ARTICLES

PRIVATE JUSTICE

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I. INTRODUCTION.....................................................................................3
II. TYPES OF PRIVATE JUSTICE ACTIONS..............................................12
   A. THE “VICTIM” PRIVATE JUSTICE MODEL ......................................13
      1. Description ...........................................................................13
      2. Assessment ...........................................................................16
   B. THE “HYBRID” PRIVATE JUSTICE MODEL ....................................17
      1. RICO .....................................................................................19
         a. Description ......................................................................19
         b. Assessment .....................................................................21
      2. Securities Fraud Private Actions ..............................................23
         a. Description ......................................................................23
         b. Assessment .....................................................................25
   C. THE “COMMON GOOD” PRIVATE JUSTICE MODEL .......................31
      1. “Citizen Suits” ......................................................................31
         a. Description ......................................................................34
         b. Assessment .....................................................................40
      2. Qui Tam Actions Under the False Claims Act .........................43
         a. Description ......................................................................43
         b. Assessment .....................................................................53

* Bainbridge Professor of Law, University of Alabama. Many thanks are due to Dean Ken Randall and the University of Alabama Law School Foundation for their support of my research activities, which include this Article. I would also like to thank the following University of Alabama Law students who provided excellent research assistance on this Article: Kristopher Aungst, Colleen McCullough, Wayne Merchant, Joseph Stutz and Christina Tabereaux; to the following individuals who shared their expertise in critiquing this Article: Susan Appleton, John T. Boese, Mary Cheh, Michael Clark, Jonathan Diesenhaus, Robert Fabrikant, Jack Getman, Russell Mokhiber, Michel Nicrosi, Ellen Podgor, Marc S. Raspanti and Barbara L. Zelner. Lastly, I greatly appreciate the opportunity to present a working draft of this Article to the law faculty of Washington University School of Law. That opportunity demonstrated, once again, that excellent teachers never stop teaching.
III. ANALYSIS ..........................................................................................54
A. STRENGTHS OF PRIVATE JUSTICE ...................................................54
  1. The Resource of Legal and Investigative Talent ..................55
     a. “Victim” and “Hybrid” Private Justice Models ..............55
     b. “Common Good” Private Justice Models ......................56
        (1) Citizen Suit Private Justice Model ..................56
        (2) Qui Tam FCA Private Justice Model .............58
  2. The Resource of Information ..................................................59
     a. “Victim” and “Hybrid” Private Justice Models ..............59
     b. “Common Good” Private Justice Models ......................60
        (1) Citizen Suit Private Justice Model .................60
        (2) Qui Tam FCA Private Justice Model .............60
B. WEAKNESSES OF THE PRIVATE JUSTICE MODEL ..........................62
  1. Problems Presented ...............................................................62
     a. Difficulties for Business .............................................62
     b. Difficulties for Regulatory Agencies ............................64
     c. Difficulties for the Judicial System ...............................67
C. WAYS TO ADDRESS THE PROBLEMS PRESENTED .........................68
  1. The “Dual-Plaintiff” Design of the FCA and how it
     Addresses Problems Posed by Private Justice .....................68
     a. Encourages Top-Quality Work Early in the Case ..........68
     b. Provides a Mechanism For Regulatory Guidance
        and Dialog ...................................................................69
     c. Allegations Kept Under Seal Protects Defendants’
        Reputations ................................................................69
     d. Government’s Authority to Move for Dismissal ..........70
  2. Improving the FCA’s Quality Control features .....................74
IV. EXPANSION: WHERE FROM HERE ...............................................76
V. CONCLUSION ......................................................................................79
APPENDIX A-1: PROPOSED AMENDMENTS, CIVIL FALSE
CLAIMS ACT ..................................................................................81
APPENDIX A-2: PRIVATE JUSTICE CAUSE OF ACTION TO
PROTECT NATIONAL FINANCIAL MARKETS .....................105
APPENDIX A-3: PRIVATE JUSTICE CAUSE OF ACTION TO
PROTECT THE ENVIRONMENT .................................................128
APPENDIX B-1: SURVEY OF RICO CASES DECIDED BY
FEDERAL APPELLATE COURTS 1999–2001 .........................151
APPENDIX B-2: DISPOSITION OF CIVIL RICO CASES,
FEDERAL APPELLATE COURTS, 1999–2001 ....................152
I. INTRODUCTION

New crimes require new thinking about regulation. Because of computerization and globalization, today’s world faces new crimes and new ways of committing old crimes. Because of the interconnectedness of our global financial markets, this evolving criminal activity has unprecedented power to wreak havoc on every aspect of modern life.¹ Law enforcement has no choice but to respond effectively.

One aspect of this new thinking is revising our concept of crime. Complex, economic wrongdoing is difficult to categorize as criminal primarily because it is enormously difficult to prove the high level of mens rea traditionally and appropriately required in criminal law.² Proving this

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¹ See Pamela H. Bucy, Information As a Commodity in the Regulatory World, 39 Hous. L. Rev. (forthcoming 2002) (manuscript at 2.3–2.4, on file with the author) [hereinafter Bucy, Information As a Commodity].

² For sources discussing the difficulty of proving intent in instances of economic wrongdoing, see, for example, Sharon L. Davies & Timothy Stoltzfus Jost, Managed Care: Placebo or Wonder Drug for Health Care Fraud and Abuse?, 31 Ga. L. Rev. 373, 397–99 (1997); Stuart P. Green, Why it’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses, 46 Emory L.J. 1533, 1614–15 (1997); Peter J. Henning, Individual Liability for Conduct by Criminal Organizations in the United States, 44 Wayne L. Rev. 1305, 1324, 1328–29 (1998); Ellen S. Podgor, Mail Fraud: Redefining the Boundaries, 10 St. Thomas L. Rev. 557, 566–68 (1998); Francis
requisite mental state by the heightened burden required in criminal cases is even more difficult. Moreover, even when proof of criminal intent beyond a reasonable doubt is possible, conducting the investigation and proving a case by these standards is so expensive and time-intensive for both the executive and judicial branches\(^3\) that the costs often outweigh any benefit achieved. Lastly, imposing the criminal sanction of imprisonment on defendants whose wrongdoing, however destructive to society, may be *malum prohibitum*, is morally and practically questionable for a criminal justice system\(^4\) and is often economically inefficient.\(^5\)

Reevaluating our approach to modern day wrongdoing requires consideration of new regulatory tools. This Article addresses the tool of private justice. “Private justice” occurs when private persons initiate lawsuits to detect, prove, and deter\(^6\) public harms.\(^7\) No matter how talented

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4. For a discussion of the moral and practical damage to the judicial system from prosecution of economic wrongdoing, see Bucy, *Information As a Commodity*, supra note 2 (manuscript at 2.28–2.29).


6. Very little has been done to measure the deterrence impact of private justice actions. One preliminary study of the qui tam provisions of the civil False Claims Act (“FCA”) noted that “[d]eterrence . . . is a difficult, if not impossible, magnitude to actually measure.” WILLIAM L. STRINGER, *TAXPAYERS AGAINST FRAUD, THE 1986 FALSE CLAIMS ACT AMENDMENTS: AN ASSESSMENT OF ECONOMIC IMPACT* 32, 35–36 (1996) (finding that the qui tam provisions of the FCA deter fraud, assuming that deterrence can be measured by recoveries in qui tam FCA cases).

7. Judge Jerome Frank employed the term “private Attorney General” in *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), to refer to private persons in whom Congress vests “authority to bring suit . . . the sole purpose [of which] is to vindicate the public interest.” *Associated Industries* was a coal consumer that brought suit challenging the setting of minimum prices for coal by the U.S. Department of Interior. In ruling that Associated Industries had standing, Judge Frank articulated the “assignment” theory later employed by the Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 777–78 (2000), almost sixty years later with regard to private actions brought under the civil FCA. See also MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS § 1.02* (Michie 1995) (referring to “[p]rivate citizen participation in enforcement of the law”); John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer As Bounty Hunter Is Not Working*, 42 Md. L. Rev. 215, 215 & n.1, 217 (1983) [hereinafter Coffee, *Private Attorney General*] (describing the public attorney general as someone who is seen as “a cliche and a crutch,” who is scorned as “champerty and maintenance” by the established bar, and as private lawyers who sue “to vindicate the public interest”); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 339 (1990) (referring to “private law enforcement as a means of attaining public objectives”); David R. Hodas, *Enforcement of Environmental Law in a Triangular...
or dedicated our public law enforcement personnel may be nor how many resources our society commits to regulatory efforts, a public regulatory system will always lack the one resource that is indispensable to effective detection and deterrence of complex economic wrongdoing: inside information. For the purposes herein, inside information is defined as significantly helpful information about economic wrongdoing produced by someone who has experience, insight, or contacts to, the industry or perpetrator involved. Private justice can supply the resource of inside information. Because of the necessary and nonsubstitutable nature of this resource, private justice is not just one option for addressing economic banditry in a global, computerized world;\(^8\) it is the best option.

Private justice has received inadequate academic and policy analysis,\(^9\) but has grown exponentially over the past few decades.\(^10\) Recent

Federal System, 54 Md. L. Rev. 1552, 1561 (1995) (arguing that “citizen suits as private attorneys general [are needed to] safeguard the enforcement system”).

This Article focuses on court proceedings initiated by private attorneys general aimed at public harms. It does not address extra-judicial proceedings such as use of mass media, administrative proceedings, or internal corporate proceedings. For the sake of simplicity this Article focuses on federal private justice actions. There are many state private justice actions, see, e.g., CAL. GOV’T CODE § 12650–55 (West 1992 & Supp. 2001); FLA. STAT. Ch. 68.081–092 (Harrison 1994 & Supp. 2000); MASS. GEN. LAWS ANN. Ch. 12, § 5A–50 (West 1996 & Supp. 2002); TEx. HUM. RES. CODE ANN. § 36.001–132 (Vernon 2001) (regarding false claims in the health care area only), but they tend to resemble, if not intentionally mimic, federal actions, making a separate discussion of them more repetitive than helpful.

8. See Bucy, Information As a Commodity, supra note 1, (manuscript at 2.9, 2.33, 2.67).

9. A number of thoughtful articles and books address various private justice actions but little attention has been devoted by policymakers or academics to comparing and contrasting the various private justice actions or to examining the role private justice might play in an overall regulatory scheme.


experience shows that private justice offers extraordinary success in
detecting illegal activity motivated by economic gain.11 Private justice also


For example, in 2000, the United States collected $1.5 billion in civil fraud recoveries, $1.2 billion of which was collected through private justice actions under the qui tam provisions of the FCA. Press Release, United States Department of Justice (Nov. 2, 2000), available at www.USDOJ.Gov. As one Department of Justice official explained in 1996: “The recovery of over $1 billion demonstrates that the public-private partnership encouraged by [the FCA] works and is an effective tool in our continuing fight against fraudulent use of public funds.” TAXPAYERS AGAINST FRAUD, THE 1986 FALSE CLAIMS ACT AMENDMENTS, TENTH ANNIVERSARY REPORT 15 (1986) (quoting Frank W. Hunger, Assistant Attorney General, Civil Division, U.S. Dept. of Justice). Also, Lewis Morris stated:

The False Claims Act has been an essential tool to protect the integrity of the Medicare program . . . . To achieve this goal . . . of ‘zero tolerance’ of Medicare fraud and abuse . . . the Government relies on a number of enforcement options—criminal, civil, and administrative, as well as educational outreach efforts. Chief among the enforcement tools has been the False Claims Act.

Id. at 15 (testimony of Lewis Morris, Assistant Inspector General, Dep’t of Health & Human Services). See also Hearings Before House Comm. on Judiciary, Subcomm. on Immigration and Claims, 105th Cong., 2d Sess. 14 (1998) [hereinafter Subcomm. on Claims Hearings] (testimony of Donald K. Stern, U.S. Attorney, Dist. Mass. and Chair, Attorney General’s Advisory Comm., Dep’t of Justice) (“[T]he False Claims Act . . . has been the Department’s primary civil enforcement tool to combat fraud.”); id. at 25 (testimony of Robert A. Berenson, Director for Health Care Plans and Provides Administration,
challenges core personal values and has the potential to mightily disrupt existing economic markets. Effective use of private justice as a regulatory tool requires an appreciation of its systemic strengths and weaknesses.

Private justice actions have grown hodge-podge in American jurisprudence throughout the twentieth century, some created by legislatures, others by courts. Today, private justice actions exist in almost every area of life that law seeks to regulate. They vary in design, impact, success, disruption to economic stability, and values communicated. To date, no one has identified private justice as a phenomenon, analyzed its various models, assessed its impact or suggested how, as an institutional design, it is the future of effective regulation. It is time to do so.

Health Care Financing Administration, Dep’t of Health and Human Services) (“[T]he False Claims Act is an important tool for . . . law enforcement . . . to pursue fraud and abuse.”).
Ruth Blacker of the American Association of Retired Persons stated:
Congress in recent years [has] expand[ed] statutory authority and income resources to deal with the problem [of health care fraud and abuse]. However, none of these things are likely to play a more important role in recovering improper payments to in acting as a deterrent than the False Claims Act. Use of the FCA by Federal authorities has become an important tool for fighting fraud and abuse in many programs, including the Medicare program.

Id. at 63 (statement of Ruth Blacker, National Legislative Counsel, American Association of Retired Persons).

12. See Bucy, Information As a Commodity, supra note 1, (manuscript at 2.53–.57).
13. For discussions of the disruptive impact of citizen suits see, for example, Jeanette Austin, Comment, The Rise of Citizen Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 NW. U. L. REV. 220, 222 (1986); Greve, supra note 7, at 339. Cf: Miller, Part III, supra note 9, at 10427–28 (noting industry arguments but dismissing them as unpersuasive and unwarranted).


For discussions of the disruptive impact of RICO, see, for example, Oversight on Civil RICO Suits: Hearing Before the Senate Comm. on the Judiciary, 99th Cong., 1–4 (1985). For a discussion of the disruptive impact of securities private actions, see Bohn & Choi, supra note 9, at 979–80; Hodas, supra note 7, at 1623–24; Macey & Miller, supra note 9, at 5–7, 116–18; Phillips & Miller, supra note 9, at 1027–29. Robert F. Blomquist also argues that private enforcement actions have substantial potential to undermine values in the American judicial system. Blomquist, supra note 9, at 340.
14. See Bucy, Information As a Commodity, supra note 1 (manuscript at 2.5–.11).
15. See, e.g., infra Part II.
The rationale typically given for creating or recognizing private justice actions is that they supplement public resources.\(^{16}\) This understates the importance of private justice, at least when it is optimally employed. Private justice is not simply a helpful adjunct to public regulation. Done correctly, it is an essential ingredient. Without the key resource of inside information that is available through private justice actions, public regulators cannot effectively detect, prove, or deter complex economic crime or public corruption. In our increasingly global, interconnected, and computerized world, such malfeasance has become more complex, more disruptive to legitimate societal institutions, and more difficult to detect.\(^{17}\) There is little choice but to embrace private justice as part of any public regulatory system.

The significant resources private justice brings to regulatory efforts are inside information about violations and entrepreneurial legal talent. Of these, the resource of inside information is more important. This is an invaluable commodity that the regulatory world must pay for. This commodity must be priced high enough to overcome the disincentives to providing it and to alter existing personal and societal values against providing it. For private justice to work, supplying information about wrongdoing must be viewed as morally respectable, not repugnant.

Part I of this Article describes the various private justice models currently in use in the American legal system, noting how at least one of them does a good job of enticing those who have inside information about wrongdoing to come forward. Part II discusses the substantial systemic costs in using the private justice model, and suggests how a private justice paradigm can be optimally designed to minimize these costs while also maximizing the benefits of private justice. Appendix A-1 contains proposed legislation incorporating these suggestions. Part III discusses how and why an optimally designed private justice model should be expanded into two areas: protection of the environment and protection of national financial markets. Appendices A-2 and A-3 contain this proposed legislation.

But first, the following Case Study shows in concrete terms how private justice could have made a difference in one instance of massive wrongdoing.


\(^{17}\) Bucy, Information As a Commodity, supra note 1 (manuscript at 2.17, 2.19–.21).
A Case Study: Enron

In early 2001, Enron was the seventh largest company in the United States. Within twelve months, it declared bankruptcy, becoming the largest bankruptcy to date in U.S. history. At its peak, in January 2001, Enron’s price traded at $83 per share. One year later, in January 2002, Enron stock was trading at 26 cents per share, a plunge of 99%. In December 2001, when it declared bankruptcy, Enron’s debts totaled $13.12 billion. Upon bankruptcy, Enron laid off 4,000 employees, who not only lost their jobs but also lost their savings which were invested in 401(k) retirement funds dominated by Enron stock holdings. As of January 2001, about 60% of Enron’s 401(k) plan assets were invested in Enron stock.

In October and November 2002, when Enron’s stock was plummeting, Enron employees were prevented from trading the Enron stock they held in their 401(k) plans. Their Enron holdings lost over $1 billion in value. At the same time that Enron employees were barred from trading their Enron stock, Enron corporate insiders were unloading their Enron stock and dissipating corporate assets. In the year prior to Enron’s bankruptcy, corporate insiders sold a total of 9,447,659 shares of Enron, valued at $130,972,228.

Enron accomplished its stunning financial failure by apparently “cooking the books.” It established over 3,000 outside partnerships, about 900 of which were based offshore, where financial records are confidential and untouchable by U.S. regulators. It used these partnerships to “move its debt off its financial statements and out of public scrutiny . . . masking

20. *Id.* at 15.
24. *Id.*
26. *Id.*
27. During this same time period, corporate insiders bought only 10,000 shares of Enron, valued at $369,800. *The Enron Scandal*, supra note 18.
28. *Id.*
billions in debt.” All the while, it received clean bills of health from its outside auditor, Arthur Anderson, which certified in its last annual statement that Enron’s “internal accounting system was ‘adequate to provide reasonable assurance as to the reliability of financial statements.’” At the time it gave this opinion, Arthur Anderson was soliciting and receiving lucrative consulting contracts from Enron.

During this same time period, Enron’s law firm reviewed warnings raised by an Enron vice-president about the impropriety of hiding the corporate debt on partnership books, but concluded that the issues raised, “did not... warrant a further widespread investigation by independent counsel and auditors.” Enron Chairman, Kenneth L. Lay, sought this advice on the partnerships from this particular law firm despite the fact that this firm had established the partnerships in question and despite the Enron vice-president’s warning that the firm should not review the partnership issue because of its conflict of interest.

As policymakers consider what can and should be done to prevent future “Enrons,” an optimally designed private justice model should be at the top of the list. Reforming existing laws on contributions to 401(k) retirement plans, tax shelters, accounting firms’ conflicts of interests, and disclosure requirements for derivatives (the type of financial arrangement Enron was able, legally, to keep off its books) should all be considered. But, there is a limit to what public regulation can do. Humans are too creative for regulators to anticipate all of the ways greed can overcome judgment and morals. Even if that were not the case, the cost, disruption

29. Krantz, supra note 21.
31. Id.
32. Id.
33. Id.
34. See, e.g., Editorial, The Real Enron Scandal, THE NEW REPUBLIC, Jan. 28, 2002, at 7; Reed Abelson, Trying Not to Be the Next Enron, Companies Scrutinize Practices, N.Y. TIMES, Jan. 26, 2002, at B1; Diana B. Henriques & Kurt Eichenwald, A Fog Over Enron, and the Legal Landscape, N.Y. TIMES, Jan. 27, 2002 at 1. As Newsweek stated, Enron is “the scariest type of scandal: a total system failure. Executives, lenders, auditors and regulators all managed to look the other way while the company ran amok.” Fineman & Isikoff, supra note 19, at 18. The Public Company Accounting Reform and Investor Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act of 2002) was passed in the aftermath of recent accounting scandals to change the way public companies do business. The Act includes a number of reforms, such as the creation of an accounting oversight board to oversee auditors of public companies; the restriction of nonaudit services that outside auditors may provide for their audit clients; the prohibition of certain inside trades; and the creation of new crimes. The Sarbanes-Oxley Act does not, however, include an effective private justice action. See infra note 36.
and injury to a growing and changing economy make massive public regulation unfeasible. Enlisting the resource of inside information: knowledgeable insiders who are willing to alert regulators to malfeasance before or as it is occurring,\(^{35}\) is the only effective and efficient way to police wrongdoing motivated by economic gain. An effective private justice institutional design can provide this resource.\(^{36}\)

\(^{35}\) Apparently, there were several Enron insiders informed about Enron’s financial house of cards who were willing to raise concerns. Four months before Enron’s bankruptcy, an Enron vice-president questioned the propriety of the Enron financial reports. In an anonymous letter to Enron Chairman, Kenneth L. Lay, she noted the massive debt that was being hidden on the books of Enron partnerships and stated, “I am incredibly nervous that we will implode in a wave of accounting scandals.” Greg Farrell, Co-workers Say She Put Enron’s Future Above Self, USA TODAY, Feb. 14, 2002, at 1B; Krantz, Peeling Back, supra note 21, at 1B; Matt Krantz, Trouble Grew in Enron’s Interlinking Partnerships, USA TODAY, Jan. 22, 2002, at 2B. The insider who wrote the perceptive letter to Lay was Sherron Watkins. Id. Other insiders who expressed their concerns to Enron bosses about Enron’s practice of hiding corporate debt on the books of offshore partnerships included Jeff McMahon, former Enron treasurer who was appointed as Enron president and COO post-bankruptcy. Nine months prior to Enron’s declaration of bankruptcy, McMahan expressed his concerns to Jeffrey Skilling, Enron CEO. McMahon was then transferred to another position in Enron. Thomas A. Fogarty & Greg Farrell, Hearings Get Combative, USA TODAY, Feb. 8, 2001, at 1B. Also, Jordan Mintz, an Enron in-house counsel, set out his concerns in writing seven months before Enron’s declared bankruptcy to Andrew Fastow, Enron’s CFO and apparent architect of the partnership arrangements. See Kurt Eichenwald & Diana B. Henriques, Web of Details Did Enron in As Warnings Went Unheeded, N.Y. TIMES, Feb. 10, 2002, at 1, 27. Her red flag was not enough. Lay merely referred her concerns to the law firm, noted above, that had established the partnerships, making the questionable accounting possible. The problem was that this insider blew the whistle only internally. Apparently, there were other top-placed Enron employees who were seriously worried about Enron’s financial house of cards that questioned superiors. For example, J. Clifford Baxter, an Enron vice-chairman who resigned from Enron seven months before its declaration of bankruptcy, apparently “complained mightily to Skilling [Enron CEO] and all who would listen about the inappropriateness of [Enron’s] transactions with LJM [one of the off-shore partnerships where Enron hid its debt].” Ex-Enron Executive Dead in Car, BIRMINGHAM NEWS, Jan. 26, 2002 at 1A, 2A. Apparently, “[e]veryone in the executive suite at Enron knew of his complaints.” Jim Yardley, Critic Who Quit Top Enron Post is Found Dead, N.Y. TIMES, Jan. 26, 2002 at 1, B1, B6. Mr. Baxter died, apparently by a self-inflicted gunshot, on January 25, 2002. Colleagues described Mr. Baxter as “anguished over the problems at Enron,” id., an “honest” person, id., of “extremely high character . . . [who] felt horrible” about the events at Enron, and possibly would have blown the whistle if there were a respected mechanism for doing so. Ex-Enron Executive Dead in Car, B’HAM NEWS, Jan. 26, 2002, at 1A, 2A. The problem is that there was no such mechanism.

\(^{36}\) The Sarbannes-Oxley Act, see supra note 34, makes it a crime to retaliate against any person who provides information to law enforcement officers about the commission or possible commission of any federal offense. § 1107, amending 18 U.S.C. § 1513. The Act also creates a private cause of action for any employee of a publicly traded company against the company if the company has discharged or discriminated against the person because of the person’s “whistleblowing activities.” § 1514A, amending 18 U.S.C. § 1513. Available relief includes compensatory damages, back pay, special damages, and “all relief necessary to make the employee whole.”

This private justice action is inadequate for two reasons. First, it does not offer enough of a financial reward to entice knowledgeable whistleblowers to come forward. Second, it has no “dual-plaintiff” mechanism to channel private investigative, litigative, and informational resources to public
II. TYPES OF PRIVATE JUSTICE ACTIONS

This Part provides a brief overview of the major models of private justice existing today in American jurisprudence. As will be seen, while all models profess the same goal of supplementing the public resources available for detecting and deterring public harms, some have additional goals such as making victims whole,37 luring entrepreneurial attorneys into law enforcement’s battle against public harms,38 and neutralizing the “capture” of regulatory agencies by industry.39 Only one model, the qui tam provisions of the civil False Claims Act (“FCA”), explicitly seeks to elicit inside information about public harms.40 The design of the various private justice models are quite different. Some promote class actions,41 others discourage them.42 Some models successfully encourage coordination between public and private enforcers;43 others try but fail;44 and some do not try at all.45 Some private justice actions are lucrative for private plaintiffs;46 others are noticeably stingy.47 Despite their differences, examination of the various private justice models provides insight into the benefits and problems presented by the private justice regulatory efforts and provides a way to monitor the quality of the whistleblower’s information. See infra Part III.C.1.


38. Examples include the securities fraud private causes of action, see infra Part II.B.2, and the qui tam provisions of the FCA, see infra Part II.C.2.

39. The citizen suit provisions of many environmental and some consumer protection statutes were created for this reason. See infra Part II.C.1.


41. The securities fraud and to a lesser extent, RICO and the Computer Fraud and Abuse Act, promote class actions. See infra Part II.B.

42. The qui tam provisions of the FCA discourage class actions. See infra III.A.1.b.(2).

43. The qui tam provisions of the FCA most successfully encourage this cooperation, see infra Part II.C.2.

44. The citizen suit provisions in many environmental and some consumer protection statutes attempt such coordination but not effectively. See infra text and accompanying note 231–42.

45. The securities fraud “hybrid” private justice actions and the “victim” private justice actions are not designed to coordinate public and private enforcement efforts. See infra text and accompanying note 74–77, 155–65.

46. The qui tam provisions of the FCA, securities fraud private actions, and, to a lesser extent, RICO, and Computer Fraud and Abuse private justice actions, are designed to produce lucrative bounties for the private plaintiff. See infra text and accompanying notes 78–165, 287–89.

47. The citizen suit provisions in many environmental and some consumer protection statutes, both by design and practice, produce no monetary recoveries for private plaintiffs. See infra text and accompanying notes 208–18.
There are three basic types of private justice actions. “Victim” actions are brought by persons who have been injured or damaged by an actor’s conduct. Such actions have been statutorily created, and judicially implied from existing statutes.

“Common good” private justice actions are brought by plaintiffs who have suffered no personal injury but who have been given authority to sue malfeasors because their lawsuits, which bring additional resources to law enforcement’s efforts, are viewed as helpful to the common community. Examples include citizen suits, generally available in environmental laws and in some consumer protection statutes, and the civil False Claims Act’s qui tam provisions.

“Hybrid” private justice actions are available only to plaintiffs who have been injured but, depending on the extent of the injuries and recoveries, resemble either “victim” or “common good” actions. Many of the “hybrid” actions proceed as class actions.

A. THE “VICTIM” PRIVATE JUSTICE MODEL

1. Description

There are a number of statutes that empower private persons, as well as public prosecutors, to sue those who violate the statutes. To bring one of these private causes of action one must be harmed by the defendant’s conduct. These actions are included in statutes such as the Civil Rights Act of 1964, the Electronic Communications Privacy Act, the Consumer Product Safety Act, the American Disabilities Act (“ADA”), and the Federal Tort Claims Act. The ADA’s provision is illustrative: “The remedies and procedures set forth in [this statute] are . . . provide[d] to any person who is being subjected to discrimination on the basis of disability in violation of this [statute].”

54. 42 U.S.C. § 12188(a)(1) (1995) (italics supplied) (providing standing for one who “has reasonable grounds for believing that [he or she] is about to be subjected to discrimination”).
In addition to statutorily created private causes of action for victims of wrongdoing, there are court-implied private causes of action for those who have been injured by defendants’ breaches of statutorily imposed duties. Judicial implication of private causes of action began in 1916 when the handhold on a boxcar gave way as a Texas railroad switchman was climbing down the boxcar. In *Texas & Pacific Railway Co. v. Rigsby*, the Supreme Court held that Rigsby, the switchman, could bring a suit for damages under the Federal Safety Appliance Act (“FSAA”), even though the statute was a penal offense and provided no explicit cause of action for individuals.55 The Court reasoned that railway employees were among the intended beneficiaries of the FSAA, which specifically required “secure hand holds” on all railroad cars “having ladders.”56 According to the Court: “[where] disregard of . . . the statute . . . results in damage to one . . . for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied.”57

Over the next sixty-plus years, courts liberally implied causes of action under the Securities Exchange Act of 1934,58 Titles VI59 and IX60 of the Civil Rights Act of 1964, the Commodity Exchange Act,61 the Voting Rights Act,62 and for persons whose constitutional or federal statutory rights had been abridged by federal law enforcement officials.63 By the late 1970s, however, the Supreme Court was reigning in the lower courts’ willingness to imply private causes of action, admonishing the courts to “adhere to a stricter standard for the implication of private causes of action.”64

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56. Id. at 37.
57. Id. at 39.
59. See Guardian Assn. v. Civil Serv. Comm’n, 463 U.S. 582, 594 (1983) (assuming that there is an implied cause of action, without explicitly holding as such).
64. Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979). The Court began its opinion in *Touche Ross* with obvious irritation at the lower courts propensity to find implied causes of action: “Once again, we are called upon to decide whether a private remedy is implicit in a statute not expressly
Whether Congress creates a private statutory cause of action or the courts implying a private cause of action, the rationale has been the same: such actions are available to help those who have been injured by a defendant’s breach of statutory duty. With many of the “victim” private justice actions, remedial relief is all that is available. When damages are available, only compensatory damages are allowed except in extraordinary circumstances. Significantly, when these causes of action have been created, there is almost no mention of vindicating the public’s rights, supplementing public regulatory efforts, or other similar expressions of serving the common good allowing court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to “vindicate the public interest” allowing court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to “vindicate the public interest” allowing court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to “vindicate the public interest.” The emphasis uniformly is on aiding victims. This is

65. See, e.g., Guardians Assn., 463 U.S. at 582, 602–03 (allowing injunctive relief only in private cause of action implied in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d); Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18–20 (1979) (holding that Investment Advisers Act of 1940 includes an implied private cause of action to void a contract that violates the Act but does not include an action for damages because the Court could not find a Congressional intent to bestow a damages remedy, reasoning that “the mere fact that the statute was designed to protect advisers’ clients does not require the implication of a private cause of action for damages on their behalf”); Cannon v. Univ. of Chi., 441 U.S. 677, 690, 699, 709 (1979) (finding that a private cause of action exists to enforce Title IX of the Education Amendments to the Civil Rights Act); Newman v. Piggie Park Enter., 390 U.S. 400, 401–02 (1968) (holding that injunctive relief only is available in private causes of action implied in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a)(j) (1994)).

66. For example, punitive damages are never permitted under the Federal Tort Claims Act, 28 U.S.C. § 2674 (1994).


68. When there is such mention, the relief available is so minimal that it provides token protection and little to no deterrent effect. See, e.g., 42 U.S.C. §§ 12188(b)(2)(c)–(b)(4) (1995) (excluding punitive damages under the Americans with Disabilities Act but allowing a court to impose penalties up to $50,000 for the first violation and up to $100,000 for any subsequent violation if necessary to “vindicate the public interest.”); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (stating that it is appropriate to imply a cause of action for violations of § 14(a) of The Securities Exchange Act of 1934 because doing so would supplement the Securities and Exchange Commission’s ability to
in stark contrast to the rationale given for the “common good” or even the “hybrid” private justice actions discussed later in this Article.

2. Assessment

Although difficult to assess since there is no systematic accounting of the many “victim” private justice actions brought under statutory or common law authority, the “victim” model would appear to be successful in reaching its stated goal of offering victims a venue for redress. Although involving relatively small amounts of money, the “victim” private justice actions do obtain some monetary relief for plaintiffs. For example, the median award in various civil rights private justice actions ranges from approximately $137,000 (employment) to $65,000 (housing); the median award in tort private justice actions is $141,000.

The courts’ lengthy struggle over whether to imply private causes of action for victims provides a rich discourse on the policy and practical
implications of permitting individuals to sue for private injuries resulting from violations of public statutes. The courts have noted the positive role private justice actions can play in supplementing governmental regulatory resources,\(^74\) deterring wrongful conduct,\(^75\) and providing relief for victims who may have no other effective remedy.\(^76\) Courts have also noted how disruptive such actions may be to an already comprehensive enforcement scheme or to the federal-state enforcement balance.\(^77\)

Missing from courts’ and Congress’ discourse on “victim” private justice actions is any mention of the truly unique contribution private justice can make: supplying inside information of wrongdoing. The obliviousness to this contribution should not be viewed as an indication that this role is unimportant; it is, simply, a reflection that the “victim” private justice model is not intended to elicit inside information and that it does not do so on any reliable basis.

B. THE “HYBRID” PRIVATE JUSTICE MODEL

A number of private justice models straddle the line between “victim” and “common good” private justice actions, taking on the characteristics of one or the other, depending upon the amount of harm suffered by the plaintiff in the particular case, and the recovery obtained.

“Hybrid” private justice actions are available only for victims of a defendant’s violation of the law; thus, they are “victim” private justice actions. As will be seen, however, minimal harm suffices in some of these actions and minimal recovery often is all that is obtained, stretching considerably the notion of “victim.” Also, because of the large damage awards these actions sometimes carry, these private justice actions may also serve as “common good” actions. For example, RICO and the Clayton Act, with their treble damages, seek to serve the common good by deterring future violations through large judgments. In addition, the fact that many of these “hybrid” private justice actions are brought as class actions means


\(^75\) See, e.g., Carlson v. Green, 446 U.S. 228, 242 (1979); Cannon v. Univ. of Chi., 441 U.S. 677, 706–08 n.41 (1979).


such actions serve the common good, or have the potential to do so.78 Class actions tend to produce large class judgments, which can serve a deterrent purpose. Class actions also tend to provide lucrative compensation for class counsel, which entices private counsel to pursue such cases, thereby supplementing public investigative and prosecutive resources.79

Hybrid private justice actions include securities fraud offenses and violations of the Clayton Act,80 the Computer Fraud and Abuse Act81 and the Racketeering Influenced and Corrupt Organizations (“RICO”) Act.82 This Section focuses on two hybrid actions: RICO, which is rarely used as

78. Because the amount suffered by any one individual victim may be quite small, these private actions are often brought as class actions. Coffee, Private Attorney General, supra note 7, at 217–19.
79. Even though many securities class actions “free-ride” governmental investigative efforts by filing a class action after public agencies have initiated a prosecution, the private securities actions can still supplement public resources. Id. at 222–24. As John C. Coffee has noted, they can do so by “escalating the penalty structure above the modest fine schedules . . . authorized by law (and nullified by inflation).” Id. at 222–24. They can also “bat clean up for public agencies’ efforts.” Id. As Coffee has noted, “it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics.” Id. at 224–50.
[A]ny person who shall be injured in his business or property by reason of anything forbidden in antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.
The Clayton Act is aimed at the following restrictive or monopolistic acts: price discrimination (sales of a product at different prices to similarly situated buyers), tying and exclusive dealing contracts (sales on condition that the buyer stop dealing with the seller’s competitors), corporate mergers with competing companies, and interlocking directorates (common board members among competing companies). E A R L W. K I N T N E R & J O S E P H P. B A U E R, IV F E D E R A L A N T I T R U S T L A W §§ 32.3–9 (1984 & Supp. 2001).
81. The Computer Fraud and Abuse Act of 1986 (“CFAA”), 18 U.S.C. § 1030 (2000), creates a number of criminal offenses pertaining to improper accessing and use of computers, and computer fraud. Many of the offenses are felonies, some punishable by as much as twenty years imprisonment for repeat offenders. § 1030(g) provides a private cause of action: “Any person who suffers damage or loss by reason of a violation of the section . . . may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.” Because it is a fairly new statute and has been in a near-constant state of revision since first enacted in 1984, the CFAA’s private justice cause of action has been used relatively little. One recent case demonstrates its potential as a private cause of action. In Shaw v. Toshiba America Information Systems, Inc., 91 F. Supp. 2d 942, 960–61 (E.D. Tex. 2000), a class action was brought under the CFAA, and the parties settled the action for $2.1 billion with $147.5 million in attorneys’ fees. Id. at 960–61. The case centered around the allegation that Toshiba and NEC “designed, manufactured, created, distributed, sold, transmitted, and marketed faulty floppy-diskette controllers (‘FDC’s’) containing allegedly defective microcode.” Id. at 945.
a “common good” action,\textsuperscript{83} and securities fraud, which often is so employed.

1. RICO

a. Description

RICO was passed as part of a major crime-fighting bill\textsuperscript{84} to protect the public from “parties who conduct organizations affecting interstate commerce through a pattern of criminal activity.”\textsuperscript{85} Modeled after the Clayton Act,\textsuperscript{86} RICO is a criminal statute as well as a civil cause of action. United States Department of Justice (“DOJ”) prosecutors may seek criminal indictments for RICO conduct, and if convicted, defendants face substantial prison terms, heavy fines, and forfeiture of “any interest . . . acquired or maintained” in violation of RICO.\textsuperscript{87} In addition to criminally prosecuting a defendant, or instead of doing so, the DOJ may bring a civil lawsuit if the federal government has been injured in its “property or business.”\textsuperscript{88} In addition, “any person” who has been “injured in his property or business” may bring a civil action under RICO.\textsuperscript{89} In civil RICO actions, the plaintiffs, whether the DOJ or private persons, must prove the same elements as must be proven in a criminal RICO prosecution, but by a preponderance of the evidence.\textsuperscript{90} There are incentives for private plaintiffs to use RICO: treble damages and the award of attorneys fees and costs.\textsuperscript{91} Congress gave the following explanation for including the private cause of action in RICO, which interestingly,
highlights the rationales for both the “victim” and the “common good” private causes of action:

[T]his private cause of action was included as an incentive for victims of organized crime activity to redress wrongful actions against their legitimate businesses. Because of the limited resources available to assist the Government in its fight against organized crime, it was believed that ‘private attorneys general’ could supplement Government efforts.92

There are four types of conduct prohibited by RICO. The gist of all four is using a business to commit crime.93 Key to all are three concepts: “racketeering activity” (any of the felony offenses listed in the statute);94 a “pattern” of racketeering activity (at least two “closely related” racketeering activities that demonstrate “continuity” and are committed within a ten-year time period);95 and “enterprise” (any entity or group of individuals “associated in fact” that affects interstate or foreign commerce).96 Twenty-five years of jurisprudence in thousands of court opinions have been devoted to delineating these three concepts. Because RICO’s reach is broad and at least some of the racketeering activity is broad (mail fraud and wire fraud, for example), RICO covers a wide range

94. § 1961(1). RICO includes a lengthy list of approximately one dozen generic, serious state offenses such as murder and kidnapping, and approximately three dozen federal felony offenses including mail fraud, wire fraud, extortion and drug offenses.
95. Id. § 1961(5), provides that: “‘Pattern of racketeering activity’ requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.” H.J. Inc. v. Northwestern Bell Telephone Co., is the leading case on this point. In H.J. Inc., the Court held that proof of both “relatedness” between the racketeering acts and “continuity” (repeated conduct over a substantial period of time or the threat of continuing conduct) must be shown to prove a “pattern of racketeering activity.” 492 U.S. 229, 240–42 (1989).
96. § 1961(4) provides that an “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” A RICO enterprise may engage in legitimate activity, and may be an informal organization, as long as it functions as a continuing unit. United States v. Turkette, 452 U.S. 576, 583 (1981). In the majority of circuits, a RICO enterprise must have an “ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity.” See, e.g., Chang v. Chen, 80 F.3d 1293, 1298 (9th Cir. 1996); Crowe v. Henry, 43 F.3d 198, 205 (5th Cir. 1995). In § 1962(c) RICO cases, the enterprise must be distinct from the person charged. See, e.g., United States v. Goldin Indus., 219 F.3d 1268, 1271 (11th Cir. 2000); Haroco v. Am. Nat’l. Bank & Trust Co., 747 F.2d 384, 400–02 (7th Cir. 1984).
of conduct: organized crime,97 white-collar crime,98 and even the protection of abortion rights.99 RICO has been used to litigate mineral shipments in Kazakhstan,100 Nigerian banking,101 baseball playing cards102 and the rights to domain names.103

The four types of conduct prohibited by RICO are: (1) using or investing income derived from a pattern of racketeering activity in an enterprise,104 (2) acquiring or maintaining control of an enterprise through a pattern of racketeering activity,105 (3) conducting the affairs of the enterprise through a pattern of racketeering activity,106 and (4) conspiring to do any of the above.107 The issues that have dominated RICO jurisprudence in recent years are standing, causation,108 and sufficiency of pleadings or evidence.109

b. Assessment

104. § 1962(a). See, e.g., United States v. Vogt, 910 F.2d 1184, 1194 (4th Cir. 1990); United States v. Zang, 703 F.2d 1186, 1194 (10th Cir. 1982).
106. § 1962(c). See, e.g., United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563, 570 (8th Cir. 1996); United States v. Gabriele, 63 F.3d 61, 68 (1st Cir. 1995).
108. The Supreme Court’s decision in Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992), paved new ground on RICO standing and causation. It holds that a civil RICO plaintiff must show “some direct relation between the injury asserted and the injurious conduct alleged” in order to demonstrate standing to bring a RICO action. Id. at 265–70. Deemed a test of “proximate causation,” Holmes has led to the dismissal of many RICO cases. See supra note 92.
109. A survey of the federal appellate decisions in RICO cases during the calendar years 1999–2001 revealed that standing and causation issues arising under Holmes were the most litigated RICO issues in civil cases. Sufficiency of pleading or sufficiency of the evidence of an element either of RICO or of the underlying racketeering activity charged were the next most common issues litigated in these appellate civil RICO decisions. Appendices B-1 and B-2 summarize this data in greater detail. The raw data collected for the survey is on file with the author.
A survey of all federal appellate decisions in RICO cases rendered between 1999 and 2001,110 provides a snapshot of contemporary RICO jurisprudence. It reveals that most RICO cases are civil (78%) and most are brought by a single plaintiff or by a fairly small group of plaintiffs. This survey also reveals a dismal rate of success for RICO plaintiffs. Almost 70% of the civil cases resulted in early, decisive victory for defendants where defendants’ motions to dismiss or motions for summary judgment were granted by the trial courts, with affirmation on appeal.111 Plaintiffs were successful in obtaining judgments at trial in 9.6% of the RICO cases surveyed but only one-fourth of those judgments were affirmed on appeal, resulting in a stunningly awful final success rate for RICO plaintiffs: of 145 civil cases, only 2% (3 out of 145), resulted in ultimate, final victory for the plaintiffs.112

This lack of success by RICO plaintiffs raises questions about whether RICO’s private justice model is working at all. Since so few RICO cases are brought as class actions (23 out of 145, or 15.9%),113 RICO apparently is not being used often by plaintiffs as a “common good” model of private justice. Additionally, since plaintiffs overall have such a poor record of success on the merits, RICO does not seem to work well when used as a “victim” or “common good” model of private justice. RICO’s lackluster performance hurts defendants as well as plaintiffs. RICO defendants incur costs when they devote resources to defending nonmeritorious, if not

110. The survey herein included all reported and unreported decisions involving RICO actions rendered by the federal appellate courts (U.S. Supreme Court and twelve courts of appeals) from 1999 through 2001. Any survey of a sample of cases, however enlightening, is by definition incomplete. A review of appellate decisions, as a sample of RICO litigation, provides insight into the ultimate success of cases, the issues raised, and the reasoning employed, but it fails to capture information about cases disposed of without appeal.

111. Of the 185 RICO cases decided by the federal appellate courts in the three calendar year time period between 1999 and 2001, 145 (78%) were civil and 40 (22%) were criminal. In nineteen of the civil cases the issue on appeal was collateral to the RICO action (that is, stay of parallel proceedings, sanctions, etc). Of the 124 cases where the court resolved a RICO issue, 99 (79%) resulted in some type of favorable ruling for defendants. Of these 99 rulings, 85 (68%) resulted in favorable final disposition for defendants. See Appendices B-1 and B-2. The raw data collected for this survey is on file with the author.

112. Most of the plaintiff victories were too preliminary to declare a success. Of the 124 civil RICO cases surveyed where there was a resolution of a RICO issue, plaintiffs obtained a reversal of the district court’s grant of a defendant’s motion to dismiss in thirteen cases, won affirmation of the district court’s refusal to grant a defendant’s motion to dismiss in one case, and obtained reversal of the district court’s grant of summary judgment for defendants in seven cases. In only three cases out of the 124 did the plaintiff obtain final success on RICO charges, in the form of affirmation of the district court’s grant of summary judgment in favor of the plaintiff (one case) or verdict for the plaintiff (two cases). See Appendix B. The raw data collected for this survey is on file with the author.

113. Calculated from civil RICO cases decided by federal appellate courts 1999–2001. Raw data is on file with the author.
frivolous claims. They also incur reputational damage when named in a serious civil lawsuit, where treble damages are at stake and they are branded as “racketeers.”114 Inappropriate RICO actions also create costs for the judicial system which spends scarce resources to resolve inappropriate actions. Lastly, there is a cost to the general citizenry, whose tax dollars fund the judicial system and whose time is taken up by non-meritorious litigation, whether as jurors or witnesses, or as litigants whose own cases are postponed because of delays in a resource-strapped judicial system.

2. Securities Fraud Private Actions

   a. Description

   Of all of the hybrid private justice actions, securities fraud actions may have received the most attention from Congress and commentators concerning their systemic impact on our economy. For this reason, they provide rich terrain for examining the institutional influence of private justice actions.

   The Securities Act of 1933115 was “designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud, and . . . to promote ethical standards of honesty and fair dealing.”116 The Act strives to do this by requiring publication of certain information about securities before they are offered for sale.117 The Securities Act expressly lists four private causes of action: § 11, relating to the submission of misleading registration statements;118 § 12(1), pertaining to the failure to file a

114. See infra text accompanying notes 351–56.
118. 15 U.S.C. § 77(k). Section 11 of the Securities Act of 1933 expressly provides a remedy for persons who have been injured by material misstatements or omissions in a registration statement filed with the SEC, or in a prospectus distributed to potential purchasers. A registration statement provides comprehensive information about the corporation that is issuing shares to the public for purchase, including a description of the registrant’s business, property, and financial condition; and data regarding price and dividends of the equity being offered. 17 C.F.R. § 229 (2001). The issuer’s attorneys (both inside and outside counsel) and accountants, and the underwriter’s attorneys and accountants prepare the registration statement. A prospectus is “any . . . notice, circular, advertisement, letter or communication written or [transmitted] by radio or television, which offers any security for sale or confirms the sale of any security.” § 77b(a)(10).
registration statement;\textsuperscript{119} § 12(2), covering sales of unregistered securities and false statements or omissions made orally or in a prospectus;\textsuperscript{120} and § 15, which expands liability of “controlling” persons for violations of the Securities Act.\textsuperscript{121} The Exchange Act of 1934 was passed to further protect investors from unduly speculative investments.\textsuperscript{122} It expressly lists four private causes of action: § 9, covering the use of “manipulative devices” that create a misleading impression of trading activity and covering the presentation of information about a stock with the purpose of raising or depressing stock prices;\textsuperscript{123} § 16(b), relating to “short-swing” profits (stocks purchased and sold or sold and purchased within a six month time period) by an “insider”,\textsuperscript{124} § 18(a), pertaining to the filing of false or misleading documents with the SEC,\textsuperscript{125} § 20, applying to the liability of controlling


\textsuperscript{120} See § 77l(a)(2). Section 12(2) of the Securities Act of 1933, like § 11, applies to misstatements. Unlike the misstatements and omissions in registration statements or prospecti that § 11 addresses, however, § 12(2) applies to any misrepresentations or omissions (made orally or in a prospectus) by a seller to an unaware purchaser in connection with an offer or sale of securities. Unlike § 12(1), which imposes strict liability, § 12(2) requires proof of at least negligence, that is, that the seller “did not know and in the exercise of reasonable care could not have known, of such untruth or omission.”


\textsuperscript{122} 73 CONG. REC. 2264 (Feb. 9, 1934) (letter to Congress from President Franklin D. Roosevelt); 48 Stat. 881 (1934).

\textsuperscript{123} 15 U.S.C. § 78(i) (1997 & Supp. 2001). A high level of mens rea must be proven before a person is liable for a section 9 violation; the defendant must be shown to have acted “willfully.”

\textsuperscript{124} 15 U.S.C. § 78(p)(b). For purposes of § 16(b), an insider is a director, officer, or any person who is directly or indirectly the beneficial owner of more than ten per centum of any class of any equity security. Id. at §§ 78(p)(a)-(b). The damages awarded in a § 16(b) action are limited to disgorgement of the short-swing profits realized. Although shareholders, as well as a company, may bring a § 16(b) action, the damages collected (less attorneys’ fees for the plaintiff’s counsel in some situations) must go to the company. Section 16(b) is a strict liability statute. It is irrelevant what the defendant knew or intended when conducting the short-swing transaction and it is specifically irrelevant whether inside information was used in either part of the transaction. 2 HAZEN, supra note 117, at 27.

\textsuperscript{125} 15 U.S.C. § 78(r). To prevail on a § 18 claim, a plaintiff must prove that (1) the statement in question was false and material, (2) the plaintiff relied upon the statement in a purchase or sale of stock, (3) the plaintiff did not know that the statement was false or misleading, and (4) the price at which the plaintiff bought or sold was affected by the statement. 2 HAZEN, supra note 117, at 47. See, e.g., Magna Invest. Corp. v. John Doe, 931 F.2d 38, 39 (11th Cir. 1991); Ross v. A.H. Robbins, 607 F.2d 545, 551–53 (2d Cir. 1979); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 211–12 (1976). Any person who prepared the document in question may be liable under § 18. Section 18 is not a strict liability offense—any individual who can show that she acted in good faith and had no knowledge that such statement was false or misleading, will not be liable.
persons and those who aid and abet violations,\textsuperscript{126} and § 29(b), relating to the validity of contracts made in violation of the Act.\textsuperscript{127}

In addition to the above express private causes of action, courts have held that an implied private cause of action exists under § 17 of the 1933 Act which prohibits the use of fraudulent or deceptive devices in connection with the sale of securities.\textsuperscript{128} The courts have also held that five sections of the 1934 Act\textsuperscript{129} imply private causes of action.\textsuperscript{130} The most well known and widely used of these is §10(b).\textsuperscript{131} Under §10(b) and its implementing Rule 10b-5,\textsuperscript{132} it is:

unlawful in connection with the purchase or sale of any securities . . . to employ any device, scheme or artifice to defraud, make any untrue statement of material fact or omit to state a material fact, or engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

b. Assessment

Concern over vexatious private securities fraud lawsuits and the detrimental impact such suits appear to have had on the securities industry\textsuperscript{133} led to significant revisions in these private justice actions in

\begin{itemize}
  \item \textsuperscript{126} See 15 U.S.C. § 78(t)(a).
  \item \textsuperscript{127} See 15 U.S.C. § 78(c)(c).
  \item \textsuperscript{128} 15 U.S.C. 77(q)(a). See, e.g., Mosher v. Kane, 784 F.2d 1385, 1390–91 (9th Cir. 1986); Kirshner v. United States, 603 F.2d 234, 241 (2d Cir. 1978); 2 HAZEN, supra note 117, at 53.
  \item \textsuperscript{129} 15 U.S.C. §§ 78(f), 78(i), 78(j), 78(n), 78(o).
  \item \textsuperscript{131} 15 U.S.C. 78(j)(b).
  \item \textsuperscript{133} For a discussion of these strengths and weaknesses, see generally Alexander, supra note 9; Bohn & Choi, supra note 9; Coffee, Private Attorney General, supra note 7; Coffee, Future of PSLRA, supra note 9; Coughlin, supra note 9; Cox, supra note 9; Fallone, supra note 9; Grundfest, supra note 9; Katz, supra note 9; Macey & Miller, supra note 9; Seligman, supra note 9.

Congress heard extensive testimony regarding the effectiveness of the private securities action. The House and Senate Committees heard evidence that abusive practices committed in private securities litigation include: (1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer’s stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants, including accountants, underwriters, and individuals who may be covered by insurance, without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent. These serious injuries to innocent parties are compounded by the reluctance of many judges to impose sanctions under FRCP 11, except in those cases involving truly outrageous misconduct. At the same time, the investing public and the entire U.S. economy have been injured by the unwillingness of the best qualified persons to serve on boards of directors and of issuers.
1995 with passage of the Private Securities Litigation Reform Act ("PSLRA"). The PSLRA placed limits on abusive discovery, adopted a heightened pleading standard, abolished joint and several liability in favor of a “fair share” rule of proportionate liability, made the awarding of attorneys fees to prevailing parties in “abusive” cases more likely, and imposed various restrictions on the selection of class representative and counsel in class actions.

Congress placed limits on plaintiffs’ discovery in private securities actions after hearing testimony about plaintiffs’ counsel who, without any indication of fraud, routinely filed suits as soon as a stock price dipped significantly and then conducted discovery as a fishing expedition, hoping to find fraud. Because of the cost and disruption of responding to such discovery, defendants often settled nonmeritorious cases. In response to these findings, the PSLRA provides that in private securities actions, discovery may commence only after the trial court has ruled on defense motions to dismiss. This restriction was intended to help insure that securities fraud cases were meritorious when filed.

The PSLRA also adopted a heightened pleading standard, making clear that Federal Rule of Civil Procedure ("FRCP" or "Rule") 9(b)—fraud to discuss publicly their future prospects, because of fear of baseless and extortionate securities lawsuits.

In these and other examples of abusive and manipulative securities litigation, innocent parties are often forced to pay exorbitant ‘settlements.’ When an insurer must pay lawyers’ fees, make settlement payments, and expend management and employee resources in defending a meritless suit, the issuers’ own investors suffer. Investors are always the ultimate losers when extortionate ‘settlements’ are extracted from issuers. H.R. REP. No. 104-369, at 37.


135. Id. There are other reforms unique to the securities area, for example, the creation of a safe harbor for certain forward-looking statements. 15 U.S.C. § 78u-5(c).

136. The Conference Committee found:

The cost of discovery often forces innocent parties to settle frivolous securities class actions. According to the general counsel of an investment bank, ‘discovery costs account for roughly 80% of total litigation costs in securities fraud cases.’ In addition, the threat that the time of key employees will be spent responding to discovery requests, including providing deposition testimony, often forces coercive settlements. The House and Senate heard testimony that discovery in securities class actions often resembles a fishing expedition. As one witness noted, ‘once the suit is filed, the plaintiff’s law firm proceeds to search through all of the company’s documents and take endless depositions for the slightest positive comment which they can claim induced the plaintiff to invest and any shred of evidence that the company knew a downturn was coming.’

H.R. REP. No. 104-369, supra note 133, at 37.


138. When the PSLRA was passed, the Second Circuit required a heightened standard: plaintiffs must “allege facts that give rise to a strong inference of fraudulent intent.” Shields v. Citytrust Bancorp, 25 F.3d 1124, 1128 (2d Cir. 1994); H.R. REP. No. 104-369, supra note 133, at 740; Coffee,
should be plead “with particularity”—should be interpreted strictly. Together, the delayed discovery rule and the heightened pleading requirement provide some protection for defendants against frivolous or poorly-prepared lawsuits since plaintiffs in these actions must now plead fraud adequately enough to meet both the heightened pleading standard and to overcome a motion to dismiss without conducting any discovery.

The PSLRA further provides that joint and several liability is inapplicable to judgments obtained in private securities fraud actions. Instead, each defendant is liable only for its fair share of the loss. This reform was passed because plaintiffs bringing securities fraud actions apparently were including defendants with deep pockets but little culpability.

The PSLRA institutes a rebuttable presumption that attorneys’ fees will be awarded to defendants in “abusive” litigation. Although the

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Future of PSLRA, supra note 9, at 520–21; Coughlin, supra note 9, at 35–53. The PSLRA made this standard mandatory.

139. In the PSLRA, Congress also made clear that FRCP 9(b)’s requirement that fraud should be plead “with particularity” should be interpreted strictly. The plaintiff must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.” H.R. REP. NO. 104-369, supra note 133, at 740; 15 U.S.C. §§ 77z-1, 78u-4(b)(1). Further, when scienter is alleged, the plaintiff must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. 15 U.S.C. §§ 77z-1, 78u-4(b)(2).

140. Id. §§ 77(k)(f), 78u-4(g).

141. The Conference Committee noted:
One of the most manifestly unfair aspects of the current system of securities litigation is its imposition of liability on one party for injury actually caused by another. Under current law, a single defendant who has been found to be 1% liable may be forced to pay 100% of the damages in the case. The Conference Committee remedies this injustice by providing a “fair share” system of proportionate liability. As former SEC Chairman Richard Breeden testified, under the current regime of joint and several liability, “parties who are central to perpetrating a fraud often pay little if anything.” At the same time, those whose involvement might be only peripheral and lacked any deliberate and knowing participation in the fraud often pay the most in damages.

H.R. REP. NO. 104-369, supra note 133, at 736.

142. 15 U.S.C. §§ 77z-1(c)(3), 78u-4(c)(3). The PSLRA did two other things that could facilitate more awards to defendants in instances of abusive litigation. The Conference Committee noted:
The Conference Committee recognizes the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of fraud to pursue legitimate claims. The Conference Committee seeks to solve this problems by strengthening the application of Rule 11 of the Federal Rules of Civil Procedure in private securities actions. ... The house hearings on securities litigation reform revealed the need to explicit authority for courts to require undertakings for attorney’s fees and costs from parties, or their counsel, or both, in order to ensure the viability of potential sanctions as a deterrent to meritless litigation. Congress long ago authorized similar in private securities actions will be an important means of ensuring that the provision of the Conference Report authorizing the award of attorneys’ fees and costs under the Rule 11 will not become, in practice, a one-way mechanism only usable to sanction parties with deep pockets.
standard for when fees should be ordered under the PSLRA is the same as under FRCP 11, the amount to be paid potentially is much greater. FRCP 11 states that in instances of abusive litigation a court may order sanctions in an amount sufficient to deter repetition of the offending action.\textsuperscript{143} Thus, while Rule 11 sanctions may require payment of attorneys’ fees, they may not,\textsuperscript{144} especially when other sanctions may be more appropriate and easier to administer.\textsuperscript{145} Also, whether any sanction should be imposed under Rule 11 is discretionary.\textsuperscript{146} In contrast, the PSLRA not only imposes a presumption, albeit rebuttable, that if a complaint violates FRCP 11, sanctions will be imposed, but also specifies that the sanctions will consist of payment of the prevailing party’s attorneys’ fees and costs incurred in the entire action.\textsuperscript{147}

Concerned about “professional plaintiffs” who own a nominal share in many public companies and so qualify to bring a class action securities fraud lawsuit if the stock price dips precipitously or there is other indication of fraud,\textsuperscript{148} Congress addressed its last set of reforms in the PSLRA to class action representatives. The PSLRA attempts to discourage “token plaintiff” private actions by requiring courts to presume that the plaintiff with the “largest financial stake in the relief sought” is the appropriate lead plaintiff,\textsuperscript{149} and by requiring that the lead plaintiff select lead counsel.\textsuperscript{150} The PSLRA also requires that plaintiffs seeking to serve as class representatives certify that they have reviewed the complaint, that

\begin{footnotesize}
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\item H.R. REP. NO. 104-369, supra note 133, at 738–39. The Reform Act also required that courts make a finding in all securities fraud litigation as to whether Rule 11 has been violated. 15 U.S.C. § 77q.
\item FED. R. CIV. P. 11(c)(2).
\item The Advisory Committee Notes to FRCP 11 list factors a court should consider in determining whether to impose sanctions and what sanctions to impose. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § 1336 (2d ed. 1990 & Supp. 2001). A number of these factors would encourage nonmonetary sanctions or sanctions in an amount other than attorneys fees.
\item Other sanctions issued include cautions or reprimands, circulation of a court’s FRCP 11 opinion, required representation of pro se plaintiffs, etc. \textit{Id}.
\item Id.
\item See 15 U.S.C. §§ 77z-1, 78u-4. The presumption that full reimbursement of the injured party’s attorneys fees is the appropriate sanction is rebuttable, with proof “that (i) the violation was de minimus; or (ii) the imposition of fees and costs would impose an undue burden and be unjust, and it would not impose a greater burden for the prevailing party to have to pay those same fees and costs.” H.R. REP. NO. 104-369, \textit{supra} note 133, at 738–39.
\item Congress’ goal in passing these class action reforms was to encourage institutional investors to seek and be selected by courts as class representatives. Congress sought to discourage professional plaintiffs who own a nominal number of shares in a wide array of public companies. H.R. REP. NO. 104-369, \textit{supra} note 133, at 731.
\item \textit{Id} §§ 77z-1(a)(3)(B)(v); 21D, 78u-4(a)(3)(B)(iii)(v).
\end{enumerate}
\end{footnotesize}
they did not purchase stock at the direction of counsel to qualify as class representative, and that they will not accept payment for serving as class representative.\(^{151}\) Finally, the PLSRA restricts persons from serving as lead plaintiff more than five times in a three year period\(^{152}\) and restricts a lead plaintiff’s recovery to a pro rata share of the final judgment.\(^{153}\) Whatever may be the beneficial impact of these class action reforms, they would seem to defeat one of the goals of the securities fraud private action, that of encouraging entrepreneurial attorneys from undertaking securities class actions.\(^{154}\)

Both before and after the PSLRA, considerable attention has been devoted to determining whether securities fraud private actions have been successful. Although private securities litigation is widely viewed as “an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action,”\(^{155}\) it is difficult to assess the success of the securities private justice action. By several measures, these cases seem to be successful. They have recruited some talented, entrepreneurial attorneys to assist in the detection, proof and deterrence of fraud in securities markets.\(^{156}\) Also, many of the filed securities fraud class actions appear to be meritorious, at least if dismissals of cases reflect merit. As compared to RICO cases where almost seventy percent of the cases sampled resulted in dismissal of the case or summary judgment for the defendants,\(^{157}\) only 5.79% of securities class actions resulted in dismissal.

\(^{151}\) Id. §§ 77z-1(a)(2)(A)(i),(ii),(iii), 78u-4(a)(2).


\(^{153}\) Id. §§ 77z-1(a)(4), 78u-4(a)(4).

\(^{154}\) Without addressing the merits of the PSLRA’s reforms regarding class action plaintiffs and plaintiffs’ counsel, it appears that these reforms have discouraged some plaintiff attorneys who heretofore have represented “professional plaintiffs.” H.R. REP. NO. 104-369, supra note 133, at 731–34. A study of securities fraud litigation after the PSLRA showed that experienced securities plaintiffs’ firms increased their share of securities litigation. For example, prior to the PSLRA, the appearance ratio of Milberg Weiss Bershad Hynes & Lerach, “[t]he dominant plaintiffs’ class action law firm,” was approximately 31%. By 1998 Milberg Weiss’s appearance ratio stood at approximately 59% nationwide and 82% in California. Coughlin, supra note 9, at 19–20. Presumably this is due in part to Milberg Weiss’s ability to “finance the delays associated with the slower procedures under the Reform Act.” Id. at 20.

\(^{155}\) H.R. REP. NO. 104-369, supra note 133, at 730.

\(^{156}\) See id. Mukesh Bajaj, Sumon C. Mazumadar & Atulya Sarin, Securities Class Action Settlements, An Empirical Analysis 14 tbl.1 (2000). There was a slight decrease of such actions in 1996, the year after passage of the PSLRA, but the number rebounded thereafter, reaching an all-time high in 1998. See also Michael A. Perino, A Census of Securities Class Action Litigation Reform Act of 1995, 1015 PLICORP. 1043, 1046 (1997) (reaching the same conclusion that litigation rates have remained stable before and after the PSLRA, but using the number of issuers sued rather than complaints filed).

\(^{157}\) See supra note 111 and accompanying text, and infra Appendix B-2.
(at least within four years of filing). Additionally, to the extent that the number of cases filed reflects deterrent impact, the securities private actions are successful. From 1987 to 2000, 2,546 securities actions were filed, for an average of 181.8 per year. This compares to 524 environmental citizen suits filed in a comparable time period, for an average of 37.4 per year, and 3,326 qui tam FCA actions, for an average of 237.5 per year.

The settlement of private securities class actions presents interesting data. Whereas most securities class actions (92%) alleged investor losses of over $10 million, the majority (80%) settled for less than $10 million, with median settlements pre-PSLRA of $3.5 million and post-PSLRA of $4.25 million. There could be alternative explanations for these settlement figures, but one must question whether the disparity between alleged loss and settlement reflects the fact that defendants are forced to settle frivolous lawsuits because the cases are too expensive to litigate. If true, it would appear that the PSLRA improved the quality of private securities cases brought since the disparity between the loss alleged and the settlement amount decreased after the PSLRA.

The PSLRA seems to have several clear consequences. There has been a substantial increase of securities class actions filings in state courts
after the PSLRA, and post-PSLRA cases seem to take longer to litigate, presumably because pretrial issues have been added, such as selection of class representative and counsel. It does not yet appear that the PSLRA’s goal of encouraging more institutional investors to serve as lead plaintiffs has been achieved. But overall, if lower dismissal rates and a lower disparity in damages sought and awarded are indications of more meritorious cases, it appears that the PSLRA has had a positive impact on securities private actions. More experience is needed to determine if this is in fact true and if other PSLRA goals, such as encouraging more institutional investors to serve as class representatives, have been reached.

As discussed in Part III, not all of the PSLRA’s reforms are beneficial when constructing an optimal private justice model, but incorporation of some of its reforms could help to neutralize the disruptive potential of private justice actions.

C. THE “COMMON GOOD” PRIVATE JUSTICE MODEL

Compared to the “victim,” and “hybrid” private justice actions, plaintiffs in “common good” private justice actions need not have been harmed by the defendant’s conduct, even minimally. These plaintiffs are given the right to sue on behalf of the party who has been harmed or simply because public harm is threatened. “Citizen suits,” included in many environmental and some consumer protection statutes, and the “qui tam” provisions of the False Claims Act, are the major contemporary examples of “common good” private actions.

1. “Citizen Suits”

Beginning in 1970, and continuing throughout the last quarter of the twentieth century, Congress included citizen suit provisions in most

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164. Roddy & Berman, supra note 158, at 43, 52.

165. Id. at 44.

environmental and some consumer protection statutes so that today, citizen suit provisions exist in over twenty environmental or consumer protection statutes.167

A typical citizen suit provision provides that: “any person may commence a civil action . . . against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter.”168 Citizen suits epitomize public choice theory,169 which assumes the following: private initiatives are needed to supplement enforcement efforts by government agencies that do not have the ability or resources to conduct their duties;170 government agencies have been “captured” by the industries they are to monitor and thus do not vigilantly pursue their given


170. Senator Muskie, the major proponent of the Clean Air Act citizen suit provisions, argued, for example, that citizen suits would motivate agencies to do their jobs and would supplement governmental resources: “I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations of the requirements [of the Clean Air Act].” Nat’l Res. Def. Council, Inc. v. Train, 510 F.2d 692, 723, 727 (1975). Senator Hart agreed: “The basic argument for the provision is plain: namely, the Government simply is not equipped to take court action against the numerous violations of legislation of this type [environmental laws] which are likely to occur.” Id. at 728.
regulatory mission; and, returning power and participation to the people is a worthy goal in and of itself.\(^{171}\)

Private resources and vigilance may well be needed to protect the environment. Virtually every expert who has examined the issue of environmental enforcement has concluded that public resources will never be adequate to do so.\(^{172}\) There are 181,578 square miles of water area in the United States including 78,937 square miles of inland waters, 42,528 square miles of coastal waters and 60,052 square miles of Great Lakes.\(^{173}\) Each year there are 7,772,037,571 pounds of toxic releases into the air, water and land of the United States.\(^{174}\) “Forty percent . . . of America’s rivers, lakes, and coastal waters currently are unsafe for fishing, swimming or basic recreation.”\(^{175}\) During 2000, there were at least 11,270 days of beach or waterway closings and advisories, forty-eight extended closings and advisories (six to twelve weeks) and fifty permanent closings and advisories (more than twelve weeks) at American water recreation areas.\(^{176}\)

Moreover, the “capture” theory comes alive as states, which are the front-line in environmental protection, compete with each other for economic development by offering lax environmental enforcement. Apparently some states routinely collude with polluters by issuing token compliance orders solely to preempt citizen suits.\(^{177}\) Federal environmental law enforcement often fares little better as an effective regulator. According to the Environmental Protection Agency (“EPA”) Inspector General, the EPA promotes a “pay to pollute” mentality by issuing low penalties after finding violations.\(^{178}\) In addition, compliance orders issued by the EPA can be empty gestures. For example, the EPA considers

\(^{171}\) For one of the early discussions of how a citizen suit model could implement concerns identified in public choice theory, see generally Joseph Sax, Defending the Environment: A Strategy for Citizen Action (1971). See also Boyer & Meidinger, supra note 9, at 836, 843; Lehner, supra note 9, at 4; Miller, Part I, supra note 9, at 10310; Richard B. Stewart, Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975).

\(^{172}\) See Hodas, supra note 7.


\(^{176}\) National Resources Defense Council, supra note 175 at vi.

\(^{177}\) See Hodas, supra note 7, at 1649. Cf. id. at 1574, 1589.

dischargers in compliance if the discharger is subject to a compliance order even if the pollution is continuing in violation of environmental laws.179

a. Description

Citizen suit provisions share the following common characteristics: (1) broad coverage of who may serve as plaintiffs and defendants, (2) the type of conduct at which citizen suits are directed, (3) required notice prior to filing suit, (4) prohibition against citizen suits when a government agency is “diligently pursuing” the problem, (5) rights of intervention, and (6) remedies available.

Most citizen suit provisions specify that “any person”180 may bring a suit against “any person” who is in violation of the relevant statute.181

179. Hodas, supra note 7, at 1609. According to the EPA, Inspector General penalties issued to violators by both the States and the EPA are so minimal that they “encourage rather than deter non-compliance.” S. 1081 Hearings, supra note 178, at 687 (statement of John Martin).

180. See, e.g., Clean Air Amendments, 42 U.S.C. §§ 7604(a), 7602(e) (1995); Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9659(a) (1995); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (1995). “Person” is defined in most environmental statutes to include: individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.


There are some statutory variations in the requirements for plaintiffs. For example, the Clean Water Act specifies that “any citizen” is entitled to bring the suit, 33 U.S.C. § 1365(a) (1995), and defines “citizen” as “a person or persons having an interest which is or may be adversely affected.” Id. § 1365(g). Similarly, the Navigation and Navigable Waters Act requires that the plaintiff must be someone who has an “interest which is, or can be, adversely affected” by the statutory violation, 33 U.S.C. § 1910 (2001). These statutory definitions are reflections of the Supreme Court’s ruling in Sierra Club v. Morton, 405 U.S. 727 (1972), which held that an organization has no standing under the citizen suit provisions of environmental statutes unless it represents members who have been injured. Id. at 739. Qualifying injuries include aesthetic, conservational and recreational injuries. Chesapeake Bay Found. v. Am. Recovery Co., 769 F.2d 207, 209 (4th Cir. 1985).

There has been considerable attention in recent years to the standing requirement for citizen suit plaintiffs. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envt’l Serv., Inc., 528 U.S. 167, 181 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (specifying that relevant injury is to a plaintiff who can show that its members: (1) [have] suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision and that relevant injury is not to the environment); Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 888–89 (1990) (Lujan I) (noting that the adverse effect to “recreational use and aesthetic enjoyment by some members of plaintiff group is within the zone of interest of the relevant citizen suit provisions so as to confer standing but the allegations of adverse effect must be specifically alleged”); Gwaltney of
Some statutes, such as the Clean Water Act, which includes one of the most commonly used citizen suit provisions, require that the plaintiff have an “interest which is or may be adversely affected” by the violation.\(^1\)\(^2\) Plaintiffs seeking greater protection for the environment bring most citizen suits.\(^1\)\(^3\) In 1997, however, the Supreme Court held that those challenging the level of EPA’s required environmental protection as excessive also qualify as citizen suit plaintiffs.\(^1\)\(^4\) Because of their cost and complexity, well-organized and funded groups bring most citizen suits.\(^1\)\(^5\) Although attorneys’ and expert witnesses’ fees potentially are available to successful citizen suit plaintiffs, paying the up-front costs can be so prohibitive that only well-funded groups can afford to bring citizen suits.\(^1\)\(^6\)

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181. Eligible defendants encompass individuals and fictional entities, including federal and state governmental agencies. Most citizen suit provisions provide that eligible defendants include “any person alleged to be in violation of the provisions of this chapter, or regulations issued hereunder.” See, e.g., Act to Prevent Pollution of Ships, 33 U.S.C. § 1910(a)(9) (2001).

182. Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987) (holding that standing does not exist for wholly past violations but does exist when plaintiffs make a good faith allegation of continuous or intermittent violations). In Laidlaw, the Court held that although citizen suit plaintiffs may not sue for wholly past violations, they do have standing to sue for violations “that are ongoing at the time of the complaint and that could continue into the future if undeterred.” 528 U.S. at 188.

183. The Environmental Law Institute (“ELI”), at the request of the EPA, examined citizen suits brought for alleged violations of environmental laws. The ELI reviewed citizen suits filed and resolved from 1978 through April 30, 1984. E.L.I., Citizen Suits, supra note 9, at I-1, I-2. Although dated, ELI’s study is the most comprehensive review of citizen suits available. It found that most citizen suits (162 out of 214 CAA citizen suits) had been brought by “a coalition of national regional environmental groups.” Id. at vi. See also Roberta J. Borchardt, Lujan v. Defenders of Wildlife: Unwarranted Judicial Interference With Congressional Power and Environmental Protection, 1993 WIS. L. REV. 1337, 1362–64; Greve, supra note 7, at 341–42, 351 (“The vast majority of private enforcement actions are brought by environmental advocacy groups.”). See also Jenny R. Rubin, Rule 68: A Red Herring in Environmental Citizen Suits, 12 GEO. J. LEGAL ETHICS 849, 855–56 (1999).

184. In Bennett v. Spear, 520 U.S. 154 (1997), the Supreme Court held that those challenging the Endangered Species Act (“ESA”) as overly protective had standing to sue under citizen suit provisions just as plaintiffs who sued under such provisions seeking greater environmental protection did. At issue in Spear were regulations limiting water levels in northern Californian lakes and rivers so as to protect two varieties of endangered fish. 520 U.S. at 157–58. Plaintiffs, ranchers, and irrigation districts, sued under the citizen suit provisions of the ESA, challenging the restricted water levels as inappropriate. The lower courts dismissed the plaintiffs’ suit on the ground that plaintiffs were not within the “zone of interests sought to be protected by the ESA.” Id. at 161. Reversing, the Supreme Court held that citizen suit provisions that apply to “any person” are not just for “environmentalists” who assert “underenforcement” of environmental laws but also for those who allege “overenforcement.” Id. at 166.

185. See infra note 183.

186. For example: “An attorney who has brought a number of Clean Water Act citizen suits estimated his litigation costs in terms of staff time. He said that he has used 4–5 full-time lawyers to handle 25 suits, and he ‘could probably use 6 or 7.’ He noted that he and his associates have expended approximately 3 1/2 lawyer-years on these cases over the last year and a half, with expenses ‘in the $25,000 range’ and nothing to show for it yet. . . .
Most citizen suit statutes provide for two types of lawsuits: suits against regulatory officials, such as the EPA Director or Secretary of the Interior for failure to perform a non-discretionary duty, and suits against dischargers.\textsuperscript{187} In the suits against regulatory officials, plaintiffs generally seek injunctions requiring the officials to take certain action, such as declaring specific acts to be violations of environmental statutes,\textsuperscript{188} holding hearings,\textsuperscript{189} adopting alternative methods for computing permissible water discharges,\textsuperscript{190} revising national ambient air quality standards,\textsuperscript{191} or promulgating water quality standards.\textsuperscript{192} The rationale for allowing citizen suits against EPA or Interior Department officials arises from public choice’s skepticism of governmental agencies’ ability or willingness to perform their duties.\textsuperscript{193} This “oversight” private justice action is unique among the private justice models.\textsuperscript{194} None of the “victim,” “hybrid,” or other “common good” private justice actions give plaintiffs authority to sue government officials for failure to perform duties.

Citizen suit statutes require that at least sixty days prior to filing suit, the putative plaintiff give notice to the relevant federal and state agencies and to the alleged violator of the plaintiff’s intent to sue.\textsuperscript{195} This notice requirement is one attempt within the citizen suit model to coordinate private and public resources, goals and direction. Theoretically, such notice gives governmental agencies the opportunity to require compliance with environmental laws.

\textsuperscript{187} The language of the Navigation and Navigable Waters Act is typical. Suits are authorized “against any person alleged to be in violation of the provisions of this chapter, or regulations issued hereunder [and] against the Secretary [of War] where there is alleged a failure of the Secretary to perform any act or duty under this chapter which is not discretionary with the Secretary.” 33 U.S.C. § 1910(a) (2001).

\textsuperscript{188} See Miccogokee Tribe of Indians v. EPA, 105 F.3d 599, 601 (11th Cir. 1997); Scott v. City of Hammond, 741 F.2d 992, 994–98 (7th Cir. 1984).

\textsuperscript{189} Miccogokee, 105 F.3d at 601.

\textsuperscript{190} Scott, 741 F.2d at 994.

\textsuperscript{191} Am. Lung Ass’n v. Reilly, 962 F.2d 258, 259 (2d Cir. 1992).


\textsuperscript{193} See Boyer & Meidinger, supra note 9, at 836–39; Miller, Part I, supra note 9, at 10310; Miller, Part III, supra note 9, at 10425.

\textsuperscript{194} Such actions may be unique to the environmental area because of the “absolutist” nature of environmental laws which are not fully enforceable even in theory. For example, the Clean Water Act calls for zero discharge of pollutants into navigable waters by 1985. 33 U.S.C. § 1251(a) (2001).

\textsuperscript{195} See, e.g., Id. § 1365(b); Clean Air Act, 42 U.S.C. § 7604(b) (1995). Such notice is not required if the citizen suit is brought against the EPA for failure to perform a non-discretionary duty. A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 93rd Cong., 1498 (1973).
by the violator and gives the violator a chance to comply with the law.\textsuperscript{196} However, this notice requirement has not been effective because of its ambiguity\textsuperscript{197} and because, in practice, it tends to provide willing agencies an opportunity to collude with industry.\textsuperscript{198}

Citizen suits are barred if the responsible governmental agency is “diligently prosecuting a civil action in a court of the United States or a State.”\textsuperscript{199} The intent of this provision, like that of the notice requirement, is to coordinate private and public enforcement efforts.\textsuperscript{200} Like the notice requirement, however, the success of this provision has been limited by the heavy litigation it has spawned\textsuperscript{201} and the opportunity it provides for collusion between government regulator and industry.\textsuperscript{202} This provision also limits the flexibility of legitimate governmental regulatory efforts, as

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  \item \textsuperscript{198} According to some citizen suit observers, notice to offenders and enforcers provides the opportunity for collusive tactics that defeat citizen suit jurisdiction. Concerned about attracting businesses by presenting an industry-friendly environment, states have entered compliance orders against the putative defendants named in the sixty-day notice by citizens. The compliance orders allow the company to delay compliance and avoid penalties but suffice under the “diligent prosecution” provision, given EPA’s minimal requirements and inability to monitor compliance, in preempting citizen suits. Hodas, supra note 7, at 1622.
  \item \textsuperscript{200} See Boyer & Meidinger, supra note 9, at 849, 897. See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay, 484 U.S. 49, 60 (1987) (holding that citizen suits are meant to supplement not supplant government action); Derek Dickinson, Is “Diligent Prosecution of an Action in a Court Required to Preempt Citizen Suits Under the Major Federal Environmental Statutes?”, 38 WM. & MARY L. REV. 1545, 1553, 1571–82 (1997) (finding that the diligent prosecution provision is to ensure that the agency is acting to protect the public, to prevent duplicate enforcement, and to prevent inconsistent enforcement); Lynn Wright & Steven D. Schell, Clean Water Act Citizen Suits: Litigation Strategies & Defenses, SE 98 ALI-ABA 1087, 1093 (2000) (reasoning that the purpose of diligent prosecution provisions is to prevent duplicate litigation and preserve the government’s role as primary enforcer).
  \item \textsuperscript{201} See Boyer & Meidinger, supra note 9, at 849–50; Miller, Part II, supra note 9, at 10068. Issues litigated include what constitutes “diligent prosecution,” see, e.g., Ark. Wildlife Fed. v. IC1 Amer., Inc., 29 F.3d 376, 379–81 (1994), whether the “diligent prosecution” had commenced at the time the citizen suit was filed, id., and whether the plaintiff in a citizen suit has met his or her burden of proving lack of diligent prosecution, Williams Pipeline Co. v. Bayer Corp., 964 F. Supp. 1300, 1324 (1997); Friends of the Earth, Inc. v. Laidlaw Envt’l Serv., Inc., 890 F. Supp. 470, 486–87 (D.S.C. 1995).
  \item \textsuperscript{202} Boyer & Meidinger, supra note 9, at 898–99.
\end{itemize}
when regulators are forced to forego negotiations or administrative actions in favor of filing a lawsuit since a lawsuit is the only governmental action that clearly preempts citizen suits under the “diligent prosecution” provision.203

Most environmental citizen suit provisions grant, “as a matter of right,” the United States intervention in any citizen suit,204 and grant citizens intervention in enforcement actions that are filed in a court of the United States.205 In instances where a citizen suit provision does not provide rights of intervention, parties may intervene, as in any federal judicial matter, if they meet the requirements of Federal Rule of Civil Procedure 24.206 Rule 24 poses higher hurdles to intervene than do citizen suit intervention provisions, which, as noted, grant intervention as a matter of right. Intervention pursuant to Rule 24 is granted only upon proof that intervention is necessary to protect the applicant’s interest.207

Almost all citizen suit provisions provide for injunctive relief.208 In addition, plaintiffs,209 interveners,210 and even defendants in some

203. Because this provision applies only when the government agency initiates criminal or civil actions in court, it can limit the EPA’s, or the relevant agency’s, flexibility to deal with polluters by forcing these agencies to initiate court proceedings when they would otherwise pursue informal negotiations or agency proceedings. See Boyer & Meidinger, supra note 9, at 901–02.


206. AXLINE, supra note 7, § 5.02.

207. FRCP 24 provides for intervention:
when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.
FED. R. CIV. P. 24(a)(2).

208. For example, CERCLA provides that courts shall have jurisdiction in [citizen suit] actions . . . to enforce the standard, regulation, condition, requirement, or order concerned . . . to order such action as may be necessary to correct the violation . . . The . . . court shall have jurisdiction . . . to order the President or other officer to perform the act or duty concerned.
instances\textsuperscript{211} are entitled to recovery of reasonable\textsuperscript{212} attorneys fees, costs and expert witness fees.\textsuperscript{213} A few citizen suit statutes permit plaintiffs to seek civil penalties, but penalties recovered are payable to the U.S. Treasury, not to the private plaintiff bringing and financing the suit.\textsuperscript{214} In practice, an additional remedy has evolved. Many settlements in citizen suit cases result in defense payments to private environmental groups.\textsuperscript{215}

\footnotesize
\textsuperscript{211} Defendants receive attorneys fees if the action brought was obviously frivolous or meant to harass. See, e.g., Ala. Power Co. v. Gorsuch, 672 F.2d 1, 4 (D.C. Cir. 1982); Commissioner's Court of Medina Co., 683 F.2d 435, 443 (D.C. Cir. 1982) (interpreting similar provision under the Voting Rights Act); Nat'l Res. Def. Council v. Costle, 8 ENVTL. L. REP. 20881, 20884 (D.C. 1978). See generally Miller, Part III, supra note 9, at 10413.

\textsuperscript{212} To obtain recovery of fees and costs, a party need not prevail on every claim or issue but need only "substantially prevail." Awards are limited to prevailing or substantially prevailing parties. See 33 U.S.C. § 1366(d) (2001); EPCRA, 42 U.S.C. § 11046(f) (1995); RCRA, 42 U.S.C. § 6972(e) (1995); 42 U.S.C. § 9659(f); Ruckelshaus v. Sierra Club, 463 U.S. 680, 684-86 (1983). A favorable consent decree, see, e.g., Citizens Coordinating Comm. on Friendship Heights v. Wa. Metro. Area Transit Auth., 568 F. Supp. 825, 827 (D.D.C. 1983), even obtaining relief that is rendered moot soon thereafter, cf. Nat'l Black Police Ass'n v. D.C. Bd. of Elections, 168 F.3d 525, 528 (D.C. Cir. 1999), may qualify for attorney fee awards. Fees may be awarded against plaintiffs, defendants and interveners. Fees may not be awarded against federal or state governments unless these entities have waived sovereign immunity, which is rarely done.


These payments usually go to funds established by environmental groups for educational efforts, community outreach, research, and even the purchase of land. Many of these payments have been large. In some years, 98% of the total amount recovered in citizen suits has gone to private funds (or state governments).

b. Assessment


216. See Greve, supra note 7, at 558; Mann, supra note 215, at 178. See, e.g., Sierra Club v. Elec. Controls Design, 909 F.2d 1350, 1354 (9th Cir. 1990) (distinguishing payments to third party environmental groups as pursuant to consent decree from penalties); Pa. Envtl. Def. Found. v. Bellefonte Borough, 718 F. Supp. 431, 436–37 (M.D. Pa. 1989) (stating that pursuant to consent decree, defendant in citizen suit case will contribute $35,000 to a private organization, Trout Unlimited, which will use funds “on projects on Spring Creek that meet the goals of the Federal Clean Water Act.”); Nat’l Res. Def. Council, Inc. v. Interstate Paper Corp. (S.D. Ga. 1988), 19 ENVTL. L. REP. 20901 (1989) (approving a consent decree, over the DOJ’s objections, which includes payments to the Georgia Conservancy for education of school children). For a strong attack on permitting contributions to private organizations as part of settlements in citizen suits, see Greve, supra note 7, at 341–42, 344, 368 (arguing that allowing such contributions has created a “partisan . . . environmentalist enforcement cartel”).

217. At least the aggregate amount per year appears to be large ($4 million, $1.1 million, $1.5 million). See Appendices C-7 and C-8. The U.S. Department of Justice, Environmental and Natural Resources Division maintains statistics on citizen suits in a way that combines monies paid to state entities and monies paid to credit funds into one category, thus making it impossible, from these statistics, to determine the exact amount of credit funds generated from citizen suits in any one year or any one payment. See Letter from the U.S. Dept. of Justice, Envr. & Nat’l Res. Div., to Author, Response to FOIA Request FOIA-2001-00144 (Oct. 30, 2001); Telephone Conversation with Amy Haskell, Paralegal Specialist (Dec. 6, 2001). Recognizing this limitation, DOJ statistics are still revealing. From 1983 to 1989, there were no payments resulting from citizen suits to anyone except the federal treasury. Id. Payments to other sources (state entities and credit funds) began in 1990 with relatively small amounts and generally remained small (that is, $32,500 in 1990; $0 in 1991 and 1992; $20,000 in 1993). Id. The amounts payable to non-Federal-Treasury sources were exceptional (that is, $4 million in 1994; $1.6 million in 1996). Id.

218. See Appendices C-7 and C-8. Note the caveat about the DOJ statistics, supra note 217.


220. Lewis, supra note 215, at 10, 101. See Mann, supra note 215, at 176; Gelp & Barnes, supra note 215, at 1028–29. For example, in Environmental Defense Fund v. Lamphier, two nonprofit organizations brought a citizen suit alleging violations of RCRA by the Lamphiers who owned a farm
resources, deterring future violations, bringing unknown violations to the government’s attention, and encouraging dialogue among environmental organizations, the Environmental Protection Agency (“EPA”) and dischargers. The EPA and the DOJ, both “strong supporters of the citizen suits as a supplement to government enforcement,” acknowledge the contributions made by citizen suits. According to the EPA: “citizen suit authority [helps overcome] the resource ‘squeeze’ on government that precludes us from addressing every violation.” Also, notes the EPA, citizen suits lead to a greater deterrent effect as “regulatees seek to achieve compliance to avoid not only federal and state prosecution but also to avoid independent citizen actions.”

Citizen suit plaintiffs also have greater flexibility in settling cases with dischargers than do public prosecutors. For example, in *Sierra Club v. Gypsum*, citizens brought suit under the Clean Water Act charging Gypsum with discharging in excess of its NPDES permit. The parties in Virginia. 12 E.L.R. 20843 (E.D. Va. 1982), aff’d 714 F.2d 331 (4th Cir. 1983). The Lamphiers were notorious because of the water, air and odor pollution they created by burying hazardous wastes on their farm. The State of Virginia intervened, adding claims for damage under Superfund and various pendant state claims. The Lamphiers were found to be in violation after a two-day trial, and the judgment against them was affirmed on appeal. As the ELI noted, in this case, the “plaintiffs obtained their objective” of getting the state to become an active enforcer that ultimately policed the Lamphier site.

222. See id. at Appendix C, 5-48.
223. See E.L.I., Citizen Suits, supra note 9, at I-5.
224. Id. at V-8.
225. Miller, Part III, supra note 9, at 822.
226. EPA, ENFORCEMENT IN THE 1990’S, supra note 221, at 5-48 (attachment C). Developments after the enactment of the CAA confirmed that citizen suits can be an important supplement to government efforts when, for whatever reason, enforcement actions overall fall. When EPA enforcement efforts fell off in the early 1980s, for example, there was a dramatic increase in citizen suits. E.L.I., Citizen Suits, supra note 9, at III-35, viii. Data surveyed by the Environmental Law Institute showed that when case referrals from EPA Regions to Headquarters fell from 320 referrals in fiscal year 1978 to a low of 93 referrals in fiscal year 1980, id. at iii-23, and administrative orders issued by the EPA fell from 2,139 in fiscal year 1979 to 496 in fiscal year 1983, id. at III-32, citizen suits increased from seven filings in fiscal year 1978 to 132 in fiscal year 1983, id. Even acknowledging the inadequacy of counting cases to account for quality issues, this data indicate that citizen suits filled a gap in enforcement resources.
227. See id. at Appendix C, 5-48 (appendix C).
229. The National Pollutant Discharge Elimination System (“NPDES”) was established under the Clean Water Act, 33 U.S.C. § 1342. An NPDES permit authorizes the discharge of pollutants in accordance with conditions specified in the permit.
reached a settlement that, unlike most government-negotiated settlements, did not set a certain date by which compliance must be achieved. Instead, the agreement permitted Gypsum to implement less expensive steps to be followed by more expensive steps only if compliance was not achieved.230

Despite these successes, citizen suits have not been as successful as they can be.231 One major deficiency in the citizen suit regulatory model is that it provides no effective way for anyone: citizens or public regulators, to learn about violations. There are essentially two ways to learn of environmental violations: publicly available discharge reports that are required to be filed by companies, and physical surveillance of discharge sources. Neither avenue is promising.

The required, publicly available data supplied by dischargers contains serious gaps.232 For starters, the EPA collects discharge information from “major dischargers” but does not collect data from “non-major” dischargers, which is the bulk of NPDES permit holders.233 In addition, not even all “major” dischargers, notably those covered by the Resource Conservation and Recovery Act (“RCRA”), are required to submit reports.234 And although there is some monitoring by the EPA and state agencies of the completeness and accuracy of dischargers’ self-reporting, resources are too limited to fully monitor dischargers’ reliability.235 Clearly, it would be prohibitively time-consuming and inefficient for government regulators or concerned citizens to review adequately all filed reports trolling for violations. Moreover, filed reports may be falsified.

Conceivably, governmental environment regulators or concerned citizens could physically monitor point sources where illegal discharging is likely. Such an investigative approach, however, is time-consuming and expensive, especially when one considers that experts are needed to test the effluent being discharged. With 181,578 square miles of water area in the United States,236 forty percent of which is unsafe for recreational use,237

230. E.L.I., supra note 9, at IV-16.
231. Id. at 1-6, V-2. See also Hodas, supra note 7, at 1655–56.
232. As the ELI noted in its comprehensive review of citizen suits, “The major impediment to wider use of citizen suits under the Clean Air Act and other environmental statutes is the lack of reliable and publicly available data indicating whether a firm is in compliance.” E.L.I., Citizen Suits, supra note 9, at vii, IV-7.
233. Hodas, supra note 7, at 1585. Audits by the EPA Inspector General have determined that the EPA does not meet its own data quality pollution programs. Id. at 1605, 1617.
235. Hodas, supra note 7, at 1605, 1617.
In short, citizen suits fail as effective supplements to public regulation. They fail for at least two reasons: they have no helpful mechanism for identifying violations or violators, and they facilitate collusion between regulators and industry. As discussed below, they also fail to coordinate public and private prosecutive efforts adequately, fail to offer adequate incentives for counsel to represent plaintiffs in citizen suits, and fail to offer an incentive for those willing to disclose inside information about environmental violations.

The inadequacy of the citizen suit private justice model can be seen in the numbers of suits filed and recoveries obtained. From 1987 to 2000, an average of 37.4 citizen suits were filed each year, compared to an annual average of 181.8 securities class actions and 237.5 qui tam FCA actions. Comparing the amount of judgments obtained in citizen suits and qui tam FCA actions is even more dramatic. From 1988 through 2000, qui tam FCA judgments totaled $3.9 billion; judgments in environmental citizen suits totaled $16.6 million, or 0.43% of the qui tam FCA aggregate amount. Although it is important to remember that the goal of many citizen suits is to obtain remedial relief not monetary judgments, the point is that monetary awards are what attract legal and investigative talent and inside information. As long as the citizen suit model fails to generate significant monetary judgments, it will fail to provide these resources to regulatory efforts.

2. Qui Tam Actions Under the False Claims Act

a. Description

If the capture theory led to citizen suits, diseased mules and defective muskets led to the False Claims Act (FCA). Passed in 1863, the FCA

238. TOXIC RELEASE INVENTORY, EXECUTIVE SUMMARY, Table E-1 (1999).
239. See infra text and accompanying notes 390. See also Section III.A.1.b.(1).
240. See infra text and accompanying notes 332–38.
241. Appendices C-4, C-5, C-6.
242. Appendices C-1, C-2, C-3.
243. 132 CONG. REC. H6482 (daily ed. Sept 9, 1986) (statement of Rep. Berman). According to the 1863 investigation, one thousand mules delivered to the Union army were “unfit for the service, and almost worthless, for being too old or too young, blind, weak-eyed, damaged, worn out or diseased.” Id. See generally False Claims Act Amendments: Hearings on H.R. 3334 Before the Subcomm. on Admin. Law & Gov’t Relations of the House Comm. on the Judiciary, 99th Cong. 1 (1986) [hereinafter
provided the federal government with a way of combating the fraud suffered by the Union Army when it received deliveries of defective or nonexisting military supplies.\footnote{244} Today the FCA is used to combat fraud by any and all federal government contractors. Such contractors include health care providers,\footnote{246} defense contractors,\footnote{247} and oil and gas companies.\footnote{248}

Since 1863, the FCA has included a “qui tam” provision. “Qui tam” comes from the Latin phrase, “qui tam pro domino rege quam pro se ipso in hac parte sequitur” which means he “who pursues this action on our Lord the King’s behalf as well as his own.”\footnote{249} Private parties who allege and prove fraud against the government bring qui tam lawsuits.\footnote{250} If successful, these qui tam plaintiffs (known as “relators”)\footnote{251} collect a percentage of the recovery.\footnote{252} The relator need not be personally injured or affected by the defendant’s conduct, but is deemed to have standing on the

\footnote{244. Act of March 2, 1863, ch. 67, 12 Stat. 696–98.}
\footnote{246. U.S. Department of Justice fiscal year 2000 statistics indicate that in 1998, 61% of FCA qui tam cases filed involved the U.S. Department of Health and Human Services as the client agency. Boese, supra note 71, at appendix B.}
\footnote{248. In fiscal year 2000, the second largest category of fraud recoveries ($230 million) came from “companies alleged to have underpaid royalties on such production, including $95 million from Chevron, $56 million from Shell, $32 million from BP Amoco, $26 million from Conoco and $11.9 million from Devon Energy.” Press Release, supra note 11.}
\footnote{249. Vt. Agency of Nat’l Res. v. United States ex rel. Stevens, 529 U.S. 765, 768, n.1 (2000); History of Qui Tam, supra note 243, (citing 3 W. BLAKEYSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160 (1st Ed. 1768)).}
\footnote{250. 31 U.S.C. § 3730 (2001). There are seven types of conduct covered by the False Claims Act, all involving the submission of false claims to the federal government: the conspiracy to do so; the submission of a false statement in support of a claim; or the making, using, or causing to be made or used a “false record or statement to conceal, avoid or decrease an obligation to pay to transmit money or property to the Government. See, e.g., 31 U.S.C. § 3729(a) (2001); Pickens v. Kanawha River Towing, 916 F. Supp. 702, 705 (S.D. Ohio 1996). This is also known as a “reverse false claim.”}
\footnote{251. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1–5 (Aspen 2001) [hereinafter, BOESE, FALSE CLAIMS]. Boese’s treatise is an excellent resource on the False Claims Act.}
\footnote{252. Relators may collect up to 30% of the total recovery, and barring a few limited situations set forth in the FCA, are guaranteed at least 15%. 31 U.S.C. § 3730(d). The recoveries are statutorily set treble damages (with double damages in instances of sufficient cooperation) and civil penalties at amounts of $5500 to $11,000. Id. § 3729(a). The statute specifies penalties of $5,000 to $10,000 but in 1999, the DOJ increased the penalty amount for all claims specified after Sept. 29, 1999 pursuant to the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 64 Fed. Reg. 47099–104.}
theory that the federal government, as the injured party, may assign its right to sue to the private plaintiff.\textsuperscript{253}

The original FCA, passed in 1863, provided both criminal and civil penalties for its violation.\textsuperscript{254} In 1874, the criminal and civil provisions were separately codified.\textsuperscript{255} Prior to 1986, the FCA was amended several times\textsuperscript{256} in ways that weakened qui tam actions,\textsuperscript{257} so that they were rarely and ineffectually used.\textsuperscript{258} In 1986, Congress substantially amended the FCA, invigorating qui tam actions.\textsuperscript{259} The 1986 amendments increased the amount of recovery a relator could obtain,\textsuperscript{260} established a generous

\textsuperscript{253} In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, (2000), the Supreme Court held “that adequate basis for the relator’s suit . . . is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. Id. at 773. The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.

\textsuperscript{254} Act of March 2, 1863, at ch. 67, 12 Stat. 696–98 (1863).


\textsuperscript{257} For example, the 1943 amendments made it difficult for would-be relators to overcome the jurisdictional bar provision, by prohibiting FCA qui tam lawsuits when federal government personnel are already aware of the false claims even if the putative relator was the one who had informed the federal government about the fraud. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (1944). A number of courts also limited use of the FCA in general through their interpretations of the mens rea requirement in the FCA. By 1986, a number of courts had interpreted the FCA’s requirement of “knowledge” as necessitating proof of “specific intent to defraud,” see United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970), or similarly high standard, see United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959).

\textsuperscript{258} BOESE, FALSE CLAIMS, supra note 251, § 1.03.

\textsuperscript{259} Id. § 1.04[H].


The 1863 FCA gave the relator 50% of any successful judgment. 12 Stat. 698, § 6 (1863) (current version at 31 U.S.C. § 3729 (2001)). The 1943 Amendment reduced this to 10% maximum if the government intervened and 25% if the government did not, with no guaranteed minimum in any case. In addition, there was no provision for attorneys’ fees and costs. 89 CONG. REC. S7606. The 1986 Amendments increased the relator’s share, guaranteed a minimum recovery in most cases and
mandatory minimum recovery for relators, and relaxed provisions that had prevented many relators from filing suit. Other amendments made FCA cases easier to prove overall, thereby improving all plaintiffs' chances of success. These amendments included relaxing the mens rea requirement, expanding the statute of limitations, and clarifying that

provided for attorneys fees and costs. A relator is now guaranteed 15–25% of judgment when the government intervenes, and 25–30% if the government does not intervene. 31 U.S.C. §§ 3730(d)(1)–(2). The FCA directs the courts to determine the appropriate percentage within the statutory range based upon “the significance of the information and the role of the person bringing the action in advancing the case to litigation.” Id. § 3730(d)(1). Legislative history to the Senate version of the 1986 Amendments identifies factors to consider in assessing this percentage. S. Rep. No. 99-345, at 28 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5293. In addition, the DOJ has promulgated factors to consider. DOJ Relator’s Share Guidelines, 11 TAF Q. REV. 17, 19 (Oct. 1997), available at http://www.taf.org./taf/docs/Oct97qr.pdf. The amount may be reduced to 10% if the FCA case is based on information additional to that provided by the relator. 31 U.S.C. § 3730(d)(3). Any relator who is convicted of criminal conduct arising from his or her role in the FCA violation receives nothing. Id. § 3730(a)(3). Reasonable attorneys fees and costs are also to be awarded under the 1986 Amendments. Id. §§ 3730(d)(1)–(2).

261. Id. § 3730(d)(1)(2).

262. See infra text and accompanying notes 267–76.

263. Prior to the 1986 Amendments, the FCA required that any violation be committed “knowingly” without defining “knowingly.” Some courts interpreted the term strictly to require proof of specific intent. See, e.g., United States v. Mead, 426 F.2d 118, 122 (9th Cir. 1970), United States v. Aerodex, Inc. 469 F.2d 1003, 1007 (5th Cir. 1972); United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962). Others applied a similarly high standard. See, e.g., United States v. Priola, 272 F.2d 589, 594 (5th Cir. 1959) (interpreting “knowingly” in the FCA as requiring proof of “guilty knowledge of a purpose on the part of [the defendant] to cheat the Government”). The 1986 Amendments defined “knowingly” to include: “(1) actual knowledge of the information, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information,” and further specified that “no proof of specific intent to defraud is required.” 31 U.S.C. § 3729(b) (2001). The Conference Committee report explained: “The Committee’s interest is not only to adopt a more uniform standard, but a more appropriate standard for remedial actions.” S. REP. NO. 345, 99th Cong., 7 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272.

264. Prior to the 1986 amendments, the FCA had a six-year statute of limitations. The 1986 amendments lengthened the statute of limitations to ten years in instances when the government failed to detect the falsity at the time the claims were submitted. Thus, the FCA currently provides that an action may not be brought:

(1) more than 6 years after the date on which the violation of section 3729 is committed, or
(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b). Questions regarding the statute of limitations abound, such as whether the statute begins running on the date the claim is submitted, see, e.g., United States ex rel. Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 410 (3d Cir. 1999), or the date on which the claim is paid, see, e.g., United States ex rel. Kriendler & Kriendler v. United Tech. Corp. 985 F.2d 1148, 1156–57 (2d Cir. 1993); whether the statute begins running on the date the government guarantees a debt or when the mortgage or lender (the innocent party) makes a claim for reimbursement, see, e.g., United States v. Rivera, 55 F.3d 703, 707–09 (1st Cir. 1995); United States ex rel. Sanders v. E. Ala. Healthcare Auth., 953 F. Supp. 1404, 1412–13 (M.D. Ala. 1996); the amount of due diligence the government must exercise to
the preponderance burden of proof, rather than a clear and convincing burden of proof, applies to FCA cases. The 1986 amendments also provided a cause of action for relators who suffer retribution from employers for whistleblower activities related to the FCA.

One of the most significant 1986 amendments was alteration of the FCA’s “jurisdictional bar” provision. This provision was included in the 1943 FCA amendments in an effort to ensure that relators did not simply file an FCA action that repackages information already available to the government regulators. In Congress’ view, a relator is not helping the government much (at least not enough to share in the judgment of the lawsuit) if the government already knows about the fraud the relator is disclosing. Thus, after 1943 and until 1986, when the jurisdictional bar provision was again amended, the FCA jurisdictionally barred qui tam actions if the information included in the relator’s lawsuit was known to the United States when the action was brought. The 1986 amendments allow relators to go forward, even if government officials are aware of the fraud at issue, if the relator is an “original source” of the information concerning the fraud. As one might imagine, numerous interpretative toll the statute, see, e.g., United States v. Incorporate Vill. of Island Park, 791 F. Supp. 354, 363–64 (E.D.N.Y. 1992).

265. 31 U.S.C. § 3731(c).
266. Id. § 3730(h).
267. Id. § 3130(c)(4):
   (A) 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 [sic, should probably be “General”] 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.
   (B) 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.

268. Boese, False Claims, supra note 251, § 1.02.
270. See United States ex rel. State of Wisconsin v. Dean, 729 F.2d 1100, 1104–05 (7th Cir. 1984) (discussing the practical impact of this change). In Dean, the State of Wisconsin brought suit as relator against a physician for filing allegedly false Medicaid claims with the state of Wisconsin. The Seventh Circuit dismissed the lawsuit, finding that Wisconsin was jurisdictionally barred because the United States was “in possession” of the information in the lawsuit at the time the case was filed. This was true. The United States knew of Dr. Dean’s Medicaid fraud, but only because Wisconsin, which had previously convicted Dr. Dean of Medicaid fraud for the same claims alleged to be false in its qui tam action, had provided information about Dr. Dean’s conviction to the Department of Health and Human Resources as required in Medicaid laws. Id. at 1103. Recognizing the unfairness of its decision, the Seventh Circuit concluded its opinion in Dean by suggesting that Congress was the more appropriate body from whom relators should seek relief from an unfair jurisdictional bar provision. Id. at 1103.
difficulties arise regarding the jurisdictional bar provision, such as how much information must be known to the government before the relator is barred,\textsuperscript{272} whether government employees who obtain information as part of their employment can qualify as qui tam relators,\textsuperscript{273} what happens when the relator’s complaint replicates public information but the relator had an independent source for the information,\textsuperscript{274} what a relator must do to qualify as an “original source,”\textsuperscript{275} and how to determine which relator, among many who file, qualifies under the FCA.\textsuperscript{276}

The 1986 amendments made a remarkable difference in the use of the FCA. Before 1986, the DOJ received about six qui tam cases per year.\textsuperscript{277} Since the 1986 amendments went into effect, and through October 30, 2000, 3326 qui tam cases have been filed and $4.024 billion has been recovered.\textsuperscript{278} Eyeing the success of the 1986-invigorated FCA, states are passing similar statutes covering false claims submitted to state governments.\textsuperscript{279}

\textsuperscript{272} Compare United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1521 (10th Cir. 1996) (information in files potentially available to the public does not activate the jurisdictional bar provisions) with United States ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1159–60 (3d Cir. 1991) (information that was discovered in unrelated case that is potentially available activates the jurisdictional bar provision).

\textsuperscript{273} Compare United States ex rel. LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1st Cir. 1990) (finding that government employee with responsibility for uncovering fraud cannot qualify as a qui tam relator) with United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1502 (11th Cir. 1991) (noting that government employee may qualify as a relator).

\textsuperscript{274} Compare United States v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992) (barring relator if complaint reflects publicly held information even if relator did not rely upon it or base his or her complaint on it) with United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1349 (4th Cir. 1994) (allowing relator’s complaint even if it reflects publicly held information if the relator received his or her information elsewhere and did not base his or her complaint on the publicly held information).

\textsuperscript{275} Compare United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir. 1990) (specifying that to qualify as an “original source” relator must provide the information to the person or entity that makes the information public) with United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1351 (4th Cir. 1994) (rejecting Second Circuit’s position in \textit{Long Island} as “unpersuasive” and “implausible”).

\textsuperscript{276} Although the FCA provides that the first to file a qui tam action is the only relator who qualifies to bring the lawsuit, 31 U.S.C. § 3730(b)(5), many questions remain, such as what occurs when the initial complaint is broad and vague compared to subsequently filed complaints, and how to handle situations where the initial complaint is dismissed and subsequent complaints survive. See Boese, \textit{False Claims}, supra note 251, § 4.03[B][2].


\textsuperscript{278} Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-6072 (Oct. 30, 2001) (on file with author).

The procedure for pursuing qui tam FCA actions is unique. Individuals who believe they can prove that others (individuals or fictional entities) have submitted false claims to the federal government may file a qui tam FCA action in federal court.\textsuperscript{280} The FCA provides that an action may be brought against “any person” who violates the Act.\textsuperscript{281}

The qui tam complaint is sealed and not served on the defendant or made public in any way. The entire action is stayed while the federal government (acting through the DOJ) is notified of the lawsuit by service of a copy of the complaint and “written disclosure of substantially all material evidence and information the person possesses.”\textsuperscript{282} While the complaint remains under seal, the DOJ evaluates the case and determines whether it will intervene.\textsuperscript{283} If it enters the case, the DOJ assumes “primary responsibility” for the lawsuit but the relator continues also as

\textsuperscript{280} 31 U.S.C. §§ 3729(a)(A), 3730(b). Typical private plaintiffs (known as “relators”) include current or former employees, competitors and competitors’ employees, state and local governments, special interest groups (such as “Taxpayers Against Fraud”), attorneys and law firms who discover fraud in the course of representing clients in other matters. \textit{Boese, False Claims}, supra note 251, § 4.01[B].

\textsuperscript{281} In \textit{Stevens}, the Court limited the “persons” who may be sued as defendants under the FCA, holding that states and state entities are not “persons” subject to qui tam liability under the FCA. 529 U.S. at 783. Justice Ginsburg noted in a concurring opinion that the Court’s opinion leaves open the questions whether the term “persons” includes states or state entities when the federal government (rather than a relator) brings the FCA action. \textit{Id.} at 780. Also, the \textit{Stevens} opinion left open the question whether other government entities have sovereign immunity from FCA liability. The lower courts have wrestled with this issue, before and after \textit{Stevens}. See, e.g., United States \textit{ex rel. Garibaldi v. Orleans Parish Sch. Bd.}, 244 F.3d 486, 491 (5th Cir. 2001) (finding that municipal entity has Eleventh Amendment immunity); United States \textit{ex rel. Graber v. City and State of New York}, 8 F. Supp. 2d 343, 349 (S.D.N.Y. 1998) (reasoning that municipalities have immunity under FCA because municipalities are immune from punitive damages and, according to \textit{Stevens}, the FCA is a punitive statute).


\textsuperscript{283} \textit{Boese, False Claims}, supra note 251, § 4.05.
plaintiff. The relator retains certain rights if the government intervenes, including the right to object and be heard on a motion to limit the relator’s role, or to dismiss or settle the case. If the federal government elects not to intervene, the qui tam relator may proceed with the action as the sole plaintiff.

If the government intervenes in the lawsuit, the relator is guaranteed at least 15% of the any judgment or settlement and the court can award more—up to 25%. If the government does not join the lawsuit, the relator is guaranteed 25% and could receive up to 30%. Only in cases where evidence is based on publicly disclosed information, or the relator is partially at fault for the violations, does the relator get less. Because the FCA’s damages and penalty provisions tend to generate exceptionally large judgments, relators’ percentages involve substantial sums.

284. 31 U.S.C. § 3730(c)(1). This dual-plaintiff system creates interesting dynamics. When the government intervenes, qui tam actions become three-party lawsuits. The co-plaintiffs (the federal government and the relator) are united on some aspects of the litigation (gathering information of fraud, opposing most defense strategies and motions). But the government and relator become pitted against each other when, for example, the government seeks to have the relator jurisdictionally barred, see, e.g., United States ex rel. Fine v. Chevron, 72 F.3d 740, 745 (9th Cir. 1995), or disagrees with the award the relator seeks upon conclusion of the case. See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp., 52 F. Supp. 2d 420, 429–30 (E.D. Pa. 1998); United States v. Gen. Elec., 808 F. Supp. 580, 583–84 (S.D. Ohio 1992).

285. 31 U.S.C. § 3730(c)(2). During the litigation, the relator’s role may be restricted by the court “[u]pon a showing by the Government that the unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment,” Id. § 3730(a)(2)(C), or “[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense.” Id. § 3730(a)(2)(D). Some relators have successfully objected to proposed settlements between the government and qui tam defendants. See, e.g., Gravitt v. Gen. Elec. Co., 680 F. Supp. 1162, 1165 (S.D. Ohio), dismissed, 848 F.2d 190, 190 (6th Cir. 1988).

286. 31 U.S.C. § 3730(c)(3). If the relator proceeds as the sole plaintiff after the DOJ has declined to intervene, the DOJ may request to receive copies of all pleadings filed and deposition transcripts (at the Government’s expense). Upon a showing of “good cause,” the court may permit the Government to intervene “at a later date.” Id. § 3730(c)(3).

287. Id. §§ 3730(d)(1), (3). Note that the qui tam FCA provisions discourage class actions: the more plaintiffs there are, the less each will get of the percentage of a judgment statutorily allocated to relators.

288. For example, recent judgments in FCA qui tam cases include a $875 million settlement from TAP Pharmaceuticals, 55 HEALTHCARE FIN. MGT. 10 (2002), a $745 million settlement with HCA Healthcare Corporation to resolve some of the alleged FCA violations pending against HCA; a $385 million settlement with National Medical Care, Inc., a $325 million settlement with SmithKline Beecham Clinical Laboratory, a $325 million settlement with National Medical Enterprises, and a $110 million settlement with National Health Laboratories. BOESE, supra note 251, § 1.05[A].

289. Recent relators’ awards include $95 million, $44.8 million, $28.9 million, and $18.1 million. 21 TAF Q. REV. 20–21 (Jan. 2001).
Historically, relators who proceed on their own after the DOJ has declined to intervene as a plaintiff have enjoyed little success. Their cases are dismissed more often and their recoveries are substantially less. The litigational advantages to private plaintiffs of obtaining DOJ intervention are so substantial that the acknowledged goal of any experienced relators’ attorney is to obtain the government’s intervention. Such intervention is obtained by preparing a thorough, complete, and convincing written statement for the government.

290. For example, the total amount paid to relators, from October 1, 1986 through September 30, 2000, as their statutory share when the government has intervened is $576 million. The total amount paid to relators over this same time period when the government has not intervened is $35.3 million. Only 2.1% (12 out of 570) of qui tam cases in which the government has intervened have been dismissed; 71.1% (1357 out of 1907) of qui tam cases in which the government has not intervened have been dismissed. Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-0072 (Oct. 20, 2001) (on file with author).

291. As one experienced relator’s counsel explained: “When evaluating a case and during the beginning stages of representing a whistle blower never forget your initial mission: persuade the government to pursue the case.” Mitchell Kreindler, So You Wanna Be a Whistleblower’s Lawyer?, Address before the ABA National Institute, The Civil False Claims Act and Qui Tam Enforcement 5 (Nov. 28, 2001).

A large part of the reason relators seek DOJ intervention is the resources the DOJ can bring to a case. DOJ attorneys and agents work with the relevant agency to obtain government records pertaining to the alleged false claims. In the health care field, for example, DOJ and HHS attorneys and agents work with private insurers who contract with the federal government to service Medicare and Medicaid claims, thereby obtaining billing data, longitudinal comparisons, and other helpful interpretations of billing regulations and history that would be available to private parties only through subpoenas or Freedom of Information Act requests, if at all. ROBERT FABRIKANT, PAUL E. KALB, MARK D. HOPSON & PAMELA H. BUCY, HEALTH CARE FRAUD, ENFORCEMENT AND COMPLIANCE, Chap 6 (LJSP 2001) (discussing the investigation of health care fraud cases). In addition, the DOJ is authorized by the Health Insurance Portability and Accountability Act (“HIPAA”) to issue subpoenas in “any investigation relating to any act or activity involving a federal health care offense.” 18 U.S.C. § 3486 (2000 & Supp. 2001). HIPAA subpoenas may require the production of tangible things but not oral testimony. Also, the FCA authorizes DOJ to seek civil investigative demands (“CIDs”) which are standard civil investigative tools (interrogatories, documents subpoenas, depositions) before a suit is filed. 31 U.S.C. § 3733 (2001). Moreover, most federal agencies have authority to issue “Inspector General Subpoenas” to investigate, among other things, fraud by government contractors upon that agency. 5 U.S.C. § 6(a) (1987). These subpoenas are quite versatile. They are not subject to the Federal Rules of Civil Procedure (and thus no showing of relevancy is required), or to the secrecy requirements of the grand jury. See, e.g., FTC v. Atl. Richfield, 567 F.2d 96, 104–05 & n.19 (D.C. Cir. 1977); United States v. Fesman, 781 F. Supp. 511, 514 (S.D. Ohio 1991).

Also, in instances where it appears that criminal violations may have occurred, the DOJ can commence a criminal investigation employing investigative tools such as grants of immunity, 18 U.S.C. § 6002 (1994) and the grand jury, with its broad topical and jurisdictional reach. United States v. R. Enter., Inc., 498 U.S. 292, 297 (1991). Upon a “strong showing of particularized need for grand jury materials,” information gathered during a criminal grand jury investigation may be disclosed to government attorneys and their assistants who are investigation FCA violations. United States v. Sells Eng’g, 463 U.S. 418, 443 (1985).

292. According to Mitchell Kreindler, an experienced qui tam relators’ counsel: “By providing a cohesive, comprehensive and understandable presentation to the government, the relator will increase
Preparation of this report, delivery of which to the DOJ is statutorily required upon filing of one’s sealed complaint, is time-consuming and requires considerable expertise.\(^{293}\) Such a report should detail applicable reimbursement guidelines and explain how the defendant committed fraud in violation of such guidelines. It should reveal witnesses’ identities and anticipated testimony, and describe what records are available to prove not just that fraud was committed, but that it was committed “knowingly.”

It is increasingly difficult to obtain DOJ intervention in part because of the explosive growth in FCA private actions over the past decade.\(^{294}\) Relators filing sealed complaints are competing with each other to obtain DOJ intervention. The relator who has the best chance of achieving DOJ intervention is the one who presents a thorough, well documented and well-conceived report, demonstrating full knowledge of applicable billing regulations and requirements, and tracking the DOJ’s guidelines for intervention.

As noted in this Article,\(^ {295}\) if the DOJ joins the relator’s lawsuit, the relator and the DOJ both continue as plaintiffs. This dual-plaintiff design provides an efficient way for private litigants to supplement the DOJ’s resources throughout the duration of a case.\(^ {296}\) It also provides the DOJ a measurably the chances that the government will be interested in the case.” Address by Mitchell Kreindler, \textit{supra} note 291. Robin Page West, also an experienced qui tam relators’ counsel, concurs. She describes the increased risks a relator faces if the government does not intervene: increased chance of assessment to the relator of defendant’s attorneys’ fees and costs, and successful defense counterclaims against relator. West notes: “Because of these risks, and because a qui tam case is more likely to result in a recovery if the government intervenes, you want to do everything possible to minimize the risk of declination.” Robin Page West, \textit{Qui Tam Litigation}, 28 A.B.A. LITIG. 21 (2001).

\(^{293}\) As Kreindler has explained:
The statutory disclosure is mandated by the Act . . . . This can be done in many ways, but the most effective is to prepare a detailed narrative that references specific exhibits. The narrative should provide information on the background of the parties, describe the relator’s involvement in uncovering the scheme, discuss the regulatory and legal background underlying the relator’s allegations, address key legal issues implicating the FCA, discuss the government’s damages, identify potential witnesses and make suggestions for investigation . . . . Such a document is not only more persuasive than a stack of raw evidence, but it provides the DOJ with a simple means of communicating the story of the case to other agencies. A well-written statutory disclosure will simplify the government’s evaluation of the relator’s allegations and help focus its investigation more quickly.

Kriendler, \textit{supra} note 291, at 6.

\(^{294}\) In 1987, thirty-three qui tam FCA cases were filed. In 2000, 336 cases were filed. Of the 3202 qui tam cases filed since 1987, the government has intervened or otherwise pursued 17.8% (570 out of 3202). Letter from the U.S. Department of Justice to Author, FOIA Request 145-FOI-6072 (Oct. 30, 2001) (on file with author).

\(^{295}\) See \textit{supra} text and accompanying notes 284.

mechanism for monitoring and supervising the quality of a relator’s activity throughout a case.297 DOJ’s quality-control authority is powerful. Because it has statutory authority to move for dismissal of any inappropriate relator’s lawsuit, the DOJ can ensure that inappropriate actions are dismissed before they are made public.298

In these ways, the FCA’s dual-plaintiff design demands and rewards top-quality work in private justice actions from the beginning through the end of a case.

b. Assessment

The qui tam FCA action contains two features unique to private justice actions that render it extraordinarily successful as a regulatory tool. First, it brings forth inside information. It does so through the damages and penalties provisions and the jurisdictional bar provision.299 The damages and penalty provisions, coupled with the mandatory percentage allocated for the relator, provide a substantial enough incentive to attract knowledgeable insiders willing to serve as whistleblowers. The jurisdictional bar provision, which disqualifies most of us from serving as relators, ensures that a whistleblower’s information is timely and helpful to the government.

Second, the “dual-plaintiff” mechanism, as noted, provides potentially powerful quality control on FCA private actions. It also provides a way for knowledgeable relators to pursue a case while working hand-in-hand with regulators.300

297. See infra Section III.C.1.
298. 31 U.S.C. § 3730(c) (2001) gives the Government authority to dismiss an FCA qui tam action “notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.”

At least one court has held that the Government does not have unfettered authority to dismiss an FCA qui tam action, and that its decisions are subject to judicial review. United States ex rel. Sequoia Orange Co. v. Sunland Packing Co., 912 F. Supp. 1325, 1340 (E.D. Cal. 1995), aff d 151 F.3d 1139, 1144–45 (9th Cir. 1998); United States ex rel. Juliano v. Fed. Asset Disposition Assoc., 736 F. Supp. 348 (D.D.C. 1990).
299. This was one of its goals. As noted in the Senate Report accompanying the 1986 Amendments, “[t]he proposed legislation seeks not only to provide the Government’s law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward.” S. REP. NO. 345, 99th Cong., (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5266–67.
300. The FCA contains another mechanism to help with quality control, but this mechanism, unlike the dual-plaintiff system, is not unique to the FCA. The FCA provides that parties filing frivolous qui tam actions may be held responsible for defendants’ attorneys fees and expenses: If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys’ fees and
The number of suits filed and monetary judgments obtained, especially when compared to other existing private justice actions, shows that the qui tam FCA private justice model is successful. Between 1987 and 2000, an average of 237.5 qui tam FCA cases were filed annually, compared to 181.8 average annual filings of securities fraud private justice actions and 37.4 average annual filings of environmental citizen suit private justice actions. Moreover, since 1987, there has been a sharp increase per year in qui tam FCA filings compared to relatively flat numbers of filings in securities and citizen suit private actions. The amount of recoveries obtained under the various private justice actions presents a more dramatic comparison, even recognizing that the goal of many citizen suit cases is to obtain remedial relief rather than monetary judgment. From 1988 to 2000, the aggregate amount of judgments obtained in qui tam FCA actions was $3.9 billion compared to $16.6 million from environmental citizen suits (0.43% of the aggregate qui tam FCA judgments).

Interestingly, more than any other private justice actions, or for that matter, more than most legal actions, the FCA’s structure seeks to change social values. Perhaps not by design, but in fact, the FCA elevates the value of protecting the larger community over the value of loyalty to those close at hand.

III. ANALYSIS

A. STRENGTHS OF PRIVATE JUSTICE

Different private justice models offer different strengths. The “victim” and “hybrid” private justice actions seek to make victims whole, and sometimes do so. However, even when they work well, these actions are inherently limited in their ability to supplement public resources. In comparison, the “common good” private justice actions,
especially the qui tam FCA actions, are capable of producing beneficial resources for public regulators, namely, legal and investigative talent and inside information.

1. The Resource of Legal and Investigative Talent

Economic wrongdoing is difficult to detect and prove. Often, it is hidden within a large organization, buried in paper trails and electronic messages, concealed by false documentation, involves complex and intricate transactions, and has many participants, none of whom may know the full extent of the conduct or even, for some, that there are any improprieties. Reconstruction of the illegality requires sophisticated investigators and attorneys with significant investigative resources and legal skill.

a. “Victim” and “Hybrid” Private Justice Models

The “victim” private justice model, when it provides for payment of attorneys’ fees and costs and expert witness fees, and especially when it offers punitive damages, attracts plaintiffs’ counsel who can supplement public regulators’ prosecutive efforts. Because these cases, by definition, involve one instance of wrongdoing and historically have resulted in minimal recoveries, their impact on overall regulation of complex economic wrongdoing is inherently limited.

The “hybrid” private justice actions have had mixed success in recruiting legal talent who can detect, organize, and bring to fruition cases exposing complex economic wrongs. For example, given the dismal success rate of RICO plaintiffs, it does not appear that Rico attracts quality legal or investigative resources. The securities fraud private


308. See supra text and accompanying notes 111–12.

309. This appears to be true despite the incentive structure in RICO (treble damages plus costs and attorneys fees) which would seem substantial enough to attract quality counsel. The reason for RICO’s apparent inability to attract quality private counsel may lie in the RICO statute itself. Its complex structure makes it difficult both to attract top legal talent, and for top legal talent to employ the RICO statute appropriately. The RICO elements of “enterprise,” “pattern,” and many of the underlying “racketeering activities” are difficult to plead and prove. See, e.g., Bessett v. Avco Fin. Serv., 230 F.3d 439, 448 (1st Cir. 2000) (affirmed dismissal of RICO complaint for failure to allege “person” distinct from “enterprise.”); Anatian v. Coutts Bank, 193 F.3d 85, 88–89 (2d Cir. 1999) (reversing judgment for plaintiff on RICO counts for failure to prove “pattern”).
justice actions seem to do a better job in attracting legal and investigative
talent as judged by the relative number and success of such actions.310

Interestingly, some features of the 1995 reform of private securities
actions may well discourage the recruitment of private legal and
investigative talent, thereby diminishing the future ability of the securities
private justice action to bring such legal and investigative talent to public
regulatory efforts. The PSLRA requires that courts presume that the
plaintiff with “the largest financial stake in the relief sought” is the
appropriate lead plaintiff, dictates that the lead plaintiff is responsible for
selecting class counsel, restricts the lead plaintiffs’ recovery to a pro rata
share of the final judgment, and institutes a variety of steps inhibiting
counsel’s recruitment of professional plaintiffs. Together, these reforms
may well discourage some entrepreneurial attorneys from monitoring areas
ripe for fraud and initiating and organizing class actions. In fact, it appears
that since the PSLRA was passed, private securities litigation has been
consolidated to a few plaintiffs’ firms.311 It may be too early to tell
whether this consolidation improves the quality of private securities cases
or scares away skilled counsel who would beneficially supplement public
regulatory efforts.

b. “Common Good” Private Justice Models

(1) Citizen Suit Private Justice Model

The citizen suit “common good” model appears to be one of the least
effective existing private justice models in recruiting legal and investigative
talent. These actions do not provide enough recovery to entice enough
well-qualified attorneys to initiate and organize cases, or otherwise
represent plaintiffs. In theory, citizen suit plaintiffs recover costs,
attorneys’ fees and expert witnesses’ fees, but in practice they rarely
recover the total expenditure for costs and fees. As one expert noted:

[F]ee awards in environmental citizen suits have not approached
awards in antitrust or securities law cases, either in the hourly

310. See supra Part III.A.1. This would appear to be the case even though counsel in securities
private actions often “piggy-back” governmental efforts by simply following up government detection
of fraud with a private lawsuit. Such duplicative efforts can be helpful to an overall regulatory system,
however. Judgments obtained in these private suits enhance the penalty meted out by public agencies,
increasing deterrence impact. In addition, it may be an efficient division of labor for public agencies to
identify problems and for private counsel to follow up with litigation arising from government
investigations. Coffee, Private Attorney General, supra note 7, at 284. Coffee also argues that
compensation available to plaintiffs’ counsel in private securities fraud actions is not adequate to attract
top legal counsel.

311. See supra text and accompanying note 159.
rates allowed or the amounts of awards made. . . . Many such awards have been to public interest group plaintiffs and their attorneys. Despite clear law that awards should not be discounted because they are made in pro bono cases or for legal work done by attorneys in public interest organizations, the disparity may result in part from lingering attitudes that such plaintiffs and their attorneys are to some extent intermeddlers, unworthy of the same level of compensation as plaintiffs’ attorneys in more traditional fields of contingent fee practice.312

The paltry awards citizen suit plaintiffs receive make it difficult to undertake these cases since they are technical and complex, require significant investigative and pre-trial preparation and expense, and often take years to prepare.313 As the Environmental Law Institute repeatedly noted in its comprehensive review of citizen suits, it is essential to the success of citizen suits that experienced attorneys handle citizen suits, and have a sufficiently large amount of resources to adequately fund the investigation and legal representation.314

More to the point, citizen suit plaintiffs recover no monetary judgments, a percentage of which could be negotiated as attorneys’ fees,315 thereby enhancing the amount available to plaintiffs’ counsel.316 In short, the package of incentives in the citizen suit private justice model is insufficient to attract entrepreneurial attorneys who are able to organize highly complex cases that carry substantial investigative and preparation costs. This fact is brought home in the number of environmental citizen suits filed: an average of 37.4 per year (compared to an average of 181.8 securities class actions filed per year and 237.5 qui tam FCA cases filed per year).317

312. Miller, Part III, supra note 9, at 10422.
313. As Boyer & Meidinger have noted, citizen suits are technical and complex. The fact that counsel experiences delay between incurring litigation costs and ultimate fee recovery “seems to be limiting the number of private firms willing to take on citizen suits and the number of cases those firms are able to handle.” See Boyer & Meidinger, supra note 9, at 934–35.
314. E.L.I., Citizen Suits, supra note 9, at IV-11, IV-13 (noting that successful resolution of citizen suit facilitated by experienced plaintiff’s attorney), IV-21 and IV-38 (noting that resolution in citizen suit hampered by inexperienced environmental attorney), V-10 (recognizing importance of good screening of cases by citizen suit plaintiffs).
315. See infra note 316.
316. While some citizen suit statutes allow private plaintiffs to recover penalties, all penalties go to the U.S. Treasury. See supra notes 208–13. Even if citizen suit plaintiffs obtain defense contributions for private organizations as part of the case settlement, these contributions go to agreed-upon community organizations, not to the plaintiffs.
317. See infra Appendices C-4, C-5, C-6.
(2) Qui Tam FCA Private Justice Model

The qui tam private justice model, by comparison, has proven to be highly effective in recruiting legal talent who have the skill and resources to handle complex, expensive cases. Because of the large recoveries available to private plaintiffs under the FCA through statutorily mandated percentages of large, fixed penalties, private plaintiffs’ counsel can receive large fees since their fees tend to be a combination of court-awarded attorneys fees and a percentage of the recovery they negotiated pre-trial with their clients. These large fees are a significant incentive for top legal talent to undertake qui tam plaintiffs’ work. As an aside, it should be noted that the large judgments at stake are incentive for defendants to hire top defense counsel, thereby evening up the sides.

The structural design of the qui tam provisions of the FCA also discourages inexperienced or unskilled counsel. As noted earlier, the goal of relators is to convince the DOJ of a case’s merit so that the DOJ will intervene and take “primary responsibility” for the case. Relators’ counsel does this by presenting to the DOJ, at the time the complaint is filed (under seal), a thorough, well-thought-out, carefully researched report describing exactly how fraud was committed and how it can be proven in the highly complex, regulatory area of government contracting. The demanding nature of this task requires skilled counsel and deters unskilled or inexperienced counsel. Such an undertaking is simply too difficult and time-consuming for inexperienced counsel, especially if—as is almost certain—counsel is working on a contingency fee basis.

Recent examples demonstrate the formidable legal and investigative resources the FCA brings to the public regulatory efforts. In one qui tam FCA case, six law firms devoted forty lawyers (twenty full time equivalents) to the case, and incurred $1 million in fees and expenses per month while the case was being intensively litigated. In another recent qui tam FCA case, where there were 125 defense attorneys, fifteen relators’ attorneys, plus DOJ attorneys, the federal courthouse was not large enough to accommodate the group for docket calls. The defendant, Shell Oil

318. For example, in United States ex rel. Taxpayers Against Fraud v. Gen. Elec., relators’ counsel and relator agreed that counsel would receive 25% of the relator’s share. 41 F.3d 1032, 1036 (6th Cir. 1994). This percentage was in addition to attorney fees and costs awarded by the court pursuant to 31 U.S.C. § 3730(d)(1). The total amount awarded to relator’s counsel in this case was $4 million. Id. at 1036.
319. See supra text and accompanying notes 290–92.
Company, produced 7,000 banker boxes of records. One of the relators’
counsel took responsibility for handling all documents in the case. Doing
so required 5,000 square feet of warehouse space (with the record boxes
stacked seven feet high). This relator’s counsel organized the records so
that plaintiffs could respond to any defense request for identification of any
record pertaining to any particular claim within thirty days by production of
a CD containing the requested records.322 This case was settled with a
recovery to the U.S. Treasury of $400 million and a relator’s share of $64
million.323

2. The Resource of Information

Although legal and investigative talent are important in detecting and
deterring illegal economic activity, inside information is more important.
Knowledgeable insiders can produce information about inchoate or on-
going malfeasance of which law enforcement is unaware. Such insiders
can also save enormous amounts of law enforcement resources by focusing
governmental investigations and case preparation.324 Cutting down on
unproductive investigations not only helps law enforcement, but also aids
defendants and putative defendants who are spared financial and
reputational costs in responding to misguided investigations.

   a. “Victim” and “Hybrid” Private Justice Models

The “victim” and “hybrid” private actions are not designed to entice
insiders to come forward. There is nothing in either of these private justice
models to identify anyone with inside information, to encourage insiders to
come forward, to reward insiders for coming forward, or to protect insiders
if they do come forward. Granted, if a person injured by a defendant’s
violation of the law happens to be someone with inside information of
wrongdoing, such information may well strengthen the plaintiff’s case but
such a circumstance would be an unanticipated fortuity rather than an
intended result.

Moreover, the class action format, used fairly successfully in many of
the “hybrid” private justice actions,325 is, in fact, designed to discourage

322. Scott A. Powell, Address before Mealey’s Conference, Litigating Whistleblower Cases
Under the Qui Tam Provisions of the False Claims Act, Panel on Reports From the Field,
Developments on Notable Cases (June 11, 2001).
323. Letter from the U.S. Department of Justice to Author, Response to FOIA Request 145-FOI-
324. Bucy, Information As a Commodity, supra note 1 (manuscript at 2.32–38).
325. See supra text and accompanying notes 157–62 (discussing success of the class action
securities cases in general). Whether the class action device attracts experienced, quality legal talent is
knowledgeable insiders from coming forward. Members of a class share in any class judgment proportional to their losses. A class member who incurred the professional and personal risks to reveal inside information\(^{326}\) regarding the wrongdoing alleged by the class would receive nothing for incurring these risks; all this whistleblower would get is a pro rata share, based upon the amount of stock held. Moreover, the class action model is not designed to induce or reward the insider who may not be a member of the class. Most insiders are present or future employees, or competitors of the wrongdoer. Such individuals are not eligible to participate in a class action unless they happen to gain class status by owning stock in the security at issue.

In short, the “victim” and “hybrid” private justice actions are not designed to bring inside information to public regulators, nor do they.

b. “Common Good” Private Justice Models

(1) Citizen Suit Private Justice Model

Like the “victim” and “hybrid” private justice actions, the citizen suit “common good” private action is not designed to bring forth inside information of wrongdoing. It provides no financial incentive for insiders to come forward with information about environmental violations; as noted, there is scarcely incentive for counsel to undertake these cases\(^{327}\).

It is unfortunate that the citizen suit model is defective in this regard because inside information about environmental violations would be quite helpful. It takes little imagination to realize this. Knowledgeable insiders will know when and where illegal discharges are taking place, which discharge reports have been falsified, and what records, witnesses, or physical evidence exists to prove the offenses. Even if dischargers’ filed reports are accurate, an insider could identify which reports, among the hundreds of thousands filed, reveal the offenses and what evidence is available to prove the offenses detailed in the reports.

(2) Qui Tam FCA Private Justice Model

hotly debated on many fronts. See, e.g., Bohn & Choi, supra note 9, at 979–82; Macey & Miller, supra note 9, at 1–4, 116–18. Coffee argues that the incentive structure in securities fraud private justice actions is inadequate to attract top legal talent. Coffee, Private Attorney General, supra note 7, at 238. This may well be true, certainly it is when these actions are compared to the incentive structure of the qui tam FCA private justice action, but compared to other private justice actions, securities fraud private actions give much more incentive to legal counsel to undertake such cases.

326. Bucy, Information As a Commodity, supra note 1 (manuscript at 2.39–.49).
327. See supra text accompanying notes 240–41, 313–17.
In comparison to all other private justice models, the qui tam FCA “common good” private justice action is extremely successful in bringing forth helpful inside information. This action does so through market economics. The FCA’s structure recognizes that inside information of wrongdoing is a valuable commodity in regulatory efforts, that there are significant disincentives in coming forward with such information, and that the regulatory world must offer adequate inducement to overcome these disincentives. Three features of the FCA work together to achieve its success in producing helpful inside information: the jurisdictional bar provision which precludes a relator’s suit if the government is already aware of the information; the requirement that the reward to a private plaintiff depend on the helpfulness of the plaintiff’s information; and the monetary collection and allocation design of the FCA (assessment of large damages and penalties against a culpable defendant, with a significant percentage of the judgment going to the relator). The first and second features help insure that the insider’s information is truly helpful to public regulators. The third feature provides the incentive for insiders to come forward by generating a significant bounty for insiders.

The FCA’s design for enticing insiders is necessary if such a resource is to be obtained. It is difficult emotionally, personally, intellectually and professionally to come forward and blow the whistle on one’s employer, colleagues and friends. At a minimum, such disclosure disrupts businesses and lives. Quite possibly it leads to an employer’s demise, colleagues’ and friends’ imprisonment or loss of employment, payment of large penalties and attorneys’ fees, and shame for all. Whistleblowers describe their experience of coming forward with inside information of wrongdoing as a “nightmare,” the equivalent of “setting your hair on fire publicly.”

328. See Bucy, Information As a Commodity, supra note 1 (manuscript at 2.39–49). See also House Comm. on the Judiciary, Subcomm. on Immigration and Claims (Apr. 28, 1998) (testimony by Lewis Morris, Assistant Inspector General, U.S. Department of Health and Human Services): The qui tam provisions of the False Claims Act . . . have provided the incentive for whistleblowers to overcome the substantial detriment and obstacles to speaking out . . . . The law is working as intended. Whistleblowers are stepping forward, and billions in false claims are being recovered as a result.

329. See supra text and accompanying note 286–89.


The consequences of coming forward can be severe: job loss or demotion; prejudice from other employers that makes it difficult, if not impossible to find another job; ostracism; family hardships; and stress-related physical and psychological ailments.\textsuperscript{333}

Given the nature of commercial transactions, the illegality revealed by a whistleblower may well consist of complex, highly technical violations. This is significant because it will take considerable training and sophistication on the part of a whistleblower to detect any wrongdoing. The insiders who need to be induced to come forward are highly skilled, well-placed in a professional hierarchal ladder, and entrenched in the corporate culture. Such persons likely are insiders in every way: professionally, financially, emotionally, and psychologically. Such persons are likely will be fiercely loyal to their corporation, profession, and colleagues, not to government regulators. In short, these insiders incur a greater professional risk by coming forward than do employees whose skill and corporate position are more fungible. These insiders are likely to take considerable convincing to come forward and reveal wrongdoing. In addition, the technical nature of the wrongdoing at issue, regardless of how destructive of an impact it may have, makes it more difficult for everyone, including a potential insider, to feel the moral outrage that helps to motivate people to come forward.\textsuperscript{334}

In short, it is difficult for a knowledgeable person to assume the risks inherent in coming forward, publicly revealing wrongdoing and committing to work with government regulators against friends and colleagues. Of all the private justice actions, only the FCA recognizes the powerful disincentives to providing inside information and provides a mechanism to overcome these disincentives and to obtain such information.

**B. WEAKNESSES OF THE PRIVATE JUSTICE MODEL**

1. Problems Presented

   Even when performing optimally, private justice actions present serious systemic problems for targeted businesses, the economy as a whole, regulatory authorities, and the judicial system.

   a. Difficulties for Business

\textsuperscript{333} Bucy, *Information As a Commodity*, supra note 1, (manuscript at 2.39-.49).

\textsuperscript{334} Coffee, *Future of PSLRA*, supra note 9, at 549 (reasoning that the legitimacy of private enforcement is undercut when private justice actions are directed to situations where social harm is unclear).
It is expensive for a company to respond to a governmental investigation or a private lawsuit alleging fraud or illegality. Company employees will need help gathering records subpoenaed or requested in interrogatories; responding to inquiries of investigators, and in some instances, testifying at hearings or depositions. When a fraud investigation becomes public, business expansions, corporate borrowing, and mergers may be put on hold or lost as opportunities. Stock prices may fall and lay-offs may result.

The experience of Dartmouth-Hitchcock, an academic medical center, demonstrates the hardship businesses can face once they become subject to investigation. The Office of Inspector General, Department of Health and Human Services (“OIG”) informed Dartmouth that it was being investigated for improperly billing Medicare for services rendered by medical residents. It was given the choice of conducting its own audit under OIG supervision or paying for OIG to conduct an audit. Dartmouth opted to conduct its own audit. In ten months, after a review of about half of the sampled admissions, and a finding of no billing errors, OIG allowed Dartmouth to terminate its audit. By this point, Dartmouth had spent approximately $1.7 million to conduct the audit. During the audit period, planned expansion was delayed because of concerns by Dartmouth’s investment banker and credit agency about the audit outcome.

When an investigation or lawsuit is nonmeritorious, the tangible and intangible costs to the targeted company are not only substantial, they are unnecessary. To the extent that private actions are more likely than government actions to be nonmeritorious, they are destructive for industry. The threat of nonmeritorious actions, brought by any one of thousands of possible private attorneys general, creates uncertainty in business planning and causes industry to engage in unnecessarily extensive and expensive preventative programs. Even meritorious actions, if brought separately by public and private enforcers who have not coordinated their efforts, result in unnecessary costs and uncertainty for industry. As William Kovacic has noted in a survey of firms subject to the False Claims Act, such firms


336. GENERAL ACCOUNTING SERVICES, REP. NO. HEHS 98-174, MEDICARE CONCERNS WITH PHYSICIANS AT TEACHING HOSPITALS (PATH) AUDITS 13–14 (1998). In another instance, St. Vincent’s Hospital, a suburban hospital in Massachusetts, received a letter from DOJ stating that a government audit indicated that St. Vincent’s had submitted false claims to Medicare and was facing $2.6 million in penalties and damages under the False Claims Act. The hospital, which had processed more than 80,000 claims totaling almost $300 million during the period in question, challenged the DOJ’s audit, ultimately settling for $19,000.
regard the FCA “as a costly, substantial burden of doing business with the
government.” Kovacic suggests that the FCA “is likely to impede efforts
to induce commercial firms to expand their relationships with government
purchasing agencies.” John T. Boese, foremost expert on the FCA and a
respected FCA defense counsel, describes the situation faced by health care
providers because of the FCA: “[H]ealth care providers today are expected
to operate in an almost Kafkaesque environment, where conventional
conduct is made illegal and where the government is permitted broad
prosecutorial discretion, the exercise of which is unpredictable and subject
to being overruled by both private citizens and other branches of
government.”

b. Difficulties for Regulatory Agencies

Private justice actions absorb the resources of regulatory authorities.
Optimally, regulators review private justice actions, monitor their progress,
and intercede when necessary. Regulators also provide guidance for
private plaintiffs through dialog and promulgation and clarification of
agency guidelines and regulations. Performing these functions absorbs
agency time, expertise and oversight, and detracts regulatory agencies from
their other duties.

In addition to absorbing regulatory resources, private justice actions
also inhibit regulators’ flexibility in dealing with regulated industry.
Broad, hortatory, and ambitious guidelines that give regulators flexibility
also subject industry to broad liability at the hands of private prosecutors.
Broad regulations, directions and other forms of guidance are
promulgated with the expectation that prosecutorial discretion will be
exercised. Yet plaintiffs in private justice actions have no incentive to
exercise discretion. In fact, private justice plaintiffs have every incentive
to push theories of liability as far as possible.
NPDES permits issued to polluters specifying the permissible effluent discharges epitomize the problem posed by broad guidelines once private justice is part of a regulatory framework. Before the explosion of citizen suits, NPDES permits were ambitious and required aggressive efforts by industry to comply with the hortatory goals specified in the permits. The expectation was that enforcement discretion would be exercised if the permittee, acting in good faith and with best efforts, were unable to meet the aspirational permit goals. However, industry fears that these ambitious permits expose businesses to citizen suits has, over time, resulted in the issuance of more lenient permits for industry and ironically, greater discharges.

Private justice actions may also make it more difficult for regulators to convince industry to regulate itself since private justice plaintiffs could use industry-generated guidelines to establish liability. The “false certification” cases in health care demonstrate this concern. The theory of fraud in these cases is that a claim that accurately lists and describes the services for which reimbursement is sought is nevertheless false if the claimant failed to comply with regulations applicable to the services rendered by the claimant. For example, if a nursing home sought reimbursement from Medicare for nursing care that was rendered to a Medicare patient residing at the nursing home, and the claim accurately described the care rendered and sought payment in an appropriate amount, the claim could still be false under the FCA if the nursing care was rendered by a nonlicensed person, was substandard, or otherwise failed to comply with myriad state licensing rules and regulations applicable to Medicare nursing home providers. The theory of fraud in such an instance is that every claim for services implicitly represents that the

345. Boyer & Meidinger, supra note 9, at 909–12 (describing the EPA’s enforcement policy of distinguishing among polluters by their level of “significant noncompliance”; only those in such state were pursued by EPA, insignificant noncompliance was not acted upon by EPA but left industry vulnerable to citizen suits). But see Miller, Part III, supra note 10, at 10427 (explaining industry’s argument but dismissing it as outdated and remediable with new permits).

346. Gitlen, supra note 9, at 18–19; E.L.I., Citizen Suits, supra note 9, at x, V-5, V-34. Cf. Hodas, supra note 7, at 1623, 1616.

347. Gitlen, supra note 9, at 18–19; Hodas, supra note 7, at 1623.

348. Recent cases discussing this theory include United States ex rel. Augustine v. Century Health Services, Inc., 289 F.3d 409, 414–16 (6th Cir. 2002); United States v. Southland Mgt. Corp., 288 F.3d 665, 674–79 (5th Cir. 2002).

services were provided in compliance with applicable rules and regulations, rules and regulations heretofore generated in cooperation with the nursing home industry.

The last way in which private justice actions can interfere with regulatory efforts is by generating harmful precedent that applies to public regulators. Litigation arising from private actions almost certainly will bind regulators who employ the same or similar causes of action or theories. Thus, incompetent, overworked, or inexperienced private counsel, whose interests may diverge from the public interest, may be generating case precedent that restricts government regulators. Examples abound. In *H.J., Inc. v. Northwestern Bell Telephone Co.*, private plaintiffs bringing a class action under RICO litigated an issue fundamental to all RICO cases: what is necessary to prove a “pattern” of racketeering activity. The precedent created in *H.J., Inc.* is binding on public and private RICO plaintiffs, in all criminal and civil RICO cases. Similarly, private plaintiffs have litigated and created precedent on issues fundamental to the FCA, such as what constitutes a claim, whether the

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350. Numerous defense counsel and some academics have attacked this use of the FCA. See, e.g., Boese & McClain, supra note 9, at 36–41; Fabrikant & Soloman, supra note 9, at 105; Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 73 IND. L.J. 525, 534–46 (2001). Use of this theory of fraud in FCA cases presents interesting questions. On the one hand, failure to deliver a certain quality of service clearly is fraud even if the service is delivered and the correct amount of reimbursement is sought. Giving a nursing home patient a bath is scarcely a service worth paying for if the patient was scalded by hot water or bathed in feces-laden water. On the other hand there are so many thousands of applicable rules and regulations applicable to government contractors that chaos would result if violation of any one or a few would render claims submitted by the contractor false. The fact that private litigants are free to bring lawsuits alleging such violation as fraud in qui tam FCA lawsuits only increases the potential for chaos.

There are two responses to these concerns if the “false certification” theory of fraud is pursued. First, neither the government nor private relators should use this theory except in the most extreme situations. As Mitchell Kreindler, an experienced relator’s attorney, stated: “The modern FCA is a toddler. . . . [Q]ui tam lawyers have a special responsibility to litigate in a manner that protects the Act for future relators.” Address by Kreindler, supra note 291, at 9. See also Suzanne E. Durrell, Chief, Civil Division, U.S. Attorney’s Office, District of Massachusetts, Address at the ABA National Institute on The Civil False Claims Act and Qui Tam Enforcement (Nov. 29, 2001) (“The lesson for relators and for the government in using the FCA is not to overreach.”).

Second, there are incentives for relators to employ the “false certification” theory sparingly. There is little money in most of the “certification” theory of fraud cases, making it unlikely relators will use this theory. In addition, relators will need government employees as witnesses in these cases (to testify to issues of materiality, regulation interpretation, etc.). Such cooperation from government is not likely to be forthcoming in frivolous cases.


352. See, e.g., Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 792 (4th Cir. 1999).
FCA covers failure to comply with relevant regulations,\(^{353}\) how damages should be calculated,\(^{354}\) whether financial loss to the government is an element of the FCA,\(^{355}\) and whether materiality is an element of the FCA.\(^{356}\) In the securities field, private plaintiffs have created binding precedent on issues such as the proof of materiality required,\(^{357}\) and how far the duty of disclosure goes in insider trading cases.\(^{358}\)

Not only does precedent generated by private litigants bind public regulators, but they lose opportunities to shape the law. When private counsel litigates issues common to public and private regulation, public regulators are unable to do what they do in other cases: coordinate appellate strategy by weeding out cases that present poor facts or have an incomplete record, and file cases in circuits where favorable precedent exists or which present opportunities for creating favorable precedent.\(^{359}\)

Notably, of all of the private justice models, the FCA, with the opportunity it provides for the government to intervene in a case partially—such as on appeal—recognizes this important function of public regulators.

c. Difficulties for the Judicial System

Private justice actions pose a variety of problems for the judicial system. Nonmeritorious private actions consume scarce judicial resources, delay adjudication of other docketed matters, and can breed disrespect for the judicial system. All nonmeritorious cases raise these problems, of course, not just private justice actions, but private justice actions exacerbate these problems by presenting situations that also create separation of powers tensions. More than other types of cases, private justice actions thrust courts into the role of corralling private prosecutors run amuck and

\(^{353}\) See, e.g., United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1996).


\(^{359}\) Cf. Sedima v. Imrex Co., 473 U.S. 479, 500–04 (1985) (Marshall, J., dissenting). In his dissenting opinion, Justice Marshall highlights some of the problems caused by empowering private litigants to enforce public laws, such as RICO, even in civil cases: less responsible use of prosecutorial discretion; an inability on the part of the DOJ to rein in private litigants using RICO; and the “strong incentive” for private litigants “to invoke RICO’s provisions whenever they can allege in good faith two instances of mail or wire fraud.” Id. at 504, 502–05.
refereeing disputes between private and public prosecutors. To resolve these conflicts, courts must rule upon issues of prosecutive discretion and Executive Branch policy. For example, with the qui tam FCA provisions, courts must determine if the DOJ has proven “good cause” sufficiently to warrant an extension of time to intervene in the relator’s case or to join the case after initially declining to intervene. Courts must also resolve disputes between the DOJ and the relator, including whether the relator’s involvement should be limited by the court, and whether a case should be dismissed or settled over the relator’s objections.

C. WAYS TO ADDRESS THE PROBLEMS PRESENTED

All of the problems presented by private justice actions arise when private justice actions are of poor quality or are not in the public interest, or if meritorious, are filed without coordination between private and public regulators. Of all the private justice models currently in use in American jurisprudence, the qui tam FCA model, because of its dual-plaintiff design, has the greatest capacity for alleviating these problems. Even so, the FCA private justice action can be improved by incorporating some aspects of the Private Securities Litigation Reform Act of 1995.

1. The Dual-Plaintiff Design of the FCA and How it Addresses Problems Posed by Private Justice

The FCA requires that private justice litigants give the DOJ extensive information about the case they are filing. The statute also stays the case while the DOJ reviews and investigates the charges made in the suit. This dual-plaintiff design encourages top-quality work early in the case and provides a mechanism for protecting defendants from frivolous allegations.

a. Encourages Top-Quality Work Early in the Case

The FCA’s structure and evolving practice encourage private litigants to do a thorough, complete, and well-informed job when preparing their cases for filing. It does so by requiring that relators file a written report

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360. Bucy, Private Justice and the Constitution, supra note 3 (manuscript at 22–27).
362. Id. § 3730(c)(3).
363. Id. § 3730(c)(2)(C), (c)(4).
364. Id. § 3730(c)(2)(A).
365. Id. § 3730(c)(2)(B).
366. See supra text and accompanying notes 290–94.
with the government upon filing their lawsuits. As noted previously,\footnote{See supra text and accompanying notes 280–92.} when relators file their lawsuits (under seal), they are required to provide the DOJ with a written report of all relevant information and evidence. Based upon its review of this report, the DOJ decides what to do about the case: whether to intervene as plaintiff, seek dismissal of the case, pursue alternative remedies that preclude the relator’s lawsuit, or seek court orders limiting the relator’s ability to litigate the case.\footnote{See supra text and accompanying notes 280–92.} Because the DOJ’s intervention exponentially improves a relator’s chances of success in a case\footnote{See supra text and accompanying notes 287–91.} and because the DOJ has authority to restrict the relator’s role\footnote{See supra text and accompanying notes 297–98.} or resolve the case to the relator’s disadvantage, there is strong incentive for relators’ counsel to do top-quality work from the earliest stages of an FCA action.\footnote{Interestingly, the FCA’s design of rewarding private plaintiffs who do extensive pretrial work on the case carries a different economic incentive than does the securities fraud “hybrid” private action model which encourages plaintiffs to file a minimally prepared class action lawsuit, and hope for a quick settlement because defendants cannot afford unfavorable publicity or litigation costs. See supra note 119 and accompanying text.}

b. Provides a Mechanism For Regulatory Guidance and Dialog

One of the problems private justice presents for regulators is the cost to regulators of providing guidance to private justice plaintiffs as to applicable governmental policies plaintiffs should be aware of when bringing suit. The FCA’s dual-plaintiff design provides a structured way for private justice litigants and regulators to maintain a dialog about regulatory policy, and for regulators to provide case-specific guidance and oversight of private litigants.\footnote{See supra text and accompanying notes 297–98.}

c. Allegations Kept Under Seal Protects Defendants’ Reputations

\footnote{There is a tradition of considerable dialog between industry and regulating agencies to develop this guidance. See, e.g., Hearing Before House Subcomm. on Immigration and Claims, 105th Cong., 12–14 (1998) (statement of Donald K. Stern, Chair, U.S. Attorney General’s Advisory Comm., Department of Justice) (referring to discussions with health care industry about two of the DOJ’s national investigations); id. at 24–25 (statement by Lewis Morris, Assistant Inspector General, Office of Inspector General, Department of Health and Human Services) (referring to efforts at HHS to reach out to industry for feedback); id. at 64 (statement of Ruth Blacker, Member, National legislative Counsel, American Association of Retired Persons) (referring to DOJ’s willingness to listen to industry and its resulting revisions of policies for using the False Claims Act). There is a significant amount of publicly available guidance also available to relators or potential relators. See, e.g., Department of Health and Human Services, Office of Inspector General, Advisory Opinions, at http://www.hhs.gov/oig. See also Lewis Morris & Gary W. Thompson, Reflections on the Government’s Stick and Carrot Approach to Fighting Health Care Fraud, 51 ALA. L. REV. 319, 349–54 (1999) (discussing OIG’s Advisory Opinions and Fraud Alerts).}
As noted in this Article, when relators file their lawsuits they are required to do so under seal. They are also required to provide the DOJ with a report detailing their information and evidence against a defendant. While the matter remains under seal, the DOJ investigates the allegations to determine if it should intervene as plaintiff, seek dismissal of the case, or seek some restrictions on the relator’s involvement in the case. The initial secrecy surrounding qui tam complaints and the confidentiality of the reports relators file with the DOJ help to protect defendants from reputational damage and from the costs incurred in responding to a frivolous private action. As Congress noted, “sealing the initial private false claims complaint protects both the Government and the defendant’s interests by giving the Government an adequate opportunity to fully evaluate the private enforcement suit.”

As noted earlier, the government also has the opportunity to file an amended complaint before a qui tam FCA lawsuit is made public and before it is served upon defendants. This opportunity to weed out frivolous allegations and refine credible allegations further protects defendants from reputational and financial damage that could result from unfounded or poorly pleaded private lawsuits.

d. Government’s Authority to Move For Dismissal

The last feature of the FCA’s dual-plaintiff system that protects against frivolous private actions is the government’s statutory authority to move for dismissal of a qui tam action, whether or not the government intervenes in the action. Heretofore, the DOJ has utilized its authority to
seek dismissal of qui tam actions sparingly. There is some logic to this approach. It absorbs government resources to monitor ongoing qui tam cases and to move for dismissal even when dismissal appears warranted. And there is always a chance, however small, that the relator will prevail and collect a judgment, of which at least seventy percent will go to the government. Thus, economically it is advantageous for the government to remain a passive observer in the FCA actions it does not join. However, there are other interests at stake, such as ensuring that qui tam actions further the public interest and protecting the long-term viability of the private justice model. These macro intangible interests would appear to outweigh the government’s economic interest in remaining passive in a single case and counsel for aggressive use by the government of its authority to move for dismissal of ill-conceived qui tam actions.

Recently, the government has taken a more aggressive stance in moving for dismissal of qui tam FCA cases. For example, in United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., the Ninth Circuit upheld the government’s authority to dismiss an otherwise meritorious qui tam action for public policy reasons. In Sequoia, a number of citrus growers and packinghouses were in noncompliance with regulations promulgated by the Department of Agriculture which limited shipping quotas. At least thirty-four qui tam actions were filed before the Secretary of Agriculture formally suspended the regulations; soon thereafter, a district court held the regulations invalid. The DOJ moved to dismiss all qui tam actions, even those in which it had intervened. The district court granted the DOJ’s motion to dismiss and the Ninth Circuit affirmed, noting that the “government[‘s] . . . decision to dismiss [is] . . . within the government’s prosecutorial discretion.”

In another recent case, the DOJ filed a motion to dismiss a qui tam action before the case was unsealed. Here, too, dismissal was sought for public policy reasons. The defendants came forward and made a voluntary disclosure to government officials of the problem alleged in the qui tam complaint. As a noted DOJ qui tam expert explained: “When people come forward and say, ‘We have a problem. We want to fix it,’ it is not fair to negotiated by the relator and the defendant, on the ground that the settlement was not in the public interest).
bring a whistleblower suit. It is important to encourage voluntary disclosure. This was a policy case in favor of voluntary disclosure.382

The government’s authority to intervene, monitor, and move for dismissal of private justice actions is a powerful, quality-control mechanism.383 Greater exercise of this authority would minimize the damage created by nonmeritorious or otherwise inappropriate private actions.384 However, greater exercise by the DOJ of the government’s supervisory power over qui tam actions is not without costs. There are at least two problems with the FCA’s dual-plaintiff model, both of which would be exacerbated if the DOJ more aggressively exercises its supervisory authority over private justice actions.


383. In comparison to the qui tam FCA private justice action, the “victim” and “hybrid” private justice models generally make no effort to coordinate public and private enforcement. Generally, there is no requirement in these actions that private plaintiffs filing these actions notify the government prior to filing suit, no opportunity for the government to review the claims in the private action before the case becomes public, no mechanism for government monitoring of these actions, and no authority for the government to move for dismissal of inappropriate private actions. There is no effort to integrate private and public prosecutive efforts through intervention or joinder as plaintiffs, and no mechanism such as the diligent prosecution or jurisdictional bar provisions to prevent unnecessary private suits. See, e.g., RICO, 18 U.S.C. §§ 1961–68; securities fraud private actions discussed supra text and accompanying notes 115–65 (no requirements for coordination.) There are exceptions but they are notoriously ineffective. For example, persons who seek to bring a “victim” private justice action under any number of federal employment statutes (i.e., Age Discrimination in Employment Act of 1967, Titles I and V of the Americans with Disabilities Act, the Equal Pay Act) must bring their charge of discrimination to the Equal Employment Opportunity Commission (“EEOC”) before filing suit. However, the EEOC has not lived up to its expectations, suffering from overload and backlogs, and from poor data collection procedures.

Or, if there are efforts to coordinate public and private enforcement, they do not work well. The citizen suit “common good” model is a prime example. Citizen suit provisions contain components designed to achieve public private coordination: the sixty day notice requirement, whereby putative plaintiffs notify relevant agencies and the putative defendant(s) of intention to sue; the “diligent prosecution” provision, which bars citizen suits if the responsible agency is diligently prosecuting the offense; and the intervention mechanism whereby the federal government may intervene in enforcement actions. But as noted, see supra Part II.C.1, III.A.1.b, none of these mechanisms effectively coordinate private and public prosecutorial efforts because of their ambiguity and the significant litigation they generate simply to clarify what they mean. Additionally, the notice requirement is unworkable because it sets an unrealistic timetable for regulatory agencies to evaluate an anticipated lawsuit. Lastly, rather than encouraging cooperation between private and public prosecutors, the interplay of these provisions has facilitated collusive agreements between regulating agencies and industry.

384. A number of commentators have argued that the DOJ should be more aggressive in exercising this authority. See, e.g., Boese & McLain, supra note 9, at 49; William E. Kovacic, Whistleblower Bounty Lawsuits As Monitoring Devices in Government Contracting, 29 LOY. L.A. L. REV. 1799, 1855 (1996); Timothy Stoltzfus Jost & Sharon L. Davies, The Empire Strikes Back: A Critique of the Backlash Against Fraud and Abuse Enforcement, 51 ALA. L. REV. 239, 316–17 (1999).
The first problem is that tight control by the DOJ over private justice actions will make it harder for private litigants to serve as watchdogs on any propensity by government officials to dawdle, delay, or subvert a case because of overwork, lack of expertise, or collusion. To take one example, if DOJ guidelines for prioritizing the qui tam cases in which the DOJ will intervene encourage collusion between industry and government, the qui tam relator will challenge or disregard such guidelines at the risk of an adverse DOJ decision on intervention in the relator’s case or even a DOJ motion to dismiss the relator’s case.

There are two responses to this concern. First, even with more aggressive monitoring of qui tam actions by the DOJ, a relator will retain significant ability to counter governmental abuse of such prosecutorial discretion. Although historically it has been more difficult for relators to prevail when the DOJ does not intervene, the relator can go forward with the case without the DOJ.385 More significantly, however, the private justice action cannot be dismissed upon the government’s motion without an opportunity for the private plaintiff to be heard publicly in federal court, and without court approval of the dismissal. Unfortunately, while helping to preserve the watchdog role of the private prosecutor, this judicial review immerses the judiciary into reviews of the Executive Branch’s exercise of prosecutorial discretion, a hazard for preserving separation of powers. Courts will have to be vigilant in balancing respect for the Executive

385. In his historical review of qui tam actions, Randy Beck also recognizes that problems are created by nonmeritorious qui tam actions under the False Claims Act, and suggests as a remedy, that qui tam actions not be permitted to go forward if the DOJ does not intervene. Beck, supra note 9, at 639–40. In her discussion of the use of the FCA in “false certification” cases, Dayna Bowen Matthew urges the same position. Matthew, supra note 350, at 588–89.

This suggestion has several problems. First, the relator’s independence is a check on any inadequacies that may exist at the DOJ that prevent a meritorious case from going forward. These inadequacies may be because of “capture” by industry or incompetence, lack of resources, or an inability to perceive what is a fraud at the DOJ. In addition, there are better ways to control the quality of private actions such as seeking restrictions on the relator’s involvement and more aggressive use by DOJ of its authority to move for dismissal. See supra text accompanying notes 378–83.

In short, giving the DOJ carte blanche to unilaterally make the decision to terminate a relator’s case by not intervening, without any public or judicial review, fails to recognize reality: that situations may arise when DOJ attorneys are too overworked, unaware, ill-equipped, untrained, or overcome by political pressures to make the best decision on a case. A public hearing in a court of law where the government must present its reasons for dismissal and demonstrate that dismissal is “rationally related” to “legitimate government interests” avoids these problems. See United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1340 (E.D. Cal. 1995) (adopting and applying the “rational relation to legitimate government interest” standard).
Branch’s autonomy with giving the relator appropriate discretion to serve as a check on governmental decisions.386

In addition, although active supervision of private prosecutors by the DOJ may make it more difficult for private parties to serve as watchdogs on government laxity or corruption, the ability to control the quality of private actions through such supervision may be worth the risk. A viable mechanism for minimizing ill-conceived, frivolous, or vexatious lawsuits is crucial if private justice, as an institutional design, is to flourish. As this and other articles have argued,387 such a design needs to flourish because it is indispensable to regulation of wrongdoing motivated by economic gain.

The second problem with active oversight of private actions by the DOJ is that such monitoring requires resources. To monitor private justice actions, DOJ attorneys and investigators must review, examine, and investigate allegations presented in complaints. They must also monitor the progress of cases in which the DOJ has declined to intervene but which relators have elected to pursue. Because of the complexity and sophistication of private justice cases, at least those brought under the FCA and those that would be brought under the expanded private justice models I advocate,388 this review and monitoring will require considerable time and expertise. Whether the extra resources that such careful monitoring of private justice actions will require are worth the public expense depends upon whether we believe private justice is valuable.

2. Improving the FCA’s quality control features

As noted earlier,389 the PSLRA was passed in 1995 to address abuses perceived to exist in the securities fraud class actions. There are four features of the PSLRA that are especially helpful in mitigating problems inherent in private justice actions. These features should be added to the qui tam FCA private justice action to improve its effectiveness.

The requirement that a plaintiff’s discovery be delayed until after a ruling on the defense’s motion to dismiss,390 coupled with a heightened

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387. Bucy, Information As a Commodity, supra note 1 (manuscript at 2.3–2.5; 2.10–11); Bucy, Private Justice and the Constitution, supra note 3 (manuscript at 2.51).
388. See infra Part III.
389. See supra text and accompanying notes 133–54.
390. Given the written summary a private justice plaintiff must prepare and present to the government upon filing a lawsuit under the qui tam FCA private justice model, and the practical reasons for ensuring that this summary is complete and thorough, this requirement would add little as a quality-
pleading standard, can help to ensure that private justice complaints are meritorious when filed. Additionally, the PSLRA’s beefed-up remedy for sanctioning plaintiffs who bring frivolous actions (rebuttable presumption of sanctions, imposition of sanctions for the full defense costs) can further help to ensure that frivolous suits are not filed. Lastly, abolition of joint and several liability in all private justice actions can help to guarantee that private justice plaintiffs target defendants because of their culpability, not because of their assets. Notably, this last feature would help to align the prosecutorial discretion of private enforcers with that of public regulators.

Including these features in the FCA would not affect the quality of FCA litigation currently conducted by experienced relators’ counsel, but would solidify the statutory requirements already in the FCA and the informal practices of reputable FCA practitioners.

Delaying plaintiffs’ opportunity to conduct discovery until after a trial court has ruled upon defendants’ motion to dismiss, coupled with a heightened pleading standard, will require thorough investigation and well-conceived pleading from the beginning of a case. This will not change control measure in most qui tam FCA cases, see supra text and accompanying notes 254–67, but imposing it would add a helpful safeguard against those frivolous qui tam actions still filed by inexperienced qui tam counsel.

391. Qui tam FCA cases will already face a high standard of pleading since they are already bound by FED. R. CIV. P. 9(b) which requires that fraud be pled “with particularity.” The PSLRA made clear that this requirement was to be interpreted strictly, as the Second Circuit—but not all Circuits—had been doing in securities private justice actions. With this strict view of FRCP 9(b), a plaintiff must “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and if an allegation regarding the statement or omission is made on information and belief, the complaint must state with particularity all facts on which that belief is formed.” H.R. REP. NO. 104-369, at 740, reprinted in 1995 U.S.C.A.A.N. 730; 15 U.S.C. § 77z-1 (1997 & Supp. 2001); 15 U.S.C. § 78u-4(b)(1) (1997 & Supp. 2001).

392. Whereas awarding attorneys’ fees to the successful party has been long recognized as a way to discourage frivolous or harassing suits while encouraging high quality of suits brought, S. REP. NO. 92-414, 92nd Cong., 81, reprinted in 1972 U.S.C.C.A.N. 3668, 3747 (1972), note the different approaches, especially among private justice actions. For example, both the PSLRA’s and citizen suit’s fee shifting provisions to that in citizen suits were designed to discourage frivolous or harassing lawsuits, see, e.g., Miller, Part III, supra note 9, at 10413, and become applicable only when the plaintiff is found to have filed a frivolous action. Id. The PSLRA’s provision is stronger, however, for it creates a presumption, albeit rebuttable, that sanctions will be imposed against plaintiffs; it also presumes that the appropriate payment is full defense costs.

responsible FCA practice. As noted earlier, thorough investigations and well-conceived pleading is already a top priority of experienced relators’ counsel. Such attorneys know that intervention by the DOJ in a qui tam action is critical for the success of the action, and that the way to obtain this intervention is to perform quality work on the case from its earliest stages.

Abolition of joint and several liability in FCA cases would emphasize that relators, like public regulators, should choose defendants based upon culpability rather than assets. This emphasis is consistent with existing responsible FCA practice. The FCA’s mens rea requirement (“knowingly,” as defined in the statute) already precludes a finding of liability without also finding culpability. Abolishing joint and several liability in FCA actions would simply further alert the inexperienced plaintiff that including “deep-pocket” defendants without proof of knowledge, will not be successful.

Grafting the last PSLRA feature onto the FCA—enhanced sanctions for frivolous lawsuits—is a necessary and helpful way to discourage frivolous FCA private justice actions. The success, if not the survivability, of private justice depends upon responsible use of private justice actions. Enhanced sanctions for abusive private justice actions can help to ensure this. As already noted, the PSLRA’s sanctions are more formidable than those provided in FRCP 11. Although the standard for when sanctions should be awarded is the same under the PSLRA and FRCP 11, the PSLRA provides that the sanction is presumed, albeit as a rebuttable presumption, in instances of “abusive” litigation. It also provides that the sanction imposed—paying the prevailing party’s fees and costs—will be significant.

IV. EXPANSION: WHERE FROM HERE

The qui tam FCA private justice model should be expanded to cover protection of the environment and national financial markets. These areas are appropriate for such an expansion for four reasons. First, both are of such importance that they demand the most productive regulation of wrongdoing possible. As I have argued herein and elsewhere, a public regulatory scheme that incorporates an appropriately designed private

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394. See supra text and accompanying notes 290–94.
395. See supra text and accompanying notes 290–94.
396. See supra note 263.
397. See supra text and accompanying notes 133–54.
398. See Bucy, Information As a Commodity, supra note 1 (manuscript at 2.32–.38); supra notes 307, 321–24, 331–34 and accompanying text.
The justice paradigm is the only way to regulate economic wrongdoing effectively. Both the environment and national financial markets cry out for effective regulation. When the environment is despoiled, the damage can be permanent or close to it; the remedy, if one exists, almost certainly requires an enormous expenditure of public resources; and too often the consequences of environmental malfeasance are catastrophic for the individuals whose lives are shortened or for the communities that vanish. Similarly, when wrongdoing infects national financial markets, the ripple-effects are immeasurable, not only for those individuals or companies that meet financial ruin, but for the economy as a whole, which reels from the uncertainty that fraud creates. The reliability and integrity of its financial markets is one of the key reasons the American financial industry—and correspondingly, the country’s economic health and stability—flourishes. Repeated or large-scale instances of thievery and fraud in this market undermine its strength.399

The second, and related, reason why expansion of the qui tam FCA private justice model is appropriate for protection of the environment and of national financial markets is that the benefit that private justice can bring to these areas is already recognized, and appropriately so. Congress noted it when enacting the private justice actions currently available in these areas. With regard to securities fraud, Congress stated: “Private securities litigation is an indispensable tool . . . [P]rivate lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee the corporate officers auditors, directors, lawyers and other properly perform their jobs.”400 With regard to environmental protection, Muskie argued successfully that citizens were needed to supplement environmental public regulatory efforts: “citizens can be a useful

399. See, e.g., Jonathan D. Glater, From Investor Fury, A Legal Bandwagon, N.Y. TIMES, Sept. 15, 2002, at Section 3, pg. 1 (“Corporate malfeasance and executive greed have undermined the stock market and fleeced investors.”); Greg Ip & Michael M. Phillips, Fed Holds Steady Despite Anxieties Among Investors, WALL ST. J., June 27, 2002, at A1 (“A month ago, the economic recovery appeared to be moving according to script. Now a crisis of confidence—intensified by WorldCom Inc.’s accounting scandal—is tanking stocks and the U.S. dollar, threatening to push the country back into recession.”).

Uncle Sam will have been exposed as Uncle Scam, the bloke who broke our faith in the free market . . . . The reason would be simple—too many of the top US companies were run by crooks . . . . The defenders of the system argue the problem with the US is not capitalism but the corruption of it.


instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike.\textsuperscript{401}

Thus, in both instances, Congress perceived, years ago, that private justice could be of enormous assistance in regulating these areas. The problem is that Congress responded by enacting defective private justice actions.\textsuperscript{402} The third reason that environmental protection and protection of national financial markets are appropriate for expansion of the qui tam FCA private justice model is that they require, and always will require, federal government regulation. While the states can be active partners in regulation of wrongdoing in these areas, the interstate impact of environmental and financial wrongdoing demands national regulatory leadership. As I have argued herein and elsewhere,\textsuperscript{403} adequate government supervision of private justice actions is essential. Given the national scope of the threats to the American environment and financial markets, federal government supervision of private actions is the only supervision feasible. The fourth and final reason why expansion of the qui tam FCA private justice model is appropriate for the environmental and financial markets is because these two areas have already experimented with private justice, albeit not successfully. Their lackluster experience is both a benefit and a disadvantage. It is a benefit since everyone involved: the industries, the regulators, the private parties who bring private justice actions, the private bar that represents the private parties, has some sense of how to play the game of three-way enforcement. The downside, of course, is that they all, almost certainly, have had bad experiences with private justice. At the risk of being a sunny optimist, however, one could expect that these players, because of their experience, would be well positioned to see and utilize the benefits of an effective private justice model.

For these reasons, the qui tam FCA private justice model, with amendments as suggested in Appendix A, should be expanded beyond its fraud-upon-the-government context to protection of the environment and

\textsuperscript{401} Nat’l Res. Def. Council Inc. v. Train, 510 F.2d 692, 727 (D.C. Cir. 1975) (statement of Senator Muskie). Testimony from former Attorney General Ramsey Clark as follows:

It will be impossible for government enforcement to control all significant acts of pollution. . . . [G]overnment will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity. . . . If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individuals affected by, or concerned about pollution in his life, the power to stop them through legal process. Far risking an undue or inhibiting interference with Government enforcement, it will provide powerful supplementary enforcement . . . and an effective and desirable prod to officials to do their duty.

\textsuperscript{402} See supra Part II.

\textsuperscript{403} Bucy, Private Justice and the Constitution, supra note 3 (manuscript at 15–20).
protection of national financial markets. Appendix A-2 contains proposed private justice legislation to protect national financial markets. Appendix A-3 contains proposed private justice legislation to protect the environment.

V. CONCLUSION

Private justice is inevitable. Use of private citizens to detect and prove public harms must be a part of any regulatory system that seeks to control sophisticated, economically motivated wrongdoing. Private justice brings resources to public regulators such as entrepreneurial private attorneys who supplement public regulators’ efforts. More importantly, however, private justice brings the resource that is indispensable to effective regulation of economic wrongdoing and that is unavailable elsewhere: inside information. Inside information reveals misdeeds about which the government, through its own resources, can never learn; focuses government investigations by identifying relevant and corroborating records, witnesses, and transactions; and overcomes cover-ups, collusion, and concealment. The more complex and interconnected our world, the more essential inside information becomes to effective regulatory efforts. Although vital, the resource of inside information is enormously hard to get. Significant psychological, professional, and societal disincentives exist to dissuade those with inside information from bringing it to public regulators.

By now we have had enough experience with private justice actions to assess their strengths and weaknesses and to determine if it is possible to structure a private justice model that provides benefits without unnecessary disruption to businesses, regulators, the economy as a whole and the judiciary. This Article has reviewed three types of private justice actions: “victim” actions that seek primarily to make the victim of wrongdoing whole, “common good” actions that give any person authority to bring suit alleging certain public harms, and “hybrid” actions that have characteristics of both, depending upon the amount of harm suffered in a particular case.

This Article argues that only one existing private justice model, the qui tam action in the FCA, which is a “common good” type of action, is effective. It is effective for two reasons. First, it successfully attracts helpful inside information. It does so by recognizing that inside information is a valuable commodity and by paying adequately for it, and by including features that insure that the inside information delivered is helpful to public regulators. The second reason the qui tam FCA private
justice model is effective is that it contains a dual-plaintiff mechanism. This mechanism allows for government monitoring and control of private actions and for cooperation between public and private regulators. Potentially, this mechanism insures that a private justice action serves the public interest and that the private litigant proceeds professionally, performing quality work. For the qui tam FCA model to reach its potential, it should incorporate the following ameliorative features from the Private Securities Litigation Reform Act of 1995: delayed discovery, a heightened pleading standard, abolition of joint and several liability, and enhanced sanctions for frivolous lawsuits. Additionally, the government should be more aggressive in exercising its existing statutory, supervisory authority over private actions.

This Article further suggests that the qui tam FCA private justice model, as amended, should be expanded beyond its false-claims-upon-the-government context to protection of the environment and protection of national financial markets.

To detect and deter economic wrongdoing effectively, a regulatory system must embrace private justice. Designing a productive private justice model requires an appreciation of the strengths private justice offers and the substantial threats it poses. This Article begins that discussion.
APPENDIX A-1: PROPOSED AMENDMENTS, CIVIL FALSE CLAIMS ACT

31 U.S.C. §3729 ET SEQ.

(PROPOSED AMENDMENTS ARE SHOWN IN ITALICS.)

Sec. 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the harm proven by the plaintiff.

(c) In assessing damages courts should take into consideration the tangible and intangible loss to specific victims as well as the loss to the public and to the economy as a whole.

(d)(1) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information;

or

(C) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(2) MISLEADING STATEMENTS AND OMISSIONS.—In any private action arising under this title in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or
(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(3) REQUIRED STATE OF MIND.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(e) CLAIM DEFINED.—For purposes of this section, “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(f) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(g) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Sec. 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only
if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) A The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person’s participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person’s cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government’s expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4)(A) If the Government elects not to proceed with the action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(B) During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat
all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(C) A party aggrieved by the willful failure of an opposing party to comply with paragraph (B) may apply to the court for an order awarding appropriate sanctions.

(5) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(6) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. 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. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent 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. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information
2002] PRIVATE JUSTICE 87

provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal
Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(a) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (4) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(b) PRESUMPTION IN FAVOR OF ATTORNEYS’ FEES AND COSTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (a), the court shall adopt a presumption that the appropriate sanction

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys’ fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that—

(i) the award of attorneys’ fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.
(e) DEFENDANT’S RIGHT TO WRITTEN INTERROGATORIES.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant’s state of mind at the time the alleged violation occurred.

(f) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) 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 General 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.

(B) 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.

(g) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.
(h) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(i) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Sec. 3731. False claims procedure

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea
of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

Sec. 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

Sec. 3733. Civil investigative demands

(a) IN GENERAL.—

(1) Issuance and service.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this
section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;
(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) In general.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.
(2) Effect on other orders, rules, and laws.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) By whom served.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) Legal entities.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or
(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person’s residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) Sworn certificates.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as
the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) Procedures.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer’s presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any
other representative of the person giving the testimony, the attorney for the
Government, any person who may be agreed upon by the attorney for the
Government and the person giving the testimony, the officer before whom
the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken.—The oral testimony of any person taken
pursuant to a civil investigative demand served under this section shall be
taken in the judicial district of the United States within which such person
resides, is found, or transacts business, or in such other place as may be
agreed upon by the false claims law investigator conducting the
examination and such person.

(4) Transcript of testimony.—When the testimony is fully transcribed,
the false claims law investigator or the officer before whom the testimony
is taken shall afford the witness, who may be accompanied by counsel, a
reasonable opportunity to examine and read the transcript, unless such
examination and reading are waived by the witness. Any changes in form
or substance which the witness desires to make shall be entered and
identified upon the transcript by the officer or the false claims law
investigator, with a statement of the reasons given by the witness for
making such changes. The transcript shall then be signed by the witness,
unless the witness in writing waives the signing, is ill, cannot be found, or
refuses to sign. If the transcript is not signed by the witness within 30 days
after being afforded a reasonable opportunity to examine it, the officer or
the false claims law investigator shall sign it and state on the record the fact
of the waiver, illness, absence of the witness, or the refusal to sign, together
with the reasons, if any, given therefor.

(5) Certification and delivery to custodian.—The officer before whom
the testimony is taken shall certify on the transcript that the witness was
sworn by the officer and that the transcript is a true record of the testimony
given by the witness, and the officer or false claims law investigator shall
promptly deliver the transcript, or send the transcript by registered or
certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.—Upon payment
of reasonable charges therefor, the false claims law investigator shall
furnish a copy of the transcript to the witness only, except that the Attorney
General, the Deputy Attorney General, or an Assistant Attorney General
may, for good cause, limit such witness to inspection of the official
transcript of the witness’ testimony.

(7) Conduct of oral testimony.—
(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) Designation.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.—

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).
(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to
interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon
that person’s predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) Petition for enforcement.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.—
A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

4) Petition to require performance by custodian of duties.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

5) Jurisdiction.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title
28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term “false claims law” means—

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term “false claims law investigation” means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term “false claims law investigator” means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;
(6) the term “custodian” means the custodian, or any deputy
custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term “product of discovery” includes—

(A) the original or duplicate of any deposition, interrogatory,
document, thing, result of the inspection of land or other property,
examination, or admission, which is obtained by any method of discovery
in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any
item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in
subparagraph (A).
APPENDIX A-2: PRIVATE JUSTICE CAUSE OF ACTION TO PROTECT NATIONAL FINANCIAL MARKETS

SECTION I. LIABILITY

(a) LIABILITY FOR CERTAIN ACTS.—Any person who knowingly violates, causes to be violated or conspires to violate the following:

(1) Sections 11, 404 12(a) 405 and (b), 406 15, 407 17 408 of the Securities Act of 1933.

(2) Sections 6, 409 9, 410 10, 411 14, 412 15, 413 16(b), 414 18(a), 415 20, 416 29(b) 417 of the Exchange Act of 1934.

(3) Title 18, United States Code, Section 1344.

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages which results from the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such

408. 15 U.S.C. § 77q(a).
violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages.

(c) In assessing damages courts should take into consideration the tangible and intangible loss to specific victims as well as the loss to the public and to the economy as a whole.

(d)(1) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information;

or

(C) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(2) MISLEADING STATEMENTS AND OMISSIONS.—In any private action arising under this title in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or

(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.
(3) REQUIRED STATE OF MIND.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(e) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(f) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

SECTION II. CIVIL ACTIONS FOR FALSE CLAIMS

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under Section I. If the Attorney General finds that a person has violated or is violating Section I, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of Section I for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person’s participation, such as—

(i) limiting the number of witnesses the person may call;
(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person’s cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government’s expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4)(A) If the Government elects not to proceed with the action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(B) During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.

(C) A party aggrieved by the willful failure of an opposing party to comply with paragraph (B) may apply to the court for an order awarding appropriate sanctions.

(5) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence.
and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(6) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. 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. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent 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. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil
penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(a) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (4) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(b) PRESUMPTION IN FAVOR OF ATTORNEYS’ FEES AND COSTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (a), the court shall adopt a presumption that the appropriate sanction—
(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys’ fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that —

(i) the award of attorneys’ fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

e) DEFENDANT'S RIGHT TO WRITTEN INTERROGATORIES.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the issue of each such defendant’s state of mind at the time the alleged violation occurred.

(f) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
(B) For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) 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 General 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.

(B) 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.

(g) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.

(h) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(i) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.
SECTION III. PROCEDURE

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Section II of this title may be served at any place in the United States.

(b) A civil action under Section II may not be brought—

(1) more than 6 years after the date on which the violation of Section I is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under Section II, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Section II.

SECTION IV. FALSE CLAIMS JURISDICTION

(a) ACTIONS UNDER SECTION II.—Any action under section II may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by Section I occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under Section II.
SECTION V. CIVIL INVESTIGATIVE DEMANDS

(a) In general.—

(1) Issuance and service.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation, pursuant to this statute, the Attorney General may, before commencing a civil proceeding under Section II or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.—

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;
(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the government investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the government investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a government investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional
circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) In general.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) By whom served.—Any civil investigative demand issued under subsection (a) may be served by a government investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found
within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) Legal entities.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity;

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.—Service of any such demand or petition may be made upon any natural person by—

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person’s residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service
shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) Sworn certificates.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the government investigator identified in the demand.

(2) Production of materials.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the government investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the government investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory
is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) Procedures.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer’s presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.—The government investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony.—When the testimony is fully transcribed, the government investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form
or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the government investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the government investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or government investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.—Upon payment of reasonable charges therefor, the government investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness’ testimony.

(7) Conduct of oral testimony.—

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.
(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) Designation.—The Attorney General shall designate a government investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional government investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.—

(A) A government investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any government investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized government investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a government investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts,
or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material.—If any documentary material has been produced by any person in the course of any government investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or
(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the government investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another government investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person’s predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) Petition for enforcement.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.—
(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the government investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any government investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or
(ii) within such longer period as may be prescribed in writing by any
government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner
relies in seeking relief under subparagraph (A), and may be based upon any
failure of the portions of the demand from which relief is sought to comply
with the provisions of this section, or upon any constitutional or other legal
right or privilege of the petitioner. During the pendency of the petition, the
court may stay, as it deems proper, compliance with the demand and the
running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.—At any
time during which any custodian is in custody or control of any
documentary material or answers to interrogatories produced, or transcripts
of oral testimony given, by any person in compliance with any civil
investigative demand issued under subsection (a), such person, and in the
case of an express demand for any product of discovery, the person from
whom such discovery was obtained, may file, in the district court of the
United States for the judicial district within which the office of such
custodian is situated, and serve upon such custodian, a petition for an order
of such court to require the performance by the custodian of any duty
imposed upon the custodian by this section.

(5) Jurisdiction.—Whenever any petition is filed in any district court
of the United States under this subsection, such court shall have jurisdiction
to hear and determine the matter so presented, and to enter such order or
orders as may be required to carry out the provisions of this section. Any
final order so entered shall be subject to appeal under section 1291 of title
28. Any disobedience of any final order entered under this section by any
court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.—The Federal
Rules of Civil Procedure shall apply to any petition under this subsection,
to the extent that such rules are not inconsistent with the provisions of this
section.

(k) DISCLOSURE EXEMPTION.—Any documentary material,
answers to written interrogatories, or oral testimony provided under any
civil investigative demand issued under subsection (a) shall be exempt
from disclosure under section 552 of title 5.

(l) DEFINITIONS.—For purposes of this section—

(1) the term “government investigator” means any attorney or
investigator employed by the Department of Justice who is charged with
the duty of enforcing or carrying into effect any laws listed in Section I(a), or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with an investigation;

(2) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(3) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(4) the term “custodian” means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(5) the term “product of discovery” includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).
APPENDIX A-3: PRIVATE JUSTICE CAUSE OF ACTION TO PROTECT THE ENVIRONMENT

SECTION I. LIABILITY

(a) LIABILITY FOR CERTAIN ACTS.—Any person who knowingly violates, causes to be violated or conspires to violate the following:


(2) Air Pollution Prevention and Control Act, as amended by Clean Air Amendments (CAA) of 1970, 42 U.S.C. § 7401 et seq.


(9) Navigable Waters Act, 33 U.S.C. § 1 et seq.


(11) Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.S. § 1311 et seq.


(14) Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 et seq.


is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages which results from the act of that person, except that if the court finds that—
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) In any private action arising under this title, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this title caused the loss for which the plaintiff seeks to recover damages.

(c) In assessing damages courts should take into consideration the tangible and intangible loss to specific victims as well as to the present and future public interest.

(d)(1) KNOWING AND KNOWINGLY DEFINED.—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

(A) has actual knowledge of the information;

(B) acts in deliberate ignorance of the truth or falsity of the information;

or

(C) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(2) MISLEADING STATEMENTS AND OMISSIONS.—In any private action arising under this title in which the plaintiff alleges that the defendant—

(A) made an untrue statement of a material fact; or
(B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(3) REQUIRED STATE OF MIND.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

c) EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

d) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

SECTION II. CIVIL ACTIONS FOR FALSE CLAIMS

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under Section I. If the Attorney General finds that a person has violated or is violating Section I, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

(1) A person may bring a civil action for a violation of Section I for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the
action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case

the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would
interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person’s participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person’s cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government’s expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4)(A) If the Government elects not to proceed with the action, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds, upon motion of any party, that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

(B) During the pendency of any stay of discovery pursuant to this subsection, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such person and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the Federal Rules of Civil Procedure.
(C) A party aggrieved by the willful failure of an opposing party to comply with paragraph (B) may apply to the court for an order awarding appropriate sanctions.

(5) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(6) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. 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. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent 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. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10
percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(a) MANDATORY SANCTIONS.—If the court makes a finding under paragraph (4) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint,
responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and an opportunity to respond.

(b) PRESUMPTION IN FAVOR OF ATTORNEYS’ FEES AND COSTS.—

(A) IN GENERAL.—Subject to subparagraphs (B) and (C), for purposes of paragraph (a), the court shall adopt a presumption that the appropriate sanction—

(i) for failure of any responsive pleading or dispositive motion to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation; and

(ii) for substantial failure of any complaint to comply with any requirement of Rule 11(b) of the Federal Rules of Civil Procedure is an award to the opposing party of the reasonable attorneys’ fees and other expenses incurred in the action.

(B) REBUTTAL EVIDENCE.—The presumption described in subparagraph (A) may be rebutted only upon proof by the party or attorney against whom sanctions are to be imposed that —

(i) the award of attorneys’ fees and other expenses will impose an unreasonable burden on that party or attorney and would be unjust, and the failure to make such an award would not impose a greater burden on the party in whose favor sanctions are to be imposed; or

(ii) the violation of Rule 11(b) of the Federal Rules of Civil Procedure was de minimis.

(C) SANCTIONS.—If the party or attorney against whom sanctions are to be imposed meets its burden under subparagraph (B), the court shall award the sanctions that the court deems appropriate pursuant to Rule 11 of the Federal Rules of Civil Procedure.

(e) DEFENDANT’S RIGHT TO WRITTEN INTERROGATORIES.—In any private action arising under this title in which the plaintiff may recover money damages only on proof that a defendant acted with a particular state of mind, the court shall, when requested by a defendant, submit to the jury a written interrogatory on the
issue of each such defendant’s state of mind at the time the alleged violation occurred.

(f) CERTAIN ACTIONS BARRED.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person’s service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, “senior executive branch official” means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) 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 General 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.

(B) 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.

(g) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.— The Government is not liable for expenses which a person incurs in bringing an action under this section.

(h) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(i) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and
conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

SECTION III. PROCEDURE

(a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Section II of this title may be served at any place in the United States.

(b) A civil action under Section II may not be brought—

(1) more than 6 years after the date on which the violation of Section I is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under Section II, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Section II.

SECTION IV. FALSE CLAIMS JURISDICTION
(a) ACTIONS UNDER SECTION II.—Any action under section II may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by Section I occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under Section II.

SECTION V. CIVIL INVESTIGATIVE DEMANDS

(a) In general.—

(1) Issuance and service.—Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to an investigation, pursuant to this statute, the Attorney General may, before commencing a civil proceeding under Section II or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.—
(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall—

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the government investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall—

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the government investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall—

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a government investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.
(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) PROTECTED MATERIAL OR INFORMATION.—

(1) In general.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which
the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

(1) By whom served.—Any civil investigative demand issued under subsection (a) may be served by a government investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—

(1) Legal entities.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons.—Service of any such demand or petition may be made upon any natural person by—
(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person’s residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) Sworn certificates.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the government investigator identified in the demand.

(2) Production of materials.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the government investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the government investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.
(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory. If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

(1) Procedures.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer’s presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present.—The government investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person
resides, is found, or transacts business, or in such other place as may be
agreed upon by the false claims law investigator conducting the
examination and such person.

(4) Transcript of testimony.—When the testimony is fully transcribed,
the government investigator or the officer before whom the testimony is
taken shall afford the witness, who may be accompanied by counsel, a
reasonable opportunity to examine and read the transcript, unless such
examination and reading are waived by the witness. Any changes in form
or substance which the witness desires to make shall be entered and
identified upon the transcript by the officer or the government investigator,
with a statement of the reasons given by the witness for making such
changes. The transcript shall then be signed by the witness, unless the
witness in writing waives the signing, is ill, cannot be found, or refuses to
sign. If the transcript is not signed by the witness within 30 days after
being afforded a reasonable opportunity to examine it, the officer or the
government investigator shall sign it and state on the record the fact of the
waiver, illness, absence of the witness, or the refusal to sign, together with
the reasons, if any, given therefor.

(5) Certification and delivery to custodian.—The officer before whom
the testimony is taken shall certify on the transcript that the witness was
sworn by the officer and that the transcript is a true record of the testimony
given by the witness, and the officer or government investigator shall
promptly deliver the transcript, or send the transcript by registered or
certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness.—Upon payment
of reasonable charges therefor, the government investigator shall furnish a
copy of the transcript to the witness only, except that the Attorney General,
the Deputy Attorney General, or an Assistant Attorney General may, for
good cause, limit such witness to inspection of the official transcript of the
witness’ testimony.

(7) Conduct of oral testimony.—

(A) Any person compelled to appear for oral testimony under a civil
investigative demand issued under subsection (a) may be accompanied,
represented, and advised by counsel. Counsel may advise such person, in
confidence, with respect to any question asked of such person. Such
person or counsel may object on the record to any question, in whole or in
part, and shall briefly state for the record the reason for the objection. An
objection may be made, received, and entered upon the record when it is
claimed that such person is entitled to refuse to answer the question on the
grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—

(1) Designation.—The Attorney General shall designate a government investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional government investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.—

(A) A government investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any government investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized government investigator or other officer or employee in connection with the taking of oral testimony under this section.
(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a government investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.
(4) Conditions for return of material.—If any documentary material has been produced by any person in the course of any government investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the government investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another government investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person’s predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) Petition for enforcement.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in
such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the government investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any government investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such
product of discovery. Any petition under this subparagraph must be filed—

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any government investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any
civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(1) DEFINITIONS.—For purposes of this section—

(1) the term “government investigator” means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any laws listed in Section I(a), or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with an investigation;

(2) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(3) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(4) the term “custodian” means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(5) the term “product of discovery” includes—

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).
APPENDIX B-1: SURVEY OF RICO CASES DECIDED BY FEDERAL APPELLATE COURTS 1999–2001

<table>
<thead>
<tr>
<th>Court</th>
<th>Supreme Court</th>
<th>Circuit Court</th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>1999</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>RICO Cases</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>RICO Civil Cases</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>RICO Criminal Cases</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>

| 2000  |               |   |   |   |   |   |   |   |   |   | 62 |
| Total | RICO Cases    | 2 | 4 | 4 | 8 | 2 | 7 | 6 | 9 | 6 | 4 | 2 | 7 | 1 |
|       | RICO Civil Cases | 2 | 4 | 2 | 7 | 2 | 7 | 4 | 8 | 6 | 4 | 2 | 4 | 1 |
|       | RICO Criminal Cases | 0 | 0 | 2 | 1 | 0 | 0 | 2 | 1 | 0 | 0 | 0 | 3 | 0 |

| 2001  |               |   |   |   |   |   |   |   |   |   | 67 |
| Total | RICO cases    | 1 | 5 | 10 | 4 | 1 | 4 | 3 | 9 | 3 | 13 | 3 | 7 | 4 |
|       | RICO Civil Cases | 1 | 4 | 8 | 3 | 1 | 4 | 2 | 6 | 3 | 11 | 3 | 5 | 3 |
|       | RICO Criminal Cases | 0 | 1 | 2 | 1 | 0 | 0 | 1 | 3 | 0 | 2 | 0 | 2 | 1 |

Total RICO cases 185
Total RICO Civil Cases 145 78%
Total RICO Criminal Cases 40 22%
APPENDIX B-2: DISPOSITION OF CIVIL RICO CASES, FEDERAL APPELLATE COURTS, 1999–2001

### In Favor of Defendant

<table>
<thead>
<tr>
<th>Aff'd Defense Motion to Dismiss</th>
<th>Aff'd Summary Judgment for Defense</th>
<th>Aff'd Defense Verdict</th>
<th>Aff'd Denial of Class Certification</th>
<th>Rev'd Plaintiff Verdict</th>
</tr>
</thead>
<tbody>
<tr>
<td>59</td>
<td>26</td>
<td>2</td>
<td>3</td>
<td>9</td>
</tr>
</tbody>
</table>

Total Number Resolved in Defendants’ Favor: 99 (79% of 124 cases where RICO issue was at stake)

### In Favor of Plaintiff

<table>
<thead>
<tr>
<th>Rev'd Grant of Defense Motion to Dismiss</th>
<th>Rev'd Summary Judgment for Defense</th>
<th>Aff'd Summary Judgment for Plaintiff</th>
<th>Aff'd Verdict for Plaintiff</th>
<th>Aff'd Certification of Class</th>
</tr>
</thead>
<tbody>
<tr>
<td>7</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>19</td>
</tr>
</tbody>
</table>

Of the 145 civil cases resolved by federal appellate courts, 1999-2001, 124 involved RICO issues; these 19 did not.

Total Number Resolved in Plaintiffs' Favor: 25 (21% of 124 cases where RICO issue was at stake)
APPENDIX C-1: MONETARY JUDGMENTS OBTAINED, QUI TAM, FCA AND ENVIRONMENTAL CITIZEN SUITS, 1988–2000

* Data are from Response by U. S. Department of Justice, dated October 30, 2001, to FOIA Request 145-FO1-6072 and Response by U. S. Department of Justice, Environmental and Natural Resources Division, dated October 30, 2001, to FOIA-2001-00144. Both FOIA Requests and Responses are on file with the author.
APPENDIX C-2: MONETARY JUDGMENTS OBTAINED, QUI TAM, FCA AND ENVIRONMENTAL CITIZEN SUITS, 1988–2000

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Amount of monetary judgments Obtained in Qui Tam, FCA and Environmental Citizen Suit Private Justice Actions 1988–2000</td>
<td>$3,905,948,010</td>
</tr>
<tr>
<td>Total Amount of monetary judgments Obtained in Qui Tam, FCA Private Justice Actions 1988–2000</td>
<td>$3,889,355,000</td>
</tr>
<tr>
<td>Total Amount of monetary judgments Obtained in Environmental Citizen Suit Private Justice Actions 1998–2000</td>
<td>$16,593,010</td>
</tr>
</tbody>
</table>

* Data are from Response by U. S. Department of Justice, dated October 30, 2001, to FOIA Request 145-FO1-6072 and Response by U. S. Department of Justice, Environmental and Natural Resources Division, dated October 30, 2001, to FOIA-2001-00144. Both FOIA Requests and Responses are on file with the author.
APPENDIX C-3: MONETARY JUDGMENTS OBTAINED, QUI TAM, FCA AND ENVIRONMENTAL CITIZEN SUITS, 1988–2000

<table>
<thead>
<tr>
<th>Year</th>
<th>Qui Tam, FCA</th>
<th>Environmental Citizen Suits</th>
<th>Citizen Suit % of Qui Tam, FCA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>$355,000</td>
<td>$1,500</td>
<td>0.42%</td>
</tr>
<tr>
<td>1989</td>
<td>$15,000,000</td>
<td>$752,150</td>
<td>5.01%</td>
</tr>
<tr>
<td>1990</td>
<td>$40,000,000</td>
<td>$1,036,170</td>
<td>2.59%</td>
</tr>
<tr>
<td>1991</td>
<td>$69,000,000</td>
<td>$327,904</td>
<td>0.48%</td>
</tr>
<tr>
<td>1992</td>
<td>$134,000,000</td>
<td>$478,610</td>
<td>0.36%</td>
</tr>
<tr>
<td>1993</td>
<td>$171,000,000</td>
<td>$161,213</td>
<td>0.09%</td>
</tr>
<tr>
<td>1994</td>
<td>$380,000,000</td>
<td>$5,861,282</td>
<td>1.54%</td>
</tr>
<tr>
<td>1995</td>
<td>$245,000,000</td>
<td>$242,350</td>
<td>0.10%</td>
</tr>
<tr>
<td>1996</td>
<td>$125,000,000</td>
<td>$1,840,775</td>
<td>1.47%</td>
</tr>
<tr>
<td>1997</td>
<td>$623,000,000</td>
<td>$2,722,150</td>
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</tr>
<tr>
<td>1998</td>
<td>$433,000,000</td>
<td>$411,106</td>
<td>0.09%</td>
</tr>
<tr>
<td>1999</td>
<td>$454,000,000</td>
<td>$1,192,500</td>
<td>0.26%</td>
</tr>
<tr>
<td>2000</td>
<td>$1,200,000,000</td>
<td>$1,565,300</td>
<td>0.13%</td>
</tr>
<tr>
<td>Total</td>
<td>$3,889,355,000</td>
<td>$16,593,010</td>
<td>0.43%</td>
</tr>
</tbody>
</table>

*All data are from Response by U. S. Department of Justice, dated October 30, 2001, to FOIA Request 145-FO1-6072 and Response by U. S. Department of Justice, Environmental and Natural Resources Division, dated October 30, 2001, to FOIA-2001-00144. Both FOIA Requests and Responses are on file with the author.*
APPENDIX C-4: NUMBER OF PRIVATE JUSTICE ACTIONS FILED, 1987–2000

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Lawsuits Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>0</td>
</tr>
<tr>
<td>1988</td>
<td>50</td>
</tr>
<tr>
<td>1989</td>
<td>100</td>
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<td>1990</td>
<td>150</td>
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<tr>
<td>1991</td>
<td>200</td>
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<tr>
<td>1992</td>
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<td>1993</td>
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<td>1996</td>
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<td>1999</td>
<td>600</td>
</tr>
<tr>
<td>2000</td>
<td>650</td>
</tr>
</tbody>
</table>

* Data for qui tam, FCA private justice actions are from Response by U.S. Department of Justice, dated October 30, 2001 to FOIA Request 145-FOI-6072 (on file with author). Data for environmental citizen suit private justice actions are from Response by U.S. Department of Justice, Environment and Natural Resources Division, dated October 30, 2001 to FOIA Request FOIA-2001-00144 (on file with author). Data for securities class actions, 1987-1990, are from CLASS ACTION REPORTS, A REVIEW OF CLASS ACTIONS DECISIONS, Table 4, Securities. Data for securities class actions, 1991-2000, are from STANFORD LAW SCHOOL, SECURITIES CLASS ACTION CLEARINGHOUSE, dated January 30, 2002.
APPENDIX C-5: NUMBER OF PRIVATE JUSTICE ACTIONS FILED, 1987–2000

<table>
<thead>
<tr>
<th>Year</th>
<th>Qui Tam, FCA</th>
<th>Securities Class Actions</th>
<th>Environmental Citizen Suits</th>
</tr>
</thead>
<tbody>
<tr>
<td>1987</td>
<td>33</td>
<td>108</td>
<td>11</td>
</tr>
<tr>
<td>1988</td>
<td>60</td>
<td>108</td>
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<tr>
<td>1989</td>
<td>95</td>
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<td>1990</td>
<td>82</td>
<td>315</td>
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<td>1991</td>
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<td>1992</td>
<td>119</td>
<td>202</td>
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<td>1993</td>
<td>132</td>
<td>163</td>
<td>41</td>
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<td>1994</td>
<td>222</td>
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<tr>
<td>1995</td>
<td>277</td>
<td>188</td>
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<td>1996</td>
<td>363</td>
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<td>1997</td>
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<td>178</td>
<td>55</td>
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<tr>
<td>1998</td>
<td>472</td>
<td>236</td>
<td>45</td>
</tr>
<tr>
<td>1999</td>
<td>482</td>
<td>209</td>
<td>45</td>
</tr>
<tr>
<td>2000</td>
<td>366</td>
<td>216</td>
<td>43</td>
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<tr>
<td><strong>Totals</strong></td>
<td><strong>3,326</strong></td>
<td><strong>2,546</strong></td>
<td><strong>524</strong></td>
</tr>
</tbody>
</table>

* Data for qui tam, FCA private justice actions are from Response by U.S. Department of Justice, dated October 30, 2001 to FOIA Request 145-FOI-6072 (on file with author). Data for environmental citizen suit private justice actions are from Response by U.S. Department of Justice, Environment and Natural Resources Division, dated October 30, 2001 to FOIA Request FOIA-2001-00144 (on file with author). Data for securities class actions, 1987-1990, are from CLASS ACTION REPORTS, A REVIEW OF CLASS ACTIONS DECISIONS, Table 4, Securities. Data for securities class actions, 1991-2000, are from STANFORD LAW SCHOOL, SECURITIES CLASS ACTION CLEARINGHOUSE, dated January 30, 2002.
APPENDIX C-6: NUMBER OF PRIVATE JUSTICE ACTIONS FILED, 1987–2000

* Data for qui tam, FCA private justice actions are from Response by U.S. Department of Justice, dated October 30, 2001 to FOIA Request 145-FOI-6072 (on file with author). Data for environmental citizen suit private justice actions are from Response by U.S. Department of Justice, Environment and Natural Resources Division, dated October 30, 2001 to FOIA Request FOIA-2001-00144 (on file with author). Data for securities class actions, 1987-1990, are from CLASS ACTION REPORTS, A REVIEW OF CLASS ACTIONS DECISIONS, Table 4, Securities. Data for securities class actions, 1991-2000, are from STANFORD LAW SCHOOL, SECURITIES CLASS ACTION CLEARINGHOUSE, dated January 30, 2002.
APPENDIX C-7: MONIES RECOVERED IN ENVIRONMENTAL CITIZEN SUITS, 1983–2000

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Amount Recovered</th>
<th>Amt of Recovery Paid to Federal Government</th>
<th>% Paid to Federal Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983</td>
<td>$20,250</td>
<td>$20,250</td>
<td>100%</td>
</tr>
<tr>
<td>1984</td>
<td>$4,504,350</td>
<td>$4,504,350</td>
<td>100%</td>
</tr>
<tr>
<td>1985</td>
<td>$125,000</td>
<td>$125,000</td>
<td>100%</td>
</tr>
<tr>
<td>1986</td>
<td>$186,395</td>
<td>$186,395</td>
<td>100%</td>
</tr>
<tr>
<td>1987</td>
<td>$1,943,596</td>
<td>$1,943,596</td>
<td>100%</td>
</tr>
<tr>
<td>1988</td>
<td>$1,500</td>
<td>$1,500</td>
<td>100%</td>
</tr>
<tr>
<td>1989</td>
<td>$752,150</td>
<td>$752,150</td>
<td>100%</td>
</tr>
<tr>
<td>1990</td>
<td>$1,036,170</td>
<td>$1,003,670</td>
<td>97%</td>
</tr>
<tr>
<td>1991</td>
<td>$327,904</td>
<td>$327,904</td>
<td>100%</td>
</tr>
<tr>
<td>1992</td>
<td>$478,610</td>
<td>$478,610</td>
<td>100%</td>
</tr>
<tr>
<td>1993</td>
<td>$161,213</td>
<td>$141,213</td>
<td>88%</td>
</tr>
<tr>
<td>1994</td>
<td>$5,861,282</td>
<td>$1,801,282</td>
<td>31%</td>
</tr>
<tr>
<td>1995</td>
<td>$242,350</td>
<td>$232,350</td>
<td>96%</td>
</tr>
<tr>
<td>1996</td>
<td>$1,840,775</td>
<td>$154,280</td>
<td>8%</td>
</tr>
<tr>
<td>1997</td>
<td>$2,722,150</td>
<td>$844,750</td>
<td>31%</td>
</tr>
<tr>
<td>1998</td>
<td>$411,106</td>
<td>$32,150</td>
<td>8%</td>
</tr>
<tr>
<td>1999</td>
<td>$1,192,500</td>
<td>$181,500</td>
<td>15%</td>
</tr>
<tr>
<td>2000</td>
<td>$1,565,300</td>
<td>$31,800</td>
<td>2%</td>
</tr>
<tr>
<td>Totals</td>
<td>$18,536,606</td>
<td>$7,926,755</td>
<td>43%</td>
</tr>
</tbody>
</table>
APPENDIX C-8: MONIES RECOVERED IN ENVIRONMENTAL CITIZEN SUITS, 1983–2000

* Data are from Response by U.S. Department of Justice, Environment and Natural Resources Division, dated October 30, 2001, to FOIA Request FOIA-2001-00144 (on file with author); Telephone Interview with Amy Haskell, Paralegal Specialist, U.S. Department of Justice, Environment and Natural Resources Division, December 6, 2001.