Legal Memorandum
Published by The Heritage Foundation
No. 42
July 2, 2009

Correcting False Claims about the New False Claims Act Legislation

Hans A. von Spakovsky and Brian W. Walsh

> *Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket?*
>
> —Abraham Lincoln[1]

Invoking the name and legacy of Abraham Lincoln—who in 1863 championed the adoption of the original federal False Claims Act (FCA) to stop fraudulent military suppliers in the Civil War—supporters of the False Claims Act Corrections Act[2] have argued that this legislation would fix the "problems" allegedly affecting the way the federal courts interpret the existing act. But the Fraud Enforcement and Recovery Act of 2009 (S. 386), Section Four of which contains the current Congress's supposed "clarifications" to the False Claims Act, destroys the balance in the FCA between protecting federal taxpayer funds while not encouraging abusive and profiteering litigation.

S. 386, which was passed by Congress on May 18 and signed into law by President Barack Obama on May 20, 2009,[3] unnecessarily expands the ability of individuals acting as private attorneys general (so-called *qui tam* plaintiffs[4]) to sue—supposedly on behalf of the government—defendants who have allegedly submitted false claims for money or property. This legislation turns the FCA from a statute protecting the government against fraud to "an all-purpose anti-fraud statute."[5] By losing track of the

Talking Points

- In May, President Obama signed into law Congress's latest amendments to the federal False Claims Act (FCA). These trial-lawyer-friendly amendments destroy the FCA's prior balance that protected federal taxpayer funds while providing some restraints against abusive and profiteering litigation.
- Congress and the President changed the FCA from a statute protecting the government against fraud to an all-purpose fraud statute that will allow punitive actions to be brought against private entities such as universities and hospitals—even where the real federal interest at stake, if any, is only tenuously related to the allegedly false claim. This enriches individual plaintiffs and trial lawyers at the expense of the American taxpayer.
- The amendments open up broad new swaths of the economy to inefficient and unjustified FCA litigation, federalizing claims that are historically and adequately addressed at the state level, and undermining America's economic recovery and growth.

This paper, in its entirety, can be found at:
www.heritage.org/Research/LegalIssues/lm0042.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

FCA's original purpose—assisting the work of federal officials in safeguarding and recovering funds belonging to the federal treasury—S. 386 ignores Lincoln's own philosophy on the practice of law and his admonition to other lawyers: *Avoid needless litigation.*

From start to finish, the new law reduces the primacy in FCA litigation of government prosecutors, investigators, and other disinterested professionals working in the public interest. It will manufacture needless litigation brought by private plaintiffs and plaintiffs' lawyers who are enticed by prospects of striking it rich through FCA lawsuits, not protecting the American taxpayer. Contrary to its supporters' assertions that all of the changes to the FCA are either "narrowly tailored" or merely "technical and correcting amendments,"[6] the new law will greatly expand the ability of individuals to bring such suits—without government involvement or oversight—against private entities only tangentially related to the public interest. In addition to reversing a unanimous opinion of the Supreme Court interpreting the FCA, the law will:

1. Increase the number of lawsuits and potential targets of such lawsuits by allowing punitive FCA actions to be brought against private entities—such as hospitals, universities, and other non-governmental organizations—for private, non-government money, just because they have received unrelated federal funds.
2. Unfairly permit the government to assert claims that would otherwise be time-barred by effectively circumventing ("tolling") the statute of limitations by relating back the government's intervention to the date that the individual plaintiff filed the original *qui tam* complaint, thereby undermining the ability of a defendant to defend himself.
3. Greatly increase the number of individuals and organizations that can bring secondary lawsuits (as well as the number of individuals who may be made defendants in those lawsuits) claiming that they were retaliated or discriminated against even if they took no steps to actually bring an FCA lawsuit.
4. Allow the Justice Department to provide information obtained using the federal government's law enforcement authority and resources to private parties for use in FCA suits against other private parties.

If nothing else, the new law illustrates how—in their hunt for easy lawsuits generating big money—powerful trial lawyers and their lobbyists influence Washington. *Fortune* magazine ranked the Association of Trial Lawyers of America, which changed its

1. Notes for a Law Lecture by Abraham Lincoln (July 1, 1850), in THE COLLECTED WORKS OF ABRAHAM LINCOLN, VOLUME 2 (Roy P. Basler ed., 1953), *available at* http://showcase.netins.net/web/creative/lincoln/speeches/lawlect.htm.
2. The legislation's supporters were at that time addressing S. 2041, the then-pending version of the False Claims Act Corrections Act, 110th Cong. (2008) (as reported by Senate Comm. on the Judiciary, Apr. 3, 2008). A closely related measure was introduced in the House on December 12, 2007 by Representative Howard Berman (D-Cal.). False Claims Act Corrections Act of 2007, H.R. 4854, 110th Cong. (2007). The primary sponsor of the False Claims Act Corrections Act (S. 386) in the 111th Congress was Senator Patrick Leahy (D-Vt.), and Representative Berman sponsored a related House measure, H.R. 1788.
3. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21 (2009).
4. According to the Justice Department, "*qui tam*" is from a Latin phrase meaning "he who brings a case on behalf of our lord the King, as well as for himself." *See* U.S. DEPARTMENT OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS (undated document), www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf.
5. *See* Allison Engine Co. v. United States *ex rel*. Sanders, 128 S. Ct. 2123, 2130 (2008) (holding that the False Claim Act's prohibition against using a false record to induce government payment requires a showing that the defendant intended that the government itself pay the claim, rather than merely showing that a false statement resulted in the use of government funds to pay a claim).
6. 153 CONG. REC. S11506 (daily ed. Sep. 12, 2007) (statements of Sen. Grassley and Sen. Durbin on the introduction of S. 2041, False Claims Act Corrections Act of 2007), *available at* http://www.govtrack.us/congress/record.xpd?id=110-s20070912-34&bill=s110-2041.

name to the American Association for Justice ("AAJ"), fifth on its list of the most powerful lobbying groups. The magazine also identified the trial lawyers as one of the three lobbying groups in *Fortune's* top ten that "owe[d] their high rankings to their substantial campaign contributions."[7] Since that time, the power and influence that lobbyists for trial lawyers and other attorneys wield in Washington has greatly increased. Trial lawyers' lobbyists and other attorneys contributed more than $232 million to candidates in the 2007–2008 election cycle, over 75 percent to Democrats, making them the top ranking industry group in total contributions.[8] AAJ's political arm alone ranked 14th in contributions to political campaigns in 2008.[9]

As a result of FCA lawsuits, from 1987 to 2008 the federal government was awarded $21.6 billion. *Private* attorneys general (*qui tam* plaintiffs) took home $2.2 *billion*.[10] S. 386 is tailor-made to ensure that from now on plaintiffs, their lawyers, and members of the AAJ receive even greater FCA paydays at the expense of individuals, private businesses, and charitable organizations.

Prior Law

The False Claims Act applies to every company, foundation, other organization, or individual who receives from or pays money to the federal government. It imposes civil liability and stiff penalties on anyone who knowingly uses a "false record or statement to get a false or fraudulent claim paid or approved by the Government."[11] It also imposes liability on any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid."[12] Over 99 percent of FCA cases end up settling before trial "because of the enormously punitive nature of the FCA."[13] Anyone held liable is penalized between $5,500 and $11,000 for each false claim,[14] but that is not all. What makes the FCA so attractive to trial lawyers is that it gives *qui tam* plaintiffs the possibility of cashing in on treble damages—i.e., "3 times the amount of damages which the Government sustains" because of the allegedly false claim.[15]

If a court finds even a single statement on which a contractor's primary agreement with the government was based to be false or fraudulent, all claims submitted under the contract can be considered false. Thus the damages awarded can be as much as three times the amount of every dollar the government paid the contractor under the contract. Each and every request for payment—whether invoice, regular bill, or even expense request—under the contract will incur an additional penalty of $5,500 to $11,000.[16]

7. *See* Jeffery H. Birnbaum, *Washington's Power 25: Which Pressure Groups Are Best at Manipulating the Laws We Live By?*, FORTUNE, Dec. 8, 1997, *available at* http://money.cnn.com/magazines/fortune/fortune_archive/1997/12/08/234927/index.htm.
8. CENTER FOR RESPONSIVE POLITICS, 2008 OVERVIEW, TOP INDUSTRIES (2009), *available at* http://www.opensecrets.org/overview/industries.php.
9. David Ingram, *Plaintiffs Bar Pushes Hill Agenda*, LEGAL TIMES, March 30, 2009.
10. U.S. DEPARTMENT OF JUSTICE, FRAUD STATISTICS—OVERVIEW, OCTOBER 1, 1986–SEPTEMBER 30, 2008, *available at* http://www.usdoj.gov/opa/pr/2008/November/fraud-statistics1986-2008.htm.
11. 31 U.S.C. § 3729(a)(2) (2009).
12. *Id.* § 3729(a)(3) (2009).
13. John T. Boese and Michael J. Anstett, "Dramatic Changes to the False Claims Act Are No Laughing Matter," THE METROPOLITAN CORPORATE COUNSEL, February 2009, *available at* http://www.metrocorpcounsel.com/pdf/2009/February/14.pdf.
14. 28 C.F.R. § 85.3(9) (1999) (increasing the statutory minimum from $5,000 to $5,500 and the maximum from $10,000 to $11,000 to adjust for inflation).
15. 31 U.S.C. § 3729 (2009).
16. *See, e.g.*, United States v. Krizek, 111 F.3d 934, 940 (D.C. Cir. 1997) (counting each instance in which a doctor used a later-invalidated billing method as a separate False Claims Act offense punishable by the statutory monetary penalty); United States v. Ehrlich, 643 F.2d 634 (9th Cir. 1981) (counting each of 76 monthly vouchers submitted by a builder as a separate False Claims Act offense punishable by the statutory monetary penalty).

The Justice Department may pursue false claims itself, or any person may hire a plaintiff's lawyer and bring a *qui tam* suit under the FCA. The theory underlying *qui tam* suits is that private citizens are often in a better position to know of fraud than are the federal officials responsible for assessing claims submitted for payment to the government. Wrongdoers thus are more likely to be punished, the theory goes, and the losses are more likely to be recovered and repaid to the federal treasury, if individuals are given a financial incentive to uncover the false claims.

Private *qui tam* plaintiffs (also known as "relators" under the language of the FCA) must serve the Department of Justice with any FCA suit they file and must also provide a "written disclosure of substantially all material evidence and information the person possesses."[17] Upon notification, the Department has 60 days (which is typically extended) to assess the merits of the case and determine whether it will intervene and conduct the lawsuit itself.[18] The Justice Department intervenes in less than 25 percent of *qui tam* lawsuits.[19] Whenever the government declines to intervene, the plaintiff and his trial lawyer get to conduct the case themselves.

Qui tam plaintiffs are rewarded handsomely. Even if the government intervenes, takes responsibility for prosecuting the lawsuit, and incurs all costs and expenses, a *qui tam* plaintiff still receives up to 25 percent of the total damages awarded. If the government declines to intervene in the case, the *qui tam* plaintiff receives up to 30 percent. The remainder goes to the U.S. Treasury. In either case, the plaintiff will also receive reasonable attorneys' fees and costs.[20] Yet trial lawyers often agree to take FCA cases on a contingency basis in exchange for a percentage of the money awarded to the *qui tam* plaintiff, meaning that *qui tam* plaintiffs are freed from having to pay any attorneys' fees unless and until they win the money to do so.

Expanding "Federal" False Claims to Cover Money Belonging to Private Parties

For the past 146 years, in order for a plaintiff to maintain a False Claims Act suit, the allegedly false claim must have been made to obtain federal money. This caveat makes good sense since it keeps the FCA from becoming a general purpose anti-fraud statute. The objective of the FCA has always been to protect the public fisc—i.e., taxpayer funds in the U.S. Treasury. If the allegedly false claim is not for federal funds, there is no federal interest for the FCA to vindicate. The intent of Congress in the FCA was "to protect the Government from loss due to fraud" while ensuring that "a defendant is not answerable for anything beyond the natural, ordinary, and reasonable consequences of his conduct."[21]

A false invoice or false bill for goods or services is the "paradigmatic example of a false claim under the FCA," but the term *false claim* "applies more generally to other demands for government funds."[22] In all cases, however, the claim must have been made with the purpose and effect of extracting funds *from the government*.[23] Accordingly, under the FCA as it existed before Congress's new expansion, the kinds of things a defendant must have done in order for an FCA lawsuit to be maintained included:

17. 31 U.S.C. § 3730(b)(2). The complaint is "filed in camera" and remains "under seal for at least 60 days, and shall not be served on the defendant until the court so orders." Thus, defendants receive no notice of a claim unless and until the court unseals the complaint.
18. *Id.*
19. U.S. Department of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits (undated memorandum), *http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf* (June 26, 2009).
20. 31 U.S.C. § 3730(d).
21. Allison Engine, 128 S. Ct. at 2130 (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 470 (2006)).
22. United States v. Rivera, 55 F.3d 705, 709 (1st Cir. 1995).
23. *See* Allison Engine, 128 S. Ct. at 2126; United States v. Neifert-White Co., 390 U.S. 228, 230 (1968).

- Presenting a false or fraudulent claim to an officer or employee of the United States for payment or approval (the so-called presentment requirement);
- Knowingly making or using a false record or statement "to get a false or fraudulent claim paid or approved" *by the federal government*; and
- Conspiring to defraud the federal government "by getting a false or fraudulent claim allowed or paid."[24]

False claims between private parties, by contrast, have for centuries been remedied by civil actions between the parties under state contract and tort law.

As the unanimous Supreme Court said just last year in *Allison Engine Co. v. United States ex rel. Sanders*, until Congress's latest expansion of the FCA it was not sufficient for a plaintiff to show merely that a false statement resulted in getting payment of a claim or that government money was used to pay it. Instead, a plaintiff had to "prove that the defendant *intended* that the false record or statement be material to the Government's decision to pay or approve the false claim."[25] A defendant must have intended "that the Government itself pay the claim," not just that the false claim may have been paid using government funds.[26] In other words, the Supreme Court clarified that, under the prior language of the FCA, it was not enough to show that a fraud scheme had "the effect of causing a private entity to make payments using money obtained from the Government. Instead, it must be shown that the conspirators intended 'to defraud the Government.'" Under any conditions other than these, "the direct link between the false statement and Government's decision to pay or approve a false claim is too attenuated to establish liability."[27] This straightforward, commonsense interpretation furthered the FCA's stated purpose of protecting the U.S. Treasury and the federal taxpayer.

Section Four of S. 386, however, reverses the *Allison Engine* holding and virtually eliminates the FCA's requirement that a direct connection exist between the false claim and government money.[28] The newly expanded FCA eliminates the requirement in the first two provisions of the FCA that false claims be used "to get" payment from "the government." These provisions would instead subject to liability any person who:

(A) knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval; or

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.

The new law expands the definition of a "claim" to mean "any request or demand...for money or property and [sic] *whether or not the United States has title to the money or property.*"[29] Some have argued that

24. 31 U.S.C. § 3729(a) (2009). Other grounds for maintaining an FCA suit include delivering to the federal government "less property than the amount for which the person receives a certificate of payment" or using a false statement or document to undermine a financial obligation to the federal government. *Id.*

25. Allison Engine, 128 S. Ct. at 2126 (emphasis added).

26. *Id.* at 2128 (emphasis added).

27. *Id.* at 2130.

28. Illustrating just how far the trial lawyers lobby would like to expand the FCA litigation industry, the original version of the False Claims Act Corrections Act would have made any false claim presented to anyone who receives any federal funds actionable under the FCA. *See* S. 2041, 110th Cong. § 2(1) (2007) (as introduced in the U.S. Senate on Sep. 12, 2007). Thus, if a plumber, painter, or other small contractor submitted an allegedly false claim for payment to anyone who earns a federal salary or anyone who receives any federal subsidy or Social Security payment, that contractor could have been the target of an FCA suit by a *qui tam* plaintiff. The current version closes this particular avenue for litigation by including a narrow exception for "compensation for federal employment or as an income subsidy with no restrictions on that individual's use of the money or property." S. 386, sec. 4(b)(2)(B), 111th Cong. (2009).

29. *Id.* Sec. 4(b)(2)(A) (emphasis added). In non-legal terms, a legislative provision stating that it makes no difference whether the United States "has title to" something is not much different than one stating that it makes no difference whether the United States owns it.

including the requirement that, in order to be actionable, any false record or statement must be "material" to a false or fraudulent claim will properly limit the ability of *qui tam* plaintiffs to receive FCA awards for claims that have only an attenuated or tangential connection to federal funds. But under the new law's overly broad definition of the term, "material" only means "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property,"[30] an extremely weak and almost meaningless materiality requirement.

All that is now required under S. 386 is for the party who receives an allegedly false claim to have also received (or expect to receive) federal funds to pay some portion of the claim as long as the funds are to be spent on the government's behalf or to advance a government program or interest. Arguably under S. 386, even undesignated federal funds given to a general operating account would suffice. As the Supreme Court warned in the *Allison Engine* decision, this will expand the FCA well beyond its intended role of combating fraud against the government into a general all-purpose anti-fraud statute. Under this amendment, allegedly false claims made to a 501(c)(3) organization that receives grants from federal employees' charitable donations could expose the claimant to an FCA suit. Or "liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants—as most of them do."[31]

This one major change transforms the FCA into an essentially different law altogether. If a private hospital, university, or contractor doing business with the government receives a false or fraudulent claim for unrelated products or services, that private entity already has existing rights under state contract and tort law. Private parties have used the state and federal courts to vindicate those rights for centuries. However, S. 386 reshapes the existing provisions of the FCA into a general federal law on fraud, even in cases where the real federal interest at stake—*if any*—is only tenuously related to the false claim. The bill over-federalizes claims historically and adequately addressed at the state level and will allow the FCA to be used to advance claims against any private organization or corporation that receives federal funds. It opens up huge swaths of the economy to FCA litigation, especially in today's post-TARP (Troubled Asset Relief Program), post-bailout, post-"stimulus" world where federal funds are being injected even into large private institutions that do not want them.

Using the Law Enforcement Power of the Justice Department to Benefit Private Parties

In order to give the government the ability to investigate a possible fraud, the FCA grants the attorney general the ability to serve a "civil investigative demand" on anyone who "may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation."[32] Previously, the attorney general could not delegate this law enforcement authority, and information and documentation obtained as fruits of the Justice Department's exercise of this authority could not be shared with *qui tam* plaintiffs and their counsel unless "consent is given by the person from whom the discovery was obtained."[33]

However, the new law as amended by S. 386 gives the attorney general the authority to delegate this law enforcement investigative power and to share any information obtained "with any *qui tam* relator."[34] This exceedingly plaintiff-friendly amendment will allow the attorney general or his designee within the Justice Department to give private individuals and private trial lawyers documents and information obtained using the law enforcement authority of the federal government. The amendment places the U.S. government in the position

30. *Id.* Sec. 4(a)

31. Allison Engine Co., 128 S. Ct. at 2128.

32. 31 U.S.C. § 3733.

33. *Id.* § 3733(i)(2).

34. S. 386, sec. 4(c).

of helping one private party in litigation against another, instead of conducting its own objective, impartial investigation to try to ascertain the truth of whether a violation of the law actually occurred.

The potential reward for a successful *qui tam* claim is enormous; the incentive for private plaintiffs is not to investigate impartially whether a fraud actually occurred, but to win a case at all costs. This amendment eliminates a sensible safeguard against frivolous litigation and the misuse of governmental power by private plaintiffs and invites them to abuse the due process rights of other private citizens. Moreover, this provision turns the *qui tam* mechanism on its head—the proffered justification for generous payoffs to *qui tam* plaintiffs is that they are supposed to bring information about fraud to the government. There is simply no reason for the government to give information to individual plaintiffs and their trial lawyers so that they can prosecute *qui tam* suits they would otherwise lack the knowledge to bring.

Multiplying the Number of FCA "Retaliation" Lawsuits

The FCA has long provided protection for a plaintiff who is discriminated against by his employer for pursuing an FCA *qui tam* suit. If the *qui tam* plaintiff's employer allegedly discriminates against him in the workplace, he may bring a separate suit for reinstatement to his same position at the same pay grade, double the amount of back pay, and interest. He may also be awarded his litigation costs and his attorney's fees. Although he may sue his employer, under the FCA before it was expanded by Congress he could not sue his individual supervisors or co-workers, nor was he able to sue any third party.

The new law opens up the door to innumerable possibilities for additional lawsuits by allowing non-employees—including subcontractors, independent contractors, and other agents—to sue for retaliation without requiring the allegedly retaliatory act to have been taken by an "employer."[35] Contractors already have rights to sue for any breaches of, or tortious interference with, their contractual rights that result from their lawfully pursuing FCA *qui tam* suits. However, this amendment will expand liability to a broad range of circumstances that do not involve employment relationships. It is unnecessary to open up this additional avenue for suing under the FCA other than to give contractors and others an incentive to bring, not state-law contracts and torts lawsuits in state courts, but FCA lawsuits in federal courts that offer the potential for a monetary windfall of double the amount of alleged damages. The amendments to the FCA made by S. 386 guarantee that the litigation industry with all of its associated costs to U.S. society will expand substantially.

Additionally, supervisors and fellow employees are now no longer protected from becoming a defendant in an FCA retaliation lawsuit. Any person who "discharged, demoted, suspended, threatened, harassed, *or in any other manner* discriminated against" the plaintiff can now be sued.[36] This will be a tremendous disincentive to other employees or contractors coming forth to correct false allegations being made by a plaintiff in a *qui tam* suit since it will expose them to potential liability and litigation. Further, an unscrupulous plaintiff or plaintiff's lawyer can simply add as defendants in any retaliation suit any individual with significant knowledge of the facts who might otherwise testify on behalf of the defendant in the *qui tam* suit. This will provide significant leverage to influence, intimidate, and coerce those individuals to "cooperate" with the *qui tam* plaintiff and his lawyers.

Effectively Tolling the Statute of Limitations

The statute of limitations for FCA claims has always been quite generous. Unlike state civil fraud actions which typically must be brought between three to five years after the fraud is committed or two to three years after the facts of a hidden fraud are discovered, the FCA currently limits suits to those initiated up to six years after the violation of the act or three years after the material facts of the

35. S. 386, sec. 4(d). The proposed language gives this right to any "employee, government contractor, or agent." *Id.*

36. S. 386 (emphasis added).

false claim are known (or should have been known) to a government official.[37] But one of the FCA amendments made by S. 386 can be used to circumvent the six-year statute of limitations. This amendment provides that if the government intervenes in a *qui tam* lawsuit, the government's pleading "shall relate back to the filing date of the complaint of the person who originally brought the action."

This amendment effectively gives the government the ability to toll (i.e., suspend) the statute of limitations without requiring that a defendant be given sufficient or adequate notice of a complaint. For example, in *United States v. Baylor University Medical Center*, the government obtained repeated extensions of the 60-day period in the FCA that a complaint remains under seal.[38] The FCA provides that the initial complaint and written disclosure is to be filed under seal in a federal court in order to give the government 60 days to decide whether to intervene—the defendant receives no notice of the lawsuit. The government can repeatedly request extensions of this 60-day period, which are almost always granted as a matter of course, and during each extension period the complaint remains under seal.[39]

In the *Baylor University* case, the government finally decided to intervene in the lawsuit after eight years. However, the Court of Appeals for the Second Circuit determined that the six-year statute of limitations had run out because the government's complaint did not relate back to the original date the lawsuit was filed.[40] As the court noted in discussing a federal rule of civil procedure on this issue, the "touchstone for relation back…is notice, i.e., whether the original pleading gave a party 'adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense.'" Since the "under seal" requirement of the FCA prevents a defendant from having any notice at all, "any relation back of subsequent filings to the original complaint is incompatible with the core requirement of notice…[and] continued running of the statute of limitations is warranted."[41]

A fundamental purpose of any statute of limitations is to encourage cases to be brought when evidence is still fresh. Over time, witnesses move, fall out of contact, die, or simply forget important facts. Statutes of limitations also reduce the costs and burden of litigation. It almost always becomes more difficult, expensive, and time-consuming for a defendant to find documents and other related information for alleged violations of the law the older the events are and the further in the past the supposed violations occurred. The amendment in S. 386 violates the fundamental requirements of fairness and due process holding that a defendant must be given adequate notice of a claim. Congress should not have granted the federal government the ability to stretch out the statute of limitations through a relations-back doctrine while a defendant's ability to defend himself deteriorates and the government's possible losses—and a *qui tam* plaintiff's potential award—pile up.

Conclusion

Regardless of what the supporters of the Fraud Enforcement and Recovery Act of 2009 might have intended, from start to finish the FCA amendments in S. 386 were crafted to expand the ability of individual plaintiffs and trial lawyers to use False Claims Act litigation, not to protect the American taxpayer, but as an all-purpose and highly punitive fraud statute against private industry and nonprofit organizations. *Qui tam* plaintiffs are considered to be acting as "private attorneys general," which is itself problematic given that a "private attorney general is understood to be someone who is suing on behalf of the public, but doing so on his own

37. 31 U.S.C. § 3731(b).

38. United States v. The Baylor University Medical Center, 469 F.3d 263 (2d Cir. 2006).

39. 31 U.S.C. § 3730(b).

40. The Baylor University Medical Center, 469 F.3d at 265.

41. *Id.* at 270. Similarly, in another case, the original complaint was filed in 1996 yet the government waited until 2003 to intervene in the lawsuit. See United States *ex rel.* Health Outcomes Technologies v. Hallmark Health System, Inc., 409 F. Supp. 2d 43 (D. Mass. 2006).

initiative, *with no accountability to the government or the electorate*."[42] The prior provisions of the FCA attempted to strike a balance between the benefits of allowing private attorneys general to develop fraud claims otherwise unknown to the government and the great potential for abuse by such private attorneys general.[43]

The Fraud Enforcement and Recovery Act's amendments to the FCA dispense with even the aspects of this balance that recent Supreme Court decisions clarifying the FCA's language helped to achieve. The act's changes throw open the door to new classes of frivolous and unscrupulous litigation for personal gain, ostensibly for the benefit of the government but controlled by individual plaintiffs and trial lawyers.

Given the current recession and economic uncertainty, when the costs of abusive litigation to the American economy are even more important, it makes no sense to increase the number of expensive, inefficient lawsuits or to place the fruits of the government's coercive law enforcement power in the hands of private litigants. No safeguards are in place to prevent misuse of such law enforcement authority, nor is there any reliable evidence that more litigation is needed. Congress and President Obama should not have created new and unnecessary litigation claims for the benefit of trial lawyers, claims which serve to undermine the U.S. economy and expose private parties to expanded liability and still more vexatious and frivolous litigation.

—Hans A. von Spakovsky is a Legal Scholar, and Brian W. Walsh is Senior Legal Research Fellow, in the Center for Legal and Judicial Studies at The Heritage Foundation.

42. Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, 61 LAW & CONTEMPORARY PROBLEMS 179, 179 (Winter 1998) (emphasis added).

43. *See* United States *ex rel*. Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994) ("The history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and encouraging opportunistic behavior.").