

# DEAD MEN TELLING TALES – A POLICY-BASED PROPOSAL FOR SURVIVABILITY OF *QUI TAM* ACTIONS UNDER THE CIVIL FALSE CLAIMS ACT

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*“You are well on your way to becoming a pirate already . . . you are obsessed with treasure.”*

Captain Jack Sparrow (Johnny Depp) to William Turner (Orlando Bloom) in *PIRATES OF THE CARIBBEAN, THE CURSE OF THE BLACK PEARL* (Walt Disney 2003).

*“Yes I am a pirate, two hundred years too late. The cannons don’t thunder, there’s nothing to plunder, I’m an over-forty victim of fate.”*

Jimmy Buffett, *A Pirate Looks at Forty*, on *SONGS YOU KNOW BY HEART* (MCA Records 1990).

## I. INTRODUCTION

Despite the demise of job security for pirates during the modern age lamented by singer/songwriter Jimmy Buffett in “A Pirate Looks at Forty,” the box-office success of recent movies about pirates such as Walt Disney Studio’s “Pirates of the Caribbean—The Curse of the Black Pearl” evidences the continued appeal of treasure-hunting and swashbuckling in the modern world. Therefore, it should be no surprise that a statute passed by Congress almost 140 years ago, designed to encourage private citizens to dig deeply into the affairs of entities that contract with the federal government in search of wrongdoing and extract buried treasure, continues to appeal to the watchdogs of the public fisc. More than a century after its birth as a fraud-fighting tool during wartime, the

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civil False Claims Act<sup>2</sup> [hereinafter, “the Act”] continues to pique the imagination and fuel dreams of bounty and glory for both publicly anointed fraud -fighters and private persons who are authorized to sue on behalf of themselves and the Government under the Act’s unique “*qui tam*”<sup>3</sup> provisions.<sup>4</sup> Consider the following modern-day uses of the Act, which illustrate its continued appeal to private citizens:

In order to be reimbursed for their costs in caring for Medicare patients, hospitals prepare a “cost report” and submit it to the federal government. A Chief Financial Officer of a hospital in Whitefish, Montana refused to prepare an “aggressive” cost report for submission to Medicare and an inconsistent “reserve” cost report for submission to the hospital’s auditors. The “aggressive” cost report showed greater costs to the hospital for caring for Medicare patients than the “reserve” cost report showed. The CFO was terminated from his position. In the course of pursuing a wrongful termination action against the hospital’s management company, which was a national company, the CFO discovered that all of the hospitals managed by the company submitted “aggressive” cost reports to Medicare that he considered fraudulent. The CFO filed a *qui tam* action under the Act against the management company, resulting in a total settlement payment of \$85,773,745.81 by the company and a recovery of \$20,585,698.99 by the CFO;<sup>5</sup>

A sales representative for a cardiovascular device manufacturer filed a *qui tam* suit under the Act against 132 teaching hospitals. He alleged that they had defrauded federal health care programs by submitting claims and receiving payments for services provided to patients participating in clinical trials involving cardiac devices that had not been fully approved for marketing by the Food and Drug Administration, in violation of a provision of a 1986 Medicare Manual that stated that payment would not be made for such procedures. The case, filed in 1994, continues ten years later against forty hospitals. The government and the sales representative

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<sup>2</sup> Civil False Claims Act, 31 U.S.C. §3729 -3733 (2000).

<sup>3</sup> The term “*qui tam*” is short for the Latin “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” meaning “who pursues this action on our Lord the King’s behalf as well as his own.” See 3 WILLIAM BLACKSTONE, COMMENTARIES \*161; Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000).

<sup>4</sup> 31 U.S.C. §3730(d) (2000). Early in American legal history, *qui tam* provisions in federal law were relatively common. See, I JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS §1.01[A] (2d ed. 2000). As the means for public law enforcement developed and increased, *qui tam* actions were increasingly disfavored in law, and by the 20<sup>th</sup> century, had virtually disappeared from federal law. *Id.*

<sup>5</sup> United States *ex rel.* Alderson v. Quorum Health Group, 171 F. Supp.2d 1323 (M.D. Fla. 2001).

have collected millions of dollars from teaching hospitals that have settled the cases against them;<sup>6</sup>

A disgruntled doctoral student brought a *qui tam* action under the Act against his former faculty advisor, alleging that the faculty advisor collaborated with other researchers to publish scholarly articles based on fabricated research and used the publications to defraud the Veterans Administration. The complaint was ultimately dismissed, but not before the defendant incurred significant costs by being forced to defend the matter on the student's appeal to the Seventh Circuit Court of Appeals.<sup>7</sup>

Recoveries under the Act are potentially enormous because the Act authorizes the imposition of treble damages and substantial per-claim penalties against its violators.<sup>8</sup> The magnitude of potential recovery provides federal prosecutors with a strong incentive to use the Act. Nevertheless, this powerful weapon does not work only for the federal government. The Act's "*qui tam*" or whistleblower provision allows a private party to sue on its own behalf as well as on behalf of the United States, and collect a substantial bounty if the suit is successful.<sup>9</sup> Actions brought by whistleblowers under the Act have recovered a total of \$1.5 billion in fiscal year 2003 alone.<sup>10</sup>

The similarity between whistle blowing under the Act and the pursuit of bounty on the high seas did not go unnoticed even by the first courts to construe the statute, well over one hundred years ago. Early in the history of the Act, one court described the *qui tam* provisions of the Act as follows: "Prosecutions conducted by such means [through a private whistleblower] compare with the ordinary methods as the enterprising privateer

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<sup>6</sup> In re Cardiac Devices Qui Tam Litigation, 221 F.R.D. 318 (D. Conn. 2004); Warren King, *UW Agrees To Settle Over Billing Claims*, *Seattle Times*, September 16, 1999, available at LEXIS, News Library, Seattle Times File.

<sup>7</sup> United States *ex rel.* Lu v. Ou, 368 F.3d 773 (7<sup>th</sup> Cir. 2004).

<sup>8</sup> 31 U.S.C. §3729(a) (2000).

<sup>9</sup> 31 U.S.C. §3730(d) (2000). The bounty is paid regardless of whether the defendant loses at trial or settles the case. *Id.*

<sup>10</sup> *Pursuit of False Claims Cases Brings 'Extraordinary' Rewards, DOJ Official Says*, 8 Health Care Fraud Rep. (BNA) 520 (June 23, 2004) [*hereinafter Pursuit of False Claims*].

does to the slow-going public vessel.”<sup>11</sup> The potential windfall encourages private parties to attempt to use this fraud-fighting weapon for their own financial benefit, even when the United States has determined that it has no interest in pursuing a particular case.<sup>12</sup>

Just as the potential rewards to the successful whistleblower are never far from the minds of potential *qui tam* relators<sup>13</sup> under the Act, the specter of financial ruin and adverse publicity that inevitably follows a prosecution under the Act is never far from the mind of entities that contract with the federal government.<sup>14</sup> The magnitude of the damages recoverable under the Act, the collateral consequences of being found liable under the Act,<sup>15</sup> and the inevitable tension between the United States, the relator, and the defendant when a treasure-hunting relator independently pursues a case that the United States has declined to pursue, gives rise to unique legal issues and challenges. In addition to substantive legal complications, many procedural complications spring from the complex relationship between the relator and the Government, and the unique procedural requirements for bringing a *qui tam* action under the Act.<sup>16</sup>

Not least among these complications is the length of time that a *qui tam* case under the Act can be under development, or filed and pending in court, before the defendant even knows of the action’s existence. The statute of limitations for bringing a

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<sup>11</sup> United States v. Griswold, 24 F. 361, 366 (D. Or. 1885), *aff’d*, 30 F. 762 (1887).

<sup>12</sup> According to the head of the Department of Justice’s Civil Division, the United States declines to intervene in over 80% of *qui tam* cases. *Pursuit of False Claims*, *supra* note 10.

<sup>13</sup> A “relator” is a person who furnishes information on which a civil or criminal case is based. BLACK’S LAW DICTIONARY 1292 (7<sup>th</sup> ed. 1999). The private person who brings a case under the Act’s *qui tam* provisions is called the “relator,” and the caption of such a case generally reads “United States *ex rel.* \_\_\_\_\_.” *See id.* at 603.

<sup>14</sup> *See generally* Stephanie L. Trunk, 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*, 71 Geo. Wash. L. Rev. 159, 161 (2003) (describing the financial impact of prosecutions under the Act on health care providers).

<sup>15</sup> For example, a health care provider who is found liable under the Act may be excluded from participating in the Medicare or Medicaid programs. 42 U.S.C. §1320c-5 (Supp. 1998). For most health care providers, exclusion from these programs signals the end of their existence.

<sup>16</sup> *See* 31 U.S.C. §3730(b).

case under the Act can be as long as ten years.<sup>17</sup> Even once a case is filed in court, the United States can request to keep it under seal for long periods of time, in renewable increments, at the discretion of the court.<sup>18</sup> Additionally, along with a civil prosecution initiated under the Act, the United States often initiates a parallel criminal proceeding based on the same conduct, warranting a stay of the Act's civil proceedings.<sup>19</sup> It is also not uncommon for the defendant to declare bankruptcy while proceedings under the Act are pending, triggering an automatic stay of the proceedings in accordance with federal bankruptcy law.<sup>20</sup>

Given the uncommonly long time periods that a *qui tam* relator's cause of action under the Act can remain in limbo, both prior to filing and after it is filed in court, the prospect of a relator's death during the pendency of the action is very real.<sup>21</sup> When the relator dies while the case remains pending, and the United States has declined to intervene in the case, the court must decide whether the action survives the relator's death. The United States Supreme Court has issued conflicting guidance about the

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<sup>17</sup> A civil action under the Act must be brought within six years from the date of the violation, or three years from when the facts material to the right of action are known or reasonably should have been known by the United States, with an outside limit of ten years after the date on which the violation was committed, whichever is later. 31 U.S.C. §3731(b)(2) (2000).

<sup>18</sup> 31 U.S.C. §3730(b)(3) (2000). It is not uncommon for cases to remain under seal for many months, and sometimes many years. *See, e.g.*, In re Cardiac Devices Litigation, 221 F.R.D. 318, 323-327 (D. Conn. 2004) (*Qui tam* case under the Act was filed against numerous hospitals in March 1994. The Government requested 16 extensions of the seal, the longest being for 3 years. The case was not completely unsealed until 2002); United States *ex rel.* Costa v. Baker & Taylor, 955 F. Supp. 1188 (N.D. Cal. 1997) (case remained sealed for 18 months).

<sup>19</sup> 31 U.S.C. §3730(c)(4) (2000). In such circumstances, stays may be sought by either the Government, in order to take advantage of the collateral estoppel effect of a criminal conviction in a subsequent civil case, or by the defendant, to avoid having to assert Fifth Amendment rights against self-incrimination during questioning in the civil matter. *See* 2B OESE, *supra* note 4, §5.03[A].

<sup>20</sup> 11 U.S.C. §101 et seq. (2000). There is a split of authority amongst the federal courts regarding whether an exception to the automatic stay provisions of federal bankruptcy law applies to cases brought under the Act. *See* 2 BOESE, *supra* note 4, §5.03[C].

<sup>21</sup> *See, e.g.*, United States *ex rel.* Harrington v. Sisters of Providence in Oregon, 209 F. Supp.2d 1085 (D. Or. 2002).

“punitive”<sup>22</sup> or “remedial”<sup>23</sup> nature of the Act; the distinction that is the basis for the historical test for survivability or abatement of a federal statutory cause of action. Therefore, lower courts faced with this question have reached conflicting conclusions.<sup>24</sup>

Part II of this article discusses the current version of the Act and its evolution from its original 1863 version. Part III discusses the historical common-law test for determining whether an action based on a federal statute survives or abates upon the plaintiff’s death. It then discusses the special problems of applying this test to the Act, caused by the dual remedial and penal nature of the Act, and the complex relationship between the *qui tam* relator and the Government as plaintiffs in cases brought under the Act. Part IV discusses the unique provisions of the Act that limit the courts’ subject matter jurisdiction in certain cases, and the effect those provisions have on the survivability analysis. Part V proposes adopting a simpler, policy-based test for survivability of a *qui tam* action under the Act, and explains why under this test such cases should survive the death of a relator, except in the rare case where the court cannot establish its subject matter jurisdiction, or the defendant is so severely prejudiced by the absence of the relator that principles of federal civil procedure require that the case be dismissed.

## **II. THE CIVIL FALSE CLAIMS ACT AND ITS *QUI TAM* PROVISIONS**

### **A. The Current Version of the Civil False Claims Act**

The current version of the civil False Claims Act [hereinafter, “the Act”] makes liable any person who knowingly presents, or causes to be presented, a false or fraudulent

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<sup>22</sup> Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 784-785 (2000).

<sup>23</sup> Cook County, Illinois v. United States *ex rel.* Chandler, 538 U.S. 119, 130-131 (2003).

<sup>24</sup> See Harrington, 209 F. Supp.2d 1085 (holding that the *qui tam* relator’s cause of action abates upon his death); *contra* United States *ex rel.* Neher v. NEC, 11 F.3d 136 (11<sup>th</sup> Cir. 1994) (holding that the *qui tam* relator’s cause of action survives his death).

claim to the United States for payment or approval.<sup>25</sup> The Act also imposes liability for making false records or statements designed to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States.<sup>26</sup> The “knowledge” required for violation of the Act includes actual knowledge of the false information, deliberate ignorance of the truth or falsity of the information, and reckless disregard of the truth or falsity of the information.<sup>27</sup> No specific intent to defraud is required.<sup>28</sup> A person found liable under the Act is subject to treble damages and penalties of up to \$10,000 per claim.<sup>29</sup>

A private person (the *qui tam* relator) may bring a civil action for violation of the Act, for the person and for the United States [hereinafter, the “Government”].<sup>30</sup> The relator must serve the complaint and a “written disclosure of substantially all material evidence and information the person possesses” on the Government.<sup>31</sup> The complaint must be filed *in camera*, under seal, and remains under seal for at least 60 days, subject to the Government’s motions to extend the seal for good cause shown.<sup>32</sup> While the case remains under seal, the Government is supposed to investigate the claims and the evidence revealed in the disclosure statement, and determine whether it wants to intervene in the action and prosecute the defendant under its own name.<sup>33</sup> If the Government declines to intervene, the relator may pursue the case without the

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<sup>25</sup> 31 U.S.C. §3729(a) (2000).

<sup>26</sup> *Id.* The Act’s prohibitions are very broad, and encompass many different types of claims to the United States. For a good categorization of the contexts in which the majority of cases under the Act arise, see generally 1 BOESE, *supra* note 4, §1.06.

<sup>27</sup> 31 U.S.C. §3729(b) (2000).

<sup>28</sup> *Id.*

<sup>29</sup> 31 U.S.C. §3730(a) (2000). The amount of penalties was increased pursuant to the Debt Collection Improvement Act of 1996, 28 U.S.C. §2461 (2000), to a minimum of \$5,500 and a maximum of \$11,000, effective September 29, 1999. 28 C.F.R. §85.3(9) (2000).

<sup>30</sup> 31 U.S.C. §3730(b) (2000).

<sup>31</sup> 31 U.S.C. §3730(b)(2) (2000).

<sup>32</sup> *Id.*

<sup>33</sup> United States *ex rel.* Pilon v. Martin Marietta Corp., 60 F.3d 995, 998 (2d Cir. 1995).

Government.<sup>34</sup> If the relator proceeds alone, the relator is entitled to receive between twenty-five and thirty percent of the proceeds or settlement of the action.<sup>35</sup> If the Government intervenes, the relator's share is between fifteen and twenty-five percent of the proceeds or settlement.<sup>36</sup>

#### B. The Evolution of the Act

The original False Claims Act was enacted in 1863, in response to alleged fraud and waste in government contracts between the Union army and unscrupulous private contractors during the Civil War.<sup>37</sup> It contained a *qui tam* provision from its inception.<sup>38</sup> *Qui tam* statutes were imported from England, where Blackstone characterized them as penal statutes, designed to redress wrongs to the public.<sup>39</sup> Because the *qui tam* relator sues on behalf of the Government, the relator can be looked upon as an advocate of the public interest, taking the place of public officials who would otherwise advocate the public interest.<sup>40</sup> At the time of the original Act, the United States Attorney General had little assistance in carrying out his responsibilities, and the *qui tam* action was a popular means of counteracting the lack of an effective public police force for investigating and dealing with public wrongs.<sup>41</sup> At the time of enactment, the False Claims Act authorized

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<sup>34</sup> 31 U.S.C. §3730(b)-(c) (2000).

<sup>35</sup> 31 U.S.C. §3730(d)(2).

<sup>36</sup> 31 U.S.C. §3730(d)(1).

<sup>37</sup> 1 BOESE, *supra* note 4, §1.01[A].

<sup>38</sup> Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863). The original Act authorized an award to the relator of one-half of the amount of a final judgment against the defendant. *Id.*

<sup>39</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*161.

<sup>40</sup> J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C.L. Rev. 539, 551 (2000).

<sup>41</sup> 1 BOESE, *supra* note 4, §1.01[A].

remedies of double damages, penalties of \$2,000 per false claim, and criminal sanctions.<sup>42</sup>

Despite the potential for large monetary awards against violators of the statute, early case law characterized the Act as remedial, but designed to protect the public interest. In *United States v. Griswold*,<sup>43</sup> the trial court stated: “The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly.”<sup>44</sup>

During the 1930s and early 1940s, the Government’s reach into the economic life of the nation grew longer.<sup>45</sup> More financial dealings between the Government and private business created more opportunities for fraud and whistle blowing. Enterprising *qui tam* relators began to use information in publicly available criminal indictments to initiate civil cases under the Act.<sup>46</sup> In the landmark case of *United States ex rel. Marcus v. Hess*,<sup>47</sup> the *qui tam* relator merely copied a publicly available criminal indictment into a civil complaint and filed it under the then-current version of the Act.<sup>48</sup> His complaint requested half of the Government’s proceeds from a civil judgment based on the complaint, although the relator brought no new information to the Government.<sup>49</sup> The Government argued for dismissal, on the grounds that such cases served no public purpose, as they added nothing to the Government’s preexisting knowledge of a

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<sup>42</sup> Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863) (current version at 31 U.S.C. §3729 *et. seq.* (2000) (civil), and Title 18 Sections 286, 287, 1001, and 1002 of the United States Code (criminal)).

<sup>43</sup> 24 F. 361 (D. Or. 1885), *aff’d*, 30 F. 762 (1887).

<sup>44</sup> *Id.* at 366. Despite the apparent perception of the judiciary that the federal treasury was being attacked on all sides, very few cases were brought under the 1863 version of the Act. See 1 BOESE, *supra* note 4, §1.01[B].

<sup>45</sup> 1 BOESE, *supra* note 4, §1.01[B].

<sup>46</sup> *Id.*

<sup>47</sup> 317 U.S. 537 (1943).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

particular fraud, and served only to require the Government to share any recovery of fraudulent gains with a relator who had added no value to the case.<sup>50</sup> The United States Supreme Court rejected this argument, based on the text of the Act, which did not limit rewards to relators who provided new information to the government.<sup>51</sup>

The *Marcus* decision prompted the Attorney General of the United States to request repeal of the *qui tam* provisions of the Act.<sup>52</sup> Repeal legislation passed the House of Representatives, but the provisions were reinstated by the Senate.<sup>53</sup> Rather than repeal the *qui tam* provisions all together, to address the seeming ability of relators to enrich themselves under the Act with no concomitant benefit to the public, Congress amended the Act in 1943 to absolutely bar the federal courts from having jurisdiction over *qui tam* suits based on allegations known to the government before the suit was filed.<sup>54</sup> This jurisdictional bar remained in place even if the relator was the original source of the government's information.<sup>55</sup>

Although the 1943 amendments may have had the desired effect of emphasizing the remedial nature of the Act, the courts interpreted them in such a way as to have the undesired effect of chilling relators' use of the statute to assist the United States in detecting fraud and waste in government contracting.<sup>56</sup> In 1986, in response to Congress' perception that "[F]raud permeates generally all Government programs ranging from welfare and food stamp benefits, to multibillion dollar defense procurements, to crop

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 546.

<sup>52</sup> S. Rep. 99-345 at 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276.

<sup>53</sup> *Id.*

<sup>54</sup> 31 U.S.C. §232-235 (1976) (current version at 31 U.S.C. §§3729-3733).

<sup>55</sup> 1 BOESE, *supra* note 4, §1.02. The original Senate amendments allowed a relator who was the original source of the Government's information to proceed even if the information was already in the possession of the Government, but the resulting conference report dropped this clause. S. Rep. 99-345 at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277.

<sup>56</sup> *See* S. Rep. No. 99-345 at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

subsidies and disaster relief programs,”<sup>57</sup> Congress amended the Act, intending to make it easier and more attractive for relators to bring private suits under the Act.<sup>58</sup> The most notable changes were: (1) A clarification that specific intent to defraud was not required to establish a violation of the Act, and that acting in deliberate ignorance of the fraud or with reckless disregard for the truth of the information in a claim provided to the Government was sufficient to violate the Act;<sup>59</sup> (2) clarifying that the burden of proof for a violation of the Act was the standard burden for civil cases, *i.e.*, a “preponderance of the evidence;”<sup>60</sup> (3) lengthening the statute of limitations in certain cases;<sup>61</sup> (4) changing the remedy for violating the Act from double to treble damages and significantly increasing the money penalties available under the Act;<sup>62</sup> and (5) expanding the rights of *qui tam* relators and increasing their financial incentives to bring suit under the Act.<sup>63</sup>

Despite these changes to the Act, all of which increased the harshness of the potential remedy for violating the Act, and many of which enhanced the ability and incentives for private persons to benefit from bringing violations of the Act to the Government’s attention, Congress repeatedly emphasized the public yet remedial purpose of the Act when explaining the amendments.<sup>64</sup> Nowhere does Congress state that it

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<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 4-6.

<sup>59</sup> *Id.* at 7; *contra* United States v. Aerodex, Inc., 469 F.2d 1003 (5<sup>th</sup> Cir. 1972).

<sup>60</sup> S. Rep. No. 99-345 at 30-31 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5295-96; *contra* United States v. Ueber, 299 F.2d 310 (6<sup>th</sup> Cir. 1962).

<sup>61</sup> S. Rep. No. 99-345 at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

<sup>62</sup> 31 U.S.C. §3729(a) (2000). Despite the seemingly large increase in money penalties made by the 1986 Amendments to the Act (from \$2,000 to a \$10,000 maximum), according to the Congressional Research Service, the buying power of \$2,000 in 1863 was actually close to \$18,000 in 1986. H. R. 99-660 at 17 (1986). Thus, this was not really an increase as much as a cost of living adjustment, and an incomplete one at that.

<sup>63</sup> *See* 31 U.S.C. §3730(c)(1) (2000); S. Rep. No. 99-345 at 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-89.

<sup>64</sup> *See, e.g.*, S. Rep. 99-562 at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266 (stating the False Claims Reform Act’s purpose “is to enhance the Government’s ability to recover losses sustained as a

intended to redress individual wrongs via the Act's *qui tam* enforcement scheme.<sup>65</sup> The public interest purpose of *qui tam* actions under the amended Act has been recognized by a majority of courts that have interpreted the amended Act.<sup>66</sup>

Nevertheless, since enactment of the 1986 Amendments, not every court has agreed that the Act serves only a public purpose. In *United States ex rel. Neher v. NEC Corp.*,<sup>67</sup> the Eleventh Circuit Court of Appeals cited the fact that a *qui tam* relator may suffer substantial emotional and financial harm due to his unwitting involvement in fraud, or due to his status as a relator.<sup>68</sup> Citing these examples of possible individual harms suffered by a relator, the *Neher* court held that the FCA's *qui tam* provisions are intended to redress wrongs suffered by individual relators, and not the general public.<sup>69</sup> The *Neher* court went on to hold that because the *qui tam* provisions of the Act are designed to redress individual wrongs suffered by relators, they are remedial as to the relator, and survive the relator's death.<sup>70</sup> The *Neher* court used the historical common-law test for survivability of a federal statutory cause of action to reach this result.<sup>71</sup>

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result of fraud against the Government.”); *id* at 6. (describing the Act as “a civil remedy designed to make the Government whole for fraud losses”).

<sup>65</sup> The 1986 amendments created a new cause of action against an employer who retaliates against an employee because the employee aided in a prosecution under the Act. 31 U.S.C. §3730(h) (2000). This cause of action contemplates that a successful employee-plaintiff has suffered an individual wrong, because the employee is entitled to “all relief necessary to make the employee whole” as a remedy, including reinstatement, two times the amount of back pay owed plus interest, and compensation for special damages. *Id.* The double back pay damages of Section 3730(h) have been held to be remedial, rather than punitive. *See, e.g.,* *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp.2d 1092, 1109 (C.D. Cal. 2001); *Wilkins v. St. Louis Housing Authority*, 198 F. Supp.2d 1080, 1087-88 (E.D. Mo. 2001). This supports interpreting the anti-retaliation provision of the Act as redressing an individual wrong.

<sup>66</sup> *See, e.g.,* *United States v. Northrop Corp.*, 59 F.3d 953, 968 (9<sup>th</sup> Cir. 1995).

<sup>67</sup> 11 F.3d 136 (11<sup>th</sup> Cir. 1994).

<sup>68</sup> *Id.* at 138.

<sup>69</sup> *Id.* The *Neher* court appeared to be construing the pre-1986 version of the Act, which the United States had characterized as “remedial” in *United States v. Bornstein*, 423 U.S. 303, 315 (1976). The pre-1986 version of the Act also did not contain a specific remedy for employee-whistleblowers who experience retaliation as a result of their whistleblowing activities. *See* 31 U.S.C. §3730(h) (2000).

<sup>70</sup> *Neher*, 11 F.3d at 138. The *Neher* court did not consider the possibility that the anti-retaliation provisions of the Act, rather than the *qui tam* provisions, were designed to redress individual wrongs.

<sup>71</sup> *Id.* at 136-137.

### III. SURVIVABILITY OF A *QUI TAM* CASE UNDER THE ACT

#### IV.

##### A. The Historical Federal Common-Law Test

The survivability of a cause of action created by federal statute is determined by federal common law, unless there is an expression of contrary intent in the statute itself.<sup>72</sup> There is no expression of contrary intent in the Act.<sup>73</sup> Therefore, if we use the historical test, we must look to federal common law to determine whether a cause of action under the Act survives the relator's death.

Under the historical federal common-law test for survivability, actions that are “penal” abate upon the death of a plaintiff, while “remedial” actions survive.<sup>74</sup> At common law, a statute giving a private right of action against a wrongdoer was truly “penal” only when it imposed punishment for an offense committed against the sovereign or the state.<sup>75</sup> Statutes that created a private right of action against a wrongdoer for a party who was not injured by the wrongdoer (such as a *qui tam* relator) were characterized as “penal” in some ways, but not “strictly” penal in the traditional sense.<sup>76</sup>

As the United States Supreme Court explained:

The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be ‘penal against the hundred, but certainly remedial as to the sufferer.’ *Hyde v. Cogan* 2 Doug. 699, 705, 706. A statute giving the right to recover back money lost at gaming and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer.<sup>77</sup>

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<sup>72</sup> *Sullivan v. Associated Billposters and Distributors, et al.*, 6 F.2d 1000, 1004 (2d Cir. 1925).

<sup>73</sup> *Neher*, 11 F.3d at 137; *United States ex rel. Harrington v. Sisters of Providence in Oregon*, 209 F. Supp.2d 1085, 1086 (D. Or. 2002).

<sup>74</sup> *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1883).

<sup>75</sup> *Huntington v. Atrill*, 146 U.S. 657, 667-668 (1892); 3 WILLIAM BLACKSTONE, COMMENTARIES \*2.

<sup>76</sup> *Huntington*, 146 U.S. at 667-668.

<sup>77</sup> *Id.* at 667; *see also Schreiber*, 110 U.S. at 79 (characterizing as punitive a suit for statutory penalties and forfeitures for copyright infringement, where the deceased plaintiff had not sustained any damage due to the alleged copyright infringement).

Statutes that provided for recovery to a party who was injured by the defendant's conduct were considered "remedial," and thus survived the death of the plaintiff, while statutes that provided for recovery to an uninjured party, even if not the public, were considered "penal" in some sense.<sup>78</sup> With regard to common-law claims that were not based on statutes, suits based on claims that were considered "personal" to the plaintiff, such as tort actions for personal injuries, abated upon the death of the plaintiff, while suits based on property or contract rights survived the plaintiff.<sup>79</sup>

The difficulty with applying this approach to determining the survivability of a *qui tam* action under the Act arises from the complex nature of the statute itself, in addition to the complex relationship between the relator and the Government. The statute is designed to compensate the public (the Government) for losses sustained as a victim of fraud, and thus, fits the historical definition of a "penal" statute.<sup>80</sup> Nevertheless, the statute is remedial in that it authorizes recovery to an injured party.<sup>81</sup> The difficulty arises from the fact that the injured party *is* the public, against whom remedies for offenses were traditionally considered punitive, and therefore, not survivable. The Act codifies a remedy for the common-law tort of fraud, which was traditionally a "personal" claim of a plaintiff that does not survive death.<sup>82</sup> Nevertheless, when the plaintiff is a *qui tam* relator, the injury asserted is the injury of the Government, a party that does not die with the relator.<sup>83</sup> Even where the Government has declined to intervene in the case, it

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<sup>78</sup> *Huntington*, 145 U.S. at 667.

<sup>79</sup> *Almour v. Pace*, 193 F.2d 699, 700 n.2 (D.C. Cir. 1951).

<sup>80</sup> S. Rep. No. 99-345 at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.

<sup>81</sup> *Id.*

<sup>82</sup> *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1883).

<sup>83</sup> *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

remains a party, with the right to have all pleadings and depositions transcripts served on it by request, and it may intervene at a later date “upon a showing of good cause.”<sup>84</sup>

### 1. The Dual “Remedial” and “Penal” Nature of the Act

The dual remedial and penal nature of the Act is best illustrated by a series of recent United States Supreme Court decisions on who can be a defendant under the Act. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,<sup>85</sup> the United States Supreme Court was asked to decide whether states were “persons” who could be sued under the Act.<sup>86</sup> In holding that as a matter of statutory construction, states were not persons who could be sued under the Act, the Court described the Act as “a federal law designed to benefit ‘the citizens of the United States, not the citizens of any individual State that might violate the [statute]’.”<sup>87</sup> Despite the fact that this purpose is consistent with a finding that the Act is remedial with regard to the Government, the Court’s opinion in *Stevens* muddied the waters regarding the punitive versus remedial nature of the Act with regard to relators. As part of its holding, the *Stevens* Court, without any historical analysis or the application of any test for distinguishing “punitive” civil actions from “remedial” civil actions, characterized the treble damages and civil penalty provisions of the Act as “punitive.”<sup>88</sup> The Court did not distinguish between the “punitive” purposes of the Act’s remedies as applied by a *qui tam* relator versus their

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<sup>84</sup> 31 U.S.C. §3730(c)(4) (2000). Out of 3,954 *qui tam* cases filed through September 30, 2002, the Government had intervened in only 718 cases as of December 16, 2002. 2 BOESE, *supra* note 4, Appendix H-1. These statistics indicate that it is uncommon for the Government to intervene, either at the inception of the case or later for “good cause.”

<sup>85</sup> 529 U.S. at 786.

<sup>86</sup> *Id.* at n.15.

<sup>87</sup> *Id.*, quoting *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); see also *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003), quoting S. Rep. No. 99-345 at 2 (1986), reprinted in 1986 U.S.C.C.A.N. 5266 (stating that the basic purpose of the 1986 amendments was to make the Act a “more useful tool” to combat fraud against the *Government*) (emphasis added).

<sup>88</sup> *Stevens*, 529 U.S. at 784-785. The Court used the punitive characterization of damages under the Act to bolster its argument that Congress did not intend to include the states, which are immune from punitive damages at common law, in the definition of “persons” who could be liable under the Act. *Id.*

“remedial” purposes as applied by the United States, although long-standing precedent permitted the Court to make such a distinction.<sup>89</sup>

After *Stevens*, lower federal courts were left with little guidance on how to characterize the Act for purposes of applying it to cases where the defendant was traditionally immune from punitive damages, and the Government had declined to intervene in the case. It is not surprising that lower courts came to conflicting conclusions regarding the applicability of the Act to municipalities, that engage in a great deal of contracting with the Government, yet are traditionally immune from punitive damages.<sup>90</sup> It is also not surprising that a federal court faced with the specific question of survivability of a relator’s action struggled to answer the question consistent with *Vermont Agency* and the historical common-law test. In *United States ex rel. Harrington v. Sisters of Providence in Oregon*,<sup>91</sup> the only reported case since *Stevens* to decide the question of whether a cause of action brought by a *qui tam* relator under the Act survives the relator’s death, the court attempted to apply the traditional common-law test of “remedial” versus “punitive” to the question. Trying to reconcile legislative history indicating that the Act was primarily meant to be remedial with *Vermont Agency*’s characterization of the current version of the Act as “punitive,” the *Harrington* court held that even if the Act could still be considered remedial after *Vermont Agency*, because *Harrington* had not alleged personal or substantial individual harm, the claim was not

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<sup>89</sup> See, e.g., *Huntington v. Atrill*, 146 U.S. 657, 668-669 (1892).

<sup>90</sup> Compare *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7<sup>th</sup> Cir. 2002), *aff’d sub nom. Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, (2003) (holding that municipalities, which are presumed to be immune from punitive damage actions, could be sued under the Act), with *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3<sup>d</sup> Cir. 2002) and *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 485 (5<sup>th</sup> Cir. 2001) (holding that municipalities cannot be sued under the Act because the Act imposes punitive damages).

<sup>91</sup> 209 F.Supp.2d 1085 (D. Or. 2002).

remedial as to him, and did not survive his death.<sup>92</sup> The *Harrington* court did not consider the effect of the United States Supreme Court’s holding in *Vermont Agency* that the injured party was the Government, which survives the relator’s death.<sup>93</sup>

Shortly thereafter, in *Cook County, Illinois v. United States ex rel. Chandler*<sup>94</sup> the United States Supreme Court attempted to clarify its statements regarding the punitive versus remedial nature of the treble damages provisions of the Act, at least for purposes of applying the Act to municipalities that are immune from punitive damages at common law. The *Chandler* Court characterized the Act’s treble damages as having a “compensatory side, serving remedial purposes in addition to punitive objectives.”<sup>95</sup> The Court specifically acknowledged the role the presence of a *qui tam* relator plays in characterizing the Act’s damages as “compensatory,” retreating from its prior statement in *Vermont Agency* that treble damages under the Act were “punitive.”<sup>96</sup> The Court re-emphasized that the purpose of the statute was public, to compensate the Government, rather than to redress a *qui tam* relator’s individual wrong.<sup>97</sup>

## 2. The Modern Formulation of the Historical Test of Survivability

In *Murphy v. Household Finance Corp.*,<sup>98</sup> the United States Court of Appeals for the Sixth Circuit articulated a test that is widely use for characterizing a federal statutory cause of action as “penal” or “remedial.”<sup>99</sup> The *Murphy* test was created from earlier

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<sup>92</sup> *Id.* at 1088-1089.

<sup>93</sup> *Id.*

<sup>94</sup> 538 U.S. 119 (2003).

<sup>95</sup> *Id.* at 130; *see also*, *United States v. Mackby*, 261 F.3d 821, 831 (9<sup>th</sup> Cir. 2001) [hereinafter, *Mackby I*] (holding that the Act’s treble damages provision, in combination with the Act’s statutory penalties, is not “solely” remedial).

<sup>96</sup> *Chandler*, 538 U.S. at 131.

<sup>97</sup> *Id.*

<sup>98</sup> 560 F.2d 206, 209 (6<sup>th</sup> Cir. 1977).

<sup>99</sup> The United States Supreme Court did not cite to the *Murphy* test in either *Stevens*, 529 U.S. 765, or *Chandler*, 538 U.S. 119, when discussing the penal and remedial nature of the Act. Nevertheless, in *United*

judicial pronouncements of the factors a court should consider in determining the penal versus remedial nature of a federal statute.<sup>100</sup> Under the *Murphy* test, a court looks at: (1) Whether the purpose of the statute is to redress individual wrongs or more general wrongs to the public;<sup>101</sup> (2) whether recovery under the statute runs to the harmed individual, or to the public;<sup>102</sup> and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.<sup>103</sup> Although this test has not explicitly been adopted by the United States Supreme Court, its elements are rooted in long-standing precedents discussing what a court should consider when determining the “penal” or “remedial” nature of a statute.<sup>104</sup> Although the *Murphy* test has both a historical pedigree and a degree of flexibility, because of the dual nature of the Act and the differing interests and rights of the two parties deemed to be plaintiffs in a *qui tam* case, analyzing the Act under each of the test’s prongs does not yield a satisfactory answer to the question of whether a *qui tam* case survives the death of the relator.

a. The Purpose of the Act

As illustrated in Section II (B), *supra*, the text and the legislative history of the 1986 Amendments do little to clear up the confusion regarding the punitive versus remedial nature of the Act.<sup>105</sup> Historically, breaches of public rights and duties, which

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States *ex rel.* Neher v. NEC, 11 F.3d 136, 137 (11<sup>th</sup> Cir. 1994), the court used the *Murphy* test to determine survivability of a *qui tam* case under the Act.

<sup>100</sup> See *Murphy*, 560 F.2d at 208-209, quoting *Huntington v. Atrill*, 146 U.S. 657 (1892), and earlier cases cited therein at length.

<sup>101</sup> *Huntington*, 146 U.S. at 668; *Murphy*, 560 F.2d at 209; 3 WILLIAM BLACKSTONE, COMMENTARIES \*161.

<sup>102</sup> *Murphy*, 560 F.2d at 209; *Read v. Stewart*, 129 Mass. 407, 410 (1880).

<sup>103</sup> *Murphy*, 560 F.2d at 209; see also, *Stevenson v. Stoufer*, 21 N.W.2d 287, 289 (Iowa 1946) (recovery of \$1750 based on overcharges totaling \$26.25 under the Emergency Price Control Act of 1942 indicated that the cause of action created by the statute was penal, rather than remedial).

<sup>104</sup> See, e.g., *Huntington*, 146 U.S. at 668; *Read*, 129 Mass. at 410 (1880).

<sup>105</sup> This confusion regarding the punitive or remedial nature of statutory treble damages provisions is not unique to the Act. It also appears in construction of the federal antitrust laws and their treble damages provisions. See 54 AM. JUR. 2d *Monopolies and Restraints of Trade* §393 (2004); *Cinnamon v. Abner A. Wolf, Inc.*, 215 F. Supp. 833, 837 (E.D. Mich. 1963).

affect the whole community, are “distinguished by the harsher appellation of crimes and misdemeanors,” and sanctions for such breaches are considered punitive.<sup>106</sup> Given that the historical purpose of the Act, including its *qui tam* provisions, was to redress and deter general wrongs to the public, and the strong legislative history indicating that the 1986 Amendments to the Act have, first and foremost, the purpose of redressing general wrongs to the public, one could argue that the Act should be considered punitive, despite the continual insistence of Congress that its purpose is remedial. The traditional “punitive” versus “remedial” distinction simply does not fit a federal statute designed to redress financial losses to the Government, as well as to deter violations of public rights and duties. It does not provide guidance for a court to determine whether such a statute can or should be considered to redress an “individual” harm, albeit a harm to the Government, such that a cause of action brought under the statute should survive the relator, who has not suffered personal harm.

b. The Relationship Between the Relator and the Government and the Concept of a “Harmed Individual.”

The relationship between the relator and the United States has been described as one of “mandated cooperation.”<sup>107</sup> The Act contemplates the relator working with the Government, but the Government exercising significant control over the case.<sup>108</sup> When the United States intervenes in the action, it has the power to dismiss the action over the objections of the relator,<sup>109</sup> settle the action over the objections of the relator,<sup>110</sup> and

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<sup>106</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*2.

<sup>107</sup> Pamela H. Bucy, *Private Justice and the Constitution*, 69 Tenn. L. Rev. 939, 949 (2002).

<sup>108</sup> *Id.*

<sup>109</sup> 31 U.S.C. §3730(c)(2)(A) (2000).

<sup>110</sup> 31 U.S.C. §3730(c)(2)(B) (2000).

restrict the participation of the relator in the action.<sup>111</sup> Even when the United States declines to intervene in the case, the United States may move to dismiss the relator's case, if it believes that pursuing the case is not in the Government's best interests.<sup>112</sup> This intricate and unique relationship between the relator and the Government, where the two parties who are supposedly aligned in interest disagree about the merits of and/or the methodology for pursuing the case, is one of the factors that makes application of the historical test for survivability of a federal statutory cause of action unworkable with regard to *qui tam* actions brought under the Act.

A relator sues on behalf of the United States *as well as* himself.<sup>113</sup> In *Stevens*,<sup>114</sup> the United States Supreme Court unequivocally stated that this language means that the relator is not merely a mechanism of enforcement, as had been suggested by some lower federal courts.<sup>115</sup> For the first time, the Court stated that a *qui tam* relator is a partial assignee of the United States' injury in fact, with standing to assert a claim on his own

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<sup>111</sup> 31 U.S.C. §3730(c)(2)(C) (2000).

<sup>112</sup> See *Swift v. United States*, 318 F.3d 250, 251-252 (D.C. Cir.), *cert. denied*, 539 U.S. 944 (2003); *United States ex rel. Sequoia Orange Co. v. Sunland Packing Co.*, 151 F.3d 1139, 1145 (9<sup>th</sup> Cir. 1998); *Juliano v. Federal Asset Disposition Ass'n.*, 736 F. Supp. 348, 351 (D.D.C. 1990), *aff'd*, 959 F.2d 1101 (D.C. Cir. 1992). Although cooperation between the relator and the Government is likely and expected when the United States intervenes in the action and prosecutes the case, this cooperative atmosphere often evaporates when the United States declines to intervene, or when the interests of the United States and the interests of the relator do not coincide. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 n.5 (1997). Case law is replete with references to conflicts between the relator and the United States when the United States has declined to intervene in a case under the Act, and the relator has taken action of which the United States does not approve. See, e.g., *Schimmels and United States v. Schimmels*, 127 F.3d 875 (9<sup>th</sup> Cir. 1997) (United States attempts to escape the outcome of the relator's adversary proceeding in bankruptcy against a defendant under the Act after it declined to intervene in the relator's proceeding); *United States ex rel. Killingsworth v. Northrup*, 25 F.3d 715 (9<sup>th</sup> Cir. 1994) (United States objects to settlement of case brought by relator under the Act, alleging collusion between the relator and the defendant to deprive the United States of its fair share of the settlement). Likewise, relators often claim that the United States does not represent their interests in conjunction with cases brought under the Act. See *Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765 (9<sup>th</sup> Cir. 1997) (relator alleges that his interests are not adequately represented by the United States in an action collateral to a claim brought by the relator under the Act, because the United States had not yet decided whether to intervene in the relator's action).

<sup>113</sup> See *Schimmels*, 127 F.3d at 877 n.1 (emphasis added).

<sup>114</sup> 529 U.S. 765 (2000).

<sup>115</sup> See, e.g., *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 968 (9<sup>th</sup> Cir. 1995); *United States ex rel. Semtner v. Medical Consultants, Inc.*, 170 F.R.D. 490, 494 (W.D. Okla. 1997).

behalf, not merely as a tool of the Government.<sup>116</sup> Although the Court’s characterization of the relator as a partial assignee assures the relator’s status as something more than a mechanism of enforcement, in so holding, the Supreme Court expressly rejected the idea that a *qui tam* relator alleges a personal injury sufficient to confer constitutional standing to bring a claim under the Act.<sup>117</sup> According to the Court, the *qui tam* relator has no personal injury even if alleging having suffered personal harm or difficulty as a result of the defendant’s actions.<sup>118</sup> The Court thereby rejected a concept that was embraced by some lower courts to explain why the relator had constitutional standing to bring suit.<sup>119</sup>

The characterization of the relationship between the *qui tam* relator and the United States also affects the characterization of the recovery that the *qui tam* relator receives. As the *Vermont Agency* Court stated, if the relator is merely a statutorily designated agent of the United States, “the relator’s bounty is simply the fee he receives *out of the United States’* recovery for filing and/or prosecuting a successful action on behalf of the Government.”<sup>120</sup> If this was the case, and the relator’s standing to sue in a *qui tam* case brought under the Act is merely as an agent of the United States, the bounty a successful relator received under the Act should have the same character as the United States’ recovery. If treble damages and penalties of up to \$11,000 per claim under the

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<sup>116</sup> *Stevens*, 529 U.S. at 773.

<sup>117</sup> *Id.* Because a *qui tam* relator represents the Government’s interests, several courts have held that a *qui tam* relator cannot pursue a *qui tam* action *pro se*. See *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7<sup>th</sup> Cir. 2004); *United States v. Onan*, 190 F.2d 1 (8<sup>th</sup> Cir. 1951). This holding appears to ignore the United States Supreme Court’s recognition in *Stevens* that the according to the Act, the relator sues on behalf of himself as well as the government. See n.102, *supra*. Indeed, the *Lu* court did not even mention *Stevens* in its opinion. Perhaps Judge Posner was influenced to dismiss the case outright without examining the soundness of holding that a *pro se* relator cannot bring a case in light of *Stevens* by the fact that he thought the complaint was “incoherent, even crazy.” *Lu*, 368 F.3d at 776.

<sup>118</sup> *Stevens*, 529 U.S. at 773-774.

<sup>119</sup> See, e.g., *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 739 (3d Cir. 1997); *United States ex rel. Kelly v. Boeing*, 9 F.3d 743, 749 (9<sup>th</sup> Cir. 1993); *United States ex rel. Neher v. NEC Corp.*, 11 F.3d 136, 137 (11<sup>th</sup> Cir. 1993); *United States ex rel. Harrington v. Sisters of Providence in Oregon*, 209 F. Supp.2d 1085 (D. Or. 2002).

<sup>120</sup> *Stevens*, 529 U.S. at 772 (emphasis in original).

Act are punitive when there is no *qui tam* relator, then they should be punitive when collected through the actions of the *qui tam* relator as an agent. If they are remedial, then they should be remedial whether collected via a *qui tam* relator agent or by the United States acting alone.

As the *Stevens* Court recognized, characterizing the *qui tam* relator as an agent of the United States reads the Act's language authorizing a person to bring a civil action under the Act "for the person" as well as for the United States Government out of the Act, and therefore the Act.<sup>121</sup> Therefore, the Act should not be so construed.<sup>122</sup> By characterizing the *qui tam* relator as a "partial assignee" of the United States, the Court remained true to the text of the statute, and avoided reading this provision out of the statute, in accordance with the tenets of statutory construction.

Nevertheless, the Court's characterization of the relator as a "partial assignee" makes application of the second prong of the *Murphy* formulation of the common-law test to determine survivability of a *qui tam* action under the Act unworkable. An assignee typically stands in the shoes of the assignor with respect to both the injury and the remedy.<sup>123</sup> But the typical assignee has paid some consideration to the assignor for the assignment,<sup>124</sup> which is not the case for *qui tam* relators. Furthermore, it is well-established that a "claim" cannot simply refer to the right to bring suit.<sup>125</sup> Congress

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<sup>121</sup> *Stevens*, 529 U.S. at 772.

<sup>122</sup> See *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") quoting *Duncan v. Walker*, 533 U.S. 167 (2001).

<sup>123</sup> *Connecticut v. Physicians Health Services of Connecticut, Inc.*, 287 F.3d 110, 117 (2d Cir. 2002).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

cannot grant standing to party based on only a public interest in the proper administration of the laws.<sup>126</sup>

Therefore, it remains unclear what part of the United States' claim under the Act is assigned to the relator. It cannot be only the right to sue. The partial assignment of the United States' "claim" to the relator may include an assignment of part of the United States' actual injury. The Government may be considered a "harmed individual," and the relator therefore be considered to have assigned status as a "harmed individual."<sup>127</sup> But because only the United States is injured in a cause of action brought under the Act, although recovery under the statute runs to both the *qui tam* relator and the Government, it may be that there is no "harmed individual," and the statute is punitive with regard to both the relator and the Government.<sup>128</sup>

Historically, if a cause of action was assignable, then it was also considered to be survivable.<sup>129</sup> The Court's characterization of the Act as providing a right that is at least partially assignable supports a finding that the Act survives the death of a party under the long-accepted common-law rule,<sup>130</sup> but contradicts the Court's insistence that the *qui tam* relator has no personal injury for purposes of constitutional standing. The Court may not have realized that its characterization of the *qui tam* relator as a partial assignee for purposes of standing in *Stevens* could have implications for determining the survivability

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<sup>126</sup> *Id.*

<sup>127</sup> *Murphy v. Household Finance Corp.*, 560 F.2d 206, 209 (6<sup>th</sup> Cir. 1977).

<sup>128</sup> *Stevens*, 529 U.S. at 770.

<sup>129</sup> *Momand v. Twentieth-Century Fox Film Corporation*, 37 F. Supp. 649, 651 (W.D. Okla. 1941) ("Assignability and survivability are convertible terms"); *Imperial Film Exchange v. General Film Co.*, 244 F. 985, 987 (S.D.N.Y. 1915) ("By a long list of decisions the general test of survivability of actions is their assignability.").

<sup>130</sup> The common law rule has its genesis in English law. The common law rule that actions in tort do not survive the death of the injured party was first modified by the Statute of 4 Edward the III, c. 7, to allow an action for trespass to goods and chattels to survive the death of a plaintiff. See *Moore v. Backus*, 78 F.2d 571, 573 (7<sup>th</sup> Cir. 1935).

of a cause of action under the Act. Nevertheless, shortly after the *Stevens* decision, the Court had an opportunity to undo some of the mischief it had wrought by characterizing the Act's treble damages as penal. In *Cook County, Illinois v. United States ex rel. Chandler*,<sup>131</sup> the Court unanimously determined that municipalities, which are presumed to be immune from punitive damages, were subject to suit under the Act.<sup>132</sup> The Court described the Act's treble damages provision as having a "compensatory side, serving remedial purposes in addition to punitive objectives."<sup>133</sup> The Court explained:

There is no question that some liability beyond the amount of the fraud is usually 'necessary to compensate the government completely for the costs, delays, and inconveniences occasioned by fraudulent claims' [Citations omitted]. The most obvious indication that the treble damages ceiling has a remedial place under this statute is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action. In *qui tam* cases the rough difference between double and triple damages may well serve not to punish, but to quicken the self-interest of some private plaintiff who can spot violations and start litigating to compensate the Government, while benefiting himself as well.<sup>134</sup>

The Court further explained that even in the absence of a *qui tam* relator, treble damages may be necessary for the Government to fully recover what it lost due to the fraud.<sup>135</sup> The Court supported its characterization of treble damages as remedial by noting that the Act has no separate provisions for prejudgment interest, nor does it provide for recovery of consequential damages.<sup>136</sup>

The Court's pronouncements in *Stevens* and *Chandler* suggest that even when the *qui tam* relator receives the maximum recovery permitted under the Act, because the

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<sup>131</sup> 538 U.S. 119 (2003).

<sup>132</sup> *Id.* at 132-133.

<sup>133</sup> *Id.* at 130.

<sup>134</sup> *Id.* at 130-131.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

relator is not personally injured by the wrongdoer's conduct, the recovery is to compensate for an offense to the public. But these pronouncements also suggest that the entire award, including the treble damages, is designed to ensure that the United States is made whole, and that public rights and duties are protected and enforced.

c. Proportionality of Recovery Under the Act

In keeping with the Act's purpose of compensating an injured Government, in *United States v. Bornstein*<sup>137</sup> the Supreme Court characterized the Act's then-double damages and money penalties of \$2,000 per claim as remedial rather than punitive.<sup>138</sup> Nevertheless, when the statute was amended in 1986 to authorize treble damages<sup>139</sup> and civil penalties of up to \$10,000 per claim,<sup>140</sup> Congress stated that the enhanced remedy remained remedial, although intended to make the Government whole through a form of "rough justice," rather than precisely compensate the Government for its losses.<sup>141</sup> When amending the Act in 1986, Congress believed that "[E]ven in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement

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<sup>137</sup> 423 U.S. 303, 315 (1976).

<sup>138</sup> *But see* *Smith v. Wade*, 461 U.S. 30, 85 (1983) (Rehnquist, J., dissenting).

<sup>139</sup> The Act allows this to be reduced to double damages when the defendant has voluntarily disclosed to the Government information regarding the false claim. *See* 31 U.S.C. §3729(a)(7) (2000).

<sup>140</sup> 31 U.S.C. §3729 (2000).

<sup>141</sup> *United States v. Halper*, 490 U.S. 435, 450 (1989). Most courts do not interpret the Act to allow for an award of consequential damages or prejudgment interest. *See, e.g.,* *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 131 (2003); *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5<sup>th</sup> Cir. 1973); *contra* *United States ex rel. Roby v. Boeing Co.*, 79 F. Supp.2d 877 (S. D. Ohio 1999) (awarding replacement costs of a defective helicopter to the government). Thus, one could argue that the treble damages awarded under the Act substitute for the prejudgment interest and consequential damages that would normally be available to a successful plaintiff in a fraud case. Likewise, although a *qui tam* relator's attorneys' fees and costs are separately reimbursable under the Act, *see* 31 U.S.C. §3730(d)(2) (2000), the government's investigative costs and expenses are not separately reimbursable. *Chandler*, 538 U.S. at 131. The treble damages and penalties take the place of these items. *Id.*

programs is seriously undermined.”<sup>142</sup> Under the Act, money penalties are usually imposed,<sup>143</sup> even when the Government has suffered little or no loss from the defendant’s false claims.<sup>144</sup> Because penalties can be imposed even in the absence of any actual damages, many courts acknowledge that at least the money penalties under the Act are punitive in nature, and that they are clearly disproportionate to the damage done.<sup>145</sup> The courts’ discomfort with the imposition of large fines that are disproportionate to actual harm done has led to some creative approaches to counting false claims for purposes of imposing damages and penalties.

*United States v. Krizek*<sup>146</sup> is a good example of the courts’ creative approach to alleviating the discomfort they experience when applying what they consider to be the disproportionate remedies of the Act. In *Krizek*, an elderly psychiatrist and his wife, who was his office manager, were found liable under the Act for submitting false claims to the Government for Medicare and Medicaid payments over a period of six years.<sup>147</sup> Because of the difficulty of determining which claims were false, the district court determined that on a day where Dr. Krizek submitted claims for time spent with patients in excess of nine

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<sup>142</sup> S. Rep. No. 99-345 at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268; *see also* *United States v. Mackby*, 339 F.3d 1013, 1018 [hereinafter, *Mackby II*] (discussing fraud against the Government as not only harming the Government monetarily, but harming the administration and integrity of a Government program).

<sup>143</sup> Many courts have held that money penalties are mandatory upon a finding of liability. *See, e.g.*, *United States v. McLeod*, 721 F.2d 282, 285 (9<sup>th</sup> Cir. 1983); *United States ex rel. Fahner v. Alaska*, 591 F. Supp. 794 (N.D. Ill. 1984) (imposing penalties for 551 false claims, although actual damages were less than \$20,000); *Mackby II*, 339 F.3d 1013 (imposing penalties of \$555,000 when actual damages were \$58,151.64); *contra* *Peterson v. Weinberger*, 508 F.2d 45 (5<sup>th</sup> Cir. 1975) (limiting penalties awarded to prevent implication of the Excessive Fines clause and keep proportionality); *United States ex rel. Garibaldi v. Orleans Parish School Board*, 46 F. Supp.2d 546, 565 (E.D. La. 1999) (court reduced penalty awarded by the jury from \$7,850,000 to \$100,000, based on prior case law holding that the court has discretion to assure that penalties are not excessive and disproportionate), *vacated on other grounds*, 244 F.3d 486, 491-93 (5<sup>th</sup> Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), *reh’g denied*, 534 U.S. 1172 (2002).

<sup>144</sup> S. Rep. 99-345 at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273; *see also* *Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9<sup>th</sup> Cir. 1991); *Rex Traylor Co. v. United States*, 350 U.S. 148, 153 n.5 (1956).

<sup>145</sup> *United States v. Mackby*, 261 F.3d 821, 830 (9<sup>th</sup> Cir. 2001) [hereinafter, *Mackby I*].

<sup>146</sup> 192 F.3d 1024 (D.C. Cir. 1999).

<sup>147</sup> *Id.* at 1025.

hours, all claims submitted in excess of the nine-hour benchmark would be considered false, and penalties under the Act would be assessed for each such claim.<sup>148</sup> Nevertheless, because the claims sent to the Government indicated only the type of service performed, not the precise length of the service, the Special Master appointed by the district court to calculate Dr. Krizek's liability assumed that each service took the minimum amount of time, and calculated the excess number of claims on that basis.<sup>149</sup> Using this methodology, "the Special Master identified 264 days on which the Krizeks billed for more than nine hours, amounting to 1,149 false claims. Multiplying by \$5,000, the minimum fine per claim under the False Claims Act, the Special Master calculated a total fine of \$5.7 million."<sup>150</sup>

The district court accepted the Special Master's findings of fact, but apparently uncomfortable with the size of the fine, abandoned the nine-hour benchmark.<sup>151</sup> Instead, the district court adopted a twenty-four hour benchmark, holding that the Krizeks would only be liable for claims submitted on days when they billed for more than twenty-four hours of work, and only for the services that were rendered after twenty-four hours had passed on a particular day.<sup>152</sup> Using this new benchmark, the court assessed a \$10,000 maximum fine under the Act for each of eleven false claims, entering judgment against the Krizeks for \$110,000.<sup>153</sup>

On appeal, the D.C. Circuit remanded the case to the district court, instructing it to consider each billing form submitted by the Krizeks as a single claim, regardless of

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<sup>148</sup> *Id.* at 1025-26.

<sup>149</sup> *Id.* at 1026.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

how many services for a patient were recorded on the form.<sup>154</sup> It also instructed the district court to allow the Government to introduce evidence refuting the Special Master's use of the minimum amount of time that could be attributed to a particular service, and to introduce evidence that Dr. Krizek also saw private-pay patients on days when he billed excessively, thus potentially increasing the number of Medicare and Medicaid claims submitted in excess of twenty-four hours a day.<sup>155</sup> Nevertheless, the D.C. Circuit did not overturn the district court's use of the twenty-four hour benchmark, which was favorable to the Krizeks. The D.C. Circuit was apparently uncomfortable with the enormity of the original \$5.7 million civil penalty imposed under the Act compared with the harm to the Government caused by the Krizeks.<sup>156</sup>

d. The Excessive Fines Clause

Courts recently have held that penalties and treble damages awarded under the Act that are disproportionate to the gravity of the defendant's offense implicate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.<sup>157</sup> Only punitive forfeitures implicate the Excessive Fines Clause.<sup>158</sup> By holding that the

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<sup>154</sup> *Id.* at 1027.

<sup>155</sup> *Id.*

<sup>156</sup> The D.C. Circuit also expressed its displeasure with the Government's prolonged prosecution of the case, stating:

“ This prosecution of a single doctor has now spanned over six years. It has consumed three weeks of trial, several days of hearings before the Special Master and the district court, two fully briefed, fully argued appeals, and five published opinions (three by the district court and two by this court). The five days on which the false claims were made occurred over twelve years ago. According to defense counsel, Dr. Krizek no longer practices medicine and is dying of cancer. . . . It is time for the parties to stop re-fighting battles long-ago lost and for the district court to bring this prosecution to an expeditious close.” *Id.* at 1031.

Despite the D.C. Circuit's desire that the litigation would end, after remand to the district court for recalculation of damages, the Krizeks appealed to the D.C. Circuit again, advocating a new theory of violation of the Excessive Fines clause (see discussion of the *Mackby* cases, *infra.*, this section.), and when that failed, requested certiorari, which was denied. *Krizek v. United States*, 534 U.S. 1067, *cert. denied*, 534 U.S. 1067 (2001).

<sup>157</sup> *Mackby I*, 261 F. 3d 821, 830 (9<sup>th</sup> Cir. 2001); *see also*, *United States v. Bajakajian*, 524 U.S. 321, 327-28, 334 (1998).

<sup>158</sup> *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

penalties and treble damages awarded under the Act implicate the Excessive Fines Clause of the Eighth Amendment, the courts have implicitly held that sanctions under the Act are punitive, without analyzing whether the *Murphy* (or any other) factors support such a characterization.<sup>159</sup> In deeming statutory treble damages “punitive,” the courts have also ignored some obvious differences between true punitive damages and statutory treble damages. As the Fifth Circuit has noted: “[P]unitive damages are awarded under notoriously open-ended legal standards and a broadly defined constitutional limit concerning the amount awarded. Treble damages, however, represent a mere mathematical expansion of the actual damages calculated [by the arbitrator].”<sup>160</sup> The limited nature of statutory treble damages may distinguish them from open-ended punitive damages in application of the Excessive Fines Clause.<sup>161</sup>

Despite all of the courts’ creativity in minimizing the disproportionate impact of sanctions under the Act, it is difficult to find a general rule explaining when recovery under the Act is disproportionate to the harm suffered, such that the Act would be considered punitive in nature under the *Murphy* test. As the Ninth Circuit Court of Appeals stated in *Mackby II*, there is no rigid set of factors used to decide whether a fine is grossly disproportionate to the gravity of the offense.<sup>162</sup> The *Mackby II* court looked at

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<sup>159</sup> See *United States v. Mackby (Mackby II)*, 339 F.3d at 1013, 1017 (9<sup>th</sup> Cir. 2003), *cert. denied*, 124 S. Ct. 1657 (2004). Nevertheless, in *Mackby II*, the court also conceded that at least some portion of the sanctions under the Act are remedial, based on cases construing the pre-Amendment Act’s sanctions as remedial. *Mackby II*, 339 F.3d at 1019.

<sup>160</sup> *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 317 (5<sup>th</sup> Cir. 2002); see also, *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003).

<sup>161</sup> See, e.g., *Investment Partners, id.* at 318 (holding that antitrust treble damages may be “punitive” because they exceed actual damages inflicted on the victim of the violative conduct, but are not “punitive” for purposes of interpreting the scope of an arbitration clause). In *Chandler*, 538 U.S. at 130, the Court implicitly recognized the difference between true punitive damages and the treble damages available under the Act by characterizing the treble damages as a “ceiling.”

<sup>162</sup> *Mackby II*, 339 F.3d at 1016. Likewise, “[I]t would be difficult if not impossible in many cases for a court to determine the precise dollar figure at which a civil sanction has accomplished its remedial purpose

the presence or absence of related illegal activity, the amount of actual harm caused to the government and others, and the criminal penalties available under the U.S. Sentencing Guidelines<sup>163</sup> for violating similar criminal statutes to make this determination.<sup>164</sup> The court also considered the relationship between the sanctions imposed by the lower court and the maximum possible sanctions authorized by Congress, and the Act's scienter requirement.<sup>165</sup> Based on these factors, the *Mackby II* court held that a judgment of \$729,454.92 under the Act based on actual damages to the Government of \$58,151.64 was not "grossly disproportionate" and did not violate the Excessive Fines Clause.<sup>166</sup>

e. Cases Where There Is No Damage

The analysis called for by the third prong of *Murphy* has no meaning when monetary penalties are imposed under the Act, but the Government has suffered no monetary damage. Such cases are much more like Blackstone's description of punitive "crimes and misdemeanors," than remedial actions to make an injured party whole.<sup>167</sup> The money penalties imposed in such a case are by definition disproportionate to the monetary harm inflicted on the United States. This is true even if some liability beyond the amount of the fraud is required to completely compensate the Government for losses

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of making the Government whole, but beyond which the sanction takes on the quality of punishment." *United States v. Halper*, 490 U.S. 435, 449 (1989)

<sup>163</sup> See U.S. Sentencing Guidelines Manual §2B1.1(b)(1) (2001).

<sup>164</sup> *Mackby II*, 339 F.3d at 1017.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* The court noted that the maximum civil penalty *Mackby* faced was \$84,990,000. If the *Mackby II* court's assumption that the Act's sanctions are mainly punitive in nature is accepted, I would expect to see future challenges to large awards under the Act on the grounds that they violate the Due Process Clause of the Fifth Amendment to the United States Constitution, in accordance with the United States Supreme Court's recent resurrection of the concept of economic substantive due process when reviewing awards of punitive damages. See, e.g., *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (both holding that large punitive damage awards under state law violate the due process guarantees of the Fourteenth Amendment).

<sup>167</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*2.

caused by the fraudulent claims.<sup>168</sup> The pre-1986 version of the Act, which imposed less-onerous penalties than those of the current Act, but had been construed to allow imposition of such penalties even in the absence of actual damages, was remedial.<sup>169</sup> The fact that the penalties imposed are higher after the 1986 Amendments to the Act than the penalties imposed under earlier versions of the Act should not matter for purposes of proportionality when the Government has suffered no damages. Whether the penalties are \$2,000 per claim, as they were under older versions of the Act, or \$10,000 per claim, as they are under the current version of the Act, the ratio of penalties to damages when the damages are zero will still be mathematically undefined, and by their very nature, disproportionate to damages suffered by the Government.

B. Using “Civil” and “Criminal” Designations as a Proxy for “Remedial” and “Punitive” Characterizations

Attempts to simplify the analysis of survivability under the common-law test by using the label of “civil” or “criminal” as a guide to the true nature of the Act are also unavailing. Although one would assume that criminal statutes “punish,” while civil statutes “compensate” or “remediate,” the label “civil” or “criminal” placed on a statute by Congress does not answer the question of whether a statutory action is “penal” or “remedial” under the law. Civil remedies can be transformed into criminal penalties if they are severe enough in purpose or effect.<sup>170</sup> The United States Supreme Court has instructed that “[e]ven in those cases where the legislature ‘has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so

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<sup>168</sup> *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003).

<sup>169</sup> *United States v. Bornstein*, 423 U.S. 303, 315 (1976).

<sup>170</sup> *Hudson v. United States*, 522 U.S. 93, 99 (1997), *citing Helvering v. Mitchell*, 303 U.S. 391, 399 (1938).

punitive either in purpose or effect,’<sup>171</sup> as to transfor[m] what was clearly intended as a civil remedy into a criminal penalty.’ ”<sup>172</sup>

Nevertheless, the United States Supreme Court has also instructed that “[o]nly the clearest proof” will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.”<sup>173</sup> Despite the courts’ direction that Congress’ denomination of a statute as “civil” or “criminal” should be treated with the utmost respect, a statute characterized by Congress as “civil,” may be considered “penal” for certain purposes, even if it is not characterized as “criminal.”<sup>174</sup> The question then becomes whether the statute is penal for all purposes, including the survivability analysis, or only for selected purposes.

In a series of decisions, the United States Supreme Court has determined that the Act is penal for some, but not all purposes, and its denomination as a “civil” statute is not helpful when distinguishing between the two. In *United States v. Halper*,<sup>175</sup> the appellee was convicted of 65 counts of violation of the criminal False Claims Act.<sup>176</sup> After Halper’s criminal conviction, the Government brought an action under the civil False

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<sup>171</sup> *Hudson*, 522 U.S. at 99, quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980).

<sup>172</sup> *Hudson*, 522 U.S. at 99, quoting *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956).

<sup>173</sup> *Hudson*, 522 U.S. at 100; quoting *Ward*, 448 U.S. at 249.

<sup>174</sup> See, e.g., *United States v. Halper*, 490 U.S. 435, 447 (1989) (The labels “criminal” and “civil” are not of paramount importance when determining whether a statutory sanction implicates the Double Jeopardy Clause), overruled on other grounds by *Hudson*, 522 U.S. 93.

<sup>175</sup> The Court first grappled with the “civil” versus “criminal” nature of the Act in applying the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution to the Act in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In that case, actual damages to the Government were \$101,500, and the total recovery was \$315,000 (\$203,000 in double damages and \$112,000 in penalties). *Id.* at 540. The total recovery to the Government, after the *qui tam* relators took their share, was only \$150,000. *Id.* at 545. The Court held that this amount was purely remedial, because it compensated the Government for ancillary costs, such as the costs of detection and investigation, and therefore it did not implicate the Double Jeopardy Clause. *Id.* at 551-552. The present-day Act, which requires sanctions of treble damages and as much as \$11,000 per-claim penalties, is far more likely to yield a recovery to the Government that is disproportionate to the damages and the ancillary costs incurred by the Government.

<sup>176</sup> 18 U.S.C. §287 (2000). Halper submitted 65 demands for reimbursement from the federal Medicare program over the course of two years at a rate of \$12 per claim, when the actual service rendered entitled him to only \$3 per claim. 49 U.S. at 436. This resulted in an overpayment of \$585. *Id.*

Claims Act based on the same transactions that formed the basis for the criminal conviction.<sup>177</sup> The statutory penalty called for by the Act totaled \$130,000, while the actual damages to the Government totaled \$585.<sup>178</sup> The district court regarded the \$130,000 penalty to be so disproportionate to the actual damages incurred by the Government (more than 220 times greater than actual damages) that it characterized the money penalty as a “punishment” that violated the Double Jeopardy Clause, despite the statute’s label as “civil.”<sup>179</sup>

The United States Supreme Court agreed, stating:

Although, taken together, these cases<sup>180</sup> establish that proceedings and penalties under the civil False Claims Act are indeed civil in nature, and that a civil remedy does not rise to the level of “punishment” merely because Congress provided for civil recovery in excess of the Government’s actual damages, they do not foreclose the possibility that in a particular case a civil penalty authorized by the Act may be so extreme and so divorced from the Government’s damages and expenses as to constitute punishment.<sup>181</sup>

The Court stated the question to be answered in *Halper* as: “[W]hether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes ‘punishment’ for the purpose of double jeopardy analysis.”<sup>182</sup> The Court noted that prior cases were not helpful in answering the question, because they did not address situations where a statutory imprecise formula for damages authorizes a remedial sanction that is

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<sup>177</sup> *Halper*, 49 U.S. at 438.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 439-440.

<sup>180</sup> The Court is referring to *Helvering v. Mitchell*, 303 U.S. 391 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); and *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956).

<sup>181</sup> *Halper*, 490 U.S. at 441-442.

<sup>182</sup> *Id.* at 443.

completely disproportionate to the Government’s damages and actual costs.<sup>183</sup> Writing on a clean slate, the Court said:

[A] civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment . . . it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.<sup>184</sup>

The Court held that the Double Jeopardy Clause applies to a defendant who has been criminally prosecuted and punished, and then is subjected to a civil sanction, if the second sanction is fairly characterized as *solely* deterrent or retributive.<sup>185</sup> Nevertheless, the Court was careful to point out that this rule is for the “rare case” where the civil penalty sought in a proceeding, after a criminal penalty has been imposed, is “overwhelmingly” disproportionate to the damages the offender has caused.<sup>186</sup> Although the Court explicitly left the determination of what constitutes an “overwhelmingly” disproportionate penalty to the discretion of the trial court, it specifically mentioned the increased civil penalties of the 1986 Amendments to the Act as an example of a civil sanction that would constitute a second punishment under the Double Jeopardy Clause.<sup>187</sup> *Halper* appeared to establish that when sanctions imposed under the Act were “overwhelmingly” disproportionate to the Government’s damages, the Act was punitive. In so doing, the Court elevated the deterrent and retributive purposes of the Act over the remedial purposes of the Act, even when the Act allowed recovery of only double damages and smaller money penalties than are permitted under today’s Act.

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<sup>183</sup> *Id.* at 446.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 448-449 (emphasis added).

<sup>186</sup> *Id.* at 449.

<sup>187</sup> *Id.* at 450 n.9. The Court also explicitly stated that the question of whether a *qui tam* action brought under the Act would implicate the Double Jeopardy Clause remained unresolved. *Id.* at 451 n.11.

Eight years later, in *Hudson v. United States*,<sup>188</sup> the appellants, relying on *Halper*, challenged a criminal prosecution initiated by the United States after the federal Office of the Comptroller of the Currency imposed monetary penalties and administrative debarment on them for violation of a federal banking statute under the Double Jeopardy Clause.<sup>189</sup> The criminal prosecution was based on the same transactions that were the basis for the prior administrative actions.<sup>190</sup> The Court, citing “concerns about the wide variety of novel double jeopardy claims spawned in the wake of *Halper*,”<sup>191</sup> breathed life back into the labels “criminal” and “civil” by emphasizing that the Double Jeopardy Clause “protects only against the imposition of multiple *criminal* punishments for the same offense.”<sup>192</sup> The Court reiterated that in the first instance, one must look to Congress’ express or implied label of “civil” or “criminal” for the statute, and that a statute that had been labeled “civil” by Congress could only be transformed into a criminal penalty if its punitive purpose or effect is “overwhelming.”<sup>193</sup> The Court described the following “useful guideposts” for determining whether a statutory scheme is punitive in either purpose or effect so as to transform a civil remedy into a criminal penalty:

- ‘(1) [w]hether the sanction involves an affirmative disability or restraint’;
- (2) ‘whether it has historically been regarded as a punishment’;
- (3) ‘whether it comes into play only on a finding of *scienter*’;
- (4) ‘whether its operation will promote the traditional aims of punishment-retribution and deterrence’;
- (5) ‘whether the behavior to which it applies is already a crime’;
- (6) ‘whether an alternative purpose to which it may rationally be

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<sup>188</sup> 522 U.S. 93, 99 (1997).

<sup>189</sup> *Id.* at 95-98, *see also*, Stephanie L. Trunk, 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*, 71 *Geo Wash. L. Rev.* 159, 167-168 (2003).

<sup>190</sup> *Hudson*, 522 U.S. at 97-98.

<sup>191</sup> *Id.* at 98. For a summary of cases asserting that various civil penalties constituted “punishment” under the Double Jeopardy Clause in the wake of *Halper*, *see* 1 BOESE, *supra* note 4, §3.06[A] at n.293.

<sup>192</sup> *Hudson*, 522 U.S. at 99 (emphasis added).

<sup>193</sup> *Id.*, quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980).

connected is assignable for it’; and (7) ‘Whether it appears excessive in relation to the alternative purpose assigned.’<sup>194</sup>

The Court criticized its decision in *Halper* as having bypassed the threshold question of whether the successive punishment was “criminal,” and because it focused on the disproportionality of the sanction to the damage without considering the other guideposts.<sup>195</sup> The Court also retreated from its focus on the character of the sanctions imposed in *Halper*, and emphasized the importance of relying on Congress’ characterization of a statute as “civil.”<sup>196</sup> According to the Court, the protections of the Double Jeopardy Clause are unnecessary in cases of civil fines, because the Eighth Amendment Excessive Fines protections apply to such cases.<sup>197</sup> Furthermore, the Court acknowledged that attempting to distinguish between “punitive” and “nonpunitive” penalties was inordinately confusing, and that the confusion outweighed the benefit of the additional protection of the Double Jeopardy Clause.<sup>198</sup>

*Hudson* establishes that civil penalties are not subject to analysis under the Double Jeopardy Clause, and that such an analysis is reserved for criminal penalties. But *Halper* and *Hudson* also establish that a “civil” action can be “punitive” even if it is not “criminal,” without specifically deciding whether a cause of action brought under the current version of the Act was such an action, and if so, under what circumstances.

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<sup>194</sup> *Id.* at 99-100, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

<sup>195</sup> *Id.* at 100.

<sup>196</sup> *Id.* at 101. The Court observed that focusing on the sanction actually imposed requires that a defendant proceed through trial to judgment before the court can determine whether the Double Jeopardy Clause has been violated, which is antithetical to the Clause’s prohibition against even attempting a second criminal punishment. *Id.* at 102.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* In *Hudson*, the Court applied the test articulated in *United States v. Ward*, 448 U.S. 242, 248-49 (1980), to the money penalties and debarment sanctions imposed on Hudson for violating the federal banking statutes. The Court held that it was apparent that Congress intended the sanctions to be civil in nature, and that there was no clear proof that the sanctions were so punitive in form or effect that they were rendered criminal. *Hudson*, 522 U.S. at 103-104.

Therefore, we must look beyond the label of “civil” or “criminal” to determine whether a cause of action is punitive or remedial, and whether it survives the death of a party. In the case of the Act, the civil label Congress has placed on the statute is particularly unhelpful to this analysis, because the United States Supreme Court has described the treble damages authorized under the Act as both “punitive in nature,”<sup>199</sup> and as having a “remedial place.”<sup>200</sup>

## V. SUBJECT MATTER JURISDICTION UNDER THE ACT

### A. Public Disclosure and “Original Source”

The historical common-law tests of survivability also do not account for challenges created by a unique provision in the Act limiting the court’s subject matter jurisdiction over certain *qui tam* cases. The 1943 version of the Act contained a revised jurisdictional bar designed to prevent the filing of “parasitic” lawsuits such as *United States ex rel. Marcus v. Hess*,<sup>201</sup> where the relator merely copied the Government’s pre-existing pleadings and filed a *qui tam* suit. This provision stated that no court would have jurisdiction over a *qui tam* suit if the government had prior knowledge of the allegations in the complaint.<sup>202</sup> In 1986, under the impression that as much as ten percent of the entire federal budget was being lost to fraud,<sup>203</sup> Congress amended the jurisdictional bar to make it possible for *qui tam* relators to bring private suits based on information that was already in the public domain, but which the relator had brought to the public domain as the “original source:”

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<sup>199</sup> *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000)

<sup>200</sup> *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2003).

<sup>201</sup> 317 U.S. 537 (1943).

<sup>202</sup> 31 U.S.C. §233(c) (1976) (current version at 31 U.S.C. §3730(e) (2000)). This provision was a compromise between legislators who wanted to repeal the *qui tam* provisions of the Act entirely, and legislators who did not want to amend the *qui tam* provisions at all. See Boese, *supra* note 4 at §1.02.

<sup>203</sup> S. Rep. 99-345 at 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68.

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

For purposes of this paragraph, “original source” means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.<sup>204</sup>

Although the meaning of this section, commonly known as the “public disclosure” bar, has been the subject of extensive litigation,<sup>205</sup> it is clear that a court has no subject matter jurisdiction over a *qui tam* case brought under the Act if the case is based on a public disclosure, and the relator is not an original source of the information on which the allegations are based.<sup>206</sup> In a case where the *qui tam* relator acknowledges that the suit is based on publicly disclosed information, or where the defendant establishes that there has been a public disclosure of such information despite the relator’s insistence to the contrary, the court must decide whether the relator is an “original source” of the information in order to establish that it has subject matter jurisdiction over the case prior to proceeding to the merits.<sup>207</sup> The federal courts cannot

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<sup>204</sup> 31 U.S.C. §3730(e)(4) (2000). In the legislative history to the 1986 Amendment to the Act, Congress expressed its dismay that the absolute jurisdictional bar of the then-current version of the Act had been interpreted by the courts to prevent a *qui tam* relator from pursuing a case even if the Government took no action after the putative relator informed the Government the allegations of fraud. S. Rep. No. 99-345 at 12-13 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5277-78.

<sup>205</sup> See 1 BOESE, *supra* note 4, §4.02. Litigation about the meaning and effect of the public disclosure provision has centered on whether the list of methods of public disclosure contained in the statute is exclusive, when a *qui tam* suit is “based upon” a public disclosure, and what is an “original source” for purposes of the provision. *Id.*

<sup>206</sup> 31 U.S.C. §3730(e)(4) (2000).

<sup>207</sup> *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (“The requirement that jurisdiction be established as a threshold matter ‘springs from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’”), quoting *Mansfield C & L. M.R. Co. v. Swan*, 111 U.S. 379 (1884).

hypothesize subject matter jurisdiction in order to decide the merits of a case.<sup>208</sup> The *qui tam* relator has the burden of proving by a preponderance of the evidence that his suit is not based upon a public disclosure, or, if it is, that he was an original source of the information.<sup>209</sup>

To be an “original source,” the relator must have “direct and independent knowledge of the information on which the allegations are based.”<sup>210</sup> “Direct knowledge” is firsthand knowledge, gained without any intervening agency or outside influence.<sup>211</sup> “Independent knowledge” is defined as knowledge independent of any public disclosure.<sup>212</sup> When a *qui tam* relator files a suit under the Act, the relator is required to prepare and serve on the Government “a written disclosure of substantially all material evidence and information” the relator possesses.<sup>213</sup> In addition to educating the Government about the case so that the Government can decide whether or not to intervene, the disclosure statement also assists the court in determining whether the relator has the “direct and independent knowledge” necessary to maintain a suit where information has been publicly disclosed.<sup>214</sup>

## B. Discovery Issues

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<sup>208</sup> *Id.*

<sup>209</sup> *United States v. Alcan Elec. & Eng., Inc.*, 197 F.3d 1014, 1018 (9<sup>th</sup> Cir. 1999); *United States ex. rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516 (9<sup>th</sup> Cir. 1998), FED. R. CIV. P. 12(b)(1).

<sup>210</sup> 31 U.S.C. 3730(e)(4)(B) (2000).

<sup>211</sup> *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674 (8<sup>th</sup> Cir. 2003); *United States ex rel. Stone v. Rockwell Int'l Corp.*, 282 F.3d 787, 799 (10<sup>th</sup> Cir. 2002); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 656 (D.C. Cir. 1994); *United States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1160 (3d Cir. 1991).

<sup>212</sup> *Minnesota Nurses Ass'n v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1048 (8<sup>th</sup> Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580 (4<sup>th</sup> Cir. 2000).

<sup>213</sup> 31 U.S.C. §3730(b)(2) (2000).

<sup>214</sup> 1 BOESE, *supra* note 4, §4.04[A]; *see also*, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 320 (2d Cir. 1992) (Government moved to dismiss case under public disclosure bar while complaint was under seal); *United States ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 459-460 (S.D.N.Y.) (Government suggested to court that it lacked subject matter jurisdiction over the relator's claims under the public disclosure bar), *aff'd*, 2002 U.S. App. LEXIS 25720 (2d Cir. Dec. 13, 2002).

The law is unsettled as to whether a defendant can discover the relator's disclosure statement to the Government. In one line of cases, the courts have held that no privilege attaches to the disclosure statement and supplementary materials, and have permitted discovery.<sup>215</sup> Other courts have held that the disclosure statement is subject to the attorney work product privilege,<sup>216</sup> the joint prosecution privilege,<sup>217</sup> or the law enforcement privilege.<sup>218</sup> Still other courts have permitted discovery of some parts of the disclosure statement, but not others.<sup>219</sup>

Even if the disclosure statement is discoverable, defendants are likely to zealously advocate that it is no substitute for the ability to cross-examine the relator regarding the source of his knowledge of publicly disclosed information. Obviously, the most relevant and fruitful source for discovery on issues of the relator's direct and independent knowledge of information forming the allegations of the complaint is the relator. The relator's deposition is virtually irreplaceable to defendants attempting to refute a relator's allegations that the relator is an "original source" in cases where there has been a public disclosure.<sup>220</sup>

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<sup>215</sup> See, e.g., *United States ex rel. Burns v. A.D. Roe Co.*, 904 F. Supp. 592, 593 (W.D. Ky. 1995); *United States ex rel. Stone v. Rockwell International Corp.*, 144 F.R.D. 396 (D. Colo. 1992).

<sup>216</sup> See, e.g., *United States ex rel. Bagley v. TRW Inc.*, 212 F.R.D. 554, 561 (C.D. Cal. 2003).

<sup>217</sup> See, e.g., *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680 (S.D. Cal. 1996).

<sup>218</sup> See, e.g., *In re Subpoena to the United States Attorney's Office*, No. M 8-85-BSJ, 2000 WL 45726 (S.D.N.Y. Jan. 20, 2000).

<sup>219</sup> See, e.g., *Grand ex rel. United States v. Northrop Corp.*, 811 F. Supp. 333, 337 (S.D. Ohio 1992) (court conducts *in camera* inspection of relator's disclosure materials and determines that the relator's analysis be redacted prior to discovery by defendant).

<sup>220</sup> The arguments of the parties made in *United States ex rel. Harrington v. Sisters of Providence* in Oregon, 209 F. Supp.2d 1085 (D. Or. 2002), provide an example of the importance of the availability of the relator to the subject matter jurisdiction determination and to the defendant. In *Harrington*, the defendants moved to dismiss the *qui tam* complaint after the relator's death, arguing (among other things) that there was a likelihood that the information on which the relator's allegations were based had been publicly disclosed, and that the death of the relator severely prejudiced the defendant and precluded the court from inquiring into its subject matter jurisdiction, thereby warranting dismissal. Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(1) at 8-10, *Harrington* (No. CV 98-1487 JO). The relator's estate's representative argued in response that the burden of establishing subject matter jurisdiction was on the relator, and therefore the

When the relator dies before the defendant has taken the relator's deposition, even if the court believes that the disclosure statement and the material evidence contained therein are sufficient for the court to determine that it does have jurisdiction, the defendant will argue that it is severely prejudiced due to its inability to cross-examine the relator regarding public disclosure and original source allegations. A court may order dismissal as a remedy to prevent unfairness to a defendant due to an inability to obtain discovery from a plaintiff.<sup>221</sup> Nevertheless, the death of a plaintiff prior to discovery of the plaintiff does not automatically mandate dismissal of the claim.<sup>222</sup> A court will balance the prejudice to the defendant caused by the death of the plaintiff against the right of the plaintiff's successors to pursue the suit.<sup>223</sup> There are no reported cases in which the court has engaged in such a balancing test with regard to prejudice to a defendant's ability to assert the Act's jurisdictional bar caused by a *qui tam* relator's death. Nevertheless, at least one case has suggested that if a plaintiff is an original and direct source of information which formed the basis for a statement that was the subject of a defamation action, and the defendant is deprived of the opportunity to cross-examine

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defendant was not prejudiced. Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to FED. R. CIV. P. 12(b)(1) at 13, *Harrington* (No. CV 98-1587-JO); *see also*, 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶12.30[5] (3d ed. 2004). The relator's estate's representative also reminded the court that the defendant had opposed a prior attempt by relator's counsel to perpetuate the relator's testimony. *Id.* The defendants replied that regardless of whom has the ultimate burden of proof on the issue of subject matter jurisdiction, the death of the relator severely prejudiced the defendants' ability to defend against the case, because it prejudiced the defendants' ability to even bring a motion to dismiss on the basis of lack of subject matter jurisdiction, much less meet the burden of proof on the motion. Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to FED. R. CIV. P. 12(b)(1) at 7-9, *Harrington* (No. CV-98-1587 JO).

<sup>221</sup> *Wehling v. C.B.S.*, 608 F.2d 1084, 1087 n.6 (5<sup>th</sup> Cir. 1979); *MacDonald v. Time, Inc.*, 554 F. Supp. 1053, 1058 (D.N.J. 1983).

<sup>222</sup> *MacDonald*, 554 F. Supp. at 1059.

<sup>223</sup> *Id.* at 1060.

the plaintiff regarding the falsity of the allegedly defamatory statement, dismissal may be required to alleviate the prejudice to the defendant.<sup>224</sup>

One commentator has suggested that prejudice to the defendant can be alleviated in a case where a “private” plaintiff in a defamation action dies by shifting the burden of proving that the statement is true from the defendant to the plaintiff, or by shifting the burden of proving certain defenses from the defendant to the plaintiff.<sup>225</sup> Although this might relieve a defendant of an ultimate burden of proof on an issue at trial, such burden-shifting does not alleviate prejudice to a defendant caused by an inability to bring a defensive motion to dismiss due to the defendant’s inability to meet the burdens of production or proof on the motion because of the relator’s death. Nor does it relieve the defendant of the prejudice caused by an inability to effectively challenge the relator’s ability to meet the burden of proof on the issue, even if the initial burden is shifted to the plaintiff. In a case brought under the Act, the determination of the relator’s original source status is even more crucial than the ability to determine the truth of information from its source in a defamation case. Under the Act, the court’s subject matter jurisdiction depends on the relator’s original source status, and the court cannot even consider the merits of the case without making this threshold determination. Neither the *Murphy* test nor any other historical test for survivability takes into account the challenges raised by the Act’s jurisdictional bar in a case where the *qui tam* relator dies.

## VI. A POLICY-BASED PROPOSAL FOR SURVIVABILITY

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<sup>224</sup> *Id.* In *MacDonald*, the court contrasted the situation at hand, where the defendant was not claiming that the plaintiff was the original and direct source of the information on which the allegedly defamatory statement was based, with a hypothetical situation in which a plaintiff was such an original and direct source. *Id.* at 1059. Because in the case at hand, the plaintiff was not alleged to be the original and direct source of the information, the court held that the prejudice to the defendants caused by the plaintiff’s death was not “substantial,” and refused to dismiss the case. *Id.* at 1060.

<sup>225</sup> Florence Frances Cameron, Note, *Defamation Survivability and the Demise of the Antiquated “Actio Personalis” Doctrine*, 85 Colum. L. Rev. 1833, 1848-49 (1985).

A. The Importance of Congressional Intent

In light of the difficulty of applying the historical test in determining whether a *qui tam* relator's cause of action under the Act survives the relator's death, and the unhelpfulness of Congress' characterization of a statute as "civil" or "criminal," "penal" or "remedial" to make that determination, the courts must look to some other criteria to determine whether a *qui tam* relator's cause of action is survivable. Rather than trying to stuff all federal statutory causes of action into the ancient "penal" or "remedial" categories, in cases involving federal statutes that create rights that were unknown at common law, codify rights that previously existed at common law, or significantly modify rights that were codified centuries ago, if there is no explicit statutory provision addressing survivability, the primary consideration should be whether survival of a cause of action under the statute furthers the purpose of the statute as expressed by Congress.<sup>226</sup>

The United States Supreme Court recognized the importance of congressional intent when determining whether a federal statutory cause of action survives the death of one of the parties in *Cox v. Roth*.<sup>227</sup> In *Cox*, the Court was faced with the question of whether an action brought under the Jones Act<sup>228</sup> survives the death of the defendant tortfeasor. The *Cox* Court acknowledged that at common law, actions for personal injury abated upon the death of one of the parties, but characterized the rule as one of "extreme harshness."<sup>229</sup> To alleviate the harshness of the common law rule, the Court looked to the policy behind the Jones Act, which it understood to be to fully provide for compensation

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<sup>226</sup> *Mallick v. IBEW*, 814 F.2d 674, 678-679 (D.C. Cir. 1987).

<sup>227</sup> 348 U.S. 207, 208 (1955).

<sup>228</sup> 46 U.S.C. §688 (2000). The Jones Act provides a cause of action for seamen injured at sea against the owners of seagoing vessels.

<sup>229</sup> *Cox*, 348 U.S. at 209.

of injured seamen or their families regardless of the nature or identity of the tortfeasor.<sup>230</sup>

To explain its decision to abandon the common law rule regarding survivability, the Court said:

The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes. . . The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal leading would preserve.<sup>231</sup>

The *Cox* Court also noted that abandoning the common-law rule of survivability of tort actions was in accordance with the trend among the states:

[W]e do note that advancing civilization and social progress have brought 43 of our States to include in their general law the principle of the survival of causes of action against deceased tortfeasors, and that such recovery, rather than being exceptional, has now become the rule in almost every common-law jurisdiction.<sup>232</sup>

The courts' willingness to elevate the policy of the law and Congress' intent over historical characterization need not be limited to statutes that codify common-law causes of action, but may also be applied to statutes that create new federal causes of action, unknown at common law, or significantly modify ancient causes of action. As the United States Supreme Court said over 100 years ago; "[w]hether an action survives or abates upon the death of a party depends on the substance of the action, not the forms of proceedings to enforce the action."<sup>233</sup> Just as the historical "personal" versus "property" nature of a tort need not be dispositive of the survivability of a tort action, the terms "penal" or "remedial" need not be dispositive of the nature of federal statutory action. Such terms are merely shorthand for the relevant considerations as to whether a cause of

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Schreiber v. Sharpless*, 110 U.S. 76 , 80 (1884).

action should survive the death of a party.<sup>234</sup> The question of survivability of a federal statutory claim is essentially a question of statutory interpretation.<sup>235</sup>

The United States Court of Appeals for the District of Columbia has recognized the need to abandon the historical distinctions of “penal” versus “remedial” when it comes to determining the survivability of federal statutes that create new rights, or significantly change rights that existed at common law. For example, in *Mallick v. IBEW*<sup>236</sup> a member of a labor union sought disclosure of the union’s financial records under the Labor Management Reporting and Disclosure Act of 1959 (“LMRDA”).<sup>237</sup> While an appeal of the trial court’s decision in favor of the plaintiff was pending, the plaintiff died.<sup>238</sup> The union argued that the plaintiff’s cause of action abated upon his death, relying on the common law distinction between suits based on personal torts and suits based on property or contract rights.<sup>239</sup> The D.C. Circuit flatly stated that “these cases no longer control adjudication of survivorship issues associated with federal claims,” noting the “difficulty of forcing many newer statutory rights into its somewhat archaic and rigid distinction between personal and property claims.”<sup>240</sup>

Rather than trying to determine whether a cause of action for disclosure of financial information under the LMRDA was based on “personal” or “property” rights, or was “penal” or “remedial,” the *Mallick* Court focused on the legislative history of the LMRDA, which indicated that a major goal of the LMRDA was deterrence of financial

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<sup>234</sup> *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68, 70 (9<sup>th</sup> Cir. 1980).

<sup>235</sup> *Mallick v. IBEW*, 814 F.2d 674, 676 (D.C. Cir. 1987), *citing* *Cox v. Roth*, 348 U.S. 207, 210 (1955).

<sup>236</sup> *Id.*

<sup>237</sup> 29 U.S.C. §431 (2000).

<sup>238</sup> *Mallick*, 814 F.2d at 675.

<sup>239</sup> *Id.* at 676, 678.

<sup>240</sup> *Id.* at 678.

abuses by unions.<sup>241</sup> The *Mallick* Court held that the plaintiff's cause of action for disclosure of information under the LMRDA survived the plaintiff's death, because the statute's goal of deterrence of financial wrongdoing by unions would be best served by allowing an action for disclosure under the LMRDA to survive the death of a particular union member.<sup>242</sup>

Twelve years later, in *Sinito v. United States Department of Justice*,<sup>243</sup> the D.C. Circuit held that a cause of action seeking the release of information held by the Government under the Freedom of Information Act ("FOIA")<sup>244</sup> could survive the death of a plaintiff. In *Sinito*, the defendant argued that under the historical common-law test, FOIA was not a remedial statute, and therefore did not survive the death of the plaintiff requesting information.<sup>245</sup> Although the trial court agreed, and dismissed the case, the D.C. Circuit, following its precedent in *Mallick*, disregarded the common-law rule. Instead, it looked to whether allowing the action to survive the death of the plaintiff would further Congress' goals in enacting FOIA.<sup>246</sup> The *Sinito* Court reviewed the legislative history of FOIA, and held that allowing a case brought under FOIA to survive the death of the plaintiff would foster one of the "paramount goals" of FOIA, the goal of deterring secrecy in government and government corruption.<sup>247</sup>

The *Sinito* defendants tried to distinguish *Mallick* by arguing that FOIA creates a right of access available to all citizens, as opposed to the defined class who are permitted to exercise the right of access under the LMRDA, and thus, creates a right that was

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<sup>241</sup> *Id.* at 677.

<sup>242</sup> *Id.*

<sup>243</sup> 176 F.3d 512 (D.C. Cir. 1999). Judge Wald authored both the *Mallick* and the *Sinito* opinions.

<sup>244</sup> 5 U.S.C. §552 (2000).

<sup>245</sup> *Sinito*, 176 F.3d at 513.

<sup>246</sup> *Id.* at 513-514.

<sup>247</sup> *Id.* at 514.

somehow less “personal” than the right held to survive the death of the plaintiff in *Mallick*.<sup>248</sup> The *Sinito* Court was unimpressed by this argument, and in holding that a claim for disclosure under FOIA can survive the death of the plaintiff, noted:

Moreover, we are dealing here not with a vast pool of potential FOIA applicants, any of whom might seek to take Thomas Sinito’s place in the litigation. An original requestor who goes to court to compel disclosure by the agency has a stake in the legal action which transcends that of “any person” who might seek the FOIA document. He has invested time, and in all likelihood money, in the action . . . . The fact that other citizens could have brought a similar action originally in no way vitiates that conclusion.<sup>249</sup>

The logic of *Sinito* applies equally to *qui tam* causes of action brought under the Act. As in *Sinito*, a *qui tam* cause of action cannot be brought by any member of the public. A cause of action under the Act sounds in fraud.<sup>250</sup> Therefore, it must be plead with particularity.<sup>251</sup> This operates to ensure that only persons with real knowledge of actual fraud can bring such cases, as opposed to members of the public at large engaging in “fishing expeditions.”<sup>252</sup> Furthermore, the jurisdictional bar prevents members of the public from engaging in copycat filings, further ensuring that a stranger to the alleged fraud.<sup>253</sup>

#### B. The Advantages of Using Congressional Intent to Determine Survivability

Applying the D.C. Circuit’s approach in *Mallick* and *Sinito* to *qui tam* cases brought under the Act preserves the proper role of Congress in creating a cause of action, and the proper role of the courts in interpreting its scope in accordance with Congress’

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<sup>248</sup> *Id.* at 514-515.

<sup>249</sup> *Id.* at 515.

<sup>250</sup> 2 BOESE, *supra* note 4, §5.04 at n.162.

<sup>251</sup> *Id.*; FED. R. CIV. P. 9(b).

<sup>252</sup> *See, e.g.,* United States *ex rel.* Russell v. Epic Healthcare Management Group, 193 F.3d 304, 309 (5<sup>th</sup> Cir. 1999).

<sup>253</sup> 31 U.S.C. §3730(e)(4) (2000).

will.<sup>254</sup> It also allows the courts to avoid trying to determine whether recovery runs to a “harmed individual,” as required under the *Murphy* test, by parsing the complex and contradictory relationship between the *qui tam* relator and the Government. The court is also saved from having to choose between the punitive aspects of the Act and the remedial aspects of the Act, and elevate one over the other, to reach a just result.

The legislative history of the 1986 Amendments to the Act makes it clear that Congress intended the current version of the Act to be a mechanism to compensate the Government for dollars lost to fraud, and to deter potential violators from embarking on a course of defrauding the Government.<sup>255</sup> The Senate Report accompanying the 1986 Amendments states:

Even in the cases where there is no dollar loss—for example where a defense contractor certifies an untested part for quality yet there are no apparent defects—the integrity of quality requirements in procurement programs is seriously undermined.<sup>256</sup>

The *qui tam* provisions of the original 1863 Act were:

passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.<sup>257</sup>

In the 1986 Amendments, Congress sought to increase the deterrent effect of the Act not only by substantially increasing the amount of money that can be assessed against a

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<sup>254</sup> *Mallick v. IBEW*, 814 F.2d 674, 677 (D.C. Cir. 1987) (“When an Act of Congress has created the action at issue, the role of the courts in deciding the survivorship issue is to effectuate the will of Congress as best they can.”).

<sup>255</sup> S. Rep. No. 99-345 at 6-7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272-5272.

<sup>256</sup> *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5268.

<sup>257</sup> *Id.* at 11, *reprinted in* 1986 U.S.C.C.A.N. 5276 (*quoting* *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885)).

defendant found liable, but by easing the restrictions on who can be a *qui tam* relator to encourage fraud-fighting by private citizenry.<sup>258</sup>

C. Applying the Test of Congressional Intent to the Act

The purposes of the Act are advanced by permitting a *qui tam* relator's cause of action under the Act to survive the death of the relator. Furthermore, the Act's jurisdictional bar assures that no person other than the relator's legal representative can continue the suit, because once the *qui tam* case is filed, the information underlying the allegations are publicly disclosed under the Act.<sup>259</sup> Such a suit can only be pursued by the original source of the information, and no outsider would qualify.<sup>260</sup> If the relator's legal representative cannot pursue the case, no other private citizen will be able to do so, and Congress' intent to enlist and encourage private persons to assist the Government in fighting fraud will be frustrated.<sup>261</sup>

Although allowing a *qui tam* action under the Act to survive the death of the relator furthers the will of Congress, it does present the problem of potential prejudice to defendants. Nevertheless, potential prejudice to defendants can be alleviated by applying ordinary principles of federal civil procedure to each case on a case-by case basis. In cases where either the defendant or the relator has presented evidence that information on which the allegations of the complaint are based was publicly disclosed, as defined by the Act, and the relator dies, the court should decide whether the parties have had sufficient

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<sup>258</sup> *Id.* at 8, reprinted in 1986 U.S.C.C.A.N. 5266, 5273.

<sup>259</sup> 31 U.S.C. §3730(e)(4) (2000); FED. R. CIV. P. 25. The term "civil hearing" in the statute has been construed broadly, such that even the filing of a complaint, without further proceedings, constitutes a "public disclosure." See, e.g., *United States ex rel. Siller v. Becton Dickenson & Co.*, 21 F.3d 1339, 1350 (4<sup>th</sup> Cir. 1994).

<sup>260</sup> 31 U.S.C. §3730(e)(4) (2000).

<sup>261</sup> The Government could request permission from the court to intervene upon the relator's death. 31 U.S.C. §3730(c)(3) (2000). Nevertheless, given the limited resources of the Government, it is unlikely that the Government will seek to later intervene in a case that it declined to prosecute initially simply because the relator has died. See note 12, *supra*.

opportunity to develop the evidence regarding whether the relator was an “original source” of the information.<sup>262</sup> If the relator’s legal representative cannot establish by a preponderance of the evidence that the relator was an “original source,” the court must dismiss the case for lack of subject matter jurisdiction.<sup>263</sup> If the court determines that prejudice to the defendant caused by the relator’s death is so great that to allow the suit to continue would be fundamentally unfair, the court can dismiss the case on those grounds, without finding that the relator’s cause of action abates upon his death.<sup>264</sup>

The survival of an action imposing treble damages and money penalties against a defendant, almost one-third of which may go to the estate of a relator who suffered no injury, is troubling under the common law test for survivability of a federal statutory action. Nevertheless, it is not particularly troubling under a public-policy based test. Congress’ stated purpose in increasing potential damages and penalties and making private enforcement easier and more attractive was to pique the interest of private persons in assisting the Government in fighting fraud.<sup>265</sup> The interest of an ill or elderly person, who wishes to leave her estate to her legal representatives or successors, in assisting the Government in fighting fraud, is likely to be as strong as the interest of a healthy or young person in self-enrichment. Private antitrust cases brought under federal statutes that authorize an award of treble damages have been held to survive a private plaintiff’s

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<sup>262</sup> 31 U.S.C. §3730(e)(4) (2000). The issue of “original source” only arises if there is “publicly disclosed” information within the meaning of the statute. *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8<sup>th</sup> Cir. 1995); *United States ex rel. Neher v. NEC Corp.*, 931 F.2d 1493, 1500 (11<sup>th</sup> Cir. 1991); *contra United States v. Rockwell Int’l. Corp.*, 730 F. Supp. 1031 (D. Colo. 1990). Therefore, this problem will only arise in a small subset of cases.

<sup>263</sup> 31 U.S.C. §3730(e)(4) (2000).

<sup>264</sup> *See MacDonald v. Time, Inc.*, 554 F. Supp. 1053, 1058 (D.N.J. 1983). The court in such a case may want to consider whether the defendant diligently pursued discovery of the relator on the issue of subject matter jurisdiction prior to the relator’s death, or whether the defendant opposed a perpetuation deposition of the relator.

<sup>265</sup> *See Cook County, Illinois v. United States ex rel. Chandler*, 358 U.S. 119, 131 (2003).

death, based on Congress' intent to encourage private enforcement of the antitrust laws through the treble damage remedy.<sup>266</sup> Unlike a *qui tam* relator, who has no personal injury of his own, a private plaintiff can only sue under the antitrust law if the plaintiff's business or property has been injured.<sup>267</sup> Nevertheless, the *qui tam* relator's status as a "partial assignee" of the injured Government provides the relator status at least equivalent to that of a person injured by an antitrust violation for purposes of survivability and public policy. Even in cases where the Government has suffered no damages, the money penalties available under the Act may serve to compensate the Government for non-recoverable consequential damages, and this consequential injury may be part of the Government's "partial assignment" to the relator.<sup>268</sup> Furthermore, the recent trend towards applying the Excessive Fines Clause to recoveries under the Act,<sup>269</sup> and the reemergence of economic substantive due process in the context of punitive damage awards,<sup>270</sup> make it likely that there are sufficient checks on the court's ability to award damages that are completely disproportionate to any harm suffered by the Government, regardless of the survivability of the relator's action.<sup>271</sup>

## VI. CONCLUSION

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<sup>266</sup> See Sheldon R. Shapiro, Annotation, *Survival of Right of Action for Damages Based on Violation of Federal Antitrust Laws*, 11 A.L.R. FED. 963 n.14 (1972). Nevertheless, there is no agreement among the courts as to whether treble damages survive the death of a private antitrust plaintiff, or if the legal representative of the plaintiff is limited to pursuing actual damages. *Id.*

<sup>267</sup> 15 U.S.C. §15 (2004).

<sup>268</sup> See 1 BOESE, *supra* note 4, §3.03[A][3].

<sup>269</sup> See Section III(A)(2)(d) *supra*.

<sup>270</sup> See note 166, *supra*.

<sup>271</sup> It is also possible that a court could take the United States Supreme Court's characterization of treble damages as a "ceiling," and impose less than treble damages in a case where the relator has died. *Cook County, Illinois v. United States ex rel. Chandler*, 358 U.S.119, 130 (2003); see also *Rogers v. Douglas Tobacco Board of Trade*, 244 F.2d 471 (5<sup>th</sup> Cir. 1957) (in a private antitrust enforcement action, court allowed the claim to survive, but limited recovery to actual damages after the defendant's death); Stephanie Trunk, 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*, 71 Geo. Wash. L. Rev. 159, 174 (proposing a two-tiered damage and penalty structure for the Act to alleviate its punitive effect).

Just as the pirate leaves a map for his successor to find the hidden treasures the pirate accumulated in life, a *qui tam* relator's complaint and disclosure statement are the map left for successors or legal representatives to uncover fraud against the Government, and reap the rewards of the relator's discovery. The Act is a powerful tool that Congress has created to protect the public fisc, deter fraud, and assist the Government in uncovering fraud that has already occurred. None of these purposes are served by abatement of relator's action upon death, and they are furthered by permitting a relator's action to survive death and continue to be pursued by the relator's legal representatives. The statute's jurisdictional bar, the inherent power of the courts to dismiss a case when the defendant is excessively prejudiced by inability to defend against it, and the constitutional protections against disproportionate remedies provide sufficient protections for defendants who might be severely prejudiced by the death of the relator.

As more and more *qui tam* cases are brought,<sup>272</sup> and they allege more and more complicated fraudulent schemes, they take more and more time to work their way through the Government's investigative process and our overcrowded courts. the likelihood of a relator dying before the case comes to its conclusion continues to increase. A *qui tam* relator's case under the Act has been described as "the gift that keeps on giving."<sup>273</sup> The will of Congress, and protection of the public, is best served when the gift of a relator's claim under the Act can be given posthumously to the relator's legal representatives.

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<sup>272</sup> See 2 BOESE, *supra* note 4, Appendix H-1, for a chart showing the steady increase in *qui tam* filings under the Act.

<sup>273</sup> *Pursuit of False Claims*, *supra* note 10.

