

NOTE

ALTERNATE REMEDIES & THE FALSE CLAIMS ACT: PROTECTING QUI TAM RELATORS IN LIGHT OF GOVERNMENT INTERVENTION AND CRIMINAL PROSECUTION DECISIONS

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INTRODUCTION

The False Claims Act (FCA or Act)¹ is the principal federal anti-fraud statute.² The Act imposes liability against any party that submits fraudulent claims for payment to the United States.³ The FCA also provides for private enforcement.⁴ Individuals with information about government fraud may bring civil suits on behalf of themselves and the government.⁵ The Act labels such actions “qui tam” suits.⁶ In order to “encourag[e] private individuals to come forward with information about fraud that might otherwise remain hidden,”⁷ the individuals bringing qui tam suits (“relators”) are entitled to a portion “of the proceeds of the action or settlement of the claim.”⁸ These qui tam suits raise a number of issues for the government.

The government faces its first decision as soon as a relator brings a qui tam action in federal court.⁹ The government has at least sixty days¹⁰ to decide whether to intervene in the relator’s qui tam suit.¹¹ If the government elects to intervene, it must assume primary responsibility for prosecuting the action.¹² If the government declines to intervene, the qui tam relator must decide whether to pursue the suit independently.¹³

The government’s second decision is whether to explore additional criminal or administrative remedies based upon the information that the relator provides.¹⁴ The evidence supporting a relator’s allegations that a defendant has defrauded the government might also provide support for government-initiated criminal or administrative

¹ See 31 U.S.C. §§ 3729–33 (2006).

² See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 541 (2000).

³ See 31 U.S.C. § 3729(a); *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 463 (2007).

⁴ See 31 U.S.C. § 3730(b).

⁵ See *id.* § 3730(b)(1). The suits are brought in the name of the government. *Id.*

⁶ See *Rockwell Int’l Corp.*, 549 U.S. at 463 n.2. The term comes from the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which translates to “who pursues this action on our Lord the King’s behalf as well as his own.” *Id.*

⁷ *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1012 (9th Cir. 2001).

⁸ See 31 U.S.C. § 3730(d). The percentage of the government recovery to which the relator is entitled varies depending on a number of factors, especially whether the government chooses to intervene. See *id.* § 3730(d)(1)–(2).

⁹ See *id.* § 3730(b)(2).

¹⁰ See *id.* § 3730(b)(2)–(4).

¹¹ *Id.* § 3730(b)(2).

¹² See *id.* § 3730(c)(1).

¹³ See *id.* § 3730(c)(3) (stating that even if the relator proceeds with the action independently, the government may still intervene at a later date upon a showing of good cause).

¹⁴ See *id.* § 3730(c)(5).

proceedings.¹⁵ For example, the government might elect to intervene in the relator's qui tam suit while simultaneously pursuing criminal fraud charges in a parallel proceeding.¹⁶ Alternatively, the government might decline to intervene and instead pursue only criminal charges.¹⁷ Court interpretations of key provisions of the FCA are likely to influence how the government makes these decisions.¹⁸

Fairness concerns arise when the government chooses to pursue criminal or administrative remedies based on the information the relator provided instead of pursuing the qui tam claim.¹⁹ One court worried that there might "be nothing left for the relator to recover" if government-initiated criminal proceedings rendered the defendant judgment proof in the qui tam suit.²⁰ On its face, the FCA purports to protect the interests of qui tam relators in instances where the government seeks "any alternate remedy."²¹ Specifically, the Act provides that the relator "shall have the same rights in such [an alternate remedy] proceeding as such person would have had if the action had continued under this section."²² Despite these safeguards, existing case law does not satisfactorily clarify the scope of the protection that the FCA's "alternate remedy" provision affords to relators. This Note engages two critical issues that remain unresolved: To what extent do the government's decisions with respect to (1) intervention in the relator's qui tam suit, and (2) pursuit of criminal remedies, affect the rights of relators to share in an eventual government recovery?

The government's intervention decision significantly impacts the relator in a number of ways. For example, government intervention automatically reduces the relator's maximum percentage share of the government's recovery.²³ Even more significantly, some courts have interpreted the government's intervention decision as dispositive in determining whether the government has pursued an alternate rem-

¹⁵ See, e.g., Geoffrey A. Goodman et al., *Parallel Proceedings in Complex Health Care Fraud Cases: The Blue Shield of California Case*, 45 USA BULL., June 1997, at 14, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4503.pdf ("Parallel proceedings are becoming more common A whistle blower's False Claims Act complaint . . . can spawn simultaneous criminal, civil, and administrative investigations.").

¹⁶ See *id.*

¹⁷ See, e.g., *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *1-2 (S.D. Ind. Dec. 21, 2005).

¹⁸ See *id.* at *4 (suggesting that one proposed construction of the FCA would incentivize the government to decline to intervene in relators' qui tam suits and instead initiate criminal forfeiture proceedings against the defendants).

¹⁹ See *id.*

²⁰ *Id.*

²¹ 31 U.S.C. § 3730(c)(5) (2006).

²² *Id.*

²³ See *id.* § 3730(d). The exact magnitude of this impact is discussed in more detail *infra* Part I.D.

edy.²⁴ This Note contends that considering the government's intervention decision in this manner is unnecessary because courts have access to better criteria that are more indicative of whether the government has pursued an alternate remedy.²⁵ Moreover, any approach that considers the government's intervention decision in alternate remedy determinations incentivizes undesirable government behavior.²⁶

Although both the text of the FCA²⁷ and case law²⁸ have clarified that an administrative proceeding may qualify as an alternate remedy, neither source has sufficiently clarified whether a criminal proceeding may also function as an alternate remedy.²⁹ Failing to classify a criminal proceeding as an alternate remedy arguably creates a loophole whereby the government can defeat the FCA's intent.³⁰ The prototypical example is a case in which the government declines to intervene in the relator's civil suit while utilizing the information the relator provided to bring criminal charges. If the criminal suit resolves first, a real danger exists that the government may be able to recover substantially all of the defendant's assets in the criminal trial and render the defendant judgment proof in the relator's ongoing civil suit.³¹ Indeed, the government likely has "the incentive in most cases" to proceed criminally and avoid sharing with the relator.³² This Note addresses this situation, which arose before a federal district court in *United States v. Bisig*.³³

The propriety of characterizing a parallel criminal proceeding as an alternate remedy is unclear. Although this approach seems to honor the intent of the FCA, it raises significant logistical concerns.³⁴

²⁴ See *infra* Part II.A.

²⁵ See *infra* Part II.B.1.

²⁶ See *infra* Part II.A.

²⁷ See 31 U.S.C. § 3730(c)(5) ("[T]he Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding . . .").

²⁸ See, e.g., *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1006, 1012 (9th Cir. 2001) (finding that an administrative proceeding concerning whether to suspend or disbar a company from receiving government contracts may be an "alternate remedy" in some circumstances).

²⁹ Compare *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *4–5 (S.D. Ind. Dec. 21, 2005) (holding that criminal forfeiture proceedings constitute an alternate remedy), with *United States v. Lustman*, No. 05–40082–GPM, 2006 WL 1207145, at *3 & n.1 (S.D. Ill. May 4, 2006) (distinguishing *Bisig* and disputing that criminal prosecutions are alternate remedies).

³⁰ See *Bisig*, 2005 WL 3532554, at *4 (arguing that this construction would eliminate relators' incentives to privately enforce the FCA).

³¹ See *id.* at *4–5.

³² See *id.* at *4.

³³ *Id.*

³⁴ See *id.* at *6 (discussing the government's contention that characterizing criminal proceedings as alternate remedies would have undesirable consequences for prosecution

Indeed, some relators may desire to intervene in criminal suits in order to protect their interests in a government recovery.³⁵ Courts are very reluctant to allow third parties to intervene in criminal proceedings for obvious reasons.³⁶ Still, it may be desirable in certain circumstances to provide qui tam relators with the opportunity to intervene in criminal suits in a limited capacity³⁷ in order to protect their interests.

Part I of this Note explores the origins of the FCA and Congress's underlying rationale for amending the Act in 1986. Part I also discusses the significance of the 1986 amendments in encouraging qui tam suits and explains how the FCA currently operates. Part II considers "alternate remedies" under the FCA. It argues that the government's intervention decision should not affect whether a parallel government action functions as an alternate remedy. Additionally, Part II analyzes and draws on the *Bisig* decision to contend that courts should characterize criminal proceedings as alternate remedies in certain cases. Finally, this Note suggests that courts should allow qui tam relators to intervene in the criminal forfeiture component of criminal proceedings.

I

THE FALSE CLAIMS ACT AND THE 1986 AMENDMENTS

One commentator characterized the FCA as "the federal government's principal anti-fraud statute."³⁸ The Act imposes liability on a party who "knowingly presents [to the United States government] . . . a false or fraudulent claim for payment or approval"³⁹ or "knowingly makes, [or] uses . . . a false record or statement to get a false or fraudulent claim paid or approved by the Government."⁴⁰ In addition to the liability component, the Act notably contains a qui tam provision, which allows private individuals to sue under the FCA "for the person and for the United States Government . . . brought in the name of the Government."⁴¹

of those suits, including the possibility that a relator might have a right to participate as a prosecuting party in a criminal case).

³⁵ See *infra* Part II.C.

³⁶ See *Bisig*, 2005 WL 3532554, at *6 ("The court recognizes that [allowing the relator to participate as a prosecuting party] would be an undesirable result.")

³⁷ Specifically, this Note echoes the *Bisig* decision in arguing that courts can reasonably limit relator intervention to participation in the criminal forfeiture proceeding. See *id.*

³⁸ See Beck, *supra* note 2, at 541.

³⁹ 31 U.S.C. § 3729(a)(1) (2006).

⁴⁰ *Id.* § 3729(a)(2).

⁴¹ *Id.* § 3730(b)(1).

A. The Historical Origins of the False Claims Act

The United States did not invent the concept of using legal provisions to incentivize the private enforcement of laws.⁴² The United States likely borrowed the idea from England,⁴³ where *qui tam* enforcement had been present for hundreds of years prior to the creation of the original False Claims Act.⁴⁴ Indeed, *qui tam* actions “appear to have been as prevalent in America as in England, at least in the period immediately before and after the framing of the [United States] Constitution.”⁴⁵

Congress enacted the original False Claims Act in 1863 to combat the fraud occurring in military procurement during the Civil War.⁴⁶ “The War and Treasury Departments had urgently requested legislation to facilitate prevention and punishment of procurement fraud.”⁴⁷ In one example of such fraud, the Army inspected a shipment of small arms and artillery shells only to find that the arms were useless and the shells were filled with sawdust.⁴⁸ The FCA’s provisions created incentives for informers to come forward with information about fraud by guaranteeing the informers half of the government’s total recovery.⁴⁹ Guilty defendants were liable to the government in the amount of \$2,000 for each violation “plus double the government’s actual damages.”⁵⁰

In the early 1940s, in the midst of World War II, Congress came very close to repealing the provisions of the FCA that permitted private individuals to bring *qui tam* suits.⁵¹ The impetus for this “statutory retrenchment” was the exploitation of the Act by opportunistic informers.⁵² In *United States ex rel. Marcus v. Hess*, for example, “[r]ealizing that the government had already made a case for him, a quick-thinking *qui tam* informer purportedly copied the allegations of the government’s indictment [of the defendant] into an FCA complaint and ultimately obtained a judgment for \$315,000.”⁵³ Then At-

⁴² See Beck, *supra* note 2, at 549–53 (explaining that William Blackstone provided “a mature explication of the nature of *qui tam* enforcement in England in the period preceding the American Revolution”).

⁴³ See *id.* at 553–54.

⁴⁴ See *id.* at 565–66; see also *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (stating that “[*q*]ui *ta*m actions appear to have originated around the end of the 13th century”). However, it is worth noting that England abolished the use of *qui tam* enforcement in 1951. See Beck, *supra* note 2, at 604–08.

⁴⁵ *Stevens*, 529 U.S. at 776.

⁴⁶ See Beck, *supra* note 2, at 555.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *id.* at 555–56.

⁵⁰ See *id.*

⁵¹ See *id.* at 558.

⁵² See *id.* at 556.

⁵³ *Id.* The full citation for this case is 317 U.S. 537 (1943).

torney General Francis Biddle sent a letter to Congress complaining that relators were able to obtain portions of government recoveries under the FCA without providing any truly valuable information.⁵⁴ Others argued that the qui tam provisions were no longer necessary in light of the resources available to the Department of Justice and the Federal Bureau of Investigation.⁵⁵

Eventually, both the Senate and the House of Representatives independently passed bills, in different congressional sessions, that would have repealed qui tam provisions in the FCA.⁵⁶ Due in part to Senator William Langer's strong opposition, Congress reached a compromise in 1943 that limited, but did not abolish, the FCA's qui tam provisions.⁵⁷ The compromise restricted a relator's ability to recover under the FCA by requiring that a relator provide information and evidence about government fraud that the government did not already possess.⁵⁸ Additionally, the amended statute reduced the share of the government's recovery that the relator was eligible to receive.⁵⁹ Specifically, if the government intervened and took control of the relator's suit, the relator could not receive in excess of 10% of the proceeds that the government recovered.⁶⁰ If the government did not intervene, a relator who successfully prosecuted the suit received no more than 25% of the recovery.⁶¹

B. The 1986 Amendments to the False Claims Act

In 1986, Congress reversed course and significantly amended the FCA to further incentivize relators to come forward and privately enforce the Act.⁶² The amended statute increased the incentives available to potential relators in a number of ways. First, and most directly, Congress increased the relator's share of the eventual government recovery in a successful FCA suit. If the government intervenes and takes responsibility for a suit the relator initiated, the relator receives between 15% and 25% "of the proceeds of the action or settlement of the claim."⁶³ Alternatively, if the government declines to intervene and the relator pursues the suit independently, the relator is entitled to between 25% and 30% of the proceeds.⁶⁴ Additionally, relators that successfully prosecute suits in which the government does not in-

⁵⁴ See *id.* at 558.

⁵⁵ See *id.* at 558–60.

⁵⁶ See *id.* at 558.

⁵⁷ See *id.* at 558–61.

⁵⁸ See *id.* at 560.

⁵⁹ See *id.* at 560–61.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See S. REP. NO. 99-345, at 2–3 (1986).

⁶³ 31 U.S.C. § 3730(d)(1) (2006).

⁶⁴ *Id.* § 3730(d)(2).

tervene may receive not only a share of the ultimate government recovery, but also reasonable costs, expenses, and attorneys' fees.⁶⁵ Congress also increased the base fine for violating the FCA to an amount "not less than \$5,000 and not more than \$10,000."⁶⁶ Lastly, the amendments greatly increased the potential size of the total government recovery because it made offenders liable for treble damages.⁶⁷

The amendments also made it easier for potential relators to bring qui tam actions. The amended FCA no longer requires "proof of specific intent to defraud."⁶⁸ Instead, the FCA imposes liability on defendants that defraud the government even if they acted with only "deliberate ignorance" or "reckless disregard of the truth or falsity" of the information that they provided to the government.⁶⁹ Moreover, the relators may base their claims upon already-disclosed public information so long as the relator qualifies as an "original source" of that information.⁷⁰

Congress amended the FCA in 1986 to increase the incentives available to qui tam relators for a number of reasons. First, the amendments functioned as a response to public pressure that arose after high-profile media stories exposed egregious government fraud.⁷¹ Provocative examples of such fraud included defense contractors charging up to \$600 for toilet seats and \$100 for screwdrivers.⁷² Second, Congress felt that the perceived magnitude of ongoing fraud justified these additional incentives. Congress relied on the Department of Justice's estimate that fraud was "draining 1 to 10 percent of the entire Federal budget . . . [and] could be costing taxpayers anywhere from \$10 to \$100 billion annually" based on 1985 budget expenditures.⁷³

Third, Congress did not believe that the then-existing fraud prevention or detection measures were sufficiently effective. Congress considered a General Accounting Office study that suggested that "most fraud goes undetected due to the failure of Governmental agen-

⁶⁵ *Id.*

⁶⁶ *Id.* § 3729(a).

⁶⁷ *See id.* A defendant found liable is not subject to treble damages in certain circumstances, such as when the defendant fully cooperates with the government investigation. *See id.*

⁶⁸ *Id.* § 3729(b).

⁶⁹ *Id.*

⁷⁰ *Id.* § 3730(e)(4)(A). In order for the relator to qualify as an "original source," the statute requires that the relator have "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government." *Id.* § 3730(e)(4)(B).

⁷¹ *See* Beck, *supra* note 2, at 561.

⁷² *See* Paul Craig Roberts, Op-Ed., *Open-Ended Assault on Liberties*, WALL ST. J., Apr. 22, 1986, at 28.

⁷³ S. REP. NO. 99-345, at 3 (1986).

cies to effectively ensure accountability on the part of program recipients and Government contractors.”⁷⁴ Additionally, proponents of the amendments argued that the Department of Justice was hesitant to aggressively prosecute fraud and lacked sufficient resources to do so.⁷⁵ The Senate Judiciary Committee clearly believed that something had to be done “[i]n the face of sophisticated and widespread fraud,” concluding that “only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.”⁷⁶ As a result, Congress’s “overall intent in amending the *qui tam* section of the False Claims Act [was] to encourage more private enforcement suits.”⁷⁷

Fourth, Congress understood that increased incentives were necessary to induce individuals to accept the concrete and psychological risks that private enforcement entails. Many informers gain information about government fraud while working either for, or with, companies or other individuals. Therefore, an informer “who sees or participates in fraudulent activity may have little to gain, and much to lose, from exposing the illegal conduct.”⁷⁸ Those who bring suit based upon the actions of companies with whom they deal risk irreparably damaging profitable business relationships. Employees who discover fraud that their employers perpetrate are understandably reluctant to come forward, particularly if they have willingly or unwillingly participated in the fraud.⁷⁹ These employees also, quite plausibly, fear that employers may punish or terminate employees who bring *qui tam* suits.⁸⁰ This fear is likely to exist despite the FCA’s protection of whistle-blowers.⁸¹ Even if the employer does not take prohibited action, employee stigma and a strained employment relationship may be unavoidable. Lastly, the potential costs of prosecuting the *qui tam* suit—both in terms of time and monetary expense—may deter a potential informer who is considering coming forward.⁸²

⁷⁴ *Id.*

⁷⁵ *See Beck, supra* note 2, at 562–63.

⁷⁶ S. REP. NO. 99-345, at 2.

⁷⁷ *Id.* at 23–24.

⁷⁸ *Beck, supra* note 2, at 563.

⁷⁹ *See United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1012 (9th Cir. 2001).

⁸⁰ *See id.*

⁸¹ 31 U.S.C. § 3730(h) (2006). The FCA renders employers liable to employees who are “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against” after “investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section.” *Id.*

⁸² *See United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 739 (3d Cir. 1997) (quoting *United States ex rel. Neher v. NEC Corp.*, 11 F.3d 136, 138 (11th Cir. 1993)).

C. The Impact of the 1986 Amendments

The 1986 amendments succeeded in increasing the number of qui tam suits filed, at least until the late 1990s.⁸³ One reason why the number of qui tam suits filed each year may not continue to increase is that attorneys litigating these types of suits have increased in number and expertise. Private attorneys developing this expertise generally accept “FCA cases on a contingency basis and front all or most investigation expenses.”⁸⁴ Perhaps these attorneys provide potential relators with better advice because they have an obvious incentive to “screen out many non-meritorious cases.”⁸⁵ Thus, it is plausible that a greater proportion of qui tam suits actually pursued today are meritorious, even if the total number of suits does not continually increase.

Indeed, the 1986 amendments have so successfully encouraged private enforcement that it is unclear whether the Department of Justice is sufficiently equipped to handle the hundreds of qui tam suits relators have filed annually since 2001.⁸⁶ The Department has approximately seventy-five attorneys reviewing these cases at a rate of roughly 100 total cases per year.⁸⁷ In July 2008, over 900 cases were awaiting review.⁸⁸ In partial response, states have begun to pursue an increasing number of these fraud cases.⁸⁹

Not surprisingly, annual government recoveries in cases involving alleged fraud have greatly increased since 1986.⁹⁰ For example, the government recovered a record \$3.1 billion in judgments and settlements in these cases during the 2006 fiscal year.⁹¹ In total, the United

⁸³ See Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 954–55 (2007).

⁸⁴ Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI. L.J. 1021, 1033 (2004).

⁸⁵ *Id.*

⁸⁶ See Carrie Johnson, *A Backlog of Cases Alleging Fraud: Whistle-Blower Suits Languish at Justice*, WASH. POST, July 2, 2008, at A1 (stating that employees have filed approximately 300 to 400 qui tam suits annually since 2001 alleging that their employers have defrauded the government); see also Peter Page, *States Getting in on Qui Tam Suits*, NAT’L L.J., Jun. 30, 2008, at 17 (stating that the Department of Justice has limited resources and therefore cannot pursue all worthwhile cases).

⁸⁷ Johnson, *supra* note 86.

⁸⁸ *Id.*; see also Page, *supra* note 86, at 17 (stating that “a backlog of 1,000 cases await[s] review at the U.S. Department of Justice”).

⁸⁹ See Page, *supra* note 86, at 1, 17. The director of Florida’s Medicaid Fraud Control Unit explained, “More states are adopting qui tam statutes because we are all addressing the same issues. There are so many viable cases that states cannot expect the feds to do all the heavy lifting.” *Id.* at 17.

⁹⁰ See Broderick, *supra* note 83, at 979 (noting that at least some of the increase is likely attributable to the treble damages provision added to the FCA in the 1986 amendment and “enhanced discovery rules under the Federal Rules of Civil Procedure”).

⁹¹ Press Release, U.S. Dep’t of Justice, Justice Department Recovers Record \$3.1 Billion in Fraud and False Claims in Fiscal Year 2006 (Nov. 21, 2006), available at http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html. Relator-initiated suits accounted for \$1.3 billion of the total recovery. *Id.*

States has recovered more than \$21 billion since Congress amended the FCA in 1986.⁹² Significantly, relator-initiated suits have accounted for more than 70% of the government's recoveries in the last two years.⁹³

D. The False Claims Act Today

In its current form, the FCA permits private individuals to bring civil suits on behalf of themselves and the United States against parties that have allegedly defrauded the government.⁹⁴ To initiate a suit, a relator files a complaint. The complaint remains under seal⁹⁵ for at least sixty days. The government receives a copy of the complaint and a written disclosure of the relator's evidence and information. Upon receipt of these materials, the government has at least sixty days to decide whether to intervene in the civil action. This period allows the government to consider the merits of the suit and conduct its own investigation before the defendant receives notice. In the event of intervention, the government assumes responsibility for prosecuting the suit.⁹⁶ If the government declines to intervene, the qui tam relator may continue to prosecute the suit independently.⁹⁷ If the suit results in a judgment against the defendant or a settlement, the relator is entitled to a portion of any eventual recovery as well as reimbursement for reasonably necessary expenses, attorneys' fees, and costs.⁹⁸ The government's decision with respect to intervention, however, affects the size of the relator's portion of the recovery. Specifically, if the government elects to intervene, the relator receives between 15% and 25% of the "proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action."⁹⁹ If the govern-

⁹² Press Release, U.S. Dep't of Justice, More than \$1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008: More than \$21 Billion Recovered Since 1986 (Nov. 10, 2008), available at <http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html>.

⁹³ See *id.* (nearly 78% of the \$1.34 billion the government recovered in fiscal year 2008); Press Release, U.S. Dep't of Justice, Justice Department Recovers \$2 Billion for Fraud Against the Government in FY 2007; More than \$20 Billion Since 1986 (Nov. 1, 2007), available at http://www.usdoj.gov/opa/pr/2007/November/07_civ_873.html (approximately 72.5% of the \$2 billion the government recovered in fiscal year 2007).

⁹⁴ 31 U.S.C. § 3730(b)(1) (2006). Such suits are "brought in the name of the Government." *Id.*

⁹⁵ The suit is not made public while it remains under seal. See *id.* § 3730(b)(2) (stating that "[t]he complaint shall be filed in camera").

⁹⁶ *Id.* § 3730(c)(1). However, the FCA limits the government's ability to unilaterally settle or dismiss the suit. See *id.* § 3730(c)(2). These provisions help safeguard the relator's interests in the outcome of the suit.

⁹⁷ *Id.* § 3730(c)(3).

⁹⁸ See *id.* § 3730(d).

⁹⁹ *Id.* § 3730(d)(1).

ment declines intervention, the relator may recover between 25% and 30% of the proceeds.¹⁰⁰

II

ALTERNATE REMEDIES

Significantly, section 3730(c)(5) of the FCA provides that:

[T]he Government may elect to pursue its claim through any alternate remedy available to the Government If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.¹⁰¹

Thus, the relator remains entitled to a portion of any government recovery realized through an “alternate remedy” to prosecuting the relator’s civil suit. The plain text of the FCA does not clearly define the exact contours of what types of proceedings, under what circumstances, qualify as alternate remedies, although it does helpfully note that “alternate remed[ies] . . . includ[e] any administrative proceeding to determine a civil money penalty.”¹⁰²

Barring further amendment, the FCA’s unanswered questions impose a significant burden on the courts. Regretfully, the courts have not yet addressed these issues satisfactorily. Shortcomings remain not only because of the dearth of case law on point, but also because of the uncertainty and disagreement inherent in the statutory interpretation of ambiguous text and legislative history.

How courts construe the scope of alternate remedies is significant. Although the FCA purports to entitle a relator to a share of a government recovery that takes place outside of the relator’s *qui tam* suit, this protection attaches only if that recovery results from the government’s pursuit of an alternate remedy.¹⁰³ Here, the FCA attempts to strike a delicate balance between incentivizing whistle-blowing, protecting the rights of whistle-blowers who have already come forward, and affording the government the flexibility to realize the full potential of the whistle-blower’s information. This flexibility permits the government to make an informed, strategic decision to bring criminal fraud charges against a defendant rather than pursue exclusively civil claims through a relator’s *qui tam* suit. This flexibility, however, may prove too costly if court interpretations of the FCA’s alternate remedy provision routinely allow the government to circumvent sharing a por-

¹⁰⁰ *Id.* § 3730(d)(2).

¹⁰¹ *Id.* § 3730(c)(5).

¹⁰² *Id.*

¹⁰³ *See id.*

tion of its recovery with the relator.¹⁰⁴ As a result, the way courts ultimately choose to construe the effect of government (1) intervention in the relator's qui tam suit on alternate remedy determinations, and (2) pursuit of criminal remedies on alternate remedy determinations is critically important to qui tam relators and the future of private FCA enforcement.

A. The Effect of Intervention on Alternate Remedies

The first unresolved question is under what circumstances the government pursues an alternate remedy within the meaning of the FCA. Specifically, may the government pursue an alternate remedy regardless of whether it has intervened in the relator's civil suit? What is clear is that the government has the option to intervene in the action initiated by the relator¹⁰⁵ and that it "may elect to pursue its claim through any alternate remedy available to the Government."¹⁰⁶ What is unclear, however, is the critical bridge between these two provisions.

Suppose a relator files a qui tam suit under the FCA alleging that Corporation A has defrauded the government. The government takes the relator's information and decides to seek civil damages against Corporation A before an administrative agency. The text of the FCA explicitly provides that an administrative remedy may qualify as an alternate remedy.¹⁰⁷ The FCA fails, however, to articulate whether the government's decision with respect to intervention in the relator's civil suit is dispositive of whether the government's administrative action qualifies as an alternate remedy. Should the government's intervention decision affect the alternate remedy determination at all?

A number of courts have responded that the government's intervention decision is relevant to the alternate remedy determination. Two conflicting views have emerged as to what effect the intervention decision should have. Some courts adhere to the view that the government may pursue an alternate remedy if, and perhaps only if, it declines to intervene in the relator's civil suit.¹⁰⁸ Others have argued the contrary position: that the government may pursue an alternate rem-

¹⁰⁴ See *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *5 (S.D. Ind. Dec. 21, 2005).

¹⁰⁵ See 31 U.S.C. § 3730(b)(2).

¹⁰⁶ *Id.* § 3730(c)(5).

¹⁰⁷ See *id.*

¹⁰⁸ See *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 647–49 (6th Cir. 2003). *But see United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 739 (3d Cir. 1997) (finding that the government did not pursue an alternate remedy when it declined to intervene in relator's qui tam suit and entered into an administrative settlement). The *Dunleavy* court also found that the government's administrative settlement did not preclude the relator from prosecuting the qui tam suit independently. See *id.*

edy only if it elects to intervene in the relator's civil suit.¹⁰⁹ After closely examining the implications of both approaches, this Note argues that the government's intervention decision should not affect whether the government has pursued an alternate remedy.

1. *View 1: The Government May Pursue an Alternate Remedy if It Declines to Intervene in Relator's Civil Suit*

Courts following *United States ex rel. Bledsoe v. Community Health Systems* have persuasively answered that an alternate remedy may exist if the government declines to intervene in the relator's civil suit.¹¹⁰ According to *Bledsoe*, the plain meaning of the text does not clearly require the government to intervene in the relator's civil action in order to seek an "alternate remedy."¹¹¹ This is particularly true if the government pursues a remedy in a separate proceeding "in lieu of intervening in a *qui tam* action asserting the same FCA claims."¹¹²

On its face, this interpretation provides a number of positive advantages. First, it carries out the FCA's overall mission of encouraging private anti-fraud enforcement and incentivizes whistle-blowing because it affords the relator a share of a recovery obtained in an alternate proceeding if the government does not intervene in the civil suit.¹¹³ Second, the view taken in *Bledsoe* decreases the government's incentive to decline to intervene in the relator's civil suit in favor of pursuing only an alternate remedy because the relator will still be entitled to a portion of that recovery.¹¹⁴ Therefore, the *Bledsoe* reading arguably increases the likelihood that the government will choose to intervene in the relator's suit, relieve the relator of the significant burden of prosecuting it alone, and award a portion of the proceeds to the relator if the suit is successful.

Additionally, as the court in *Bledsoe* suggested, reading the FCA to indicate that the government may *only* pursue an "alternate remedy" if it has previously intervened in the civil suit would allow the government to easily circumvent the FCA's purpose in two ways. First, the government could simply wait for a whistle-blower to file a *qui tam*

¹⁰⁹ Cf. *Bledsoe*, 342 F.3d at 647–49 (discussing and rejecting the government's contention that it may pursue an alternate remedy only if it has intervened in the relator's *qui tam* suit).

¹¹⁰ See *id.* at 648–49; *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1010–11 (9th Cir. 2001); *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *2–3 (S.D. Ind. Dec. 21, 2005).

¹¹¹ See *Bledsoe*, 342 F.3d at 647–49.

¹¹² *Id.* at 649.

¹¹³ See *id.* at 649–50.

¹¹⁴ Cf. *Bisig*, 2005 WL 3532554, at *4 (explaining that if this procedure allows the government to avoid sharing the proceeds with the relator, it will incentivize the government to decline to intervene and instead to choose to recover from the defendant in a separate proceeding).

suit,¹¹⁵ decline to intervene at the outset of the suit, and instead bring a separate action based upon the relator's information. Under this reading, the government would not have to share any portion of the recovery it obtained in the separate proceeding as long as it did not formally intervene in the relator's civil suit.¹¹⁶

Second, the government could take advantage of the FCA provisions that permit the government to apply to (1) extend the time period during which the relator's complaint remains under seal in the *qui tam* suit,¹¹⁷ or to (2) stay discovery in the *qui tam* suit.¹¹⁸ Under the FCA, the government does not have to make a final intervention decision until the last of these extensions expires.¹¹⁹ Even if the government knew at the outset of the *qui tam* suit that it would ultimately decline to intervene, it could purport to need the extension in order to further investigate the merits of the case. With the extension in hand, the government could then potentially use the information provided by a relator to proceed against the same defendant in a separate proceeding while simultaneously delaying the resolution of the relator's *qui tam* suit.¹²⁰ When the stay finally expires, the relator might attempt to prosecute the *qui tam* suit only to find that the defendant is now judgment proof as a result of the government recovering substantially all of the defendant's assets in the separate proceeding.¹²¹ It seems obvious that Congress would not have intentionally created such blatant loopholes.

Unfortunately, the *Bledsoe* reading only gets it half right. The *Bledsoe* reading of the FCA also suggests that the government *must* decline to intervene in order for the court to find that the government has pursued an alternate remedy.¹²² This interpretation, which would permit a relator to recover a share of an "alternate remedy" *only* if the government has declined to intervene, is unsatisfactory for the reasons stated in the following section. Furthermore, such a narrow

¹¹⁵ See *Bledsoe*, 342 F.3d at 648–49; see also 31 U.S.C. § 3730(b)(2) (2006) (requiring government access to the relator's complaint and written disclosure of substantially all of the relator's evidence and information relating to the alleged fraud when a relator brings a *qui tam* suit under the FCA).

¹¹⁶ See *Bledsoe*, 342 F.3d at 649.

¹¹⁷ See 31 U.S.C. § 3730(b)(3).

¹¹⁸ See *id.* § 3730(c)(4).

¹¹⁹ See *id.* § 3730(b)(4).

¹²⁰ See *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *4 (S.D. Ind. Dec. 21, 2005) (discussing the government's stay of the relator's *qui tam* action while pursuing criminal charges against the same defendant); cf. *Goodman et al.*, *supra* note 15, at 15 (discussing the government's decision, made after a relator filed a *qui tam* suit, to halt a civil investigation while the criminal investigation proceeded).

¹²¹ See *Bisig*, 2005 WL 3532554, at *4 (finding that leaving the defendant judgment proof contradicts the FCA's purpose).

¹²² See *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 648–49 (6th Cir. 2003).

reading is unnecessary. The better view, as explained below, is that the government pursues an alternate remedy—whether it intervenes or not—whenever it utilizes the information provided by the relator to seek recovery in a criminal or administrative proceeding.

2. *View 2: The Government May Pursue an Alternate Remedy if It Elects to Intervene in Relator's Civil Suit*

There is also merit to the argument that the government has pursued an alternate remedy if it seeks recovery against the defendant based upon the information that the relator provided, even if the government also intervened in the *qui tam* suit. Factual variations on this theme could take place given that the government may elect to proceed simultaneously against the same defendant in civil, criminal, and administrative fora.¹²³ Nevertheless, on its face, this reading seems less persuasive. The need to protect a relator's interest in a government recovery obtained in a parallel proceeding seems less pressing when the government elects to intervene in the relator's civil suit.

Still, taken to its logical extreme, it would create an undesirable loophole to adopt the entirety of the *Bledsoe* reading and hold that the government can *only* pursue an alternate remedy if it has not intervened in the relator's civil suit. All things being equal, the government is unlikely to intervene in the relator's civil suit if it anticipates recovering substantially all of the defendant's assets in a parallel criminal or administrative proceeding.¹²⁴ In such a case, the government would not perceive any benefit to electing to intervene in the relator's *qui tam* suit.¹²⁵ An adoption of the *Bledsoe* reading that an alternate remedy may exist only if the government declines to intervene,¹²⁶ however, creates a perverse incentive for the government to intervene. The government might intervene even if it had no intention of actually prosecuting the action because it could attempt to recover substantially all of the defendant's assets in a criminal or administrative proceeding, knowing that it would not have to share that recovery with the relator. This is because, under the strict reading of *Bledsoe*, a court could not characterize the criminal or administrative proceeding as an alternate remedy if the government met the formal requirement of intervening in the relator's *qui tam* suit. It would be highly undesirable and unfair for the government to effectively deny the rela-

¹²³ See Goodman et al., *supra* note 15, at 14.

¹²⁴ See *Bisig*, 2005 WL 3532554, at *4 (explaining that allowing the government to recover substantially all of the defendant's assets in a parallel proceeding will incentivize the government to decline to intervene and instead recover from the defendant in a separate proceeding).

¹²⁵ See *id.*

¹²⁶ See *Bledsoe*, 342 F.3d at 648–49.

tor any portion of the proceeds it recovered in the separate action simply by virtue of bad-faith intervention in the civil action.

3. *Legislative History*

The basic tenet of statutory construction is that the court must begin by analyzing the plain text of the statute.¹²⁷ The court will also view the “words not in isolation but in context; favoring the more reasonable result; and avoiding a construction contrary to clear statutory intent.”¹²⁸ Indeed, “where the statutory language provides a clear answer, [the analysis] ends there as well.”¹²⁹ As the conflicting interpretations discussed above indicate, the meaning of “alternate remedy” is not clear from the plain text. Thus, courts may look to the legislative history and the statute’s underlying purpose.¹³⁰

Unfortunately, as the court in *Bledsoe* correctly observed, the Senate Judiciary Committee Report on the 1986 amendments provides seemingly conflicting guidance in this area.¹³¹ Although the report makes the overall purpose of the legislation clear,¹³² it does little to fill in the gaps in the plain language of the FCA regarding how the government’s intervention decision might affect determining whether it has pursued an alternate remedy.

First, it appears that the report discusses the “alternate remedy” provision found in 31 U.S.C. § 3730(c)(5) within an explanation of 31 U.S.C. § 3730(c)(3), even though § 3730(c)(3) makes no mention of alternate remedies.¹³³ The court in *Bledsoe* guessed that this discussion “might refer to an earlier draft of the 1986 FCA amendments.”¹³⁴

In isolation, the discussion includes some statements that almost seem to command the second reading of the FCA—that the government can pursue an alternate remedy only if it has intervened in the relator’s civil suit. For example, the report states that “once [the government] intervenes and takes over a false claim suit brought by a private individual, [the government] may elect to pursue any alternate remedy for recovery of the false claim which might be available under

¹²⁷ See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)).

¹²⁸ *Bisig*, 2005 WL 3532554, at *3 (citing *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725 (7th Cir. 2004)).

¹²⁹ *Jacobson*, 525 U.S. at 438 (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

¹³⁰ See, e.g., *Bledsoe*, 342 F.3d at 648–49 (examining Senate Reports to ascertain congressional intent).

¹³¹ See *id.*

¹³² See *id.* (suggesting that Congress wanted to encourage more private enforcement suits).

¹³³ See S. REP. NO. 99-345, at 27 (1986).

¹³⁴ *Bledsoe*, 342 F.3d at 648.

the administrative process.”¹³⁵ Later the report states that “if the Government declines to intervene in a *qui tam* action, it is estopped from pursuing the same action administratively or in a separate judicial action.”¹³⁶

Other portions, however, seem to support the strict *Bledsoe* reading that requires the government to decline to intervene in the relator’s *qui tam* suit in order to pursue an alternate remedy. For example, the report also states in the same section that “[w]hile the Government will have the opportunity to elect its remedy, it will not have an opportunity for dual recovery on the same claim or claims. . . . [It] must elect to pursue the false claims action either judicially or administratively.”¹³⁷ These statements suggest that the government must choose either to intervene and seek the civil remedy in the *qui tam* suit or decline to intervene and pursue only the administrative remedy.

What the legislative history does clearly communicate is the Senate’s underlying desire to encourage private enforcement under the FCA.¹³⁸ Though at least one other country that had legislation similar to the United States’s FCA has abolished the *qui tam* provisions in its legislation,¹³⁹ the United States Senate tailored the 1986 amendments to the FCA to provide powerful incentives for individuals to privately enforce the FCA by bringing *qui tam* suits.¹⁴⁰ The Senate believed that such private enforcement, in conjunction with the government’s own efforts, was critical to combating the increasing amount of fraud perpetrated against the government.¹⁴¹

Although the discussions that deal specifically with the alternate remedy provision of the FCA remain contradictory, this Note argues that the legislative history should be read to lend additional support for the position that most effectively furthers the private enforcement policy that clearly motivated the 1986 amendments. That position is that the government’s decision whether to intervene in the relator’s *qui tam* suit should not affect alternate remedy determinations under the FCA’s *qui tam* provisions.

¹³⁵ S. REP. NO. 99-345, at 27.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *Bledsoe*, 342 F.3d at 648–49.

¹³⁹ See Beck, *supra* note 2, at 548–49 (discussing England’s change in policy).

¹⁴⁰ See *id.* at 561–63.

¹⁴¹ See S. REP. NO. 99-345, at 1–2 (1996) (“In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.”).

4. Preferred View

Unfortunately, the courts and legislative history have not sufficiently clarified whether the government's intervention decision determines whether the government has pursued an alternate remedy under the FCA. Both the strict *Bledsoe* reading and the contrary reading create obvious loopholes that the government may exploit to avoid payments to relators and defeat the underlying legislative intent of the 1986 FCA amendments.

If courts adhere to the strict *Bledsoe* reading and take the position that an alternate remedy may exist only if the government declines to intervene in the relator's qui tam suit, the government may potentially (1) intervene in the relator's suit in bad faith and without intending to fully prosecute the suit, thereby delaying resolution; (2) simultaneously bring a separate action, which it will vigorously pursue based on the information that the relator provided; (3) avoid paying the relator a share of the proceeds recovered in the separate action; and (4) render the defendant judgment proof before the relator can successfully resolve the qui tam suit.

Alternatively, if the courts adopt the competing view that an alternate remedy can exist only if the government has previously elected to intervene in the relator's qui tam suit, the government may potentially (1) utilize the information provided by the relator to proceed against the same defendant in a separate action; (2) decline to intervene in the relator's suit while simultaneously frustrating the progress of that suit by using the FCA provisions permitting the government to stay the action; (3) avoid sharing a portion of the proceeds it recovered in the separate action with the relator; and (4) render the defendant judgment proof before the relator can successfully recover in the qui tam suit.

When taken to their logical extremes, both of these competing views contain loopholes that are too easy to exploit and provide the government with undesirable incentives. Allowing the government to routinely avoid sharing proceeds with relators nullifies any congressional desire to encourage private enforcement of the FCA by potential whistle-blowers. To honor the unambiguous purpose behind the 1986 amendments to the FCA, courts should refuse to construe the FCA according to either of the views described above.

The best view would hold that the answer to whether the government has pursued an alternate remedy is not contingent upon the government's intervention decision. Courts should take the position that it is possible for the government to pursue an alternate remedy in cases where the government elects to intervene as well as in cases where it declines to do so. What should drive the court's determination is whether the government has utilized the information provided

by the relator to recover against the same defendant “in a manner outside of the *qui tam* action . . . ma[king] an actual monetary recovery by the relator in the *qui tam* action either impossible or futile.”¹⁴² For, “[i]f the government has recovered funds lost from conduct asserted in Relator’s *qui tam* action, then the government has essentially settled Relator’s claims, regardless of whether it formally intervened in Relator’s action or not.”¹⁴³

This view best supports Congress’s underlying purpose for the 1986 amendments to the FCA because it eliminates the most egregious loopholes that would permit the government to avoid sharing proceeds obtained in alternate remedy proceedings with relators. It also relies on a workable standard that informs the conclusion reached in the next section of this Note: courts should be willing to characterize some government-initiated criminal proceedings as alternate remedies. Therefore, this view is also advantageous because it represents a standard for resolving alternate remedy questions more generally—not only in the context of the government’s intervention decision.

B. Criminal Proceedings as Alternate Remedies

Courts have made incremental progress in addressing the issue of what types of proceedings constitute alternate remedies. Given the plain meaning of the FCA’s provision that an alternate remedy may “includ[e] any administrative proceeding to determine a civil money penalty,”¹⁴⁴ courts have had little difficulty determining that administrative proceedings qualify as alternate remedies in some situations.¹⁴⁵ Still, it is unsatisfactory to read the FCA as providing that only administrative, and not criminal, proceedings may qualify as alternate remedies. This is particularly true given that the information a relator brings forward often indicates that a defendant is subject to civil, administrative, and criminal liability.¹⁴⁶ It is also unrealistic to believe that the government will not seriously consider proceedings in any or all of these fora, given that it may obtain different remedies in each type of proceeding.¹⁴⁷

More abstractly, courts have correctly found that a government recovery is an “alternate remedy” if there is “overlap” between the re-

¹⁴² United States v. Bisig, No. 100CV335JDTWTL, 2005 WL 3532554, at *4 (S.D. Ind. Dec. 21, 2005).

¹⁴³ *Bledsoe*, 342 F.3d at 649.

¹⁴⁴ 31 U.S.C. § 3730(c)(5) (2006).

¹⁴⁵ See, e.g., United States *ex rel.* Barajas v. United States, 258 F.3d 1004, 1012 (9th Cir. 2001) (holding “that in some circumstances, a suspension or debarment proceeding can be an alternate remedy”).

¹⁴⁶ See Goodman et al., *supra* note 15, at 14.

¹⁴⁷ See *id.*

covery the government received and the recovery the government “could have obtained if it had intervened” in the relator’s civil action.¹⁴⁸ Specifically, this overlap refers to monetary recovery.¹⁴⁹ In *Bisig*, the court extended this analysis to criminal proceedings by arguing that “whether the United States recovered proceeds of the fraud through the *qui tam* action or through criminal forfeiture, the result should be the same: the relator must be rewarded for its part in uncovering the fraud.”¹⁵⁰ The *Bisig* court supported this proposition by pointing to prior cases that it concluded appropriately focused on “rewarding the source of the government’s information, not on what procedure the government used in recovering the proceeds of the fraud.”¹⁵¹

Under this approach, it is apparent that in some cases courts should find that the government has sought an alternate remedy if it elects to proceed criminally against a defendant based upon information provided by a relator. The overlap is especially obvious in situations where the government recovers such a substantial portion of the defendant’s assets in the criminal proceeding that the defendant is essentially judgment-proof in the relator’s civil action.¹⁵² If the FCA’s purpose is to sufficiently incentivize relators to come forward with information about fraud by awarding them finder’s fees,¹⁵³ that purpose is fundamentally undermined if the government can deprive relators of any portion of the recovery simply by electing to resolve a criminal proceeding first and rendering the defendant judgment-proof.¹⁵⁴ This danger is even more pronounced given the viability of the strategies, described above, by which the government may rely on FCA provisions to stay the relator’s *qui tam* suit while proceeding against the same defendant criminally.¹⁵⁵

¹⁴⁸ *Barajas*, 258 F.3d at 1011 (“Despite the differences between an FCA action and a suspension or debarment proceeding, the government can, and sometimes does, seek a remedy in such a proceeding that effectively takes the place of the FCA remedy.”).

¹⁴⁹ *See id.*

¹⁵⁰ *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *5 (S.D. Ind. Dec. 21, 2005).

¹⁵¹ *Id.*

¹⁵² *See id.* at *4.

¹⁵³ *See S. REP. NO. 99-345*, at 1–2 (1986).

¹⁵⁴ *See Bisig*, 2005 WL 3532554, at *4.

¹⁵⁵ *See supra* notes 115–121 and accompanying text.

1. *Resistance to Characterizing Criminal Proceedings as Alternate Remedies*

Still, courts are resistant to the notion that criminal proceedings may qualify as alternate remedies.¹⁵⁶ Courts may be reluctant to adopt this view for a number of reasons. First, it is still a novel position.¹⁵⁷ Presently, the *Bisig* court remains the only federal court on record as having firmly taken the position that criminal proceedings may qualify as alternate remedies.¹⁵⁸ The fact that courts have very little precedential guidance on this issue of great importance suggests that the question has been under-litigated.

Second, the text of the FCA does not adequately resolve the issue.¹⁵⁹ Although the FCA specifically states that administrative proceedings to determine civil monetary penalties may qualify as alternate remedies,¹⁶⁰ the ambiguous text leaves it to the courts to define the exact contours of what other types of proceedings may qualify as alternate remedies.¹⁶¹ This ambiguity compels the courts to look back to the FCA's legislative history, which is itself the subject of disagreement.¹⁶²

The third, and perhaps most significant, reason courts may hesitate to endorse the view that criminal proceedings qualify as alternate remedies is the implication that *qui tam* relators would have some rights in those criminal proceedings. Indeed, the FCA provides that "[i]f any such alternate remedy is pursued [by the government] in another proceeding," the relator "shall have the same rights in such proceeding as [the relator] would have had if the [original *qui tam*] action had continued."¹⁶³ Previously, courts have very rarely permitted third parties to intervene in criminal suits.¹⁶⁴ A partial response to

¹⁵⁶ See, e.g., *United States v. Lustman*, No. 05-40082-GPM, 2006 WL 1207145, at *3 & n.1 (S.D. Ill. May 4, 2006) (distinguishing *Bisig* in dictum and arguing against characterizing government-initiated criminal proceedings as alternate remedies).

¹⁵⁷ See *Bisig*, 2005 WL 3532554, at *2 (finding it an issue of first impression "whether a relator in a *qui tam* action is entitled to a relator's share where the United States has declined to intervene in the *qui tam* action but has pursued criminal prosecution against the defendant and has recovered substantially all of the defendant's available assets").

¹⁵⁸ See *id.* at *2-5.

¹⁵⁹ See *id.* at *3-4.

¹⁶⁰ 31 U.S.C. § 3730(c)(5) (2006).

¹⁶¹ See *Bisig*, 2005 WL 3532554, at *3-5 (discussing various possible interpretations of "alternate remedy").

¹⁶² Compare *id.* at *3-6 (emphasizing the FCA's stated goal of encouraging private enforcement to support finding a criminal forfeiture proceeding was an "alternate remedy"), with *United States v. Lustman*, No. 05-40082-GPM, 2006 WL 1207145, at *3 n.1 (S.D. Ill. May 4, 2006) (interpreting legislative history to support excluding criminal prosecution from the definition of "alternate remedy") (citing *United States ex. rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 648 (6th Cir. 2003)).

¹⁶³ 31 U.S.C. § 3730(c)(5).

¹⁶⁴ See *infra* Part II.C.

this concern is that the FCA empowers courts to limit the rights of the relator to the extent necessary to protect both the government's prosecution of the criminal case¹⁶⁵ as well as the criminal defendant's interests.¹⁶⁶

2. *The Bisig Decision*

The *Bisig* decision stands as an important example of a court taking a position that is novel and difficult, but ultimately correct, because it interprets otherwise ambiguous statutory language to give the greatest effect to Congress's purpose in amending the FCA in 1986. Conversely, courts would seriously subvert the FCA's purpose if they adopted a bright line rule that a criminal proceeding could never qualify as an alternate remedy.¹⁶⁷

In *Bisig*, the relator filed a qui tam suit alleging the defendant had defrauded the government.¹⁶⁸ Though the government declined to intervene in the civil suit, it brought criminal charges against the same defendant.¹⁶⁹ The defendant chose to accept a guilty plea in the criminal action.¹⁷⁰ In total, the defendant forfeited property with a value in excess of \$900,000 to the government.¹⁷¹ The relator believed that the government was trying to use a procedural loophole to avoid paying a finder's fee. As a result, the relator filed a motion to intervene in the criminal proceeding and asserted an interest in the defendant's forfeited assets.¹⁷²

The first critical issue in *Bisig* was whether a criminal proceeding could qualify as an alternate remedy under the FCA. The court began with the traditional tools of statutory interpretation. First, it noted that the language of the FCA states that the government may pursue "any alternate remedy."¹⁷³ To the court, this indicated that the "statute unambiguously places no restriction on the alternate remedies available to the United States."¹⁷⁴ Other courts have also endorsed a broad reading of this clause.¹⁷⁵

¹⁶⁵ See 31 U.S.C. § 3730(c)(2)(C).

¹⁶⁶ See *id.* § 3730(c)(2)(D).

¹⁶⁷ See *Bisig*, 2005 WL 3532554, at *4.

¹⁶⁸ *Id.* at *1.

¹⁶⁹ *Id.* at *1–2.

¹⁷⁰ *Id.* at *2.

¹⁷¹ *Id.*

¹⁷² See *id.* at *1–2.

¹⁷³ *Id.* at *3 (quoting 31 U.S.C. § 3730(c)(5) (2006)) (emphasis added).

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1010–11 (9th Cir. 2001) ("The language of § 3730(c)(5) places no restrictions on the alternate remedies the government might pursue The term 'any' is generally used to indicate lack of restrictions or limitations on the term modified.").

Next, the court found that the plain meaning of the term “alternate remedy” was itself ambiguous because it was reasonably susceptible to more than one interpretation.¹⁷⁶ The court relied on legislative intent to resolve the ambiguity, ultimately rejecting the government’s contention that a remedy “is only alternate when it precludes the continuance of the *qui tam* action.”¹⁷⁷ The court noted that this narrow interpretation would undermine the overall purpose of the legislation, which is to encourage more private enforcement suits.¹⁷⁸ The rejected interpretation would allow the government to routinely circumvent the relator’s recovery by declining to intervene in the *qui tam* action and, instead, unilaterally recovering “substantially all the Defendant’s assets through [criminal] forfeiture proceedings.”¹⁷⁹

Bisig supplies a standard of review under which courts should consider whether the government’s pursuit of an alternative action significantly undermines the relator’s ability to seek recovery in the original *qui tam* suit. In such situations, courts should protect the relators’ interests in sharing the government’s recovery by characterizing the action as an alternate remedy. This should be true even if the government elects to proceed criminally against the same defendant based upon the information provided by the relator. Otherwise, the government could easily “sidestep the requirement to share recovery with the relator” and “achieve [] a monetary recovery from the Defendant in a manner outside of the *qui tam* action . . . ma[king] an actual monetary recovery by the relator in the *qui tam* action either impossible or futile.”¹⁸⁰ As noted in *Bisig*, even if the relator’s civil action is not precluded by the resolution of the criminal proceeding, leaving the relator to attempt recovery against a judgment-proof defendant “would have the effect of destroying Congress’ unambiguous purpose that the government and private citizens collaborate in battling fraudulent claims, and it would impede Congress’ legislative intent to encourage private citizens to file *qui tam* suits.”¹⁸¹

C. Allowing Intervention in Criminal Forfeiture Proceedings that Courts Characterize as Alternate Remedies

The second critical issue in *Bisig* was whether the court would permit the relator to intervene in the government-initiated criminal proceeding. The FCA provides that if the government elects to pursue an alternate remedy the relator “shall have the same rights in such

¹⁷⁶ See *Bisig*, 2005 WL 3532554, at *3.

¹⁷⁷ *Id.*

¹⁷⁸ See *id.* at *4.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

proceeding as such person would have had if the action had continued under this section.”¹⁸² The most important of these rights, of course, is the relator’s entitlement to a share of the proceeds the government recovers from the defendant. The best way to protect the relator’s rights is to allow the relator to intervene in a limited capacity in a criminal proceeding that constitutes an alternate remedy.

This proposition is not uncontroversial, however. Given the unusual nature of such a request, courts have rarely confronted the issue. Indeed, no rule of criminal procedure sanctions party intervention.¹⁸³ Rule 24 of the Federal Rules of Civil Procedure permits party intervention in civil proceedings,¹⁸⁴ but “[t]he interests of efficient administration of the criminal law . . . warrant denial of permissive intervention under [Federal] Rule [of Civil Procedure] 24(b), assuming arguendo that Rule 24 has any application to criminal proceedings.”¹⁸⁵

Notwithstanding the lack of a general rule governing intervention in criminal proceedings, statutes and the common law have permitted intervention in limited instances. For example, courts have permitted intervention, if only tacitly, in some cases involving media issues.¹⁸⁶ In addition, statutory provisions allow third parties to intervene in criminal forfeiture proceedings.¹⁸⁷ Essentially, a party asserting a legal interest in the property a defendant forfeits may petition the court for a hearing to assert a claim to that property.¹⁸⁸ If the court is persuaded, it may award a portion of the forfeiture proceeds to the intervenor.¹⁸⁹

When confronted with this novel issue in the context of the FCA, the *Bisig* court ultimately decided that it could protect the relator’s interest in the proceeds the government sought to recover by permitting the relator to intervene in the alternate remedy portion of the government’s criminal action—the criminal forfeiture proceeding.¹⁹⁰ The government argued that allowing intervention in the criminal suit would “allow a relator to have the right to participate as a prosecuting party in a criminal case against the defendant, a result that

¹⁸² 31 U.S.C. § 3730(c)(5) (2006).

¹⁸³ See *In re N.Y. Times Co.*, 878 F.2d 67, 67 (2d Cir. 1989).

¹⁸⁴ FED. R. CIV. P. 24 (providing for interventions of right and permissive interventions).

¹⁸⁵ See *United States v. Gordon*, No. 03 CR. 1494(GEL), 2005 WL 2759845, at *3 (S.D.N.Y. Oct. 19, 2005).

¹⁸⁶ See, e.g., *In re N.Y. Times Co.*, 878 F.2d at 67–68 (intervention by interested media not challenged); *In re Nat’l Broad. Co.*, 635 F.2d 945, 949 n.2 (2d Cir. 1980) (same, but attaching no significance that the order was entered in a criminal case because it could have been treated as a separate civil case).

¹⁸⁷ See 21 U.S.C. § 853(k), (n) (2006).

¹⁸⁸ See *id.* § 853(n)(2).

¹⁸⁹ See *id.* § 853(n)(6).

¹⁹⁰ See *United States v. Bisig*, No. 100CV335JDTWTL, 2005 WL 3532554, at *6, *10 (S.D. Ind. Dec. 21, 2005).

[was] clearly not intended by Congress.”¹⁹¹ Certainly, it would be highly problematic for courts to allow third parties to intervene in the merits portion of a criminal prosecution. Unfettered third-party intervention could irreparably hinder the government’s ability to effectively prosecute criminal cases and might disrupt the criminal justice system.

Fortunately, the *Bisig* court’s ingenious interpretation of the FCA addresses the most pressing concerns discussed above. As the court explained, the FCA purports to protect the relator’s interests in the alternate remedy the government pursues. When “alternate remedy” means a government recovery in the context of an action other than the qui tam suit brought by the relator, it is possible to characterize the criminal forfeiture proceeding as the alternate remedy.¹⁹² Under this interpretation, the court would permit the relator to intervene in what is essentially the penalty phase of the criminal proceeding, but not any other portion of the criminal prosecution, after the court has decided the merits.¹⁹³ Permitting relators to intervene only in the criminal forfeiture proceeding obviates the most troubling concerns raised by a third-party attempt to intervene in a criminal suit. The relator will not be able to interfere with the sensitive, merit-based portion of the government’s prosecution of the defendant. Additionally, because existing federal statutory provisions permit third-party intervention in criminal forfeiture proceedings under certain circumstances,¹⁹⁴ courts have already developed the necessary competence and experience to successfully manage limited relator intervention in these proceedings.

Furthermore, the FCA’s provision regarding alternate remedies explains that the relator has the “same rights in such proceeding as such person would have had if the action had continued under this section.”¹⁹⁵ Even within the qui tam action, however, the FCA places some limitations on the relator’s rights. Specifically, if the government intervenes in the relator’s qui tam action and makes a showing that the relator’s “unrestricted participation” would “interfere with or unduly delay the Government’s prosecution of the case, . . . the court may, in its discretion, impose limitations on the [relator’s] participation.”¹⁹⁶ The court may impose similar limitations if the defendant shows that the relator’s unrestricted participation would result in harassment, “undue burden[,] or unnecessary expense.”¹⁹⁷ These provi-

191 *Id.* at *6.

192 *See id.*

193 *See id.*

194 *See* 21 U.S.C. § 853(k), (n).

195 31 U.S.C. § 3730(c)(5) (2006).

196 *Id.* § 3730(c)(2)(C).

197 *Id.* § 3730(c)(2)(D).

sions can be read together to permit the court to “substantially limit the relator’s involvement in the criminal prosecution,”¹⁹⁸ including the criminal forfeiture proceeding. This interpretation helps address concerns that a relator’s intervention in criminal forfeiture proceedings might raise.

CONCLUSION

In sum, relators need to know where they stand if Congress wants to fully realize the amended FCA’s potential to encourage private fraud enforcement. In particular, relators must have a clear understanding of how the government’s decisions with respect to (1) intervention in the relators’ suits, and (2) pursuit of claims in parallel criminal proceedings, may affect their rights and potential recoveries. Currently, the plain text of the FCA is too imprecise to address relators’ concerns. Similarly, the courts have not yet interpreted the FCA with enough specificity and consensus to settle these questions. Given the significance of *qui tam* suits brought by relators under the FCA, the potential magnitude of recoveries in these cases, and the novel rulings in cases like *Bisig*, it is likely that additional trial and appellate courts will soon have opportunities to take up these issues. These open questions will certainly benefit from such litigation.

Courts should adopt the view that the government pursues an alternate remedy under the FCA if it (1) utilizes information that the relator provided to proceed against the same defendant in criminal proceedings, and (2) the overlap in the remedies sought in the relator’s *qui tam* suit and the government’s proceeding threatens to render the common defendant judgment-proof prior to any relator recovery. Specifically, courts should recognize that parallel criminal forfeiture proceedings may qualify as alternate remedies in these situations. Additionally, the government’s decision with respect to intervention in the relator’s civil suit should not control whether an alternate remedy may exist. This approach best supports the spirit of the FCA, maximizes the protections available to relators who have accepted the risk accompanying exposing government fraud, and incentivizes the government to intervene in meritorious relator-initiated suits.

¹⁹⁸ See *Bisig*, 2005 WL 3532554, at *6 (relying on 31 U.S.C. §§ 3730(c)(5), 3730(c)(2)(D)).

