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# **The Government Declares War On Qui Tam Plaintiffs Who Lack Inside Information: The Government's New Policy To Dismiss These Parties In False Claims Act Litigation**

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## **Introduction**

In 1986, Congress, in the words of one court, “let loose a posse of ad hoc deputies to uncover and prosecute frauds against the government.”<sup>1</sup> Specifically, Congress substantially amended the False Claims Act (“FCA”), 31 U.S.C. § 3729, et seq.,<sup>2</sup> to encourage corporate insiders aware of fraud to deliver that information to the United States by filing a lawsuit.<sup>3</sup> Once the person files an action, the United States determines whether to intervene in and assume primary responsibility over the action.<sup>4</sup> If the United States intervenes, qualified whistleblowers can obtain up to 25 percent of the government’s recovery; if the United States declines to intervene, the relator can obtain up to 30 percent of the recovery.<sup>5</sup>

As a result of Congress’ expansion and liberalization of the FCA, the government’s recoveries under the FCA have skyrocketed, totaling more than \$4 billion.<sup>6</sup> Further, more than 3,000 qui tam cases have been filed since Congress’ 1986 amendments.<sup>7</sup> The majority of these actions have been filed against those who do business in the healthcare industry.<sup>8</sup>

The success of the qui tam provisions in generating recoveries has spawned a new type of qui tam lawsuit – qui tam actions targeted against a whole industry or multiple defendants within an industry.<sup>9</sup> This is because relators, when they file a qui tam action, have a financial interest to state their allegations as broadly as possible and to name as many corporate defendants as possible because they are paid based upon a percentage of the proceeds the government recovers in the action.

These actions, however, typically do not follow the paradigm “insider” whistleblower lawsuit that Congress intended to foster.<sup>10</sup> In the paradigm case, the whistleblower transfers inside information to the United States in exchange for a reward.<sup>11</sup> Courts have conceptualized this arrangement as a unilateral contract under which the United States offers those with inside knowledge of misconduct to report that information and the relator accepts the offer upon filing a lawsuit.<sup>12</sup>

In industry-wide, multi-defendant qui tam actions, however, the relator typically is not an insider – that is, not a person employed by the particular defendant – and thus rarely has access to the type of inside information that would substantiate an FCA claim. These actions, therefore, turn the chief purpose underlying qui tam actions on its head. Rather than the qui tam provisions operating as a mechanism under which insiders supply needed information to the United States and in exchange receive a substantial bounty, the United States receives no useful evidence or information and still must pay a reward.

Because these lawsuits can undermine the government’s interest and not provide it with any benefit,<sup>13</sup> the government has recently moved to dismiss two such pending actions. One of the grounds for dismissal the government has invoked is 31 U.S.C. § 3730(b)(2), which mandates that the relator provide the United States with information in his or her possession that supports the claim.<sup>14</sup>

The government’s position marks an important shift in its enforcement of the FCA. Given the number of qui tam cases pending against healthcare companies, some of which are industry-wide actions and several of which involve multiple defendants, the government’s position is worth careful scrutiny. Set forth below is a discussion and evaluation of the position

the United States has taken to dismiss these actions and opportunities that position presents for those who are named as defendants in those actions.

## The Government's Position In Multi-Defendant Or Industry-Wide Qui Tam Actions

The government has articulated its position most recently in two industry-wide qui tam actions pending against companies operating in the Energy industry. In one action, relator Jack Grynberg alleged that several energy companies had mismeasured gas in calculating the royalties they owe to the federal government.<sup>15</sup> In another action relator Glenn Osterhoudt alleged that approximately twenty-five defendants had underpaid royalties they owe on natural gas.<sup>16</sup>

The government moved to dismiss both the Grynberg and Osterhoudt cases. Specifically, the government asserted that both relators had failed to furnish the government with any evidence that supports the particular allegations in their complaint.

In the Grynberg case the government asserted that, under § 3730(b)(2), the relator must have a “core of knowledge” about the fraud and supply that knowledge to the government as “a condition precedent” to filing the action.<sup>17</sup> The government elaborated at length regarding its interpretation of subsection (b)(2) in its brief:

The FCA requires that, upon initiating a qui tam suit, a relator must serve the government with a “written disclosure of substantially all material evidence and information” in his possession. 31 U.S.C. § 3730(b)(2). While [the relator] alleges that hundreds of defendants have violated the FCA by entering into schemes with affiliated entities to sell gas at artificially low prices, and by inflating rates for transportation and processing services, he has failed to meet the FCA’s requirement of providing the United States with material evidence to support these valuation allegations.

The FCA’s disclosure requirement has the primary purpose of “provid[ing] the United States with enough information on the alleged fraud to be able to make a well reasoned decision on whether it should participate in the filed lawsuit or allow the relator to proceed alone.” *United States ex rel. Woodward v. Country View Care Ctr.* 797 F.2d 888, 892 (10th Cir, 1986). The relator’s written disclosure of evidence should assist the government in determining the direction of the investigation. It should allow the government to determine, based on the evidence submitted, whether the claims overlap with an existing case or investigation, and to fix the relator’s knowledge at the point that the complaint is filed so as to allow the government and the court to make the determination whether the qui tam plaintiff is a proper relator. See *id.*

A relator’s failure to comply with the FCA’s disclosure requirement is grounds for dismissal. *United States ex rel. Made in the USA Foundation v. Billington*, 985 F. Supp 604, 608-09 (D. Md. 1997)(FCA claim dismissed where relators did not provide adequate written disclosure statement). The requirement that the relator provide the government with material evidence is the only provision in the FCA that implements Congress’ intent that a relator can proceed and share in the potentially huge bounties mandated by the statute only if he brings the United States actual evidence of fraud. The FCA does not provide bounties for bare allegations contained in a complaint, unsupported by evidence. To comply with 31 U.S.C. § 3730(b)(2), at a minimum, a relator’s disclosure of evidence “must be more substantive than the notion that ‘something fishy’ is going on.” *Id.* at 608 (footnote omitted). The FCA requires “that a person seeking relator status have a core of knowledge about the fraud.” *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1020 (E.D. Va. 1995). Whether a qui tam plaintiff is a proper relator must be judged “in light of what he knew about [the defendant], not what he suspected.” *Id.* at 1023.

The validity of a relator’s status is decided based on information he provided at the outset of the case, not on information that the government develops through its investigation. *Detrick*, 909 F. Supp. at 1019 n.28. The relator’s provision of material evidence to support his allegations from the beginning of the case is a condition precedent to his pursuit of claims under the FCA. A contrary rule would impermissibly have the government function as the relator’s “free private investigator,” *id.* at 1022, and turn qui tam suits into “fishing expeditions.” *Id.* *Made in the USA Foundation*, 985 F. Supp. at 608. The FCA places upon the Attorney General the responsibility to “diligently investigate” alleged violations of the statute. 31 U.S.C. § 3730(a). If bare allegations with no supporting evidence were permissible under the statute, the Attorney General’s task – difficult enough with over 2,000 qui tam cases filed since the Act was amended in 1986 and about 900 now under investigation – would be impossible to fulfill.<sup>18</sup>

In the Osterhoudt case, the United States similarly described subsection (b)(2) as serving as one “of the primary filters that Congress installed to weed out improper relators” who did not “possess a certain level of actual knowledge about the submission of false claims to the government” and to ensure that the qui tam provisions do not operate as a lottery, “with the relator hitting the jackpot if the government investigates and happens to discover fraud”:

Congress repeatedly has attempted to fine tune the False Claims Act to limit its rewards only to those who have sufficient “core knowledge about the fraud” to “contribute something to the suit.” *United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010., 1020-21 (E.D. Va. 1995). One of the primary filters that Congress installed to weed out improper relators was to require, as a threshold matter, that a relator possess a certain level of actual knowledge about the submission of false claims to the government. This threshold obligation is manifested in the requirement that would-be relators provide to the government material evidence or information in support of their complaints. 31 U.S.C. § 3730(b)(2). The clear import of this provision is that would-be relators must do more than just assert allegations based on speculation and guesswork. Rather, to qualify for relator status under the Act, would-be relators must be able to provide to the United States evidence and information sufficient to provide a basis for their allegations of fraud. The purpose of this knowledge requirement is to ensure that the qui tam provision does not serve as a lottery, allowing the filing of complaints containing allegations that are not supported by proof, with the relator hitting the jackpot if the government investigates and happens to discover fraud.<sup>19</sup>

Further, the government asserted that the threshold of knowledge provided by the relator should be sufficient to satisfy Fed. R. Civ. P. 9(b):

Section 3730(b)(2) is silent as to the specific quantum of evidence that a relator must possess and disclose to the government. Under 31 U.S.C. § 3730(b)(1), however, a relator must file a complaint satisfying the pleading requirements of the Federal Rules of Civil Procedure, including Rule 9(b). See *United States ex rel. Russell v. EPIC Healthcare Management*, 193 F.3d 104, 108 (5th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *United States ex rel. Johnson v. Shell Oil Co.* 183 F.R.D. 204, 206 (E.D.Tex. 1998). As the FCA requires a relator to provide the United States with material evidence and information supporting the allegations in the relator’s complaint, one can fairly expect that the level and quantity of evidence that the relator must possess under 31 U.S.C. § 3730(b)(2) is similar to the facts that must be alleged in a fraud complaint to satisfy Fed.R.Civ.P. 9(b). See *SmithKline*, 149 F.3d at 234 (Rule 9(b) requires that only those with actual knowledge of fraud against the government can claim relator status); *Quinn*, 14 F.3d at 655 n.10 (citing Rule 9(b) and commenting “[t]o the extent the plaintiff comes forward only with a bare allegation unsupported by proof, the district court has ample traditional tools with which to dismiss the case”); cf. *Daniel F. Young*, 909 F. Supp. at 1019 (concluding in context of original source inquiry that “a complainant’s eligibility for relator status, in terms of fraud knowledge, is measured only by the standard of Rules 9 and 11”).

In other words, a would-be relator’s disclosure statement, like the complaint it is supposed to support, should provide evidence sufficient to demonstrate the “who, what, when, where, why and how of the alleged fraud.” *Columbia/HCA*, 125 F.3d at 903. Such an interpretation not only recognizes the structural interdependence of sections 3730(b)(1) and 3730(b)(2), but is consistent with the independent purposes served by the knowledge requirement that Congress included in the Act. See *EPIC*, 193 F.3d at 309 (Rule 9(b) prevents plaintiff from fishing for discovery “that the statute itself does not contemplate”). Besides being faithful to the letter and design of the False Claims Act, applying a Rule 9(b) type standard to section 3730(b)(2) also brings to the judiciary and would-be relators “the advantages of familiarity, accessibility, and ease of application.” *Daniel F. Young*, 909 F. Supp. At 1021, fn. 31.

Taken together, then, sections 3730(b)(1) and 3730(b)(2) require a would-be relator to possess sufficient knowledge to plead and prove the submission of false claims with particularity. It is not sufficient for a relator to file a complaint based on mere “speculation and conclusory allegations.” *Columbia/HCA*, 125 F.3d at 903. A relator must do more than assert that “‘something fishy’ is going on.” *United States ex rel. Made in the USA Foundation v. Billington* 985 F. Supp. 604, 608 (D.Md. 1997). The Act is not a license for a private party to go on “a fishing expedition” or to use the federal government as “a sort of free private investigator.” *Daniel F. Young*, 909 F. Supp. at 1022; *Billington*, 985 F. Supp. at 608. The relator must possess “a core of knowledge about the fraud.” *Id.* at 1020. Where such knowledge is lacking, or is insufficient to satisfy the requirements of Rule 9(b), the would-be relator is not entitled to proceed under the Act and the complaint must be dismissed. See, e.g., *EPIC*, 193 F.3d 308-09; *Columbia/HCA*, 125 F.3d 899, 903; *United States ex rel. Grynberg v. Alaska Pipeline Co.*, No. 95-725 (THF)(D.D.C. Mar. 27, 1997)(Exh. J); *Billington*, 985 F. Supp. 608-09.<sup>20</sup>

## The Implications Of The Government's Position

Given the plethora of multi-defendant qui tam lawsuits now pending, the position the government has recently articulated marks an important occasion in FCA jurisprudence.

In these cases, the government has interpreted subsection (b)(2) to be something more than a mere formality. Instead, the government maintains that just as the relator is required to file a complaint that satisfies Fed. R. Civ. P. 9(b), the relator is also required under subsection (b)(2) to disclose evidence and information that is sufficient to withstand a Rule 9(b) challenge. Otherwise, the government reasons, the purposes underlying the statute would be thwarted – rather than having an arrangement under which the relator furnishes useful information to the government and in exchange receives a substantial bounty; the arrangement would be that the relator furnishes no useful information to the United States and still receives a substantial bounty. Under these circumstances, two vastly different relators would be treated similarly. Those who supplied no useful information would be just as entitled to a bounty as those who supplied valuable information based merely upon the fortuity of a successful governmental investigation. Such a result, in the government's words, transforms the qui tam process into a lottery.

Given this interpretation of the plain language of subsection (b)(2) and its underlying policies, defendants, like the government, should be able to avail themselves of this statutory provision.<sup>21</sup> As the government points out in its briefs the qui tam provisions mandate that relators, in order to invoke the qui tam provisions, must possess a threshold of information and evidence that would, without the aid of discovery or the governmental investigative process, withstand scrutiny under Rule 9(b). If the relator cannot satisfy that threshold, then it has failed to stake its claim with respect to any recovery that is obtained, and if a subsequent governmental investigation reveals that the defendant did breach the FCA, the government should not be compelled to split the recovery with the relator. Alternatively, if the relator can in fact satisfy that threshold, then he or she has fulfilled the precondition to filing an action and merits a bounty.<sup>22</sup>

## Conclusion

Two converging forces are at play in industry-wide or multi-defendant qui tam actions. One is the relator's interest in maximizing his or her personal recovery by making expansive allegations against multiple parties in the hope that some of the mud will stick and the government's investigation of the broad allegations will verify the relator's claims.<sup>23</sup> This practice, however, necessarily limits the United States' ability to recover since the United States must pay the relator for the provision of useless information. Thus the other force at work is the United States' (laudable) interest in safeguarding the federal Treasury by refusing to pay these non-insider relators. The United States' recently filed legal briefs are merely a manifestation of its interest in quelling such lawsuits. Based upon the reasoning underlying the government's position, its position should win support in the courts and thereby limit qui tam actions to the true insiders that Congress sought to reward.

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## Endnotes

<sup>1</sup> See *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Center*, 961 F.2d 46, 49 (4th Cir. 1992).

<sup>2</sup> The FCA imposes liability upon those who submit or causes the submission of false or fraudulent claims with "reckless disregard" or in "deliberate ignorance" of the truth or falsity of the claim. *Id.* § 3729(b). As noted, the FCA also authorizes private persons (known as relators) to file actions (known as qui tam actions) on behalf of the United States to enforce the FCA and to obtain, if successful, a substantial bounty. Those held liable under the FCA must pay treble damages and civil penalties ranging from \$5,000 to \$10,000 per claim. For all violations committed on or after Sept. 29, 1999, the defendant is liable for treble damages plus penalties ranging from \$5,500 to \$11,000 per claim (see *Civil Monetary Penalties Inflation Adjustment*, 64 Fed. Reg. 47,103-04 [1999][to be codified at 28 C.F.R. pt.85]).

- <sup>3</sup> Specifically, Congress liberalized the FCA's qui tam provisions by increasing the amount of the whistleblower's bounty, expanding the relator's right to participate in the action, and eliminating the broad existing jurisdictional bar which barred all actions that were based upon information already in the government's possession. See *United States v. Northrop Corp.*, 59 F.3d 953, 964-69 (9th Cir. 1995) (describing Congress's goals in amending the qui tam provisions of the FCA); see generally Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 *Yale L.J.* 341 (1989); Robert Salcido, *Screening out Unworthy Whistleblower Actions: An Historical Analysis of the Jurisdictional Bar to Qui Tam Actions Under The False Claims Act*, 24 *PUB. CONT. L.J.* 237 (1995) (setting forth the history underlying the 1986 amendments to the qui tam provisions of the FCA).
- <sup>4</sup> See 31 U.S.C. §§ 3730(b)(4), (c)(1).
- <sup>5</sup> *Id.* §§ 3730(d)(1)-(2).
- <sup>6</sup> The Department of Justice ("DOJ"), in a press release it issued on February 24, 2000, reported that it had received more than \$3.5 billion in whistleblower litigation. See <<http://www.usdoj.gov/opa/pr/2000/february/079civ.htm>>. Since that time, it has announced a tentative settlement of \$745 million with Columbia/HCA. See Bill Brubaker, *Hospital Chain to Settle Case*, *WASHINGTON POST*, May 19, 2000 at A1.
- <sup>7</sup> See <<http://www.usdoj.gov/opa/pr/2000/february/079civ.htm>>. Further these numbers should dramatically rise in the near future. Besides the Columbia/HCA case referenced above, the DOJ has entered into other large FCA settlements and participated in actions this year that likely will embolden relators to file additional actions. In January 2000, the DOJ announced its FCA settlement with Fresenius Medical Care, the world's largest provider of kidney dialysis products and services, in which Fresenius agreed to pay a record setting \$385 million to resolve claims under the FCA; Fresenius also agreed to pay \$101 million in criminal fines. The relator in the FCA action received \$65.9 million. See Statement of Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice, *Announcement of Criminal Pleas and Civil Settlements United States v. Fresenius* (Jan. 19, 2000). Further, in February, DOJ announced that nursing home and home health operator Beverly Enterprises will pay a total of \$170 million to settle FCA allegations that it overbilled the Medicare program. Beverly Enterprises-California, Inc., a subsidiary, agreed to plead guilty to mail fraud and false statement charges and pay a \$5 million criminal fine. See <http://pubs.bna.com/ip/BNA/hce.nsf/id/a0a2u0h7j7>. The whistleblower purportedly received \$28.9 million. In March 2000, the United States announced that it had claims against Vencor, Inc. under the FCA worth one billion dollars. See David S. Hilzenrath, *Vencor Faces \$1 Billion Claim*, *WASHINGTON POST*, March 14, 2000 at E1.
- <sup>8</sup> The percentage of qui tam cases involving the Department of Health and Human Services as the client agency is as follows:
- |                           |              |              |
|---------------------------|--------------|--------------|
| FY 1987: 12%              | FY 1995: 34% |              |
| FY 1988-92: 15% each year |              | FY 1996: 56% |
| FY 1993: 30%              | FY 1997: 54% |              |
| FY 1994: 36%              | FY 1998: 61% |              |
- See <http://www.taf.org/docs/qtstats99.html>.
- <sup>9</sup> See, e.g., *In re Natural Gas Royalties Qui Tam Litigation*, No. 1293, 1999 U.S. Dist. LEXIS 20892 (J.P.M.D.L. Oct. 20, 1999) (qui tam action against more than sixty companies operating in natural gas industry); *United States ex rel. Johnson v. Shell Oil Company*, 33 F.Supp.2d 528 (E.D.Tex. 1999) (qui tam action against 18 major oil companies); cf. *United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F.Supp.2d 141 (D.Mass. 2000) (qui tam action alleging that nation-wide classes of hospitals and certain vendors breached the FCA because vendors supplied hospitals with invoices that did not reflect various discounts and rebates and the hospitals failed to report these reductions in price on their cost reports).
- <sup>10</sup> See, e.g., *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997) ("It is commonly recognized that the central purpose of the qui tam provisions of the FCA is to 'set up incentives to supplement government enforcement' of the Act, by 'encourag[ing] insiders privy to a fraud on the government to blow the whistle on the crime'") (citations omitted); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1161 (3d Cir. 1991) ("The paradigmatic 'original source' is a whistleblowing insider. This covers those the Senate Report specifically referred to: 'individuals who are close observers or otherwise involved in the fraudulent activity'") (citing S. Rep. No. 99-345, at 4, reprinted in 1986 U.S.C.A.N. at 5269); *United States ex rel. Hansen v. Cargill, Inc.*, No. C 98-4367 CRB, 2000 U.S. Dist. LEXIS 10845 at \*31-\*38 (N.D. Cal. July 24, 2000); *United States ex rel. Trice v. Westinghouse Hanford Comp.*, No. CS-96-0171-WFN, 2000 U.S. Dist. LEXIS 8838 at \*58-\*59 (E.D. Wash. March 1, 2000) ("Qui tam plaintiffs are allowed to bring suit on behalf of the government due to their unique 'insider' knowledge"); *United States ex rel. Koerner v. Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 453 (E.D. La. 1996) ("[T]he False Claims Act... aims at ferreting out fraud by encouraging persons with first-hand knowledge of alleged wrongdoing to come forward. It is the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity that Congress sought to enlist through the qui tam provisions of the Act") (emphasis in original); see generally *United States v. Health Possibilities, P.S.C.*, 207 F.3d 335, 340 (6th Cir. 2000) ("The FCA is not designed to serve the parochial interests of relators, but to vindicate civic interests in avoiding fraud against public monies") (citation omitted); *United States v. Northrop Corp.*, 59 F.3d 953, 968 (9th Cir. 1995) ("The private right of recovery created by the provisions of the FCA exists not to compensate the qui tam relator, but the United States. The relator's right to recovery exists solely as a mechanism for deterring fraud and returning funds to the federal treasury").
- <sup>11</sup> See generally *United States ex rel. Russell v. Epic Healthcare Mgmt Group*, 193 F.3d 304, 309 (5th Cir. 1999) (Under qui tam provisions, "the government seeks to purchase information it might not otherwise acquire").
- <sup>12</sup> Cf. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993) (under one "theory of standing, the FCA's qui tam provisions operate as an enforceable unilateral contract. The terms and conditions of the contract are accepted by the relator upon filing suit").
- <sup>13</sup> Besides the government not obtaining any benefit from these actions, important governmental interests are undermined by the filing of such lawsuits because the government loses its choice of forum, its opportunity to exercise prosecutorial discretion as to whether the defendant's conduct results in a violation of the FCA, and its ability to choose the appropriate remedy to pursue against the defendant.
- <sup>14</sup> Specifically, that provision provides in pertinent part that the relator must serve upon the government a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses...." See *id.* § 3730(b)(2) (emphasis supplied). An alternate ground the government invokes to dismiss these actions is § 3730(c)(2)(A), which authorizes the government to dismiss the action "notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." The government successfully persuaded a

court to dismiss an industry-wide action under this provision in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998).

- <sup>15</sup> See, e.g., *In Re Natural Gas*, 1999 U.S. Dist. LEXIS 20892; *United States ex rel. Grynberg v. Alaska Pipeline Co.*, No. 95-725 (TFH), 1997 U.S. Dist. LEXIS 5221 (D.D.C. Mar. 27 1997).
- <sup>16</sup> See *United States ex rel. Osterhoudt v. Amoco Prod. Co.*, No. 9:98CV101 (E.D. Tex.).
- <sup>17</sup> See Brief of the United States in *In re: Natural Gas Royalties Qui Tam Litigation*, MDL No. 1293 (D. Wyo. filed July 20, 2000).
- <sup>18</sup> *Id.* at 4-6 (emphasis supplied and footnote omitted).
- <sup>19</sup> See Brief of the United States in *United States ex rel. Osterhoudt v. Amoco Prod. Co.*, No. 9:98CV101 at 12-13 (E.D. Tex. filed July 31, 2000) (emphasis added).
- <sup>20</sup> *Id.* at 13-15 (emphasis added and footnotes omitted).
- <sup>21</sup> The relator's statement of material evidence is not filed with the court and is only served upon the United States. The majority of courts, however, have ruled that the defendant is entitled to obtain the statement in discovery. See *United States ex rel. Burns v. A.D. Roe Co., Inc.*, 904 F.Supp. 592, 594-95 (W.D. Ky. 1995), *rev'd* other grounds, 186 F.3d 717 (6th Cir. 1999); *United States ex rel. Robinson v. Northrop Corp.*, 824 F.Supp. 830, 838-39 (N.D. Ill. 1993); *Grand ex rel. United States v. Northrop Corp.*, 811 F.Supp. 333, 337 (S.D. Ohio 1992); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 401 (D. Colo. 1992); *cf.* *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680 (S.D. Cal. 1996). In *Burroughs*, the district court ordered the relator to produce the requested documents to the court for in camera review to determine whether the documents disclosed relator's counsel's "opinion-work product," in which event defendants could not obtain the documents, or other work product prepared in anticipation of litigation in which event the documents would be produced if defendants demonstrated a substantial need for the documents and that they are unable to obtain the information without undue hardship. *Id.* at 684-85. Defendants had alleged that relator waived work-product protection on the grounds that he had provided the information to the government, a third party. The court rejected the contention, holding that a "joint prosecution privilege" applied between the government and the relator and thus no waiver occurred. *Id.* at 686.
- <sup>22</sup> *Cf.* *United States ex rel. Biddle v. Stanford Univ.*, 161 F.3d 533, 539 (9th Cir. 1998) ("Where the relator brings new information of fraud to the government, the relator should be rewarded regardless of how the relator came into possession of that information. The reason is that the allegations in the complaint, being previously undisclosed, are valuable to the government in remedying the fraud that is being committed against it. On the other hand, where the allegations of the fraud are already public knowledge, the relator confers no additional benefit upon the government by subsequently repeating the fraud allegations in the complaint"); *United States ex rel. Coleman v. Indiana*, No. 96-714-C-T/G, 2000 U.S. Dist. LEXIS 13666 at \*49 (S.D. Ind. Sept. 19, 2000) ("where the relator confers no additional benefit upon the government and merely repeats information already available to it, he should not be rewarded under the FCA") (citation and internal quotation omitted).
- <sup>23</sup> Fed. R. Civ. P. 11 does not operate to deter relators at the filing stage because the action is filed under seal and the defendants are not served so that if the government's investigation does not bear fruit the relators can move to voluntarily dismiss the action before the defendant receives the complaint and can invoke Rule 11.