immunity, so this broad interpretation of the “original source”- by adding such a literal “rogue to catch a rogue” requirement - will further restrict Qui Tam actions, contrary to the intent of the Legislature. See generally, Helmer, False Claims Act: Whistleblower Litigation, supra, at 323

<sup>84</sup> The New Mexico statute appears to attempt to avoid this result in many Federal Court decisions by providing that one who learns the information regarding the fraud from his or her own investigation has “independent knowledge” and is an original source, even if not an eyewitness to the fraud. N.M. Stat. Ann. § 27-14-10(C).

The obvious effect of these two holdings in *Grayson*, adopting the most restrictive Federal interpretations, is to limit - at least in the Third District - the number and nature of Qui Tam cases that can be brought.

### **CONCLUSION**

With the possible exception of *Grayson*, California Courts thusfar have wisely not fallen into the trap of looking to or adopting any specific subsequent construction of the Public Disclosure bar by the Federal Courts, either generally or from any particular Federal Circuit.

To have done so would have given any defendant in a Qui Tam case a veritable arsenal of varyingly destructive weapons from which to pick and chose to mount an attack on nearly any relator's case against it, and would have led to even greater chaos in the State courts than that which exists in the Federal Circuits, as a defendant could surely find some case - or combination of cases - from various Federal Circuits to defeat even the most worthy and enterprising relator based on some limited public disclosure of just some or one of the facts alleged in the relator's complaint.

Other than the chaos among the U.S. Courts of Appeals, California cases have not yet articulated any other clear rationale for refusing to follow the varying and hostile Federal precedents.

It is submitted that perhaps the differences in Jurisdiction between Federal and State Courts, the lack of State rules of statutory construction disfavoring the existence of jurisdiction such as those used to interpret Federal statutes, the regressive reliance by the Federal Courts on the pre-1986 "Government knowledge" bar analyses - as well as the plain and ordinary meaning of the words themselves, and State Legislative intent - are rationales which California and other state courts might use to decline to follow any of the restrictive Federal "public disclosure" precedents at all