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The Private Enforcement of Government Interests Under the False Claims Act

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by

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Professor Justin McCrary, Chair
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Professor Lee Friedman

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Abstract

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Fraud against the federal government can be extremely costly, as the Department of Health and Human Services estimated it made $70 billion in improper payments in 2010 under Medicare and Medicaid.[1] Combating fraud is a similarly costly affair, and the federal government has revitalized a Civil War statute to help in the fight. Under the False Claims Act, the government pays private enforcers a bounty to file cases against defendants committing fraud. These private enforcers, typically whistleblowers, have helped the government recover over $18 billion as of 2010.

Private enforcement has a long history under the common law tradition, but its role in a the modern, public enforcement state is less certain. The False Claims Act's private enforcement system, known as its qui tam provisions, specifies government review of private actions in an attempt to curtail past abuses.

In the first part of this dissertation, I evaluate the role of private enforcers and their attorneys in this qui tam system. The government review process allows a standardized reference point for comparing private performance. I argue that it also provides private actors the opportunity to slack by pursuing a “filing mill” strategy. From the data available, however, I do not find law firms aggressively submitting cases under such a high volume, low effort strategy. Rather, law firms and the government appear to be cooperating as intended under the statutory design.

In the second piece of this dissertation, I address the question of the optimal bounty percentage for a finder's fee in the False Claims Act. The statute current specifies a minimum 15% bounty for information leading to a successful prosecution of fraud. I consider the responsiveness of private enforcers to variation in the bounty percentage.

[1] GAO testimony 11-409T from Kathleen M. King, (March 9, 2011) available online at http://www.gao.gov/new.items/d11409t.pdf. Also U.S. Department of Health and Human Services FY 2010 Agency Financial Report, Section III. Available online at http://www.hhs.gov/afr/2010-sectioniii-oai.pdf.pdf

Using variation from a 2004 change in the tax code, I find evidence that private enforcers are more willing to bring new cases valued under $440,000 given an approximate 23% increase in bounty.

For the final piece of this dissertation, I consider the bounty percentage for private litigation in the qui tam process. Unlike the finder's fee bounty, I suggest that a 100% litigation bounty may be useful for both compensatory and deterrence purposes. Although a government agency concerned about compensation for fraud losses might initially be concerned about granting a 100% litigation bounty, I argue that the threat of such a litigation bounty may result in additional compensation. The Department of Justice should have the discretionary power to grant high litigation bounties.

Table of Contents

List of Tables & Figures

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Chapter I: Introduction

Economists have compared theories regarding the superiority or equivalence of private versus public enforcement.[2] In modern U.S. jurisprudence, there is a relatively bright line distinguishing criminal prosecutions and private civil litigation. Although not consistently true in the past,[3] public prosecutors now exclusively control the application of criminal sanctions in serving the public interest. Private citizens can pursue civil litigation against defendants, but they must satisfy requirements of standing or particular personal harm before litigating. This is not to say that civil litigation does not serve public purposes, but rather that private citizens, in comparison to public prosecutors, are quite limited in the types of cases they can initiate. Private actors can nonetheless play important roles in the detection and resolution of criminal violations by notifying authorities, acting as witnesses, and applying extrajudicial pressure. As Polinsky and Shavell (2000) note, coordinating these public and private efforts merits examination.[4]

Rather than examining the various supporting roles of private citizens, I look at the most directly comparable case of qui tam litigation. A qui tam provision authorizes private citizens to act as "private attorneys general" in litigating against defendants. Unlike other forms of private attorneys general, the Supreme Court has established that the regular requirements of private standing do not apply. Thus, any citizen, even if she has not suffered any particularized loss from the defendant's actions, can bring a qui tam claim forward. Under this scenario, private citizens are on nearly equal grounds with public prosecutors.

Although qui tam actions have a long history in the common law tradition, the major remaining U.S. federal statute with a qui tam provision is the False Claims Act (FCA). The FCA proscribes fraud against the federal government, most of which today is Medicare and defense contractor fraud. Private citizens, known as "relators" in the qui tam rubric, can sue on behalf of the federal government and recover a portion of the fraud as their reward.

The coordination of public and private enforcement efforts makes particular sense in the area of financial crimes within a complex economy. Following the concern regarding relative enforcement costs from Polinsky (1980), detection alone of such crimes may be the most difficult and costly step of the enforcement process. We do not have good victimization data to help determine background rates of offenses. Without such data, a social planner concerned about deterrence has a very difficult problem in determining the

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[2]See, e.g., Becker, Gary S. and George J. Stigler. 1974. ``Law Enforcement, Malfeasance, and Compensation of Enforcers,'' J. Legal Stud., 3, pp. 1-18.; Landes, William M. and Richard A. Posner. 1975. ``The Private Enforcement of Law,'' J. Legal Stud., 4, pp. 1-46.; Polinsky, A. Mitchell. 1980. ``Private versus Public Enforcement of Fines,'' J. Legal Stud., 9, pp. 105-27.; Shavell, Steven. 1993. "The Optimal Structure of Law Enforcement," J. Law Econ., 36, pp. 255-87.

[3]*See, e.g.*, JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003)

[4] See A. Mitchell Polinsky and Steven Shavell, The Economic Theory of Public Enforcement of Law, Journal of Economic Literature, Vol. 38, No. 1 (Mar., 2000), pp. 45-76

sufficiency of enforcement efforts. Prompt detection by public authorities may require intrusive and costly monitoring techniques that could generate hostility and political backlash. In contrast, existing employees within such businesses and organizations have regular, real-time visibility into potential legal violations. Personal detection by such employees is nearly costless, although for them to reveal this personal knowledge and pursue enforcement action is a very different story.

Prior models have emphasized a uniform harm per violation, resulting in concerns of marginal enforcement costs per harm. In reality, we may be more concerned about crimes that result in greater harm to society. For financial crimes we can see a range of external harms; deterring large scale fraud may be more important than stopping a single bad check. Rewarding private enforcement via a percentage bounty may improve the distribution of enforcement resources. If civil penalties correspond to the level of societal harm, a percentage reward can help ensure that greater resources are against legal violations that cause greater harm.

Literature Review

A. Private Enforcement in General

Qui tam litigation is a form of private action in the support of public interests. There is a substantial literature describing such programs generally.[5] Private enforcement of public law has a number of perceived benefits. Private involvement can increase the total resources devoted to fighting a particular problem, and the private parties might be more efficient at doing so. For example, the cost for an employee to monitor an employer might be less than the costs involved if the federal government were to do so. Private involvement might also correct for agency slack; government regulators might be more subject to political pressure or lobbying, but private involvement might shame them into action. Private enforcement could also develop innovations in litigation, settlements, and law.

The potential downsides to private enforcement dovetail with the aforementioned benefits. Private party involvement might generate excessive enforcement—enforcement against parties who should not be liable. Private enforcement might also interfere with the public regulatory system—either interfering with ongoing government efforts, or perhaps triggering even further government slack. Finally, there can be a lack of public accountability for private enforcement.

More formally, Landes & Posner (1975) argue that private enforcement is theoretically inefficient because of the incentive problem with fines under optimal enforcement. To minimize costs of detection and enforcement, they recommend a combination of high

[5] See, e.g., Richard B. Stewart and Cass R. Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193 (1981-82) (discussing private rights of action and initiation).

fine and low detection rate for crime. The high fine, however, will provide an incentive for greater investment by private enforcers, thus increasing the overall social loss.

Polinsky (1980) emphasizes the importance of enforcement costs. Due to a combination of defendant wealth constraints and their ability to cause societal damage, a theoretically high fine and low detection probability may not work. If the costs of raising the detection chance to a level satisfying rational deterrence are too high, public (as opposed to private) enforcement may be the only option. Public enforcement is not constrained by the profit motive of private enforcers. Polinsky also notes that paying private enforcers an amount different from the fine assessed to the defendant may generate socially optimal results.

B. FCA formal models

A number of papers have taken steps towards modeling the FCA qui tam provisions. Bucy presents a complicated game theoretic model incorporating the relator, the defendant, and the regulatory as three players.[6] Although not explicitly in her model, she does mention the fact that the potential relator's counsel is a repeat player, thus justifying the design of her analysis in the form of repeated/iterated games.[7]

Depoorter & De Mot also present a game theoretic model of the FCA, utilizing the same main three players as Bucy.[8] Their model emphasizes the differences in probability of success between the relator acting alone versus the government intervening. With a government actor that values the recovered dollars, it predicts that the government will intervene in high dollar cases along with low dollar cases that the relator would not otherwise pursue. They hypothesize that this setup may trigger underprovision of qui tam cases if the relators recognize the government's potential for free riding. Finally, they mention the perverse incentive for relators to delay in obtaining maximum damages.

Heyes & Kapur, although not specific to the FCA, present an economic model of the whistleblower.[9] They highlight different decision metrics by which whistleblowers decide to take action along with the impact of "noisy" or imperfect information.

C. Empirical Studies

Empirical evidence surrounding FCA qui tam actions is rather ambiguous. The Department of Justice's official statistics show that non-intervention qui tam cases are dismissed at an extremely high rate, but there are numerous plausible explanations. Certainly, as hypothesized, the government might simply be intervening in the best cases, and relators are otherwise pursuing weak cases. In contrast, however, the court may be

[6] Pamela H. Bucy, Games and Stories: Game Theory and the Civil False Claims Act, 31 Fla. St. U.L. Rev. 603 (2004)
[7] Id. at 627.
[8] Ben Depoorter & Jef De Mot, Whistle Blowing, 14 Supreme Court Economic Review 135 (2005)
[9] Anthony Heyes and Sandeep Kapur, An Economic Model of Whistle-Blower Policy, JLEO 2008.

drawing negative inferences from the government's decision to not intervene. Perhaps the government is resource constrained and cannot intervene in all qui tam actions, but courts are dismissing legitimate actions because they believe the government is not actually resource constrained. There is also difficulty in pleading without government cooperation. The Federal Rules of Civil Procedure requires that fraud be pleaded with particularity; the lack of government involvement might preclude the specifics required by a court to survive a 12(b)(6) motion. The FCA also requires scienter of the fraud; a simple defense is that the government was aware and approved of the allegedly fraudulent claim. The lack of government participation here also could makes it difficult to defeat such a defense. The high rate of settlement in the intervention cases might also be due to the government's powerful ability to threaten to discontinue ongoing or other business.

While not specifically investigating FCA relators, some studies suggest that the costs to whistleblowers in general are very high.[10] Zingales (2004) summarizes evidence on the consequences of whistle-blowing for individual employees.[11] In a 1992 survey of 1,500 federal workers, twenty-five percent of employees reported that they experienced verbal harassment and intimidation; 20 percent were shunned by co-workers and managers; 18 percent were assigned to less desirable duties; 11 percent were denied a promotion. A 1998 survey of 448 emergency physicians paints an even worse picture: twenty-three percent of those who complained about an issue reported having been fired or threatened with termination. Brickey reports that in a random review of 200 whistleblower complaints filed with the National Whistleblower Center in 2002 found that about half of the complainants said they were fired after they reported misconduct.[12] The remaining complainants had been subjected to other retaliatory action such as on-the-job harassment or discipline. A survey by another watchdog group, the Government Accountability Project, found that about ninety percent of whistleblowers are subjected to reprisals or threats.

A meta-analysis of various studies by Mesmer-Magnus and Viswesvaran shows that whistleblowers in general "tend to have good job performance, to be more highly educated, to hold higher-level or supervisory positions, to score higher on tests of moral reasoning, and to value whistleblowing in the face of unethical behavior."[13]

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[10] See, e.g., C. Fred Alford , Whistleblowers: Broken Lives and Organizational Power 1 (2001) ("Most [whistleblowers] are in some way broken, unable to assimilate the experience, unable… to come to terms with what they have learned about the world. Almost all say they wouldn't do it again."); K J Lennane, 307 British Medical Journal 667 (1993) "Whistleblowing": a health issue.

[11] Zingales, L. 2004. Want to Stop Corporate Fraud? Pay off those Whistle-blowers. AEI-Brookings Joint Center Policy Matters Sunday, January 18, 2004.

[12] Brickey, K. 2002. From Enron to WorldCom and beyond: Life and crime after Sarbanes-Oxley. Working paper, Washington University in St. Louis.

[13] Jessica R. Mesmer-Magnus & Chockalingam Viswesvara, Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation, 62 Journal of Business Ethics 277, 279 (2005).

These studies are limited in that they have difficulty studying individuals who witnessed wrongdoing but did not blow the whistle, nor do they clearly identify those who make false accusations, the results suggest that most whistleblowers fall on the positive side.

D. FCA Qui Tam Concerns

The modern FCA qui tam provisions typically attract two lines of concern. The first area of concern is the private parties' ability to select meritorious cases. The second concern surrounds the proper bounty percentage to be paid to the private parties.

1. Proper case selection

Beyond anecdotes of poor case choices, the most cited statistical evidence of improper case selection is the high dismissal rate of qui tam actions that are not joined by the government. The official DOJ published data show that 94% of qui tam actions in which the attorney general intervenes result in a settlement or judgment.[14] In comparison, only 6% of qui tam actions in which there is no government intervention result in a settlement or judgment. The vast majority (92%) of such non-intervention cases are dismissed. Some commentators infer that relators are pursuing frivolous claims.[15] As noted earlier, there are a variety of alternative explanations for this success rate disparity.

Various solutions have been proposed. Broderick suggests increasing attorney general control over qui tam litigation and limiting qui tam actions to areas of fraud in which the attorney general has difficulty detecting fraud.[16] Matthew believes the problem stems from moral hazard—the attorney general is reluctant to dismiss weak cases, since it does not shoulder any cost from allowing weak cases to progress. Thus, Matthew argues that the FCA should require the attorney general to certify all qui tam litigation rather than the qualitatively ambiguous non-intervention categorization.[17] Following a similar line of moral hazard, Brollier proposes that the defendant's attorney costs be split between the government and the relator,[18] while Rich argues for joint and several liability for the defendant's costs.[19]

2. The proper bounty percentage

[14] Broderick, Qui Tam and the Public Interest: An Empirical Analysis, 107 Columbia L. Rev. 949, 975 (2007).
[15]See, e.g., Broderick; Rich.
[16]Broderick, 107 Col. Rev at 997-99.
[17]Matthew (2007) 40 U. Mich J.L. Reform 281 at 336. The Moral Hazard Problem with Privatization of Public Enforcement: the Case of Pharmaceutical Fraud. See also Rich (2008) (at 1276-1277) (requiring an express government position on any novel theories of liability introduced by relators)
[18] Brollier, Jonathan T., note: Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act (2006) 67 Ohio St. L.J. 693 (at 710)
[19] Rich (2008), Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-control Qui Tam Litigation Under the False Claims Act, 76 U. Cin. L. Rev. 1233 (at 1275-76)

Another major line of concern is that the FCA's bounty percentage. Since relators receive a percentage of the damages, various commentators argue that the relators have an incentive to allow the fraud to increase, thus improving the relator's reward. In a related strain of argument, others are concerned that relators target relatively trivial contractual violations, and then pursue claims of fraud for the value of the entire contract (or series of contracts), thus unjustifiably penalizing the defendant.[20] Many of the statutory changes of the FCA, along with commentator proposals, thus have centered on restructuring the maximum bounty percentage. The FCA originally guaranteed a full 50% of recovery to the relator.[21]

Brollier suggests a graduated bounty percentage that will encourage prompt revelation.[22] His proposal grants up to 30% to relators who file within two years of defendant's first fraud, decreasing down to 10% for relators who file after four or more years have elapsed. In contrast to Brollier's suggestion, Kovacic proposes that the relator's damage award be constrained by the time at which the relator knew or had constructive knowledge of the misconduct.[23] Trunk recommends improved incentives for voluntary disclosure of compliance/contractual violations, including assurances of continued government business and guarantees of less than treble damages.[24]

Ferziger & Currell make broad recommendations of low (single digit percentage) bounties, maximizing informant anonymity, and increasing the predictability of bounty payment.[25] Their ideal bounty percentage "should be equal to the agency's average information cost per dollar of enforcement revenue, not including the bounty program's marginal operating cost."[26]

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[20]Trunk (2003) 71 Geo. Wash. L. Rev 159, 177. NOTE: Sounding the Death Toll for Health Care Providers: How the Civil False Claims Act Has a Punitive Effect and Why the Act Warrants Reform of Its Damages and Penalties Provision. See also Kovacic at 1854.

[21]James B. Helmer, Jr., How Great Is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act, 68 U. Cin. L. Rev. 737, 739 (2000).

[22] Brollier (2006) (at 716-18)

[23]Kovacic (1996), 29 Loyola L. Rev 1799, William E. Kovacic, Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting

[24]Trunk, at 177

[25] Ferziger & Currell, Snitching for Dollars: the Economics and Public Policy of Federal Civil Bounty Programs, 1999 U. Ill. L. Rev. 1141 (1999).

[26] Id.. at 1187.

Chapter II: False Claims Act Background

A. A brief history

Private enforcement has a long history in the common law tradition, based on the adversarial dispute resolution model.[26] Due in part to underenforcement by private parties, however, the British experimented with a variety of tools to encourage private participation. Private groups sprung up to fund prosecution efforts, and the government experimented with bounties and payment of expenses for successful litigants. Among these tools was the qui tam lawsuit.

Qui tam provisions allow a private citizen, also known as a "relator," to bring a civil action in the name of the government. Qui tam is shorthand for the Latin phrase “qui tam pro domino rege quam pro se ipso in hac parte sequitur,” which translates to “who as well for the king as for himself sues in this matter."[27] Such provisions date back thirteenth century England, originally a jurisdictional device by which private citizens gained access to royal courts.[28] The British expanded the statutory use of qui tam, allowing “observer” litigation in which relators did not have to meet any standing requirement. While England's American colonies adopted statutes with qui tam provisions, most have not survived.[29]

The main remaining modern statute with a qui tam provision is the False Claims Act. The False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733 was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were defrauding the Army.[30] It originally provided for a $2000 fine per violation along with double damages to the government, and the relator would receive 50% of the recovery.[31] In 1943, Congress amended the statute to increase government oversight of relator actions, but it also dramatically reduced the bounty. Relators were no longer guaranteed a percentage, but they could be awarded a maximum of 10% or 25% of the recovery, depending on the government's involvement.[32] The statute fell into disuse for decades after the 1943 amendments.[33]

In 1981, the General Accounting Office (now the Government Accountability Office) found that most fraud against the government remained undetected and that the government prosecuted only a small percentage of those cases in which it detected

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[26] *See, e.g.*, JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003)
[27] Black’s Law Dictionary 1282 (8th ed. 2004).
[28] See Kary Klismet, Quo Vadis, “Qui Tam”? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens, 87 Iowa L. Rev. 283, 287–88 (2001) (explaining English development of qui tam actions).
[29] See J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 553–54 (2000) (explaining that most early qui tam statutes “passed out of existence long ago”).
[30] See Klismet at 288-89.
[31] See id. at 289.
[32] See Beck at 560-61.
[33] See Klismet at 290.

fraud.[34] The Department of Justice estimated that this fraud drained between 1% and 10% of the federal budget at a cost of between $ 10 and $ 100 billion annually.[35] Congress expressed particular concern about fraud in defense procurement. Nearly half of the largest 100 defense contractors were under investigation for potential fraud.[36] Moreover, Congress found that fraud in the defense industry could endanger human health and might even threaten national security.[37]

Congress found that regulators had a difficult time detecting fraud without inside information from employees who witnessed the fraud or were otherwise involved in it.[38] Yet potential whistleblowers declined to come forward because they believed that their complaints would be ignored and feared retaliation from employers.[39] Congress also found that federal investigators would not address "questionable" allegations that could lead to "very significant cases" because of scarce resources and that funding was unlikely to increase.[40] Though Congress did not suggest as much explicitly, some commentators have contended that collusion between regulated industries and their regulators could explain the government's inaction in some cases.[41] Finally, Congress found that a "resource mismatch" existed when investigators targeted a large corporation, because the corporation could devote many times the government's manpower and resources to defending any allegations.[42]

In response to these problems, the House sought "to amend the existing civil false claims statute in order to strengthen and clarify the government's ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud."[43] The Senate was blunter about its financial motives: "The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[44]

B. The Modern Statute

The 1986 FCA amendments jumpstarted qui tam enforcement.[45] Compared to the stagnant situation pre-1986, today approximately 400 such cases are filed at the federal level each year.[46] The amendments granted that prior government knowledge of the

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[34] S. Rep. No. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5267.
[35] Id. at 3, as reprinted in 1986 U.S.C.C.A.N. 5266, 5268.
[36] Id. at 2, as reprinted in 1986 U.S.C.C.A.N. 5266, 5267.
[37] Id. at 3, as reprinted in 1986 U.S.C.C.A.N. 5266, 5268.
[38] Id. at 4, as reprinted in 1986 U.S.C.C.A.N. 5266, 5269.
[39] Id. at 4-5, as reprinted in 1986 U.S.C.C.A.N. 5266, 5269-70.
[40] Id. at 7, as reprinted in 1986 U.S.C.C.A.N. 5266, 5272; see also 132 Cong. Rec. H9382-03, at 23 (daily ed. Oct. 7, 1986) (remarks of Rep. Berman) ("Another reason for providing for this full party status [for relators] is to keep pressure on the Government to pursue the case in a diligent fashion.").
[41] Bucy, Private Justice at 73.
[42] S. Rep. No. 99-345, at 8, as reprinted in 1986 U.S.C.C.A.N. 5266, 5273.
[43] H.R. Rep. No. 99-660, at 16 (1986).
[44] S. Rep. No. 99-345, at 1, as reprinted in 1986 U.S.C.C.A.N. 5266, 5266.
[45] Klismet at 292.
[46] DOJ Civil Division stats website 2009 at http://www.usdoj.gov/civil/frauds/fcastats.html

allegations does not automatically prevent a relator from filing a qui tam action.[47] More importantly, the 1986 amendment provided that even if the government joins the lawsuit and has "primary responsibility for prosecuting the action," the relator "shall have the right to continue as a party to the action."[48] Second, it increased a relator's recovery for a successful suit to a maximum of 30% if the government does not intervene, and to a maximum of 25% if it does, and increased the overall damages and penalties that can be imposed on a defendant from double to treble damages. Finally, the 1986 amendment protected a relator from retaliatory actions by employers, making it safer for an individual to bring qui tam actions by adding whistleblower protection language to the statute.[49]

§§ 3729(a)(1)(A) and (B) set forth FCA liability for any person who knowingly submits a false claim to the Government or causes another to submit a false claim to the Government or knowingly makes a false record or statement to get a false claim paid by the Government. Section 3729(a)(1)(G) is known as the reverse false claims section; it provides liability where one makes a false record or statement - not to get money from the Government - but to avoid having to pay money to the Government.

Those found liable must pay a civil penalty of between $5,000 and $10,000 for each false claim (those amounts are adjusted from time to time; the current amounts are $5,500 to $11,000) and treble the amount of the Government's damages. Where a person who has violated the FCA reports the violation to the Government under certain conditions, the FCA provides that the person shall be liable for not less than double damages.

Mens Rea

To violate the FCA a person must have submitted the false claim (or made a false statement or record) with knowledge of the falsity. In § 3729(b)(1), knowledge of false information is defined as being (i) actual knowledge, (ii) deliberate ignorance of the truth or falsity of the information, or (iii) reckless disregard of the truth or falsity of the information. Some courts have considered the importance of intentionality in interpreting this portion of the statute,[50] but the current statute in § 3729(b)(1)(B) indicates that there is no requirement of specific intent to defraud.

C. The Qui Tam Procedure

The qui tam provisions begin at § 3730(b) of the FCA; § 3730(b)(1) states that a person may file a qui tam action. Section 3730(b)(2) provides that a qui tam complaint must be filed with the court under seal. Most relators are represented by counsel on a contingency fee basis; they are not responsible for attorneys' fees if the case is unsuccessful.[51] The

[47] See 31 U.S.C. § 3730(e)(4) (2010) (barring qui tam suits in such situations unless relator is an "original source" of the information).
[48] Id. § 3730(c)(1).
[49] See 31 U.S.C. § 3730(h) (relief from retaliatory actions).
[50] See, e.g., United States v. Bolden, 325 F.3d 471, 494 (4th Cir. 2003) (quoting United States v. Maher, 582 F.2d 842, 847 (Va. Ct. App. 1978)) (additionally requiring the defendant to be conscious of "doing something which was wrong or violated the law.").
[51] Bucy, Private Justice at 58

complaint and a written disclosure of all the relevant information known to the relator must be served on the U.S. Attorney for the judicial district where the qui tam was filed and on the Attorney General of the United States.

The qui tam complaint is initially sealed for 60 days. The Government is required to investigate the allegations in the complaint; if the Government cannot complete its investigation in 60 days, it can seek extensions of the seal period while it continues its investigation. Such extensions are generally granted, as the typical time under seal is around 13 months. When the Government has made a decision, also known as the time of "election," the Government must then notify the court that it is proceeding with the action (generally referred to as "intervening" in the action) or declining to take over the action, in which case the relator can proceed with the action. The Government can also dismiss the case outright, although it does not choose to do so often. If the Government has not made a decision, but the court does not grant an extension, the Government will file a "notice of no decision," which courts generally treat as non-intervention. Accompanying such a notice of no decision is typically a proposed order unsealing materials for litigation, although it is still within the court's discretion to actually unseal the case.

Upon initial receipt of the complaint, the DOJ and the local AUSA decide on the preliminary handling of the case. Handling specifies which attorneys have sufficient authority to take on the case. The three major handling categories are delegated, monitored, and personally handled. Delegated cases are delegated to a local AUSA. Under the current regulations, these cases are valued under $1 million.[52] Monitored cases are run by a local AUSA, but decisions regarding intervention or settlement are made by the Civil Division. Finally, personally handled cases are run directly out of the Civil Division.

Copies of the initial complaint go to the potentially defrauded agency, typically the inspector general's office. The results of the investigation can be shared with both criminal and civil divisions. The agency can then “shop” the case to different attorneys, depending on the handling rules of the case. The local US Attorney's office has the authority to handle smaller cases independently, while individual attorneys within the DOJ Civil Division may make recommendations to the deputy assistant attorneys general or higher regarding larger value cases.

If the Government intervenes in the qui tam action it has the primary responsibility for prosecuting the action.[53]. It can dismiss the action, even over the objection of the relator so long as the court gives the relator an opportunity for a hearing[54] and it can settle the action even if the relator objects so long as the relator is given a hearing and the court determines that the settlement is fair.[55] The relator's attorneys can work alongside government attorneys in pursuing the case, and the relator may also provide expertise and support. If a relator seeks to settle or dismiss a qui tam action, it must obtain the consent

[52]Title 28 Subpart Y Directive No. 1-10 section 4(c)(5).
[53] § 3730(c)(1)
[54] § 3730(c)(2)(A)
[55] § 3730(c)(2)(B)

of the Government.[56] When the case is proceeding, the Government[57] and the defendant[58] can ask the court to limit the relator's participation in the litigation. Even if the government decides against intervention during the sealed complaint period, it can do so at a later time upon a showing of "good cause."[59]

If the government decides against intervention (and thus implicitly deciding against dismissal), the relator can then litigate the case with counsel.[60] The Government will often notify the relator and counsel of its non-intervention decision prior to formally notifying the court, thus allowing the relator and counsel time to make a decision regarding the case.

Current DOJ policy is to request for courts to unseal cases even if relators withdraw except in cases of unusual hardship—for example, if the relator has reason to fear severe retaliation.[61] I do not have information at this time on U.S. Attorney compliance with this policy, and courts still retain discretion as to the unsealing of cases.

D. Award to the relator

If the Government intervenes in the qui tam action, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the Government through the qui tam action.[62] If the Government declines to intervene in the action, the relator's share is increased to 25 to 30 percent. If the case turns primarily on publicly disclosed information, the relator's share may be reduced to an amount no more than ten percent. If the relator planned and initiated the fraud, the court may reduce the award without limitation. The relator's share is paid to the relator by the Government out of the payment received by the Government from the defendant. If a qui tam action is successful, regardless of intervention, the relator also is entitled to be paid his legal fees and other expenses of the action by the defendant. The FCA also provides that if the Government chooses to obtain a recovery from the defendant in certain types of proceedings other than the relator's FCA suit, this is known as an alternate remedy and the relator is entitled to same share of the recovery as if the recovery was obtained through the relator's FCA suit.[63] Even if the government does not immediately intervene in the qui tam action, the attorney general may be able to veto settlements otherwise approved by the court, relator, and defendant.[64]

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[56] § 3730(b).
[57] § 3730(c)(2)(C)
[58] § 3730(c)(2)(D)
[59] § 3730(c)(3).
[60] A relator generally may not prosecute a non-intervened case pro se. See United States ex rel. Lu v. Ou, 368 F.3d 773, 775-76 (7th Cir. 2004) (citing United States v. Onan, 190 F.2d 1 (8th Cir. 1951)). See also United States ex rel. Rockefeller v. Westinghouse Elec. Co., 274 F. Supp. 2d 10,16 (D.D.C. 2003). But see Minotti v. Lensink, 895 F.2d 100 (2d Cir. 1990) (pro se relator appealing dismissal of case).
[61] 28 CFR 50.9 DOJ policy in favor of open proceedings; 28 CFR 50.23 policy in favor of publicly disclosed settlements.
[62] § 3730(d)
[63] §3730(c)(5).
[64] There is a circuit split as to the requirements of "good cause" applied to future government involvement. See, e.g., United States v. Health Possibilities, 207 F.3d 335, 339 (6th Cir. 2000) (holding that “a relator

E. Statutory bars to qui tam actions

Under several circumstances, the FCA prohibits pursuit of a qui tam action:

1. The relator was convicted of criminal conduct arising from her role in the FCA violation.[65]

2. Another qui tam case concerning the same conduct already has been filed (the "first to file bar").[66]

3. The Government already is a party to a civil or administrative proceeding concerning the same conduct.[67]

4. The qui tam action is based upon information that has been disclosed to the public through any of several means included criminal, civil, or administrative hearings, Government hearings, audits, or reports, or through the news media (this is known as the "public disclosure bar.")[68] There is an exception to the public disclosure bar where the relator was the original source of the information.

F. Parallel Criminal Actions

The civil enforcement provisions of the FCA run in parallel with the criminal provisions in 18 U.S.C. § 287. Although the civil provisions explicitly exclude tax fraud,[69] § 287 has been used for a variety of claims including tax fraud.[70] Criminal violations of the FCA can incur sentences of up to five years[71] and fines up to $250,000 per charge.[72] Qui tam proceedings, like other civil FCA proceedings, generally defer to criminal proceedings for a number of reasons. First, a defendant has a different set of rights under civil discovery rules. Second, while a civil case is not entitled to knowledge of an ongoing grand jury process, the civil division can obtain a court order to learn about the grand jury proceedings after the criminal case is complete. Finally, a criminal conviction can be the basis for summary judgment in a civil case.

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may not seek voluntary dismissal of any qui tam action without the Attorney General's consent"); Searcy v. Philips Elecs., 117 F.3d 154 at 158, 160 (5th Cir. 1997) (noting that government may appeal district court decision or veto settlement despite its failure to intervene); United States v. Tex. Instruments Corp., 25 F.3d 725, 728 (9th Cir. 1994) ("Following Killingsworth, we hold the government may not both withhold its consent to the settlement and refuse to intervene . . . .").

[65] § 3730(d)(3)

[66] §3730(b)(5)

[67] §3730(e)(3)

[68] §3730(e)(4)(A).

[69] § 3729(d)

[70] See United States v. Alli, 344 F.3d 1002, 1003 (9th Cir. 2003) (upholding a criminal FCA conviction for filing fraudulent tax returns and claiming the resulting tax credits); United States v. Barnes, 324 F.3d 135, 137 (3d Cir. 2003) (affirming the conviction of defendant who filed fraudulent claims for his clients); United States v. Nash, 175 F.3d 429, 431 (6th Cir. 1999) (affirming conviction of defendant who falsely claimed that he was a nonresident alien, not subject to federal income taxes).

[71] 18 U.S.C. 287

[72] See 18 U.S.C. 287; 18 U.S.C. 3571.

Chapter III: Does Qui Tam Encourage Excessive Litigation?

Abstract

Abusive litigation is an ongoing concern in allowing the private enforcement of public laws, but the variety of courts and cases can make systematic identification of abuse difficult. To limit potential abuse under the False Claims Act, the federal government has the right of first refusal on all private enforcement actions. Utilizing a new data set from this government review procedure, I do not find numerous law firms acting as "filing mills" in pursuing a high volume of poorly selected cases. Repeat law firms appear to be improving over time, and there is a surprising number of successful single-shot law firms. The government rarely uses its unilateral power to dismiss cases, suggesting a cooperative equilibrium between public and private enforcement.

I. Introduction

The common law's origins as a private enforcement system show numerous attempts to restrain frivolous or abusive litigation.[73] Given the power of criminal sanctions, modern common law systems have moved almost entirely to a public enforcement scheme. Nonetheless, the specter of improper private lawsuits remains in civil litigation, as individuals may find creative legal strategies that do not further the public interest.[74]

One vestige of the common law's private enforcement past is the *qui tam* lawsuit, allowing private citizens to sue on behalf of a king.[75] The False Claims Act (FCA) contains one of the remaining *qui tam* provisions in modern law, by which private parties may prosecute fraud against the federal government.[76] Since the statute's revision in 1986, there has been tremendous growth in *qui tam* litigation, as whistleblowers and other private parties helped recovery billions of dollars in fraud.[77] These successful whistleblower cases have inspired new legislation such as the Dodd-Frank Wall Street Reform and Consumer Protection Act to increase whistleblower rewards.[78] At the same time, there continue to be allegations of private citizens selecting unmerited cases.[79]

It is difficult to compare systematically the legitimacy of cases in general litigation, as most cases end up being settled. Even if the settlement amounts are reported, the amounts may conflate the defendants' beliefs about the claims with their concerns about litigation costs. [80] Under the FCA, however, the Department of Justice (DOJ) is responsible for reviewing every new *qui tam* case.[81] Centralized government review provides a common reference point to evaluate cases. It also provides *qui tam* law firms an opportunity to

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[73] *See, e.g.*, JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003).

[74] *See, e.g.*, Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 864 (condemning "Plaintiff's extensive collection of lawsuits... filed as part of a scheme of systematic extortion.") (C.D. Cal. 2004), Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1281 (expressing concern over "an explosion of private ADA-related litigation.... filed by a relatively small number of plaintiffs.") (M.D. Fla. 2004), Consumer Defense Group v. Rental Housing Industry Members, 137 Cal. App. 4th 1185 (Ct. App. 2006) (holding private management of a Proposition 65 case to be against the public interest), Letter from California Attorney General dated May 11, 2007 (expressing concern that a law firm's three clients served over 600 notices of violation that may not have been in the public interest under Proposition 65) available at http://ag.ca.gov/prop65/pdfs/Chanler_51107_letter.pdf

[75] *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 553–54 (2000).

[76] 31 U.S.C. §§ 3729 – 33 (2010).

[77] *See* Linda J. Stengle, Note, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act*, 33 DEL. J. CORP. L. 471 (2008); Department of Justice, False Claims Act Statistics, http://www.justice.gov/civil/frauds/fcastats.html (last visited Dec. 11, 2010).

[78] *See* Robert R. Stauffer and Andrew D. Kennedy, *Dodd-Frank Act Promises Large Bounties for Whistleblowers*, law.com, Aug. 23, 2010, http://www.law.com/jsp/law/article.jsp?id=1202470880915; SEC press release, SEC Proposes New Whistleblower Program Under Dodd-Frank Act, Nov. 3, 2010, http://www.sec.gov/news/press/2010/2010-213.htm

[79] *See* Dena Aubin, *Prosecutor warns of whistleblowers "run amok,"* REUTERS, Nov 12, 2010, http://www.reuters.com/article/idUSTRE6AB4U720101112

[80] *See, e.g.*, Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1 (2006).

[81] 31 U.S.C. § 3730(b) (2010).

slack. Rather than carefully determining the merits of each case before filing, a law firm could simply become a "filing mill," churning out a high volume of unfiltered cases for the DOJ to investigate. Moreover, *qui tam* plaintiffs do not have to adhere to the formal requirements of standing, giving the law firms wide latitude in case selection.

Utilizing a new data set from the DOJ, I examine the *qui tam* performance records to understand whether law firms are pursuing such a filing mill strategy. In Part II I briefly review the False Claims Act's *qui tam* provisions and procedure. I then outline my identification strategy based on Freedom of Information Act data in Part III. In Part IV I test for the presence of filing mill strategy, followed in Part V with some tests for government deterrence of filing mill behavior. Part VI concludes with suggestions for future work.

II. Background on the False Claims Act

The False Claims Act proscribes fraud against the federal government through the imposition of both civil[82] and criminal[83] penalties. Besides traditional public enforcement, the Act also contains *qui tam* provisions, which allow private litigants known as relators to pursue civil actions and prosecute cases of fraud separately from the Department of Justice (DOJ)[84]. Dating back to the Abraham Lincoln presidency, the *qui tam* provisions received renewed attention in 1986 when Congress enhanced the reward structure.[85] Today, relators can receive as much as 30% of the civil recovery, which can be substantial given the treble damages provisions in the statute. They do not have to satisfy the traditional requirements of standing[86]; as such, they have a remarkable amount of flexibility in pursuing cases of their choice. From a private enforcement perspective, relators are nearly on par with public enforcement agents in their ability to select cases. The relators, often whistleblowers within an organization, typically obtain representation by counsel on a contingency fee basis; they are not responsible for attorneys' fees if the case is unsuccessful.[87]

The DOJ effectively has a right of first refusal on every FCA *qui tam* case.[88] Upon the initial filing by a relator, the court will immediately seal and stay the case for 60 days. During this time, the DOJ investigates the allegations. The government typically requests time extensions for investigation, which are routinely granted. After an average of 13 months, the DOJ announces whether or not it is "intervening" in the action, also known as its "election" regarding intervention. If it chooses to intervene, it either takes over litigation of the case or dismisses the case outright and may do so over the objections of

[82] 31 U.S.C. §§ 3729 – 33.
[83] 18 U.S.C. § 287.
[84] 31 U.S.C. § 3730(b).
[85] *See Beck*, 78 N.C.L. REV. 539, 554-65 for a brief history.
[86] Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771-78 (2000).
[87] *See* Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1, 58 (2002).
[88] *See* § 3730(b).

the relator.[89] If it does not intervene, the relator is then free to litigate the case. Should the relator attempt to settle or dismiss the action, however, she must obtain DOJ consent.[90]

If the DOJ intervenes in the *qui tam* action, the relator is entitled to receive between 15 and 25 percent of the amount recovered.[91] If the DOJ declines to intervene in the action and the relator prevails in litigation against the defendant, her share is between 25 to 30 percent.[92] Regardless of intervention, a successful relator is also entitled to legal fees from the defendant.[93]

The DOJ Civil Division's Commercial Litigation Branch (Fraud Section) centrally collects data on *qui tam* cases since 1986. Its officially published statistics show the startlingly poor success rate of non-intervened cases.[94] According to the published figures as of September 20, 2009, only 239 out of 3,920 non-intervened cases resulted in a settlement or judgment in favor of the United States, a 6% success rate. In comparison, of the 1,134 cases in which the DOJ intervened, 1,076 resulted in a settlement or judgment in favor of the United States, a 95% success rate. A disheartening inference some have drawn from this discrepancy is that the private litigants are pursuing weak cases.[95] There are, however, a variety of other possible explanations. The DOJ might simply intervene in all of the best or easiest cases. It may be that judges, juries, or the defendants draw negative implications about the validity of the litigants case due to the DOJ's non-intervention and thus treat the relator more harshly than otherwise deserved. Alternatively, it may be procedurally difficult to work a fraud case without the actual defrauded party, the United States, in litigation. Resolving the difference in final success rates would require substantial investigation into each case and the parties involved. I do not undertake such an effort at this time.

III. Research Method

Rather than focusing on final case success rates, I utilize the DOJ's review process as a benchmark for law firm performance in initial case selection. By shifting the analysis point earlier in the process, I can identify potentially strategic "filing mill" behavior by law firms.

Outside of the FCA *qui tam* process, a stereotypical filing mill law firm would take on a high volume of plaintiff clients without careful analysis of each case. By litigating numerous cases, the firm shifts some of the cost burden onto the judicial system and defendants. Many of the cases may end up settling to reduce defendants' litigation costs. The identification problem for researchers is the difficulty in distinguishing meritorious

[89] § 3730(c)(2)(A).
[90] § 3730(b).
[91] § 3730(d).
[92] *Id.*
[93] *Id.*
[94] Department of Justice, False Claims Act Statistics, *supra* note 5.
[95] *See, e.g.*, Christina Orsini Broderick, Note, *Qui Tam and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 975 (2007); G.A.O., Information on False Claims Act Litigation, report GAO-06-320R, available at http://www.gao.gov/new.items/d06320r.pdf (2005).

from non-meritorious cases; a filing mill law firm's aggregate results might look remarkably similar to that of a law firm pursuing more meritorious cases. The lack of commonality in defendants and courts makes between-firm comparisons difficult.

The FCA's *qui tam* provisions provide an opportunity to identify this filing mill strategy. Since each case must pass through DOJ review, we have a common reference point to evaluate the legitimacy of each case. While law firms could pursue a variety of strategies with regards to *qui tam* case filing, the design of the FCA regime allows a law firm to pursue a filing mill strategy. A filing mill law firm would exercise little discretion with regards to selecting cases. Rather, it would simply file anything remotely meritorious. As the DOJ is obligated to investigate each filing, the law firm could avoid expending efforts until after the DOJ decision. Thus, we could observe such a firm by identifying repeat player firms that have an unusually low intervention rate combined with a high filing rate. In contrast, firms pursuing cooperation with the DOJ will end up with higher intervention rates, as they will expend effort in filtering out less-meritorious cases.

This identification approach relies upon the legitimacy of the DOJ's review and selection process. There are doubtless numerous factors that may impact the agency's willingness to take on a particular case, including, but not limited to, the harm of the offense, the precedential value of the case, the defendant's liability under other statutes, agency resources, and perhaps political sensitivities. The fact that the DOJ did not intervene in a case should not be a strong condemnation of the actual merits of the case. Rather, I approach the function of the law firms in light of the statutory purposes: either to provide useful information to the DOJ or to litigate cases of fraud themselves. As noted earlier and in the following Table 3, the relators and their law firms do not have a good track record in successfully litigating non-intervened cases. In aggregate, then, it is unreasonable for the DOJ to expect successful litigation if it declines intervention. The remaining function of the law firms is the provision of useful information to the DOJ. The fact that the DOJ intervenes in a case is a proxy for the usefulness of the information. My analytical approach assumes that higher rates of usefulness suggest that law firms are expending more effort in finding cases that match DOJ interests.

In response to a Freedom of Information Act (FOIA) request, the DOJ's Civil Division provided two raw tables. The first raw table contained 6,581 entries describing *qui tam* cases. The second raw table, with 1,476 entries, described impositions: the dollar judgments or settlements against defendants. Many cases did not result in defendant liability, thus the smaller size of the second raw table. As the DOJ has a vested interest in properly tracking impositions, it has greater confidence in the accuracy of the second raw table.[96] A *qui tam* case could span multiple entries in either table. I collapsed and joined the tables together using case captions as a unique identifier, resulting in 3,577 entries.

The cases provided are unsealed, resolved *qui tam* actions under the FCA starting from 1986. The latest settlement is from July 16, 2009, and the latest election date is July 20, 2009. The DOJ did not provide information as to the number of sealed cases during the

[96] Relators may not always be prompt or accurate in reporting case status, and the DOJ often relies on PACER records to keep up to date.

corresponding timeframe, nor is there information regarding unsealed but unresolved cases.

The FOIA data do not have as many cases as the official published total, but this may be due to the presence of sealed cases in the official publication or due to different classification of what counts as a distinct case. As a verification step, the FOIA data nonetheless roughly match the officially published figures: 95% of the data's intervened *qui tam* cases resulted in a settlement or judgment for the U.S., and only 9% of the non-intervened cases generated such a result. The FOIA data contain more detail regarding the litigation status of cases, so the categories do not match exactly. Also note that Tables 2 and 3 do not cover all possible cases; for example, some cases are dismissed before the DOJ made a decision on intervention.

Table 1: Summary Statistics

Total FCA qui tam cases*	3515
Cases resulting in defendant liability (settlements and judgments)	1,116 (32%)
Cases resulting in government intervention	953 (27%)
Primary Agency Defrauded (by case volume)	
HHS	1,807 (51%)
DOD	697 (20%)
All others	< 3% each
Judicial Circuit (by case volume)	
9th Circuit	767 (22%)
11th Circuit	489 (14%)
5th Circuit	380 (11%)
All others	< 10% each
Impositions (Settlements or Judgments for U.S.)	
Total value	$11,700,000,000.00
Maximum	$568,000,000.00
Minimum	$0.00
Median	$931,112.00
Total HHS value	$8,360,000,000 (71%)
Total DOD value	$1,750,000,000 (15%)
Relator share of imposition	

Maximum	$96,600,000.00
Minimum	$0.00
Median	$144,020.00
Relator Filing Frequency (by case volume)	
Total Relators	3209
Relators responsible for only one case	3,087 (96%)
Relators filing two cases	85 (2.6%)
Relators filing over 10 cases	3 (< 0.1%)
Cases with pro se relator	294
Intervened pro se cases	12 (4%)

* Total cases with sufficient data for summary statistics. There is actually a total of 3,577 cases, but some are lacking basic information.

Table 2: Outcome of Intervened Cases

Litigation Status	*FOIA Data*	*Official DOJ Publication*
Dismissed No FCA Recovery	29 (3%)	58 (5%)
Dismissed by U.S.	9 (1%)	not reported
Final Judgment for Defendant	9 (1%)	not reported
Final Settlement/Judgment by U.S.	906 (95%)	1076 (95%)
Total	953	1134

Table 3: Outcome of Declined Intervention Cases

Litigation Status	*FOIA Data*	*Official DOJ Publication*
Dismissed	1148 (49%)	3681 (94%)
Dismissed by relator	585 (25%)	not reported
Dismissed by U.S.	82 (4%)	not reported
Final Judgment for Defendant	291 (12%)	not reported
Final Settlement or Judgment for U.S.	208 (9%)	239 (6%)
Unknown	15	1
Total	2329	3920

While this piece focuses on the potential of "filing mill" law firms in *qui tam* litigation, the legal entity in question may not actually be a law firm in the strict sense of the phrase. Of the 3,577 entries, there are approximately 2,505 "law firms" listed, but a firm might simply be a single practitioner. For purposes of the basic filing mill hypothesis, it does not matter if there is a single attorney responsible for the filings or if it is an entire firm. 1,072 cases do not have any law firm listed, although all but 69 of those cases do list an attorney.[97] If the law firm field listed "Attorney", "Esq," or "Lawyer," I replaced the law firm field with the name of the attorney. Therefore, the use of the term "law firm" in this piece should be interpreted rather broadly. There are understandably substantial differences between an individual attorney and a firm, but since this analysis focuses upon the presence of strategic legal representation, the combination of the entities should only increase our opportunities for detecting such representation.

IV. Identifying "filing mills"

Utilizing the detailed information from the FOIA request, I apply two tests regarding filing mill strategy. The first is to compare law firms' intervention rates; law firms pursuing a high volume of cases paired with a low intervention rate would suggest a filing mill strategy. Since the firm is not carefully evaluating the merits of each case, the DOJ does not intervene as often, and the firm is not obligated to follow up on a declined intervention case. The second method is to look at the aggregate intervention rate by firm experience. If the intervention rate is improving with experience over time, it could imply that in the aggregate, firms are learning to cooperate with the DOJ. As a reference point, the overall intervention rate is 27% if we consider all cases in the data.[98]

A. Law firms with low intervention rates and high volume

The proposed filing mill strategy emphasizes a high volume of cases with a resulting low intervention rate. I measure the DOJ's case intervention rate by dividing the number of intervened cases by the total number of cases filed by the firm. I have two proposals in measuring case volume. The first possible method of case volume is in absolute number of cases filed. Figure 1 is a scatter plot of firm intervention rate by the total number of cases filed; only firms with a minimum of 10 total cases are included to insure a meaningful intervention rate. If we consider 10 cases to be the cutoff for significant repeat players, only 496 cases out of the 3,515 total come from these repeat players, approximately 14%.[99] Appendix A contains more specific information regarding these firms.

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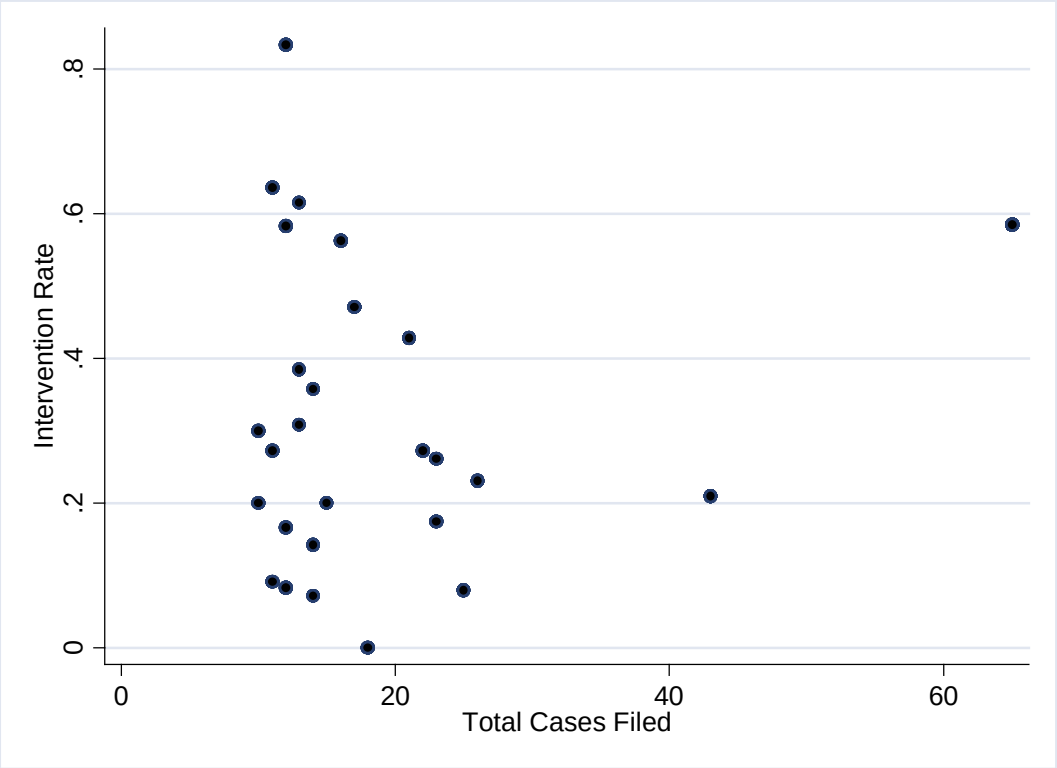
[97] There are 294 cases identified as pro se relators, but I do not have information regarding the bar membership of those relators. Overall, pro se litigants do not fare well in intervention, with only 12 interventions (including one partial intervention) equaling a 4% successful intervention rate. I also considered statistics on individual relators, but there are few significant repeat relators in the data. Only three relators have ten or more filings.

[98] The DOJ intervened in 953 out of 3,515 cases. This includes 166 partial interventions, which I treat as intervention for purposes of this article.

[99] 1,475 of the cases come from single-shot players, firms that filed only one case.

Figure 1: Firm intervention rate vs. total cases filed

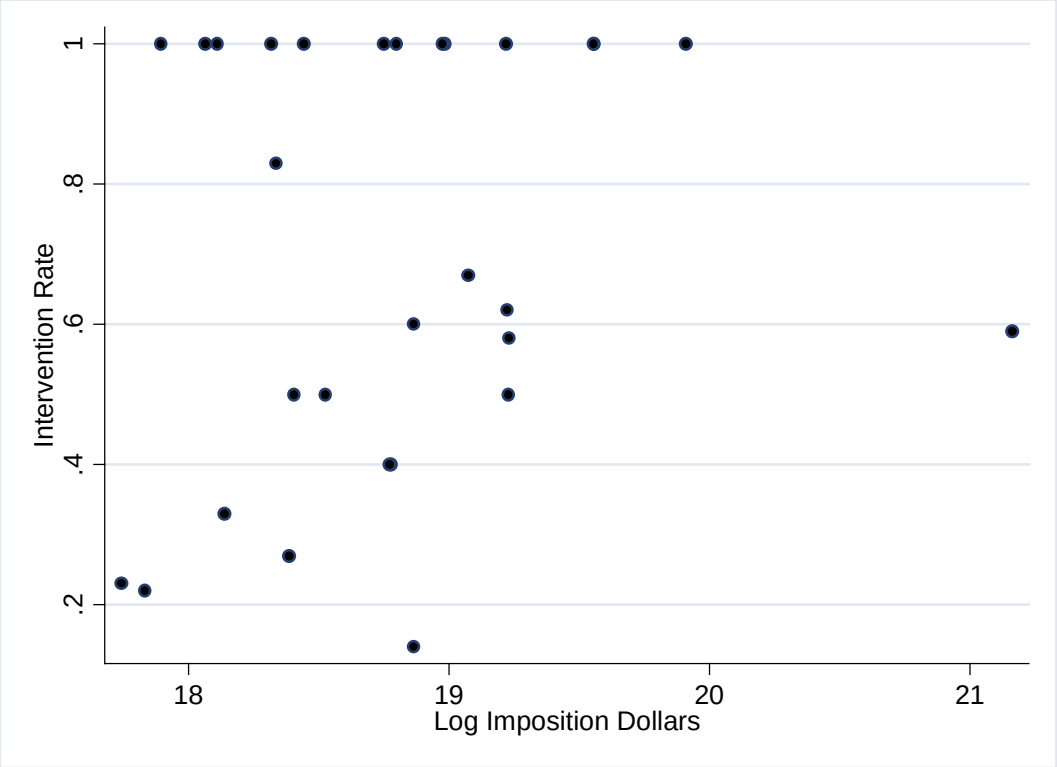


Firms pursuing a filing mill strategy would be found in the lower right corner of the graph, combining a high volume of cases with a lower intervention rate. Only two firms stand out with higher case volume, Philips & Cohen with 65 cases, and the Warren Benson Law Group with 43 cases. Neither has a remarkably low intervention rate.

There are a few firms that obtain intervention at rates substantially below 27%. Walker, Knopf & Billingsley (8%), Grayson, Kubli & Hoffman, P.C. (0%), and Frank, Haron,

Weiner & Navarro (7.1%) stand out as firms with single digit intervention rates. All of Walker, Knopf & Billingsley's cases have the same relator, an individual named Jeff Cox. Seven of Grayson, Kubli & Hoffman, P.C.'s cases list a Goldstein as the relator, while Frank, Haron, Weiner & Navarro's cases do not have any immediate relator commonalities. More detailed investigation into their case files might clarify their filing strategy.

Figure 2: Firm intervention rate vs. log total imposition dollars



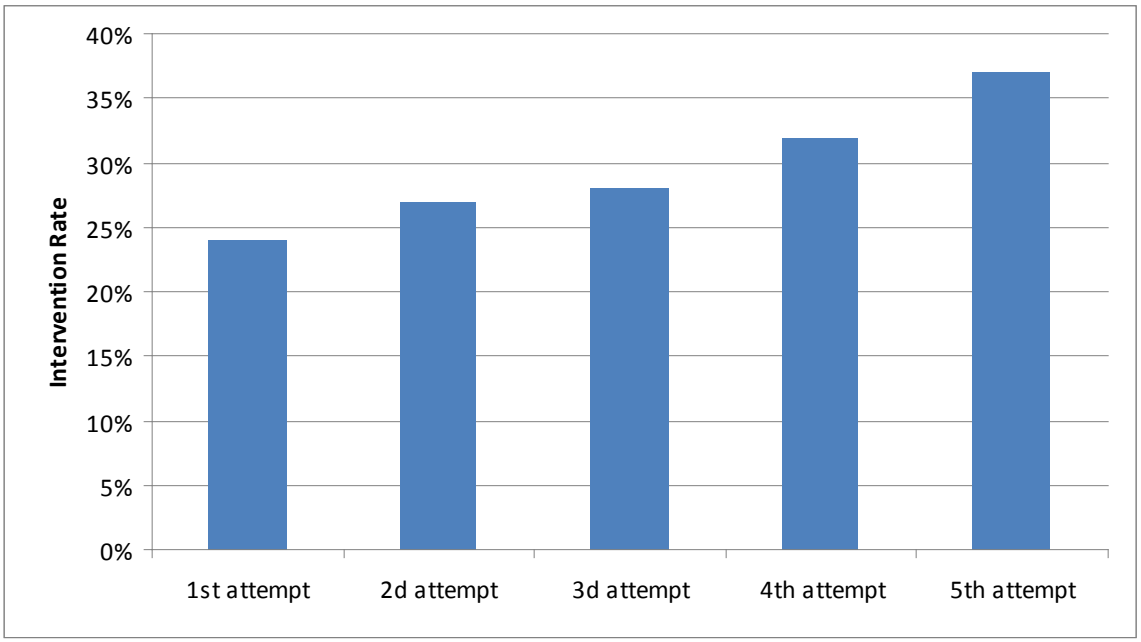
An alternative method of measuring case volume would be dollar volume. Unfortunately, I do not have access to uniform pre-filing case valuation, as it is considered to be attorney work product. The case values in the data are only for settlements or judgments against the defendants, known as imposition values. The defendants might not have actually paid these amounts due to insolvency or other factors. As such, measuring case volume by the imposition data is skewed in favor of successful law firms. Figure 2 is a scatter plot of firm intervention rate by log total imposition dollars with a minimum of $50 million in total impositions. Similar to the previous figure, Figure 2 is dominated by high intervention rate firms, which adds additional evidence to the prevalence of DOJ intervention in large dollar cases. Philips & Cohen is again the right-most firm with over $1.5 billion in impositions. There is no law firm generating large recoveries with a strategy of single-digit intervention rate. The lowest firm here is Ashcraft & Gerel with a 14% intervention rate. Appendix B is a table listing the firm identities. From the additional information in Appendix B, we can see that the 100% intervention rate firms tend to be single-shot law firms.

B. Aggregate intervention rates with experience

An alternate method of identifying a firm's strategy would be to evaluate their performance as they gain experience in filing *qui tam* actions. If the intervention rate is improving with experience over time, it could imply that the firm is learning to cooperate with the DOJ. Given the limited number of cases by each firm, it is difficult to compare individual intervention probabilities over time. To help capture some of the low-

frequency firm actions, though, we can look *qui tam* filings in aggregate. Figure 3 shows the firms' average intervention rates by chronological case sequence.

Figure 3: Aggregate intervention rate by chronological case sequence



Since our concern is with law firm performance given previous experience, Figure 3 excludes firms having participated in only one case total. Thus, Column 1 is the intervention rate for the first case filed by firms that have filed at least two cases. Column 3 shows the intervention rate for the third case filed by firms that have filed at least three cases. The intervention rate rises steadily over time, which can be an indication that firms are improving their case selection process with experience. The DOJ or defrauded agency might prefer to intervene in cases with particular characteristics, and the firms may be learning how to choose and present the most desirable cases. There may also be a strong selection effect; the only firms continuing with additional cases are the successful ones. Thus rather than learning to improve, the firms that are less successful simply drop out and stop submitting cases. Either way, the aggregate performance over time tends to suggest that repeat player law firms are pursuing cooperation with the DOJ through intervention.

V. Does the DOJ deter "filing mills"?

Our inability to observe filing mill law firms may be evidence that the DOJ is deterring such behavior. Given the special procedures in *qui tam* litigation, it is possible that the DOJ would penalize weak relator filings. If the threat of sanction is sufficiently strong,

we might not expect to see any filing mill law firms. Some deterrence methods might not be visible in these data. For example, the DOJ might restrict relator access to government witnesses, making it more difficult for the relator to survive dismissal at the pleading stage or to litigate further. Also, DOJ approval is required for all settlements, so a threat to withhold approvals might be intimidating and undocumented. Finally, although I draw an artificially stark contrast between meritorious and non-meritorious cases, the reality is that there is a continuum of case quality. My data do not provide clear insight as to the weakness of any case, so the group of non-intervened cases in aggregate likely contains much merit diversity. Nonetheless, there are a couple of deterrence strategies that could be visible through these data.

A. Dismissal

The first method of stopping disfavored cases is the most direct. By statute, the DOJ can shut down any relator's case upon initial filing.[100] If the DOJ intervenes and dismisses, the relator procedurally cannot stop the dismissal. This is technically an "intervened" case, but it is unlikely that any relator would desire this type of intervention. This would be the strongest method of immediately halting disfavored litigation.

While the ability to dismiss any case immediately is powerful, it would only effectively deter non-meritorious cases to the extent that the case would not otherwise have been promptly dismissed. If a judge would also have promptly dismissed the case, the DOJ's decision to do so would not generate any additional deterrence. Alternatively, it may be sufficient that the defendant's belief about the judge's actions would generate positive expected value for relators. A defendant who believes a judge would not immediately dismiss a case might be more likely to settle, thereby encouraging relators to file. Under this scenario, the DOJ's decision to dismiss would be costly to relators and generate some deterrence.

Looking at the 953 intervened cases as described in Table 2, we see that the DOJ explicitly dismissed only nine cases, or less than one percent. Seen in context of the total volume of some 3,515 cases, these nine cases represent an extremely limited exercise of the DOJ's prerogative to terminate a case. Note, however, that there are 29 cases listed as "Dismissed No FCA Recovery," which does not indicate the party responsible for dismissal. Even including the additional 29 cases, however, it is difficult to argue that the DOJ is aggressively dismissing disfavored *qui tam* cases.

Less officially, the DOJ also has some ability to control litigation after declining intervention. While the statute requires government approval of any settlement agreement and provides for later intervention with "good cause," it does not specify other government rights during private litigation. Looking at the statistics in Table 3, the government has dismissed 82 cases, approximately 4% of the total declined intervention cases. This level is relatively low in magnitude, although for many cases, the dismissing party is not identified, leading to some uncertainty regarding the level of government

[100] § 3730(c)(2)(A).

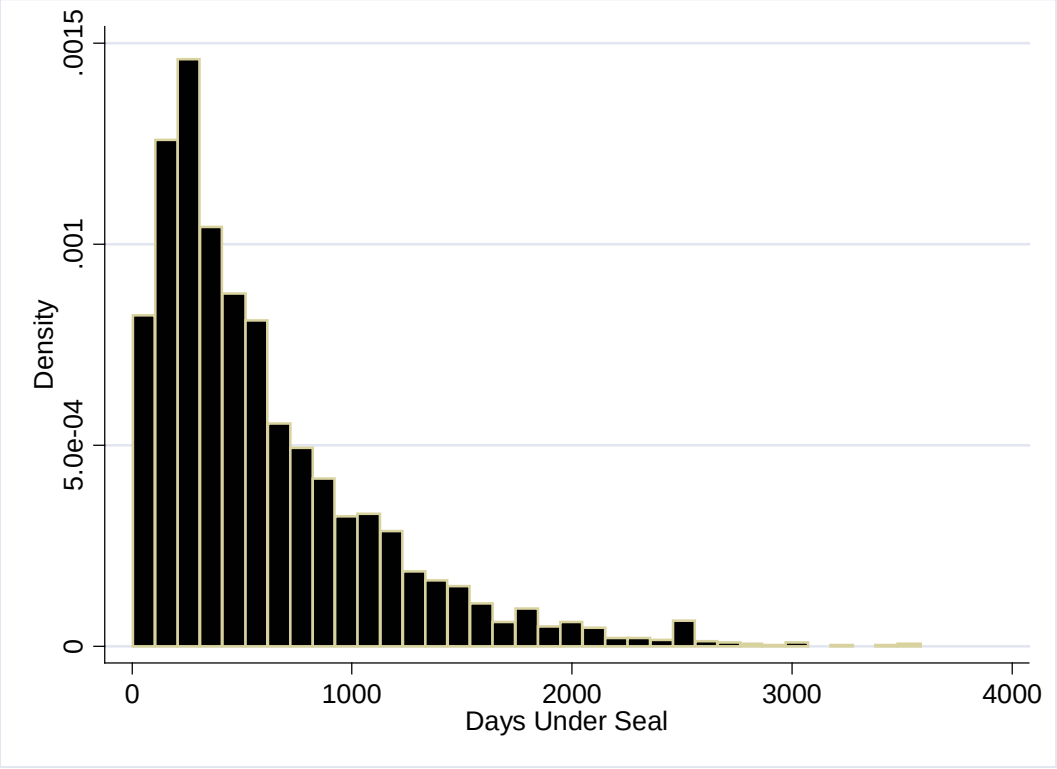
involvement. Without better data on each case, it is difficult to argue that the DOJ is aggressively dismissing non-meritorious cases after declining intervention.

Despite the minimal application of the DOJ's prerogative to immediately dismiss cases, it is possible that the mere threat of dismissal may be exerting a deterrent effect on relators. Under such a scenario, the DOJ and potential relators may be in an equilibrium in which the DOJ does not need to dismiss and law firms only select meritorious cases. A stronger version of this threat equilibrium might be that both law firms and the DOJ value a law firm's reputation as a cooperative player; a law firm that attempted to pursue a filing mill strategy might be punished later by denying government support. I currently do not have a method to verify these potential equilibria.

B. Delay

An alternative method the DOJ might use to discourage weak litigation would be to delay. Although the statute grants the government 60 days during which the case is stayed, courts routinely grant time extensions. Since 1986, there have only been 18 Notices of No Election, cases in which the judge denied an extension request. The DOJ thus seems to have a significant amount of latitude in determining when relators can actually resume private litigation. Following the information from Figure 1, cases have a mean decision time of nearly 600 days and a median of 437 days after initial filing.

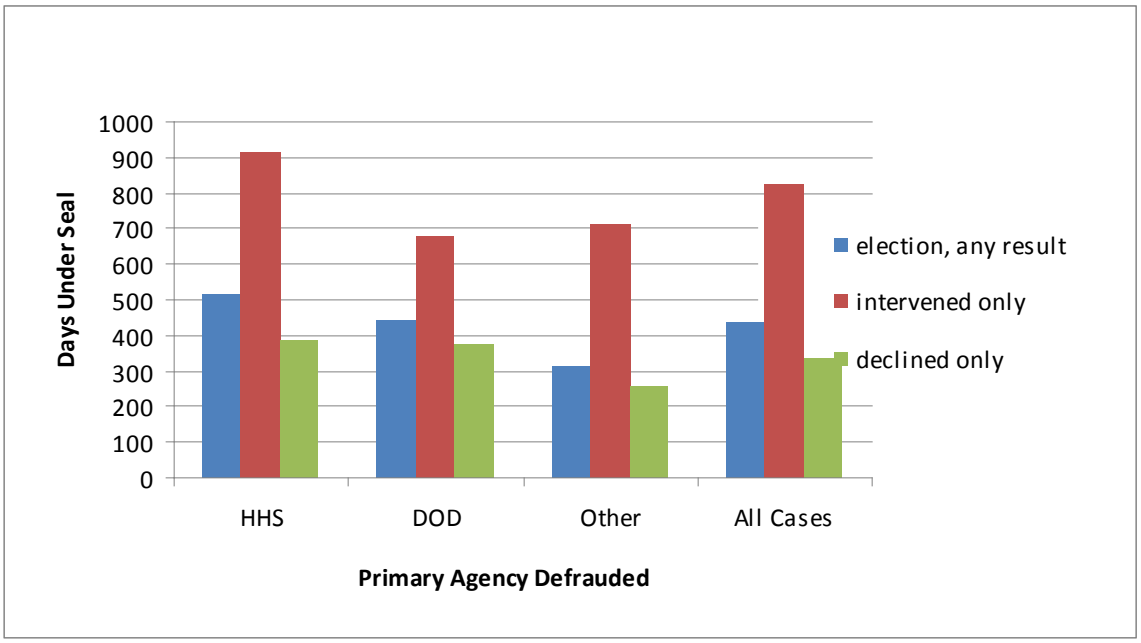
Figure 4: Histogram of time to election



Delay in deciding on intervention does not have to be a strategic choice by the DOJ. The time to decide could be based in part on internal priorities. Both the DOJ and the allegedly defrauded agency have numerous cases to handle. Weaker cases might simply be low priority and thus require more time before full investigation. Nonetheless, it is also possible that the DOJ could deliberately use this power to discourage non-meritorious private litigation. Keeping a case under seal for additional time might frustrate the law firm or relator, and it certainly would prolong the time before the law firm can proceed with litigation and recovery.

Assuming that the DOJ's analysis time for meritorious and non-meritorious cases to be similar, we might expect to see the time under seal for declined intervention cases to be high in comparison to intervened cases. An alternative assumption is that meritorious cases take more analysis time than non-meritorious cases. This could be reasonable if, for example, dodgy law firms and relators do not expend much effort in obfuscation around non-meritorious cases. Under this assumption, we would expect a non-penalizing DOJ to take less time for declined intervention cases. A DOJ intent on discouraging non-meritorious cases would keep declined intervention cases under seal for equal or more time in comparison to intervened cases.

Figure 5: Comparison of median days to election



From Figure 5, we can see above that the government takes fewer days to decline intervention than it does to intervene in a case. This suggests that the DOJ is not aggressively delaying decisions on cases in which it plans to decline intervention. Nonetheless, without specifics on case details or the DOJ's activities during the decision time, these data cannot rule out the possibility that the DOJ is unnecessarily delaying its intervention choice for disfavored cases.

VI. Conclusion

The False Claims Act provides a channel for the private enforcement of law with government oversight. Despite the opportunity for firms to proceed with a low-effort, high volume case strategy, most firms do not seem to be following such an approach. Instead, the repeat player firms typically maintain good track records as to intervention percentages. These firms seem to understand government enforcement interests. Furthermore, a surprising number of one-shot law firms are prominently successful in their efforts. The Department of Justice similarly has the opportunity to dismiss weak cases promptly, yet it rarely uses this power. Although the data cannot rule out less visible forms of influence upon the case filing process, the evidence suggests an equilibrium in which law firms and the DOJ attempt to cooperate.

Of the major parties involved in the *qui tam* process, this article has focused primarily on the role of the relator's law firm. While I do not strongly identify any "filing mill" law firms, further research is important in understanding the reason for the observation. I considered some straightforward forms of DOJ influence over the process, but other parties could also contribute to the finding. It may be that the background rate of potential relators is relatively honest, easing the law firms' selection process. Under that scenario, distinguishing legitimate potential relators from frivolous relators could be a straightforward task. Thus, selecting legitimate clients could be the dominant strategy for law firms. Given the limited frequency of cases for many firms, a more detailed case study approach may help understand the law firms involved. Of particular interest are the successful one-shot law firms. Not only is it remarkable that the law firm did not choose to pursue other cases, but also that a relator chose to trust the law firm with a valuable case.

A case study approach may also help clarify the role of the federal government. This article effectively relies upon the DOJ's decision as a reference for identifying legitimate fraud cases. The common reference point facilitates the comparison of different law firms, but there remains a broader normative question of the nature of the government review. The government's decision is not an easy one, as legal enforcement efforts are spread across a variety of offenses. Additional information regarding the non-intervened cases would help understand both government interests and law firm decisions. Even within the FCA statute alone, there are numerous separate government agencies that may serve as plaintiffs; treating the government as a unified actor is a simplification. Further attention should also be paid to the interaction among various offenses and sanctions.

Allowing private enforcement of laws entails significant risk, as it can be difficult to predict how private parties will utilize the legal system. Congress's amendments of the FCA in 1986 have enlisted private law firms and relators in recovering billions of government fraud. Ongoing research into the reasons for its performance may help better utilize the strengths of private enforcement within a public regime.

Chapter IV: The Price of Information

Abstract

A government may recover losses due to fraud by paying a bounty for information leading to prosecutions. Paying a percentage bounty encourages more valuable information, but a high bounty could reduce net government recoveries. Under the False Claims Act, the Federal government pays a minimum 15% bounty for information regarding fraud. Utilizing a 2004 change in the tax code, I present evidence that whistleblowers respond to higher bounty percentages by bringing more cases valued under $440,000. The current 15% minimum may be sufficient for higher valued cases, but the government may be able to increase prosecutions and recoveries through a higher minimum for smaller cases of fraud.

The Finder's Bounty

How much should we pay for information?

The finder's bounty is the most common bounty in FCA enforcement. If the DOJ chooses to intervene in a qui tam case, it will pay the relator a percentage of its recoveries against the defendant. As the DOJ runs the litigation, the finder's bounty is mostly for the relator's information regarding the fraud. The relator and her attorney will still cooperate with the DOJ after the intervention decision, but I will focus my analysis on the relator's pre-election incentive. The main question for the government, then, is the proper bounty in encouraging relators to come forward with cases of fraud.

In designing its fraud enforcement scheme, the DOJ has at least two priorities: compensation and deterrence. The defrauded government agency desires compensation for its loss. This principle of compensation is more precisely described as net government compensation, since paying the relator reduces the amount of government compensation. Furthermore, it may be better if the agency had never suffered loss in the first place. A sufficiently strong enforcement scheme might deter potential offenders. The public litigation bounty is one method by which the DOJ can encourage relator participation in the enforcement scheme.

A. A Simple Model of Private Enforcement

To determine the appropriate finder's bounty, I begin with a simple model of private enforcement with formal details in Appendix C. The three parties are the DOJ, the potential defendant, and the potential relator. Working from a rational crime perspective, the potential defendant is a profit maximizer. He will commit fraud if he expects it to be profitable. If the probability of being caught is too high, the DOJ has successfully deterred him from committing fraud.

The potential relator is an individual who has knowledge of fraud otherwise unknown to the DOJ. She recognizes that becoming a relator is a costly activity, as whistleblowing can be a lengthy process with serious career consequences. She may have various motivations in becoming a relator, including personal satisfaction in seeing wrongdoing exposed. The important assumption in this simple model is that she responds positively to financial reward. A larger bounty percentage increases the probability that she will step forward and become a relator. Her decision is a binary decision: either she blows the whistle, or she does not.

For now, I abstract away from the remaining qui tam procedure. Once the relator decides to file, the DOJ handles the rest. Thus, this simple model is analogous to other reward schemes in which enforcement agencies offer cash for information leading to arrest or prosecution. While there are many methods the DOJ might use to encourage potential relators to take action, I here look at the DOJ's choice of bounty percentage.

I begin with a DOJ that focuses only on government compensation. With this objective, it wishes to maximize recovery dollars going to the government from defendants. The bounty paid to relators is a cost that reduces net government recoveries. As such, this DOJ will set a bounty percentage high enough to encourage relator participation, but not so high that relators receive all of the recoveries. More precisely, this DOJ will select a bounty percentage such that the marginal gain due to last case brought forward is equal to the marginal cost of paying the bounty. If the DOJ were to raise the bounty any higher than this level, it would encourage another relator to come forward, but the gain in prosecuting that case would be outweighed by the additional bounties paid to all of the relators. If the DOJ were to set the bounty lower than this level, it would be "leaving money on the table." In other words, by raising the bounty percentage, relators would bring new cases forward. The recovered dollars from those cases would outweigh the additional bounty percentage paid for all cases.

A DOJ that focuses solely on deterrence would behave differently. Since a higher probability of detection makes potential defendants less likely to commit fraud, it could attempt to maximize the probability of detection. One simple solution would be to maximize the bounty percentage. If the DOJ does not spend its own funds, the maximum bounty percentage would be 100%. The success of this system approach depends on the susceptibility of potential defendants to detection and thus deterrence, though, along with the responsiveness of potential relators. It is possible that despite high bounty percentages, potential relators might be generally unwilling to come forward. As a result, although the 100% bounty might maximize their willingness, the still low probability of their action might not generate much deterrence. Similarly, if many potential defendants believe their probability of detection is low even at a 100% bounty, a 90% bounty might produce the same level of deterrence.

Now, I consider a DOJ that incorporates both deterrence and compensation objectives. Such a DOJ would likely choose a bounty percentage in between the aforementioned levels. More precisely, the DOJ would select a bounty percentage such that the marginal compensation benefit is equal to the marginal deterrence benefit. The compensation-only DOJ previously selected a percentage at which a higher percentage would have resulted in a net compensation loss for the DOJ. By factoring in the additional deterrence gain from the higher percentage, though, the unified objective DOJ can find the higher percentage acceptable.

It is possible, though, that potential defendants simply are not deterred at the relevant bounty percentages. If this is the case, the unified objective DOJ would behave like the compensation only DOJ. There is no additional deterrence gain in raising the bounty percentage, so it only considers the compensatory value in setting the bounty.

First Implication of the model: Deterrence disagreements

In comparing the two goals of deterrence and compensation, it is important to note that compensation is easier to observe. We can measure the total dollars recovered in a rather straightforward manner, but properly measuring the amount of potential fraud deterred

can be challenging. To an outside observer, then, a DOJ establishing a relatively high bounty percentage may appear to be "irrationally" paying too much to relators. The argument would be that the relators who came forward with information under the high bounty percentage would still have done so under a slightly lower bounty percentage. Therefore, the DOJ is being wasteful by paying too much for information and thereby failing to maximize net compensation. Following the broader line of reasoning in this section, however, the discrepancy may be explained by differences in estimating deterrence. The DOJ might believe that the higher bounty percentage generates substantial deterrence, while the outside observer might disagree or not even value deterrence.

Second Implication: Administrative ease of deterrence

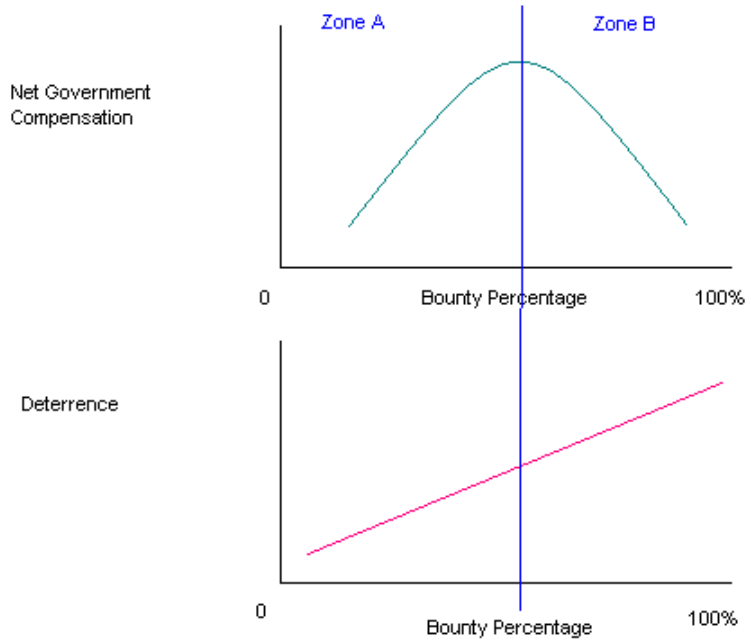
Another important implication is that a fixed bounty percentage might have advantages beyond administrative ease. In an idealized sense, a DOJ focused exclusively on compensation might want to engage in price discrimination among relators. Such a DOJ might try to determine the minimum it would have to pay any particular potential relator to induce her to provide information. This theoretical price discrimination scheme would be complex and administratively difficult, as each relator would be reluctant to disclose her price flexibility. Offering a fixed bounty percentage makes it easier for relators to set expectations regarding their personal compensation for whistleblowing. Making the decision to become a whistleblower has serious career and social consequences; the prospect of also having to negotiate with the government regarding bounty percentages may not be attractive to a potential relator.

Besides administrative feasibility, however, note that the fixed percentage may also help drive deterrence against larger cases of fraud. If the magnitude of fraud offense varies, a fixed bounty percentage may inadvertently grant "too much" to a potential large-fraud relator from a compensation perspective. Nonetheless, the large bounty may help increase the probability of relator participation and thus drive deterrence of such large frauds.

Third implication: Compensation and deterrence are only tradeoffs at the high end.

The third implication is that compensation and deterrence are not always in competition as goals. If the current bounty percentage is particularly low, increasing the percentage may result in both more compensation and more deterrence. On figure 1, this would be zone A. If the government can determine that its current bounty percentage is in Zone A, increasing the bounty is a win-win. Only after the current bounty percentage exceeds the compensation maximum, zone B, do we actually confront a tradeoff between compensation and deterrence. Within zone B, the government must then determine how much it values deterrence in comparison to compensation for fraud. If deterrence is more important than compensation, it may select a bounty percentage on the right side of zone B. If deterrence is difficult to measure or less important than compensation, the government may end up choosing a spot closer to the left side of zone B.

Figure 1: Deterrence and Compensation



B. Evidence from the FCA data

Empirical evaluation of a fraud enforcement system is difficult due to the challenge of offense detection. Unlike more physical crimes such as homicide, the victim of fraud often may not realize she has been victimized until the offender is caught. Without background victimization information, we cannot make claims that a program has detected and prosecuted a specific percentage of fraud offenses. The volume of observed offense prosecution could reflect a complex interaction between the unobserved offense prevalence and enforcement efforts. For example, if enforcement efforts result in a consistent 20% of offenses detected, a sudden increase in the absolute number of prosecutions could reflect a sudden increase in the background rate of offense.

In healthcare, HHS has attempted to estimate the total annual amount of "improper payments" under Medicare and Medicaid, and some have touted the 2010 estimate of $70 billion as a background fraud estimate.[101] HHS generated the improper payments estimate through random sampling of medical claims.[102] If the provider was unable to support a claim with documentation, for example, HHS would flag the claim as an improper payment. Due to the tremendous volume of healthcare claims, this technique is useful in estimating the error rate in payments, but it both over and under-identifies fraud. For over-identification, we typically view fraud as a purposeful action with an attendant

[101]GAO testimony 11-409T from Kathleen M. King, (March 9, 2011) available online at http://www.gao.gov/new.items/d11409t.pdf.
[102]U.S. Department of Health and Human Services FY 2010 Agency Financial Report, Section III. Available online at http://www.hhs.gov/afr/2010-sectioniii-oai.pdf.pdf

mens rea. Sloppy or misfiled documentation may simply be a mistake or negligence not rising to the level of fraud.

The under-identification problem is more serious, though, from a performance measurement perspective. First, documentation is notoriously easy to manufacture. For example, consider practices such as "up-coding" or "up-charging," in which medical providers intentionally diagnose patients with worse conditions than merited for billing purposes. If the practice is common and subtle, it should be easy to maintain documentation in compliance with the exaggerated diagnosis. Ex post verification of whether the patient actually had acute chest spasms or just a mild cough would be extremely difficult. Second, the HHS estimate does not include some of the major fraud recoveries under the False Claims Act, such as off-label advertising fraud[103] or average wholesale price litigation[104]. As such creative methods of fraud come to light, we lack systematic evidence of the underlying frequency of such frauds.

An estimate of the FCA detection rate

The approach I take in estimating enforcement performance focuses on the relationship between fraud offenses of varying magnitude. I claim that the underlying volume of smaller offenses can be approximated by the volume of larger offenses. For example, if I observe 30 cases of $10 million fraud in one year, I expect that there are at least 30 cases of $1 million fraud occurring in that time period.

This expectation can be justified via two methods. First, to the extent that offenses are an aggregation of repeated fraudulent behavior, it is possible that the $10 million fraud might have been detected earlier. An unscrupulous healthcare provider might steadily increase its monthly volume of fraudulent Medicare claim. At an earlier point, the accrued fraud might only have reached $1 million. It was only the failure to detect and stop the fraud earlier that resulted in the $10 million value of the offense.

The second justification is based upon a prediction of defendant behavior. Most enforcement schemes apply greater penalties to large offenses over smaller offenses. The FCA is no different, as criminal sanctions generally apply only to the worst offenders, and civil penalties scale with the magnitude of the offense under the treble damages rule. Under this type of enforcement scheme, I predict greater deterrence of worse offenses over smaller offenses. Unless greater resources are targeted explicitly at the smaller offenses, the offense volume for those smaller offenses should be at least at the level of the worse offenses, if not greater.

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[103]Pfizer settled a $2.3 billion off-label marketing case under the False Claims Act in 2009. See Gardiner Harris, NY Times pg B4, Sept 3, 2009, "Pfizer Pays $2.3 Billion to Settle Marketing Case."

[104]Abbott Laboratories and others paid $421 million in penalties for distorting average wholesale prices of their products. See DOJ press release "Pharmaceutical Manufacturers to Pay $421.2 Million to Settle False Claims Act Cases" dated Dec. 7, 2010, avail at http://www.justice.gov/opa/pr/2010/December/10-civ-1398.html

Utilizing this approach to estimate the background level of offenses, we can look at the distribution of offenses by offense value.

Figure 2: Histogram of prosecuted offenses by log offense value

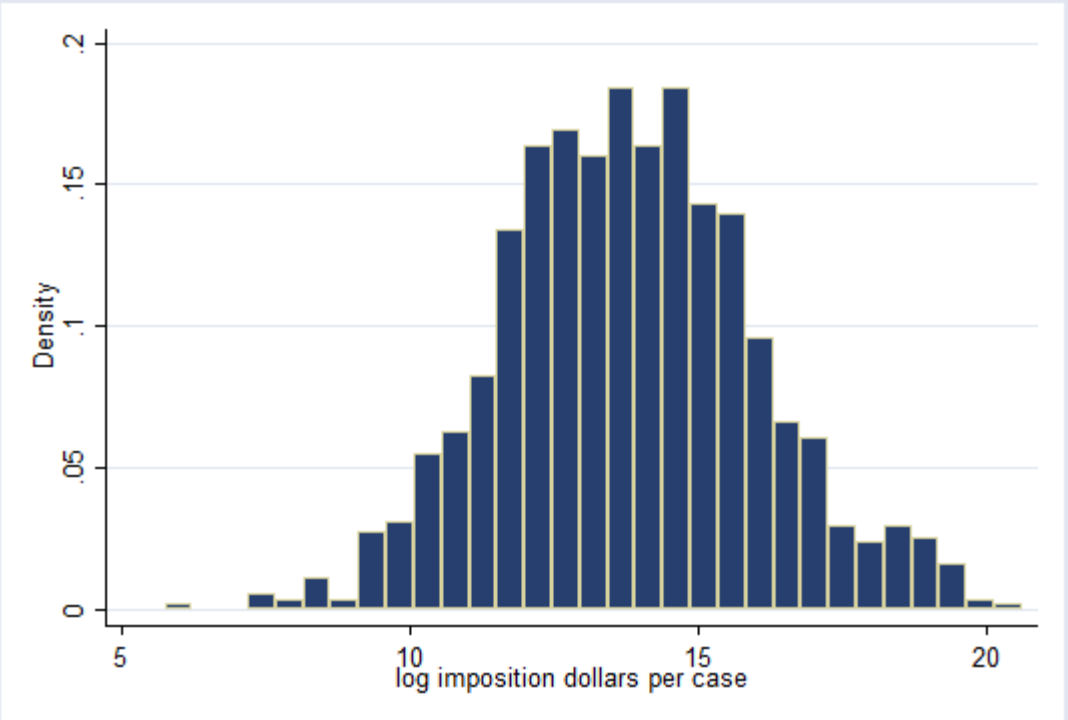


Figure 2 shows the volume of successfully prosecuted offenses, with a peak between e^13 and e^15 ($440,000 and $3.2 million). I will call this range of offenses the middle value offenses. On either side of this peak, the volume of offenses decreases.

Utilizing this distribution of offenses, I infer that the FCA is less successful at prosecuting offenses valued under $440,000 relative to offenses between $440,000 and $3.2 million. If, hypothetically, the DOJ were catching and prosecuting 50% of middle value offenses, I would claim that the DOJ caught less than 50% of the sub-$440,000 offenses. An alternative interpretation, of course, is that there are simply fewer offenses occurring that are valued under $440,000. For the above reasons, I argue this is unlikely. Nonetheless, it is possible that potential offenders are less willing to commit smaller amounts of fraud. Perhaps, for example, their fear of criminal or other sanctions is so great that only large amounts of money are sufficient to compensate for the risk.

This information does not help much in understanding the performance of the FCA in the $440,000 to $3.2 million zone. To the right of the $3.2 million, the rate of prosecuted offenses declines. This might suggest that deterrence is at play, in that large bounties or criminal sanctions reduce the probability of committing high dollar frauds. Since the high dollar fraud commission rate is lower, there are simply fewer cases to be caught. On the

other hand, it could also be evidence that defendants with the resources to commit such large frauds also fight more vigorously against detection and sanction. Alternatively, judges and juries might be unwilling to award such large sanctions for fraud despite the prevalence of such actions.

For purposes of this evaluation, though, it is sufficient to say that there appears to be opportunity for improvement in prosecuting cases valued under $440,000. The next question is whether relators could play in a role in the improvement. Given a higher bounty percentage, would relators be more willing to bring these sub-$440,000 cases forward?

Measuring responsiveness of relators to the bounty percentage

Predicting how relators react to various bounty percentages is difficult. We theoretically ask whether a relator would have come forward with information if the bounty percentage had been, for example, 5% rather than 15%. An ideal situation would be a randomized experiment as to the effective finder's bounty percentage. We could then make strong recommendations as to the appropriate bounty percentages.

Unfortunately, not only do we lack a randomized experiment, we do not have much variation in the finder's bounty percentage. Since the FCA's 1986 amendments, the base finder's bounty percentage has remained constant at 15%. The lack of variation on the bounty percentage makes it difficult to observe how relators would respond to different bounty percentages. The statute provided different bounties prior to 1986, but the 1986 amendments had other significant changes besides the bounty percentages. It would be challenging to determine which portion of increased relator participation would be properly attributable to the bounty percentage change as opposed to the other statutory changes. Further clouding the issue would be the broader differences in government contracting, cultural norms, and legal environment before and after 1986.

My strategy is to look at a source of exogenous variation in the effective bounty percentage. The American Jobs Creation Act of 2004[105] (AJCA) changed the rules for the tax treatment of plaintiff awards paid on or after October 23, 2004. Prior to that statute, the Internal Revenue Service held that the plaintiff's proceeds were fully taxable as income, including the attorneys' fees paid under a contingency arrangement.[106] Although the attorneys' fees could be deducted as a miscellaneous itemized expense, this deduction was not available to taxpayers subject to Alternative Minimum Tax (AMT). After the AJCA, the plaintiff's net proceeds after attorneys' fees were treated as income, thus avoiding the AMT and deduction problem.

[105] Pub L. No 108-357, section 703, 118 Stat. 1418, 1547 to 48.

[106] Lucas v. Earl, 281 U.S. 111 (1929). Helvering v. Horst, 311 U.S. 112 (1940). See Campbell v. Commissioner of Internal Revenue, 2010 TNT 14-10 (U.S. Tax Ct. Jan. 21, 2010) (holding that for pre-October 23, 2004 awards, entire amount of relators share, including any attorney fee portion, must be included in gross income, and attorney fee portion could be deducted as a miscellaneous itemized deduction where retainer agreement substantiated that claim).

I argue that the AJCA is a source of exogenous variation as the motivations for passing the law do not seem related to the underlying causes of qui tam cases. As a contrasting example, consider a hypothetical judge whom we observe to grant higher bounty percentages in comparison to other judges. We would be suspicious of drawing inferences from this difference in this judge's bounty awards. Her award of greater percentages might be the result of particularly reprehensible defendant conduct in her jurisdiction. She could also be an unusually demanding judge, such that only the most skilled relators would appear before her, yet she would compensate for the high demands by offering higher bounties, too. Utilizing a source of exogenous variation reduces the impact of other causal arguments in predicting the impact of the bounty change.

The impact of this tax treatment change is an effective increase in the bounty percentage, but it is not a uniform increase for all relators. There are two groups of relators who receive an effective increase. The first group consists of relators subject to AMT. Given that the median relator share is approximately $144,000, many relators likely fall into this category. For large rewards, the change is uniform, as the reward of itself is sufficient to bring the taxpaying relator into the AMT range. For smaller rewards, however, the impact depends upon the non-qui tam income of the relator. If the relator’s total income was sufficient to subject her to AMT, then the tax treatment change provides a higher effective bounty.

The second group of relators who receive an effective increase are those who did not benefit from the miscellaneous itemized deduction of attorneys' fees. These are relators who did not have enough deductions to justify itemizing deductions and would have taken the standard deduction on their income tax. It is possible that the miscellaneous itemized deduction of attorneys' fees was large enough to justify itemization, but on the margin, the benefit might not be that much greater than the standard deduction they would have received. Of course, if attorneys' fees are lower than the standard deduction, the relator would receive no marginal tax reduction under the pre-AJCA regime. The AJCA treatment allows these relators to benefit from both the standardized deduction and the removal of the attorneys' fees from income. Given that the standard deduction is on the order of $5,000 to $10,000, it is unclear how many relators would fall into this category. A qui tam case must be rather small if the standard deduction significantly weighs against the importance of the attorneys' fees. Without more detailed information regarding relator income tax filings, it is difficult to estimate the size and impact of this tax treatment.

My rough prediction, then, is that the effective shift in tax treatment should disproportionately favor larger cases. These larger cases will result in larger bounties that subject relators to AMT. Unless relators are uniformly high income individuals subject to AMT, or if relators filing low-dollar cases are distinctly higher income, it is more likely that the relator filing a high-dollar case would benefit under the AJCA tax regime.

I will focus on the AMT benefit to estimate the magnitude of the tax treatment improvement. Consider that the AMT is roughly 28% on income over $175,000. Next, I approximate the contingency fee for the attorney at 40%. A relator subject to AMT

receiving a bounty before October 23, 2004, would not only have to pay her attorney 40% of her share, but she would also pay 28% of that 40% to the IRS, which translates to an additional 11.2% of her total share. I ignore the tax she owes on the original 60% of her share, since that does not change under the AJCA. Thus, she takes home 48.8% of her share of the qui tam recovery. After October, 2004, she can now take home the 60% of her share, as she is no longer responsible for the 11.2% under AMT. This is approximately a 23% increase in the amount she takes home after October 23, 2004.

First stage: relator recognition of improved tax treatment

The first stage in measuring the elasticity of relators to greater financial compensation is potential relator recognition of the effectively greater reward under the AJCA tax regime. Before a potential relator decides to file, she must weigh various factors of taking action, including perhaps the costs and benefits of proceeding with a qui tam claim. Becoming a whistleblower can have dire career and social consequences, and others might view a whistleblower receiving financial reward to be particularly distasteful. It is unclear if potential relators consider the tax consequences of the qui tam bounty, since receipt of litigation proceeds is probably an unusual tax circumstance for most people.

Perhaps a more likely vector of either information or incentive is the relator's attorney. A responsible attorney might discuss the tax consequences of potential rewards with the relator in helping her make a decision about proceeding with a qui tam filing. Another possibility is that the attorney works harder or is more likely to encourage a relator to move a claim forward under the AJCA tax regime because he predicts that the relator will be more satisfied with the eventual financial reward. Note that the attorney does not personally benefit from the favored tax treatment under the AJCA, except to the extent that it encourages greater relator participation on either the extensive or intensive margins.

Again, this first stage is extremely difficult to evaluate; it is unclear if potential relators and their attorneys have much precision or accuracy regarding the value of their information. The improved tax treatment could generate an upward nudge in their preliminary value estimate.

The second stage: Relator responsiveness to an increased reward

Assuming that knowledge of the improved AJCA tax treatment does find its way to the potential relator and her attorney, I now consider the impact of the effectively increased reward. Under the finder's bounty, the financial incentive is for relators to bring information to the DOJ. The ostensible prediction is that a relator is more likely to come forward if the bounty percentage is greater.

The AJCA is quite clear that cases paying out after October 23, 2004, should be subject the more favorable tax regime. Assuming that the relator or her attorneys are aware of this improvement in tax treatment, we might expect the change in relator filings to occur immediately after the October date. Complicating matters, however, is whether or not

relators might have had earlier knowledge of the AJCA. It is possible that they might have been aware of the Act before October. Given that the expected time under seal while waiting for the DOJ's election is over a year, such relators could have increased their rates of filing before the October 2004 date. This anticipatory filing behavior would weaken my estimate of relator elasticity using the October date as a discontinuity. Alternatively, relators could react to the shift in tax treatment by holding off filing qui tam actions until immediately after the October 2004 date. This type of relator would have otherwise filed earlier, but decided she would rather obtain the guarantee of an effectively higher bounty percentage. This alternative anticipatory action would bias the discontinuity estimate upwards, since the "additional" filing generated by the relator after the October 23, 2004 date would not be a marginal case in the counterfactual pre-October 2004 situation.

The extended time pending DOJ election causes a further challenge in evaluating relator elasticity. The FOIA data end in July, 2009. Cases spend an average of 600 days under seal, with a median time of 437 days and a standard deviation of 517 days. Given this lengthy time under seal and my lack of data regarding sealed cases, we likely observe only a small fraction of cases filed in 2007 or 2008. Since the key filing date is October 23, 2004, I do not have many years of final outcome data after that date. Without substantial post- October 23, 2004 data, a regression discontinuity design does not seem feasible until the DOJ provides further information.

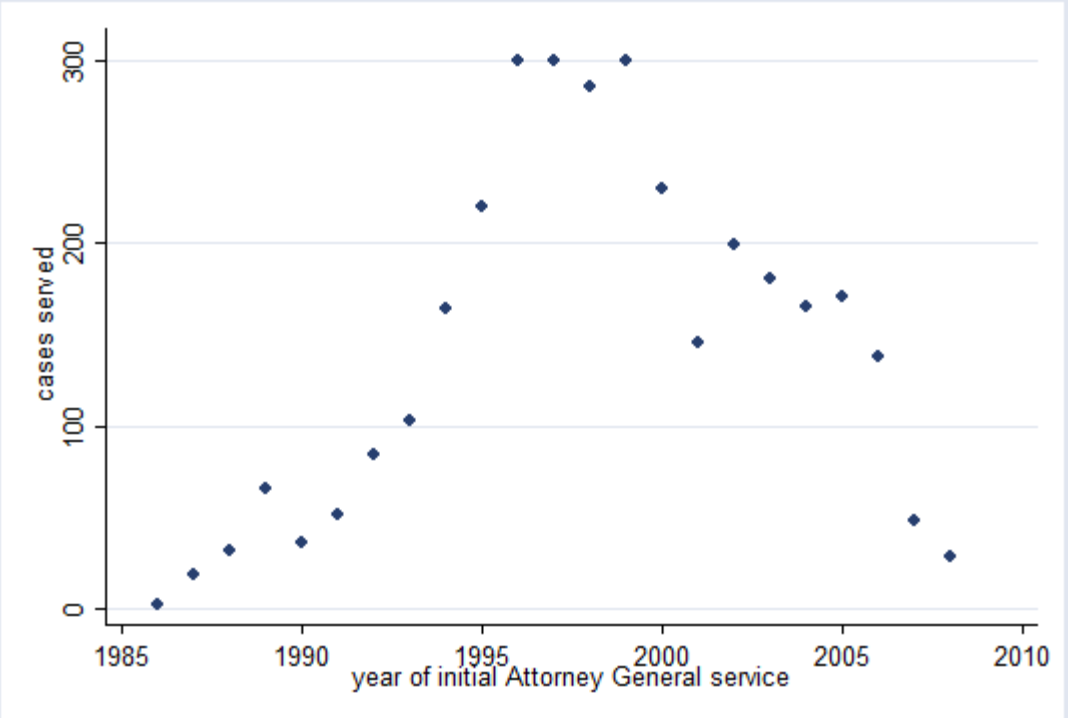


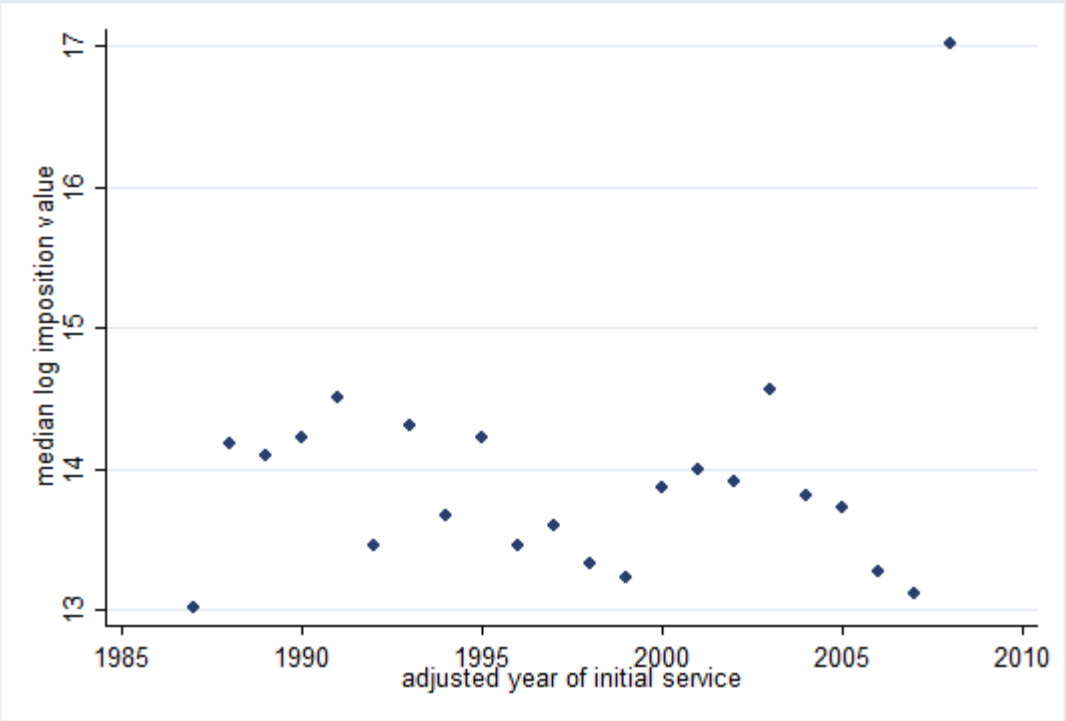
Figure 3: Qui tam cases per year (year in which the attorney general was served)

Given the sparse data I have presently, I utilize a difference approach. I look at cases filed in the years immediately before and after October 23, 2004. I will refer to these as pre-AJCA and post-AJCA years.

Table 1: Two years of cases before and after the AJCA

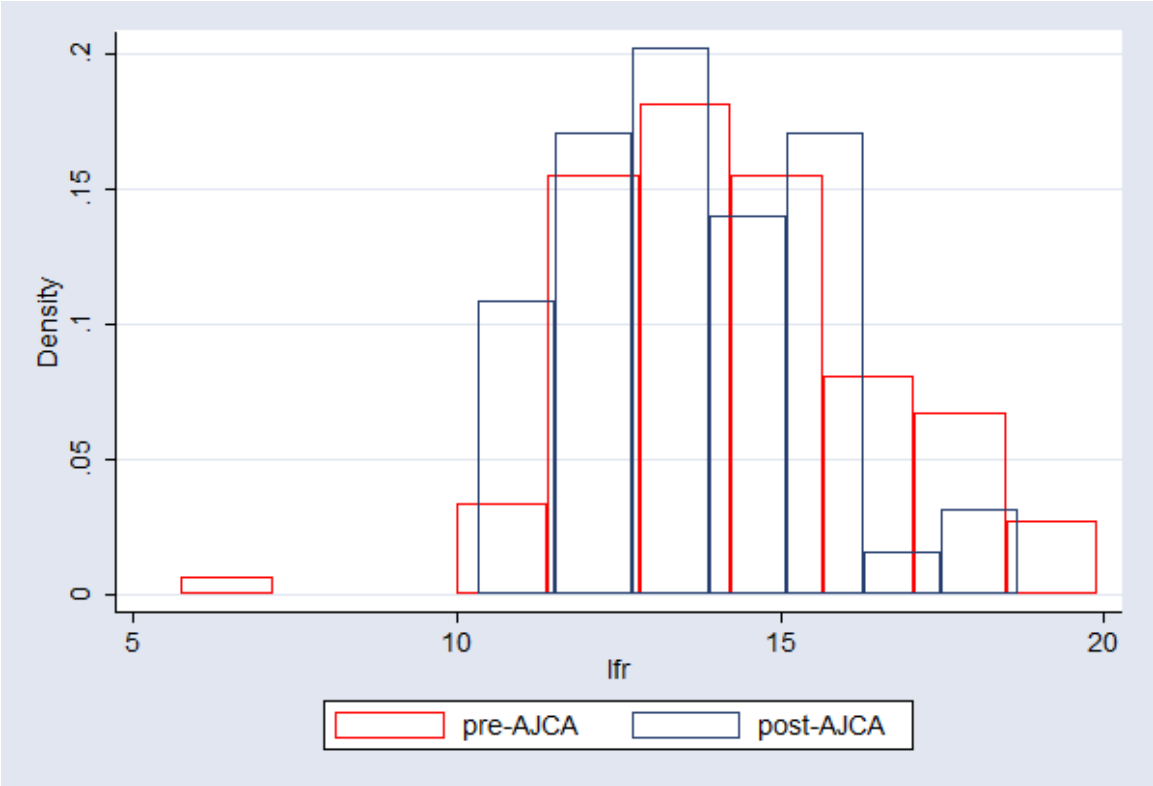
Years	# cases with values	Median Log Case Value	Mean Log Case Value
-2 (adjusted 2003)	59	14.56	14.71
-1 (adjusted 2004)	46	13.8	13.63
1 (adjusted 2005)	34	13.73	13.78
2 (adjusted 2006)	20	13.27	13.54

Figure 4: Median log case value vs adjusted year (year in which AG was served)



* Table 1 and Figure 4 both use an adjusted year of service. A case treated as filed in the adjusted 2005 could actually have been filed anytime between October 24, 2004 and October 24, 2005.

Figure 5: Twoway histogram: density of case values. Red is two years pre-AJCA, Navy is two years post-AJCA



There is a decrease in the median case value after October 23, 2004; above I show a graph overlaying the distribution of case values before and after the AJCA date. This suggests that the increased incentive is disproportionately affecting the smaller value cases. Alternatively, the reduction in median case value could be driven by a lower relative frequency of high dollar cases, but it would be difficult to attribute this to the preferential tax treatment.

From a rough visual analysis, the greatest region of relative increase is between e^10 and e^12, which roughly corresponds to $22,000 and $160,000. Cases around e^13, around $440,000, also seem to rise in proportion, but to a smaller extent.

From this evidence, I infer that for large dollar cases, relators were already moving forward in the pre-AJCA regime. The additional effective bounty they receive in the post-AJCA regime does not impact them in the same way as relators considering small dollar cases. The potential relators with knowledge of small dollar cases in the pre-AJCA regime were relatively less likely to participate in the qui tam system. After the increased bounty, some of those reluctant potential relators seem to have moved forward with their qui tam claims.

Verification

The challenge with this approach is that it is entirely possible that something else may have fundamentally changed around the October, 2004 timeframe that would have resulted in this effect. My assumption in measuring the responsiveness of relators to the AJCA change is that other factors related to qui tam actions would have remained smooth for purposes of regression. The difference approach I use is even more rough than a regression discontinuity design. Nonetheless, I can at least verify that other case attributes are relatively consistent before and after October 23, 2004.

Table 2: Case characteristics in the two years before and after the AJCA.

	Settlement/Judgments		All cases	
	Pre-AJCA (2yrs)	Post-AJCA (2yrs)	Pre-AJCA (2yrs)	Post-AJCA (2yrs)
n (cases)	105	54	351	323
Primary Agency = HHS	64 (61%)	36 (67%)	208 (59%)	199 (62%)
Intervention rate	87%	80%	28%	14%
Median Time to Decide (days)	907	658	550	416
Primary Agency = DOD	13 (12%)	8 (15%)	40 (11%)	53 (16%)
Dismissal rate	n/a	n/a	210 (60%)	228 (71%)

The above table considers two years of cases immediately before and after the AJCA date. The first and second columns reflect characteristics of the cases in which there was an imposition against the defendant; these are the only cases I consider above, as I have no other method of distinguishing case values. The third and fourth columns include all unsealed cases filed during the two years before and after the AJCA date. Many of these comparisons suffer simply from the small volume of cases. Nonetheless, there do not appear to be dramatic differences before and after the AJCA date. The reduction in median time to decide regarding election supports the censoring difficulty. That is to say, likely many cases are not showing up in the years after the AJCA because they remain under seal.

Weaknesses of this approach

The empirical strategy I have chosen has quite a few limitations. First, similar to other regression discontinuity designs, the window of causal inference is extremely narrow, which may limit the external validity. Even if everything in the measurement design works well, the strongest claim I can make is that, given the bounty situation that existed before October 2004, an approximate 23% post-tax increase in bounty generated an increase in relator participation for cases valued under $440,000. This claim is, of course,

different than saying that an additional 23% today would still generate a further increase in relator participation. This difficulty in causal inference is unfortunately common, but I believe these data at least give policy makers some evidence as to future considerations in the finder's bounty percentage.

Second, there are legitimate concerns with the difference approach I utilize instead of the preferred regression discontinuity design. Given the likelihood of censored data in the last five years of my data and the limited number of cases after 2004, the difference approach seems to be my best choice at present. Nonetheless, since I am not comparing the absolute volume of cases before and after October 2004, the design does not actually show an absolute increase in volume of cases valued under $440,000. The increase is relative to higher valued cases. As such, from an absolute sense, there may not have been an actual increase in case volume after October 2004 attributable to the AJCA. As more cases filed after 2004 are resolved, we may be able to gain better insight into the absolute effects of the AJCA.

Third, the first stage of my exogenous variation could use more support. It is unclear how attorneys or relators perceive a 23% increase in the effective bounty percentage. The percentage does not seem so large as to "shock" marginal individuals into taking action. If relators and attorneys do not have clear conceptions of the value of their cases, it is uncertain if a 23% increase would be meaningful.

C. What is socially optimal?

Thus far, I have considered the DOJ as an organization pursuing some mix of deterrence and compensation. I have used the concept of rational crime deterrence for the first goal, and I have looked at net government compensation for the second goal. To determine a socially optimal enforcement scheme, I will step back from these specific DOJ goals. For a hypothetical social planner, the enforcement system's goal should be to maximize social welfare. Besides the losses accrued to society by the fraud, social welfare also incorporates the benefits obtained by offenders and is reduced by the costs of catching and sanctioning defendants.

Is fraud costly?

Fraud is a rather broad concept. In some ways, it might be analogous to theft. When a healthcare provider bills Medicare for a non-existent procedure, the provider's gain of money seems like theft at Medicare's expense. On the other hand, courts have also recognized some forms of regulatory violation as fraud. Under FDA regulations, pharmaceutical companies may not market "off-label" uses for their products. The FDA approves drugs for the treatment of specific conditions, and the companies sell and label drugs for those particular purposes. Physicians, however, may utilize the drugs as they see fit. They may learn or discover other conditions for which the drug is useful, even though the FDA has yet to approve the drug for those other conditions. While the pharmaceutical company may respond to physician inquiries about such off-label uses, they cannot market or advertise these alternative treatments. As an example, Pfizer settled

a $2.3 billion off-label marketing case under the False Claims Act in 2009.[107] While the action may have been a clear violation of FDA guidelines, it is more difficult to determine the social harm from the offense. Perhaps patients who otherwise would have suffered greatly gained early access to a treatment that was yet to be FDA approved. On the other hand, there may have been patients who were exposed to unnecessary risks and side effects due to insufficient drug testing. We can see similar concerns for other frauds that stem from regulatory violations, such as compliance with the Department of Education's regulations regarding school loans.

Even in the more direct case of fraud as theft, social welfare analysis might consider the defendant's situation. Perhaps the defendant is a poor, disadvantaged individual who does not quite qualify for Medicare coverage, yet obtains life saving healthcare through fraudulent billing.

Also consider the dynamic costs of fraud. Fraud, like theft, is a form of the involuntary transfer of resources. In many ways, the legal system helps facilitate voluntary agreements and transfers in the support of private freedoms. The potential for involuntary transfers can trigger both offensive and defensive investments that seem wasteful. Offenders may expend efforts concealing their fraud, while the government may create additional bureaucracy to slow or complicate attempts at fraud. These costs are above the direct costs of detection and prosecution of fraud.

The efficacy of this system depends greatly on the ability of the judicial system to ascertain the proper costs and, perhaps, benefits, of fraud offenses. If the damages or penalties awarded are out of line with this social calculus, the system can break down. For purposes of the percentage bounty system, fraud penalties must be proportional to the social harm in order to provide the appropriate incentives to relators. Recall that the False Claims Act provides a $5,500 to $11,000 civil penalty per claim in addition to treble damages. A difficult outstanding question is whether courts utilize this sanction scheme to produce total penalties in line with the social costs of the defendant's actions.

Does it create bad incentives?

One simple concern is that bounties might induce people to commit fraud, and high bounties might induce higher amounts of fraud. We can imagine a disgruntled employee inducing her employer to commit fraud and then profiting by blowing the whistle. She must be sufficiently sophisticated to hide her role in the fraud, lest the DOJ cut her off from any reward. Although I do not have any evidence of this fraud-inducing effect, the DOJ's investigative abilities are important in preventing such abuse.

Another concern is that the bounty system might induce excessive investment in fighting fraud. This is the Landes & Posner (1975) concern with damage multipliers and private enforcement: if private enforcers receive an amount that is greater than the social cost of

[107] See Gardiner Harris, NY Times pg B4, Sept 3, 2009, "Pfizer Pays $2.3 Billion to Settle Marketing Case."

the offense, they may over-invest in enforcement.[108] Given that the FCA is a treble damages statute, it is possible that the actual social loss due to a case of fraud might be less than triple the base damage amount. If relators receive a sufficiently high percentage of the treble damages, there may be incentive for them to over-invest.

At this point, I separate the analysis between the relator and her attorney. The data show a very limited number of repeat players; the few relators who file multiple cases tend to file them against multiple defendants in a short period of time. From this, I infer that relators are not making investments to discover fraud. Rather, they discover fraud in the course of their regular work. As such, I argue that the bounty as currently structured does not appear to induce relators to invest excessively in discovering fraud.

On the other hand, the bounty system does encourage relators to disclose the existence of fraud. This whistleblowing behavior can be costly to the relator, and the damage to her career may be irreparable. The fact that a successful relator receives compensation for her efforts may be of some comfort to her, but there is still social loss due to the whistleblowing costs.

The bounty system may also encourage attorneys to invest in searching for relators and cases. Perhaps if bounties are too high, there may be excessive competition and expenditures among law firms in securing the best relators. Given the prevalence of successful one-shot firms in the data, however, it may be that firms simply search for valuable cases. FCA cases are a possibility, but the bounty system might not play a large role in diverting search resources from other cases.

Costs & Benefits of the system

The earlier bounty analysis treats compensation and deterrence as the main benefits of the qui tam system as measured by prosecuted cases. The majority of cases submitted under the qui tam system, however, are not prosecuted. It is difficult to measure the costs and benefits of those other cases. What was the cost to the whistleblower of bringing a non-prosecuted action? There may have been value to the information she provided to the DOJ, but that value might not be immediately realized. The information might later guide the DOJ in discovering other fraud, or it may alert the DOJ to entities that merit more thorough investigation.

The deterrence provided by the system might also be greater than described under the rational offender theory. The DOJ's ability to secure both large recoveries and pay large bounties might be particularly salient and attention-grabbing in ways smaller frauds and smaller rewards might not.

[108] William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1 (1975).

D. Conclusion

Private individuals have valuable information that may help prosecute cases of fraud, but the choice to become a whistleblower is not easy. By paying a finder's bounty, the government can encourage these whistleblowers to come forward. Such a whistleblower reward program can help the government both recover penalties against offenders and potentially deter people from committing fraud in the first place.

One difficult question, then, is selecting the proper finder's bounty percentage. If the bounty percentage is too low, perhaps too few whistleblowers will come forward. Conversely, an excessively high bounty percentage may leave "money on the table," as all of the whistleblowers who participate would have been willing to do so for less money.

I utilize evidence from the False Claims Act to suggest that the Federal government's base bounty of 15% for information regarding fraud may be too low for certain offenses. Given the spectrum of fraud offenses, whistleblowers seem to address only a limited number of cases valued under $440,000. Working with evidence from a 2004 change in the tax code, I claim that whistleblowers may be more willing to disclose information regarding these smaller offenses in exchange for a higher bounty percentage.

Chapter V: Paying for Private Litigation

Abstract

A government addressing an economic offense through private enforcement may have conflicting goals of compensation and deterrence. Offering a 100% bounty for private enforcement may maximize deterrence, but the government will receive no compensation. Under the False Claims Act, however, this tradeoff may not be as serious. First, because the government receives detailed information under the Act, it may be able to discern which private actors actually require larger bounty percentages to encourage their participation. Furthermore, the government may not actually have to pay larger bounties if it can induce settlement with defendants. If the government can commit to a 100% bounty in settlement negotiations, it may be able to strengthen its negotiating position and increase its settlement dollars. Thus, the government's ability to commit to a 100% bounty could improve both compensation and deterrence in a private enforcement regime.

The Private Litigation Bounty

How much should we pay for purely private litigation?

The private litigation bounty comes into play if the DOJ declines to intervene in a qui tam case. After the declination, the relator has the option of litigating the case herself. If she prevails, she receives the litigation bounty as a percentage of the final recovery. For a potential relator who has yet to file a case, she effectively faces an incentive scheme that combines both the finder's bounty and the private litigation bounty. Until she knows the DOJ's election, the relator faces uncertainty regarding which bounty percentage she could receive. The incentive analysis for the potential relator is similar to the issues already raised in the finder's bounty discussion with some added uncertainty.

Instead, I move the point of analysis to the DOJ's election, also known as the intervention decision. This rules out consideration of potential relators evaluating participation in qui tam. Every relator here has already taken the first step by filing her case, and she has revealed detailed information regarding the potential fraud to the DOJ. If the DOJ intervenes in the case, it will be responsible for paying the finder's bounty. If it allows the relator to handle the case privately, it may end up paying the private litigation bounty should the relator prevail in prosecuting the defendant.

A. Who handles which case?

The first gain from establishing a private litigation bounty is the incentive for relators to take on litigation responsibility. Setting the bounty question aside for a moment, the practical question for the DOJ at election is whether or not it wants to litigate the case itself. The DOJ faces a large variety of cases, and its limited resources are spread not only across FCA cases, but also a mix of other offenses. If a case merits criminal sanctions, the DOJ should intervene, since a relator cannot bring criminal charges against a defendant. Other factors, such a defendant's offense history, the magnitude of the fraud, and the wrongfulness of the action, may impact the DOJ's desire to litigate the case. In theory, the DOJ can sort all of the proffered cases by priority. Below a certain cutoff, it will pass litigation responsibility to the relator.

Of course, the relator is not obligated to litigate the case. She may have initially filed the case expecting the DOJ to intervene, and she, along with her attorney, may not be ready to take the lead in litigation. Each relator will have a distinctive willingness to pursue her case as a private litigant. Perhaps she expects the defendant to be subject to very large damages, and thus the relator will be satisfied with a relatively small litigation bounty percentage. She might also have a strong personal grudge against the defendant, increasing her willingness to go through with a trial.

Relator willingness adds complexity to the DOJ's task of sorting its cases. Beyond the cases for which private litigation is not an option (i.e., criminal cases), it must consider the relator's willingness and comparative ability to litigate the case. After determining which cases it will litigate, the DOJ then should offer a sufficient litigation bounty to

induce relators to litigate the remainder. If the DOJ sets a fixed bounty percentage for all cases, we would see relators sort themselves by willingness. The high willingness relators will litigate since they do not require a large bounty percentage, while there will be relators who decline to litigate cases themselves.

Regardless of the DOJ's precise choice of fixed bounty percentage, we would usually expect at least one relator to be the marginal relator if the relator pool is large enough. This is the relator that would have participated in litigation if the litigation bounty percentage had been just slightly higher. If the DOJ wished to induce the marginal relator's participation under the fixed bounty percentage, it would have to increase the litigation bounty percentage. The marginal relator's participation will increase the total amount of deterrence. The tradeoff is that the total amount of compensation might not necessarily increase, since the DOJ is now paying out a higher percentage of the total recoveries. This tradeoff is the result of paying a fixed bounty percentage for all cases.

Instead of a fixed bounty percentage for all relators, however, the DOJ could also tailor the litigation bounty for a relator's situation. The most obvious choice for a tailored bounty is the marginal relator. If the marginal relator does not participate, there is no gain in either deterrence or compensation from her inactivity. Assuming the DOJ can identify this marginal relator, offering her a slightly higher litigation bounty is a win-win.[109] Her added participation contributes both deterrence and compensatory values. Since the tailored bounty applies only to her, there is no loss in compensation from the non-marginal cases.

Following this reasoning, the DOJ should also extend a tailored bounty to the next marginal relator, as she too can make an additional contribution. Taken to the logical conclusion, the last marginal relator should receive a tailored 100% bounty.[110] Although offering her a 100% bounty does not result in any added compensation to the government, it still contributes deterrence value since she would otherwise not litigate the case. Having this last marginal relator participate at the 100% bounty is still better than not having her participate. Beyond the binary question of participation, these higher tailored bounties may also reduce the principal-agent problem in determining the relator's level of effort in litigation. I discuss this issue in greater detail in the following negotiation section.

Tailoring a precise litigation bounty to every relator is not trivial, but the DOJ does have a remarkable amount of information and time to investigate each case prior to election. The DOJ currently does not have much flexibility in the litigation bounty, which is restricted to a narrow band between 25% and 30%. There is some rough evidence of reluctance to litigate on the part of relators, as they dismiss at least 25% of their own non-

[109] I discuss the potential downside of strategic behavior in the hold-up section below.

[110] This follows James Mirrlees's reasoning regarding optimal taxation. See A. Atkinson and J. Stiglitz, Lectures in Public Economics (New York, McGraw Hill, 1980), or Cooter (1978) Optimal Tax Schedules and Rates: Mirrlees and Ramsey

intervened cases.[111] It is difficult to determine in aggregate why non-intervened cases are often unsuccessful, but allowing the DOJ latitude in setting tailored bounties approaching 100% may result in both greater compensation and deterrence through relator action.

Table 1: Outcome of Declined Intervention Cases

Litigation Status	*FOIA Data*
Dismissed	1148 (49%)
Dismissed by relator	585 (25%)
Dismissed by U.S.	82 (4%)
Final Judgment for Defendant	291 (12%)
Final Settlement or Judgment for U.S.	208 (9%)
Unknown	15
Total	2329

B. Negotiation & Settlement

The second area of potential gain through the private litigation bounty is in the DOJ's settlement process. The threat of private litigation can aid the DOJ in negotiating settlements with defendants, potentially increasing both the number of settlements and the dollars recovered in each settlement.

The qui tam procedure provides the DOJ the opportunity to negotiate with defendants prior to announcing its election. This allows both defendants and the government to have certainty regarding the outcome of most qui tam cases before the DOJ commits to intervention. For a defendant to be willing to settle, there must be some credible threat of trial and sanction. Given its limited litigation resources, though, the government cannot credibly commit to bringing every case to trial. As such, the potential of private litigation may augment the government's negotiating power during settlement talks. If the defendant agrees to settle with the government by the time of election, the government only pays the finder’s bounty, presumably less than the private litigation bounty.

Settlement as a bargaining game

The common explanation of litigation settlement is that trial is an expensive and uncertain proposition; both sides stand to benefit by negotiating the surplus resulting from avoiding trial costs. Each side bargains to gain a share of the cooperative surplus, which is the difference in expected values should the parties proceed to trial. The

[111] The percentage of self-dismissed non-intervened cases could be as high as 74%, but many cases lack detailed information regarding the dismissing party. Unfortunately, it is also unclear how soon the relator dismissed her own case.

expected value of proceeding to trial is the threat value for each party. The two initial parties are the DOJ and the defendant. If they fail to settle, the DOJ's outside option is to go to trial. If the DOJ does not settle and does not go to trial, then I assume it receives no payoff from the abandoned case. From the government's perspective, I assume that settling a case does not reduce the deterrence value of the case. With the addition of private litigation, there is now an alternative outside option to settlement-- having the relator litigate the case against the defendant.

1. Which cases settle?

Working under the initial two-player bargaining game model, we expect cases with a cooperative surplus to settle since both parties would be better off settling. If the parties are not risk-seeking and litigation is costly, most cases should have a cooperative surplus available. Nonetheless, there are a variety of reasons cases might not settle. One common difficulty in the economics literature is mutual optimism or erroneous beliefs, in which both parties believe their cases to be stronger and thus making settlement difficult. There may also be strong emotions at play that lead to bargaining breakdowns, or breakdowns due to strategic calculation or miscalculation. I consider two methods by which the threat of private litigation might impact which cases settle: negative expected value cases and small cooperative surplus cases.

a. Negative Expected Value cases

Perhaps the greatest contribution of the threat of private litigation is with the non-credible threat problem. With the non-credible threat challenge, the DOJ may encounter a case in which the expected value of litigation is zero or negative. For example, the probability of success in litigation may be limited, and the opportunity costs of pursuing the case may be high if there are more serious cases to be prosecuted. The defendant thus may not believe that the DOJ would actually bring the case to trial, and, as a result, would be unwilling to settle the case. The scenario is analogous to a game of mutually assured destruction, in which both sides expect to lose should the case go to trial. Unless the DOJ can somehow establish a reputation for litigating these negative expected value cases, I would expect these cases to remain unsettled.

The addition of the private litigation option may make the defendant willing to settle in this scenario. Even if there is a negative expected value for the DOJ, the same may not be true for the relator. The relator and her attorney may face a different set of opportunity costs, perhaps making it worth their while to try the case. Furthermore, the relator is entitled to attorneys' fees from the defendant should she prevail at trial, which may further encourage pursuit of the case. Thus, to induce defendant settlement, the DOJ should convince the defendant that the relator would be willing to litigate the case.

The question, then, is the choice of private litigation bounty. Similar to the analysis in the previous section, there may be a choice of litigation bounty that is sufficient to induce relator participation. In the process of researching the case, the DOJ may be able to select a bounty that will thus push the defendant to the settlement table.

b. Size of Cooperative Surplus

Negotiations may also break down due to the size of the cooperative surplus. If the cooperative surplus is relatively small, the parties may be unwilling to exert sufficient negotiation effort. The transaction costs of negotiation could outweigh the gain from dividing the cooperative surplus.

The presence of third party litigation could increase the size of the cooperative surplus, though. In the extreme case, consider a relator entitled to a 100% litigation bounty. If the DOJ is concerned only about its own net recovery, it will gain nothing by allowing the relator to litigate the case. The defendant also believes it will suffer a net loss if it must face the relator in litigation. In this scenario, the addition of the relator provides additional cooperative surplus that could be distributed in settlement negotiation. Thus, to the extent the DOJ values its own recovery, the presence of the relator increases the size of the cooperative surplus. A higher litigation bounty percentage raises the size of the cooperative surplus, which may increase the probability of successful settlement.

2. Case settlement values

The dollar value of settlements should be important to the DOJ from both the compensatory and deterrence perspectives. Not only does a small settlement result in less compensation, a large disparity between the settlement amount and the offense magnitude may embolden both the defendant and other potential offenders. I assume that the settlement values are driven by some measure of negotiating power in the DOJ-defendant relationship. Although economic theory indicates that the final settlement amount should be some division of the cooperative surplus, there is no clear prediction as to the precise distribution. Some theories suggest that only the DOJ's threat value matters,[112] while others are highly dependent upon the final offeror in negotiation.[113]There does not appear to be consensus in economic theory as to how these adjustments in threat value and surplus affect the final negotiated result. For purposes of this analysis, I simply consider the potential impact of the private litigation bounty on the threat value of each side.

The DOJ position

The private litigation bounty presents the DOJ with an alternative outside option to settlement-- having the relator litigate the case against the defendant. For some serious cases, the DOJ might be committed to trying the case if settlement talks break down. For other cases, however, the DOJ might be less certain of bringing the defendant to trial for a variety of reasons. In such cases, the additional possibility of relator litigation can strengthen the DOJ’s negotiating position.

[112]See, e.g., Cheung, Rayner. "A Bargaining Model of Pre-Trial Negotiation," Working paper 29, Stanford Law School, John M. Olin Program in Law and Economics (1988) and Spier, Kathryn E. "The Dynamics of Pretrial Negotiation," 59 Review of Economic Studies 93-108 (1992).
[113]See Wickelgren, Law and Economics of Settlement for a summary of exogenous trial timing models.

Maximizing the DOJ's negotiating strength is to maximize the relator's threatened efforts at litigation. Although the DOJ cannot force the relator to litigate,[114] it can provide an incentive for the relator to do so through the private litigation bounty. I view the DOJ's challenge a principal-agent problem in encouraging the relator's litigation efforts. The challenge is twofold: first, maximizing the probability that the relator will litigate the case, and second, maximizing the effort applied by the relator in litigating the case. Assuming that DOJ and relator litigation efforts are substitutable, one simple optimal contract would be to give the relator a 100% bounty for a successful case coupled with a fixed payment regardless of success. The 100% bounty ensures that the relator will provide the appropriate marginal level of litigation investment in the case. The fixed supplement may be necessary to ensure that the litigation occurs, as the expected value of the litigation might be insufficient to cover expenses. The latter may be important for certain cases, assuming that the relator is a profit maximizer and the DOJ is not.

Given the importance of private litigation due to the DOJ's resource constraints, I disregard the fixed payment component as an impractical expenditure. Focusing then on the bounty percentage, bounties closer to 100% reduce the principal-agent problem. For a social planner concerned only with deterrence, solving the principal-agent concern would be the top priority. Maximizing the bounty percentage maximizes both the probability the relator will litigate and the level of effort expended by the relator. Providing a 100% bounty would deny the government any compensation for loss due to the fraud, though.

On this first look, the option of having the relator litigate the case improves the DOJ's threat value. The government's precise mix of compensatory and deterrence goals may complicate the precise choice of bounty percentage. Nonetheless, there should be some bounty percentage for which the government finds itself better off than in the case where there is zero probability of relator litigation. Without the option of private litigation, the DOJ must either prosecute or abandon the case if it cannot reach settlement. Potential relator litigation gives the DOJ an alternative to abandoning the case that maintains the possibility of recovery. As the bounty percentage increases, the probability of private litigation and recovery increases.

The defendant position

From the defendant's perspective, the presence of potential relator litigation reduces his threat value. If the defendant previously believed that there were a limited probability of the DOJ actually bringing the case to trial, the probability of trial is now higher. As the private bounty percentage increases, we expect both the probability of private litigation and the marginal level of private effort to increase. Worse yet, if the relator prevails at trial, she is entitled to attorneys' fees in addition to the bounty. These factors lead to a reduction in defendant threat value. As the private litigation bounty increases, the defendant's negotiating position becomes worse. If, however, the defendant believed that the DOJ were committed to bringing the case to trial regardless of relator participation, the defendant's threat value does not change.

[114]It is somewhat unclear what courts intend when the DOJ is allowed to reject a relator-defendant settlement while also rejecting dismissal of a case.

Higher litigation bounty increases DOJ negotiating power

The combined effect of the private litigation option suggests that it shifts the balance of power in settlement negotiation towards the DOJ. As the bounty percentage increases, the defendant is in an increasingly worse negotiating position. The presence of private litigation generally improves the DOJ's negotiating position.

Since the principles of compensation and deterrence both support higher settlement amounts, they similarly support a high litigation bounty. From a deterrence perspective, a 100% litigation bounty maximizes the threat of private enforcement. From a compensation perspective, the same 100% litigation bounty counter-intuitively also may provide the most leverage in maximizing the settlement amount for the DOJ.

Balancing negotiating power and private litigation

The downside in offering a 100% litigation bounty is having to pay the bounty. This is not an issue if the defendant settles with the DOJ. Unfortunately, it can be difficult to predict a priori whether any case will settle. The decision regarding the private litigation bounty percentage is then an attempt to balance two factors. The DOJ gains benefits from settling cases, and it also gains benefits if private parties successfully litigate cases. Roughly speaking, if cases rarely settle, committing to a 100% litigation bounty may be questionable, but if most cases settle, the 100% litigation bounty may be a useful tool in maximizing the settlement amounts.

A simple counterargument is that the lack of a 100% litigation bounty actually prevents many cases from settling. A more precise formulation of the balancing analysis is to weigh the marginal benefit of settling cases against the marginal benefit from private litigation. Increasing the litigation bounty may increase recoveries through settlements, but it may reduce net government compensation in cases that fail to settle.

The limited empirical evidence suggests that a higher private bounty may be a possibility. As noted earlier in part A's Table 1, there are many cases that are not settled nor litigated by private parties. Those cases remain opportunities for settlement negotiations, and perhaps added pressure through an aggressive litigation bounty could convert some of those cases into settlements.

Table 2: Intervention vs Private Litigation

	Cases with impositions	Total Impositions	Median Imposition
Intervened	876	$12 billion	$1.3 million
Privately Litigated	192	$395 million	$142,500

With regards to the balance between settlements and private litigation, DOJ-led settlements are the typical resolution method. Private relator litigation results in only a

small percentage of total qui tam recoveries, roughly suggesting that committing to higher litigation bounties may not be very costly. Establishing the appropriate private bounty is still quite difficult, as I do not have a method for measuring negotiation power in the settlement process. It is possible that the current litigation bounty of 25% maximized the negotiating power of the DOJ for all of the intervened cases and that the threat of a higher litigation bounty would not have raised the settlement amounts. It is also possible that the same litigation bounty balanced the compensatory and deterrence benefits from the 192 privately litigated cases. Nonetheless, it seems unlikely that these statements would be true for even most cases.

Who should establish the private litigation bounty?

Perhaps a more tractable question, then, is who should establish the private bounty percentage. Congress has established a tight range of 25-30% for all cases with narrow exceptions. The statutory commitment to a minimum 25% is useful in that potential relators have a clear expectation of minimum bounty. It does not give much flexibility, though, in identifying marginal cases. Note that granting a 100% private bounty may not be necessary in all cases to maximize negotiating power. A similarly powerful strategy is to grant only the 100% bounty to the marginal cases. There may be plenty of relators willing to pursue cases at the 25% bounty; it is the other relators for which a higher bounty may be necessary. This type of "price discrimination" could be a method by which the DOJ maximizes its negotiating power while not paying unnecessary private bounties, but it is extremely difficult to perform this type of price discrimination on potential relators. Before filing, potential relators have strong incentives to not release any information regarding themselves or their case.

After the relator has filed, though, the DOJ has significantly more information regarding the particulars of each case-- the difficulty of litigation, the strength of the defendant. Allowing the DOJ to determine the sufficient bounty percentage for the relator may increase the probability of the marginal relator continuing action. Should it become clear that a defendant is unwilling to settle and that the relator is unwilling to shoulder the risks of further litigation, the DOJ carrot of a greater bounty percentage may be useful. The inducement may help both in settlement negotiation and, should settlement talks break down, in encouraging ongoing relator participation. The risk for Congressional delegation of the bounty percentage to the DOJ is a mismatch on the social priorities of compensation versus deterrence. Since both deterrence and compensation under this analysis may lead towards the 100% bounty, though, this may not be a large concern.

Perhaps a greater risk for Congress is that the DOJ fails to offer sufficiently high bounties. Before the 1986 amendments, the 1943 version of the FCA provided no lower bound for the bounty percentages.[115] During that time period, relator participation was sporadic and minimal, although other statutory problems may have also played a role in

[115] Relators in intervened cases could receive between 0 and 10%, while relators in non-intervened cases could receive between 0 and 25%. See See J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 560-61 (2000).

scaring off relators.[116] Unfortunately, we do not have any history with the modern FCA and full bounty discretion for the DOJ. Nonetheless, relators likely need some assurance of a minimum guaranteed bounty percentage, as they otherwise have little guidance as to how the DOJ might view their individual case. Furthermore, it is possible that some government bureaucrats might take a dim view of private litigation. Such individuals might quietly offer low bounties to minimize private contributions, perhaps thereby magnifying their own litigation roles. A statutory minimum bounty percentage could reduce the risk of such behavior and provide more certainty for relators.

C. Challenges

1. The hold-up problem

Introduction of a negotiable private bounty percentage from the DOJ raises the concern of holdup over the bounty. Under the current statute, bounty percentages are determined after the determination of defendant liability. With the proposed flexibility for the DOJ to commit to greater bounty percentages, relators might aggressively negotiate with the DOJ at an earlier stage. A tragic potential outcome of giving the DOJ greater flexibility might be that relators reduce participation in an effort to strengthen their negotiating power versus the DOJ. This scenario seems unlikely, however, given that it would require either strong repeat players or highly coordinated law firms. Most whistleblowers tend to be one-shot players, and their attorneys have ethical duties regarding client interests. Furthermore, qui tam cases do not appear highly concentrated among a limited group of law firms. Also note that prior to election, the DOJ and the relator already engage in ongoing negotiations regarding information and the role of the relator. Given the sequential nature of the qui tam procedure, the DOJ's negotiating position against the relator is quite strong. If, under the proposal, the DOJ refused to grant any additional private bounty over the minimum 25%, the relator would be no worse off in comparison to the current regime. She would still have the same incentive to pursue private litigation absent the strategic motivations above.

2. Possibility of slack

The presence of the private litigation option might induce the DOJ to slack. For example, the DOJ might reduce its own probability of trial, counting on the private party to handle the case. This type of coordination problem might mitigate the reduction in defendant threat value, since the total probability of trial is not a simple sum of the DOJ and relator's probabilities. The coordination between DOJ and private litigation could be particularly bad. Under such a scenario, the DOJ might have improperly high expectations regarding the relator's proclivity towards trial. The DOJ's personal reduction in probability of trial could actually outweigh the additional probability of trial due to the relator. This combination would result in a lower aggregate probability of trial than the

[116] See Kary Klismet, Quo Vadis, “Qui Tam”? The Future of Private False Claims Act Suits Against States After Vermont Agency of Natural Resources v. United States ex rel. Stevens, 87 Iowa L. Rev. 283, 289–90 (2001)

situation in which the relator were not present as an outside threat. This bad coordination problem would result in the defendant's threat value improving.

This coordination problem seems unlikely in reality for a number of reasons. First, the qui tam procedure is sequential, in which the DOJ is the first mover after initial case filing. Second, both defrauded government agencies and DOJ attorneys have common incentives in pursuing the most serious and wrongful offenses. Unless the private relator and attorney had a strong comparative advantage in trial, it is difficult to imagine a government agency and DOJ attorney explicitly agreeing to not handle a case together.

3. Credibility of threat

For private relator litigation to have an impact on settlement negotiation, the probability of relator litigation must be perceivable by the defendant. The aggregate qui tam statistics do not shed much light on this question, as the low rate of private litigation could simply be the result of defendants identifying litigious relators and promptly settling those cases with the DOJ. Given this strong selection effect, it is difficult to evaluate the willingness of relators to litigate privately.

A second order concern is the willingness and ability of the DOJ to commit to a bounty percentage. Under the current qui tam procedure, the final bounty percentage is determined after final judgment on the main fraud case. The DOJ can certainly threaten to argue for specific bounty percentages earlier in the process, but it does not seem to have a statutory method for making the commitment. Making this commitment is important, since, by the end of litigation, there are strong incentives for a compensation-oriented DOJ to not pay a high percentage bounty.

Moreover, the defendant might believe a 100% bounty claim to be a bluff. If the DOJ is narrowly compensation-focused, it might be particularly unhappy to pay 100% of the litigation proceeds to the relator. As such, rather than allow the relator to litigate the case, the DOJ would simply handle the case personally. As such, maximum negotiating power might be achieved at a bounty percentage lower than 100%.

4. Does settlement hurt deterrence?

Given the prevalence of settlement in government intervened qui tam cases, I have thus far assumed that settlement does not detract from the deterrence value of cases. I have considered how the presence of relators might improve the deterrence value of any given settlement by increasing the dollar value. Nonetheless, many have suggested that settlement, in comparison to trial, may dilute the deterrence power of cases.[117] It is possible that the threat of private litigation might convince a defendant, who would otherwise have gone to trial, to agree to settlement. Assuming that the DOJ would have brought the case to trial, the settlement might be a reduction in deterrence value.

[117]See, e.g., Polinsky & Shavell, The economic theory of public enforcement of law. Journal of Economic Literature, 38, 45-76 (2000) and Polinsky & Rubinfeld, The deterrence effect of settlements and trials. International Review of Law and Economics, 8, 109-16. (1988)

The potential for private litigation to drive this reduction in deterrence value seems low, though. If the DOJ was likely to bring the case to trial, it seems implausible that the threat of private litigation would often be the deciding factor in the defendant's decision to settle. Rather, the threat of private litigation being a deciding factor in settlement is more likely for cases that the DOJ was unlikely to bring to trial. In the latter scenario, the alternative to settlement is non-litigation, and settlement has superior deterrence value to non-litigation.

Perhaps the broader concern is the government's ability to settle cases that private parties would otherwise have litigated. It is difficult to determine which cases might fall into this category, as I do not have a method for measuring private willingness to litigate in the data. Despite the empirical challenge, however, note that the government may have a stronger negotiating position in comparison to private parties. For example, the DOJ can more credibly threaten to limit existing government business with the defendant during litigation. If the government's settlement is tougher on the defendant than the likely resolution via private litigation, the settlement deterrence value may not be weakened.

Conclusion

The private litigation bounty is a powerful tool for encouraging private participation in an enforcement scheme. Under the False Claims Act's qui tam structure, the federal government can simultaneously pursue its goals of compensation and deterrence by delegating the power to set the private litigation bounty to the Department of Justice. While the principles of compensation and deterrence may be in competition under a finder's bounty system, they can work well together under the qui tam process. First, allowing the DOJ to set a 100% bounty for certain cases may induce private litigation that would otherwise not proceed. If DOJ would not have litigated the case itself, the additional private litigation would result in deterrence with no offsetting loss in compensation. Second, the DOJ may be able to maximize its settlement dollars with defendants by adjusting the private litigation bounty percentage. The ability to commit to a high litigation bounty could strengthen the government's position in settlement negotiations, as the high litigation bounty could induce aggressive private litigation behavior. The increased negotiation power may lead to more settlements and higher value settlements, for which the government only pays the lower finder's bounty. Both the payment and the threat of high private litigation bounties could increase compensation and deterrence under the FCA.

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Appendix A: Law Firms Ranked by Number of Cases, minimum 10

Firm	*Total Imposition $*	*Cases*	*Intervention rate*
Phillips & Cohen	$1,550,000,000	65	58.5%
Warren Benson Law Group	$47,100,000	43	20.9%
Law Offices of Herbert Hafif	$50,700,000	26	23.1%
Walker, Knopf & Billingsley	$305,050	25	8.0%
James, Hoyer, Newcomer & Smiljan	$25,300,000	23	17.4%
Law Offices of Mark Allen Kleima	$25,100,000	23	26.1%
Packard, Packard & Johnson	$96,400,000	22	27.3%
Law Offices of Phillip E. Benson	$31,100,000	21	42.9%
Grayson, Kubli & Hoffman, P.C.	$0	18	0.0%
Helmer, Martins, Rice & Popham,	$24,800,000	17	47.1%
Levin, Papantonio, Thomas, Mitch	$40,800,000	16	56.3%
Pace & Rose	$35,600,000	15	20.0%
Ashcraft & Gerel	$156,000,000	14	14.3%
Candace McCall, P.C.	$9,760,693	14	35.7%
Frank, Haron, Weiner & Navarro	$2,480,136	14	7.1%
Greber & Simms	$20,200,000	13	38.5%
Ronald E. Osman & Associates, Lt	$223,000,000	13	61.5%
William R. Ramsey, A Professiona	$15,300,000	13	30.8%
Harmon, Smith, Bridges & Wilbank	$225,000,000	12	58.3%
Law Office of Robert L. Vogel	$91,800,000	12	83.3%
Law Offices of Danz and Gerber	$1,100,000	12	8.3%
Sommers, Schwartz, Silver & Schw	$1,935,279	12	16.7%
Gerald K. Fugit	$3,500,313	11	9.1%
Kleinfeld, Kaplan & Becker	$37,100,000	11	63.6%
Mike Bothwell, P.C.	$6,275,000	11	27.3%
Bothwell & Simpson, P.C.	$1,700,000	10	20.0%
Law Offices Of Robin P. West	$12,200,000	10	30.0%

Appendix B: Law Firms Ranked by Total Imposition Dollars, minimum $50 million

Firm	*Total Imposition $*	*Cases*	*Intervention Rate*
Phillips & Cohen	$1,550,000,000	65	58.5%
Sheller, Ludwig & Badey	$443,000,000	1	100.0%
Thomas J. Lynch, P.C.	$312,000,000	1	100.0%
Kohn, Shands, Elbert, Gianoulaki	$311,000,000	1	100.0%
Harmon, Smith, Bridges & Wilbank	$225,000,000	12	58.3%
Wampler, Buchanan, Walker, Chabr	$224,000,000	4	50.0%
Ronald E. Osman & Associates, Lt	$223,000,000	13	61.5%
Patzik, Frank & Samoty, Ltd.	$222,000,000	1	100.0%
Hall & Phillips	$192,000,000	6	66.7%
Kleinbard, Bell & Brecker	$176,000,000	1	100.0%
Grant & Roddy	$174,000,000	1	100.0%
Ashcraft & Gerel	$156,000,000	14	14.3%
Getnick & Getnick	$156,000,000	5	60.0%
Tinsman & Houser, Inc.	$146,000,000	1	100.0%
Phebus & Winkelmann	$143,000,000	5	40.0%
Vezina & Gattuso, LLC	$142,000,000	5	40.0%
Hangley, Aronchick, Segal & Pudl	$139,000,000	1	100.0%
Law Offices of Bradley Scott Wei	$111,000,000	6	50.0%
Cochran & Cochran, P.C.	$102,000,000	1	100.0%
London & Mead	$98,500,000	2	50.0%
Packard, Packard & Johnson	$96,400,000	22	27.3%
Law Office of Robert L. Vogel	$91,800,000	12	83.3%
Tyson, Cleveland A.	$90,000,000	1	100.0%
Boyd & Associates	$75,300,000	3	33.3%
Farella, Braun & Martel LLP	$73,300,000	1	100.0%
Futterman & Howard, Chtd.	$69,900,000	4	100.0%
Dugan Barr & Associates	$59,000,000	1	100.0%
Kenneth J. Nolan, P.A.	$55,500,000	9	22.2%
Law Offices of Herbert Hafif	$50,700,000	26	23.1%

Appendix C

I first begin with a simple model of private enforcement under the FCA. In this model, potential offenders, which I call contractors, are risk neutral profit maximizers. They have a binary choice in committing a fixed amount of fraud. This amount of fraud is the same for all contractors. The contractors vary in an attribute called visibility (or transparency). This exogenous attribute describes the openness of its operations and is related to the probability that someone will detect fraudulent activity.

Besides the contractors, I treat the rest of the private enforcement system as a black box that responds only to the bounty percentage. A higher bounty percentage results in a higher probability that a contractor committing fraud will be sanctioned. I normalize the fraud loss to 1, which is both the gain to the contractor and the loss to the government.

Notation

v = visibility, aka exogenous transparency of contractor
$h(.)$ = probability density of contractor visibility
$H(.)$ = cumulative distribution of $h(.)$
α = bounty proportion, where $\alpha > 0$ and $\alpha = 1$ indicates all defendant recoveries go to the relator
$p(v, \alpha)$ = probability of detection & punishment given reward of the fraud, $dp/dv > 0, dp/da > 0$

Under this model of the FCA, each contractor's expected profit if committing fraud is the following:

$$E[profit_i] = 1 - (3 * p(v_i, \alpha)) - \epsilon$$

The contractor's loss is 3 since this is a treble damages statute. I include ϵ indicating that committing fraud is not entirely costless, thus ensuring that an indifferent contractor will choose not to commit fraud. As long as $E[profit_i] > 0$, contractor i will commit fraud. Otherwise, contractor i's profit will be 0 as he will not commit any fraud. To deter contractor i from committing fraud, $p(v_i, \alpha)$ must be at least $\frac{1}{3}$.

With a non-pathological p, for every α, there is a corresponding v^* for which $p(v^*, \alpha) = \frac{1}{3}$. I'll call this mapping $v^* = f(\alpha)$, where $\frac{df}{d\alpha} < 0$.

Under this nomenclature, the amount of fraud deterred by choosing α is $1 - H(v^*)$. $H(v^*)$ fraud is still committed, although some of that will be caught and recovered. Rewritten, $H(f(\alpha))$ fraud is being committed.

$$3 * \int_0^{v^*} p(v, \alpha) h(v)\, dv$$

will be the total dollars recovered from detected fraud. Of that sum, α will go to the relators, while the government receives $1 - \alpha$.

For a social planner only attempting to deter fraud, the goal is to minimize $H(v^*)$ choosing α.

For a government agency attempting to minimize its losses due to fraud and payments to relators, it will set α such that the marginal deterrence is equal to the marginal government recovery.

$$\frac{dH}{d\alpha} = \frac{d}{d\alpha}[3 * (1-\alpha) \int_0^{v^*} p(v,\alpha)h(v)\,dv]$$

As α increases, the level of deterrence rises. For compensation, raising α increases the percentage of fraud caught, but it also reduces the percentage the government receives. The total potential compensation also decreases as deterrence increases.

Very costly deterrence

In the very costly deterrence situation, the α satisfying $H(f(\alpha)) = 1-\epsilon$ is greater than 1. This indicates that to generate any recognizable amount of deterrence, the government must pay more than the treble damages award. Effectively, besides giving relators a 100 percent bounty, the government must go on to pay an additional amount out of its own pocket.

Assuming an unwillingness or inability to pay for such private enforcement, the government could simply focus upon recoveries. Rather than balancing marginal deterrence with marginal recoveries, it instead tries to maximize government recovery after paying relators. Thus, its optimization problem is

$$\max{}_\alpha 3 * (1-\alpha) \int_0^{v^*} p(v,\alpha)h(v)\,dv$$

If there really is no significant deterrence, this can be rewritten as

$$\max{}_\alpha 3 * (1-\alpha) \int_0^{\infty} p(v,\alpha)h(v)\,dv$$

This objective function is similar to a government agency that is unable to measure deterrence or simply does not care about deterrence. In the limit, an agency that under-values deterrence will approach this objective function. Maximizing this government recovery level leads to

$$(1-\alpha)\frac{d}{d\alpha}[\int_0^{\infty} p(v,\alpha)h(v)\,dv] = \int_0^{\infty} p(v,\alpha)h(v)\,dv$$

In comparison with the case in which deterrence matters, we expect a slightly lower bounty percentage since deterrence was a factor driving up α.