

The False Claims Act: A Circuit Split Based Upon the Interpretation of “Based Upon”

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I. INTRODUCTION

Through the False Claims Act (FCA), Congress has created a private army of attorney generals—citizens who stand to share in the recovery of improperly paid money—seeking to identify and aggressively report fraud and false claims by individuals and companies providing goods and services to the government.¹ The FCA prohibits false or fraudulent claims for payment to the Federal Government and provides a civil cause of action against persons who knowingly submit fraudulent claims.² Anybody, and potentially everybody, represents possible members of this private army of attorney generals seeking to identify and profit from discovering fraudulent activity, particularly former employees and business partners.³ With governmental expenditures on health care rising, the FCA has become highly relevant for health care providers.

In 2013, spending on health care in the United States exceeded \$2.9 trillion or approximately \$9,255 per person.⁴ Of this \$2.9 trillion, individual

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¹Brian G. Flood & Timothy P. Ribelin, *2010–2014 Enforcing and Enhancing the Provisions of the Deficit Reduction Act of 2005*, in HEALTH CARE COMPLIANCE PROFESSIONAL’S MANUAL ¶ 20,360 (Al Josephs et al. eds., 2014).

²*United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins.*, 944 F.2d 1149, 1152 (3d Cir. 1991).

³Flood & Ribelin, *supra* note 1.

⁴*National Health Expenditure 2013 Highlights*, CENTERS FOR MEDICARE AND MEDICAID SERVICES (Dec. 09, 2014), <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/highlights.pdf>.

spending (i.e. out-of-pocket) only represented 12 percent.⁵ The lion's share of health care spending, 68 percent in 2013, came from Medicare, Medicaid, and private health insurance.⁶ Medicare, Medicaid, and private health insurance companies operate as third-party payers, with the Federal Government as the largest third-party payer through government health benefit programs such as Medicare and Medicaid.⁷

Providers caring for patients with government health benefits first provide services to the patients and then seek reimbursement from the government.⁸ The providers do not necessarily receive automatic payment for their services; sometimes the providers will receive requests for additional information from fiscal intermediaries responsible for paying the claims.⁹ Health care providers often view these requests as harmless and/or necessary because of missing information or the need for additional information.¹⁰ However, for a growing number of providers these requests can, and do, represent the possibility of a much larger problem.¹¹

The request for information represents a much larger problem when this request serves as the first stage of a governmental investigation into the provider's billing practices. If the investigation continues and progresses, the provider receives a civil investigative demand (CID).¹² A CID is a power tool for government officials, allowing them to acquire documents

⁵ *Id.*

⁶ *Id.*

⁷ In a third-party payment model, the third-party payer acts as "agents of patients who contract with a [health care] provider (the second party) to pay all or part of the bill for the patient (the first party)." Michael Nowicki, *Generating Revenue—Third-Party Payers by Types and Percentages*, in *HOSPITALS: WHAT THEY ARE AND HOW THEY WORK* 319 (Donald J. Griffin ed., 4th ed., 2012).

⁸ Laura D. Hermer, William J. Winslade, *Access to Health Care in Texas: A Patient-Centered Perspective*, 35 *TEX. TECH L. REV.* 33, 64–65 (2008); see *Albert Einstein Med. Ctr. v. Sullivan*, 830 F. Supp. 846, 847–48 (E.D. Pa. 1992).

⁹ See *Sullivan*, 830 F. Supp. at 847–48.

¹⁰ See *id.* ("If the provider is dissatisfied with the NPR ["Notice of Program Reimbursement"], it may request a hearing before the PRRB ["Provider Reimbursement Review Board"] within 180 days of the issuance of the NPR").

¹¹ See Gabriel L. Imperato, *Internal Investigations, Government Investigations, Whistleblower Concerns: Techniques to Protect Your Health Care Organization*, 51 *ALA. L. REV.* 205, 205 (1999).

¹² See generally David E. Matyas, Carrie Valiant, Jason Eric Christ & Anjali N.C. Downs, *LEGAL ISSUES IN HEALTHCARE FRAUD AND ABUSE: NAVIGATING THE UNCERTAINTIES*, 241–42 (American Health Lawyer Association 4th ed., 2012).

and conduct depositions of providers and their staff.¹³ To the unsuspecting health care provider, the CID is the first real indication that they are the subject of an ongoing governmental investigation and possibly a civil lawsuit.

The FCA empowers a private individual that believes they have discovered credible evidence of fraud to file a civil lawsuit on behalf of the government, a *qui tam* lawsuit.¹⁴ Filing this lawsuit triggers an investigation by the Department of Justice into the merits—often through the use of a CID—while the case is under seal. While investigating, the DOJ can keep the case under seal for a maximum of six years.¹⁵

During the time the case is under seal, the DOJ can force the provider to turn over documents through the use of a CID.¹⁶ A proactive provider will engage counsel during this process incurring legal fees—often substantial legal fees—trying to back engineer their potential exposure to the mysterious lawsuit. During this entire process, the provider does not know who filed the lawsuit or what forms the basis of the lawsuit until the case is unsealed.

Eventually, the DOJ decides if they want to take over the lawsuit or decline to pursue the lawsuit. When the government declines to pursue the lawsuit, the FCA allows a *qui tam* plaintiff to pursue the civil case.¹⁷ In either scenario, the plaintiff and the Federal Government share in the settlements and judgments.¹⁸

Between October 1, 1987, and September 30, 2014, the DOJ obtained \$44.7 billion from settlements and judgments attributable to civil cases involving fraud and false claims against the government.¹⁹ More than half of the settlements and judgments obtained under the FCA during this time period—\$22.75 billion—have been obtained since 2009.²⁰ Besides the substantial amount of money obtained in settlements and judgments, in

¹³ *See id.*

¹⁴ *Id.* at 240.

¹⁵ *See id.* at 241–42.

¹⁶ *See id.*

¹⁷ *See id.* at 240–42.

¹⁸ *See id.* at 240–41.

¹⁹ Fraud Statistics, U.S. Department of Justice, Fraud Statistics – Overview October 1, 1987 – September 30, 2014 (November 20, 2014), <http://www.justice.gov/civil/pages/attachments/2014/11/21/fcastats.pdf>.

²⁰ *Id.*

2014 the DOJ reported the filing of over 700 *qui tam* lawsuits for the second year in a row.²¹

While currently providing the government with staggering financial recoveries, the FCA has not always achieved this impressive result. In 1986, largely in response to restrictive interpretations and a perceived growing problem of fraudulent activity against the Federal Government, Congress amended the FCA.²² One of the major changes to the FCA included a provision increasing the incentives for private enforcement by allowing a *qui tam* plaintiff (also known as a “relator”) to keep between 15–25 percent of the settlement or judgment if the government intervenes, and 25–30 percent if the government does not intervene (plus attorney’s fees and costs).²³ In FY2014 alone, the DOJ recovered nearly \$3 billion attributable to *qui tam* cases and the *qui tam* plaintiff’s received \$435 million.²⁴

With significant financial incentives available to successful *qui tam* plaintiffs and a large number of cases filed each year alleging fraud and false claims, the courts have utilized statutory construction for several provisions of the FCA in deciding *qui tam* cases.²⁵ Congress has provided a system of checks and balances within the FCA in an effort to find the correct balance of encouraging people to report fraud while also discouraging individuals from filing frivolous claims. One component of the FCA designed to require individual knowledge and provide merit to the claim is the public disclosure bar.²⁶ The public disclosure bar prevents individuals from utilizing previously publically disclosed information to support a *qui tam* lawsuit.²⁷ Absent a public disclosure bar it is conceivable

²¹ *Id.*

²² *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins.*, 944 F.2d 1149, 1154 (3d Cir. 1991).

²³ 31 U.S.C. § 3730(d)(1)–(2) (2010).

²⁴ Fraud Statistics, *supra* note 19.

²⁵ *See, e.g.*, *United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 57–58 (1st Cir. 2009); *United States ex rel. Findley v. FPC–Boron Emps.’ Club*, 105 F.3d 675, 683 (D.C. Cir. 1997).

²⁶ *See* Tammy Hinshaw, Annotation, *Construction and Application of “Public Disclosure” and “Original Source” Jurisdictional Bars Under 31 U.S.C.A. § 3730(e)(4) (Civil Actions for False Claims)*, 117 A.L.R. Fed. 263 (1994).

²⁷ *See id.*

that a relator could read an article detailing fraud, file a *qui tam* lawsuit, and gain a financial windfall.²⁸

In 1986, Congress amended the FCA to include the public disclosure bar.²⁹ The statute provides that no court shall have jurisdiction over a *qui tam* action that is “based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.”³⁰ Currently, the circuit courts interpret the statutory language of the public disclosure bar differently giving rise to an ongoing circuit split.³¹

Congress placed a limitation on the public disclosure bar, the original source exception.³² The original source exception allows a court to retain jurisdiction over a *qui tam* action after finding that the complaint is “based upon the public disclosure of allegations or transactions” if the relator is an “original source of the information.”³³ The original source exception encourages people with actual first-hand knowledge of fraudulent activity to recover, even if public disclosure of the information has occurred. However, this also limits the number of people that can proceed with a *qui tam* lawsuit and participate in the financial recovery.

Congress provided clarity to the meaning of “original source” by defining, in the statute, an original source as a relator “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.”³⁴ This exception plays an important role in interpreting the public disclosure bar and in furtherance of Congress’s intent to expand the impact of *qui tam* claims in preventing fraud against the government.

Through a detailed analysis of the reasons offered by both the majority and the minority interpretations of the public disclosure bar, this Comment argues that the majority of the circuit courts correctly interpret the statutory scheme and all circuits should adopt the majority’s interpretation. Part II provides background information regarding the adoption of the public

²⁸ *See id.*

²⁹ *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010).

³⁰ *Id.* at 286 (quoting 31 U.S.C. § 3730(e)(4)(A)).

³¹ *See United States ex rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 57 (1st Cir. 2009).

³² 31 U.S.C. § 3730(e)(4)(A) (1986).

³³ *Id.*

³⁴ 31 U.S.C. § 3730(e)(4)(B) (1986).

disclosure bar. Part III discusses the interpretation of the public disclosure bar by the majority of the circuit courts and the reasons given in support of this interpretation. Part IV examines the minority approach to the public disclosure bar and the reasoning and support offered for this interpretation. Part V concludes that the approach utilized by the majority of circuit courts is most consistent with Congress's intent.

II. PUBLIC DISCLOSURE BAR: WHERE IT CAME FROM, WHAT IT SAYS, AND WHY IT MATTERS

Qui tam lawsuits represent a powerful tool in the government's arsenal to combat cases of fraud. Beginning during the Civil War and continuing through today, Congress has amended the FCA several times seeking to strike the correct balance of encouraging whistleblowers with relevant information to sue, while discouraging individuals without any particular knowledge of fraud from filing excessive lawsuits in hopes of a financial windfall.³⁵ The tool Congress utilized in striking this balance is the public disclosure bar. The public disclosure bar, and the courts' interpretation of the statutory language, has a powerful effect on *qui tam* litigation. Because the public disclosure bar is jurisdictional, interpreting this provision can have a significant effect on the success or failure of a *qui tam* relator's case. Part II.A begins with a historical development of the FCA and the public disclosure bar. Part II.B discusses and provides the statutory language of the public disclosure bar in the 1986 amendments. Part II.C discusses why the 1986 version of the public disclosure bar remains highly relevant today.

A. *The Public Disclosure Bar: Where it Came From*

In 1863, against the backdrop of the Civil War, President Abraham Lincoln encouraged Congress to implement a system designed to prevent and dissuade profiteers from selling the Union Army overpriced and defective supplies.³⁶ In response to this request, Congress enacted the first version of the FCA which created civil penalties for fraud against the Federal Government and financially incentivized private individuals to identify, investigate, and enforce the government's interest in avoiding

³⁵ See 31 U.S.C. § 3730 (1986).

³⁶ Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 90 (1997).

fraud.³⁷ The purpose of the FCA—both at the time of its passage and now—remains the same: “[T]o eradicate fraud against the government by encouraging private citizens to detect and prosecute fraudulent claims for payment.”³⁸

Originally the FCA did not require a relator to have specialized knowledge or conduct an independent investigation to file a *qui tam* claim.³⁹ A relator could simply copy an indictment for criminal fraud prepared by the government and file the indictment as a civil *qui tam* suit. If successful, the relator recovered a substantial civil reward without providing any new or useful information to the government.⁴⁰ The ease with which an individual could file a *qui tam* suit gave rise to many claims by individuals without firsthand knowledge of fraud, often labeled as “parasitic lawsuits.”⁴¹ In *United States ex rel. Marcus v. Hess*, the United States Supreme Court held that the FCA did not prevent a relator from bringing a *qui tam* action even if the basis for the lawsuit was entirely information obtained from the government’s own investigation.⁴² This holding encouraged parasitic lawsuits.

Congress responded to the problem of parasitic lawsuits and the Supreme Court’s decision in *Marcus* by passing an amendment to the FCA in 1943.⁴³ The 1943 amendment prohibited relators from filing *qui tam* lawsuits if the government knew of the alleged fraud before the relators sued even if the relator was the original source and had, before suing, personally disclosed the information to the government.⁴⁴ This represented a significant change in the FCA and effectively barred *qui tam* suits from private individuals.⁴⁵ However, with such drastic restrictions dictating the circumstances with which relators could succeed with a *qui tam* action, “it soon became apparent that . . . Congress had killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against

³⁷ *See id.*

³⁸ *Id.* (quoting S. REP. No. 345, 99th Cong., 2d Sess. 8 (1986)).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943).

⁴³ *Hamer*, *supra* note 36, at 91.

⁴⁴ *Id.*

⁴⁵ *Id.*

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the government.”⁴⁶ The courts broadly construed the amended FCA as a virtual ban on FCA lawsuits and the number of *qui tam* lawsuits dramatically declined.⁴⁷

The amended FCA did not substantially further Congress’s purpose of the FCA by acting as a deterrent to fraudulent activity by private individuals and companies against the government. Forty-three years later Congress responded to the problems with the 1943 amendments by amending the FCA again in 1986.⁴⁸ The 1986 amendments increased the relator’s share of the recovery, increased the civil penalties for fraud, and sought to strike a balance between preventing the filing of parasitic lawsuits while also eliminating the virtual ban on lawsuits which had dissuaded whistleblowers.⁴⁹ The tool that Congress chose to help achieve this middle ground is the public disclosure bar.

B. *The Public Disclosure Bar: What it Says*

The public disclosure bar, as enacted in the 1986 amendments, is a jurisdictional bar which blocks a putative *qui tam* action if the information has been publically disclosed.⁵⁰ The goal of the public disclosure bar is the prevention of parasitic lawsuits by barring attempts by *qui tam* relators “to free-ride by merely repastinating previously disclosed badges of fraud” and forces relators to forge new ground to recover money.⁵¹ As enacted in 1986, the public disclosure bar stated that:

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

⁴⁶United States *ex rel.* Findley v. FPC–Boron Emps.’ Club, 105 F.3d 675, 680 (D.C. Cir. 1997).

⁴⁷*Id.*; see *Hamer*, *supra* note 36, at 91.

⁴⁸*Hamer*, *supra* note 36, at 91.

⁴⁹*Id.*

⁵⁰United States *ex rel.* Ondis v. City of Woonsocket, 587 F.3d 49, 53 (1st Cir. 2009) (citing 31 U.S.C. § 3730(e)(4)).

⁵¹*Id.* (citing United States *ex rel.* Duxbury v. Ortho Biotech Prods., L.P., 579 F.3d 13, 26–27 (1st Cir. 2009)).

Attorney General or the person bringing the action is an original source of the information.⁵²

While the goal of the 1986 amendments is understandable, the execution of its provisions has not been without controversy and a significant amount of litigation due to the drafting and manner in which Congress adopted the amendments.⁵³ The legislative history of the 1986 amendments reflects Congress's goal of drafting the public disclosure bar provision in such a way that would encourage private citizens to bring forward cases of fraud while also preventing parasitic lawsuits.⁵⁴ However, the Supreme Court, in deciding other aspects of the public disclosure bar in the FCA, has noted that "the drafting history of the public disclosure bar raises more questions than answers."⁵⁵ Courts have noted that "[o]ne difficulty in interpreting the 1986 amendments is that Congress was never completely clear about what kind of 'parasitic' suits it was attempting to avoid."⁵⁶ Because of the lack of clarity, the courts have interpreted various provisions of the public disclosure bar differently. One specific aspect which the circuit courts disagree, and which the Supreme Court has not yet addressed, is the interpretation of the phrase "based upon" in the statute.⁵⁷ The differences between the majority and minority interpretations of "based upon" in the FCA has been characterized as "a clash between two textual arguments . . . one [interpretation] based on the ordinary meaning of the phrase 'based upon' and [the other interpretation] on the precept that a statute should be construed if possible so as not to render any of its terms superfluous."⁵⁸

Congress subsequently amended the FCA in both 2009 and 2010.⁵⁹ The 2009 amendments to the FCA did not address the public disclosure bar, but

⁵² 31 U.S.C. § 3730(e)(4)(A) (1986).

⁵³ See, e.g., *City of Woonsocket*, 587 F.3d at 49; *United States ex rel. Findley v. FPC–Boron Emps.' Club*, 105 F.3d 675, 680 (D.C. Cir. 1997).

⁵⁴ David M. Nadler & Justin A. Chiarodo, *The Public Disclosure Bar: New Answers and Open Questions*, 47 *PROCUREMENT LAW* 1, 15 (2011).

⁵⁵ *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 296 (2010)).

⁵⁶ *Graham Cty. Soil & Water Conservation Dist.*, 559 U.S. at 296 n.15 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.3d 1149, 1163 (1991) (Scirica, J., dissenting)).

⁵⁷ See *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 909–10 (7th Cir. 2009).

⁵⁸ *United States ex rel. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 387 (3d Cir. 1999).

⁵⁹ Robert T. Rhoad, *A Gathering Storm: The New False Claims Amendments and Their Impact on Healthcare Fraud Enforcement*, 21 *THE HEALTH LAW* 14, 16–20 (2009).

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the 2010 amendments significantly altered the language and implementation of the bar.⁶⁰ Specifically, § 3730(e)(4)(A) of the False Claims Act was amended as part of the Patient Protection and Affordable Care Act (PPACA).⁶¹ Section 3730(e)(4)(A) now provides:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publically disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) 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.⁶²

Congress removed the controversial “based upon” language from the amended version of the FCA by replacing it with “substantially the same allegations or transactions” and now allows the Government to decide if a court may dismiss a case based on a public disclosure.⁶³ Importantly, the 2010 changes to the FCA public disclosure bar altered the rules of the game because the government, as a real party in interest to the litigation, can simply oppose dismissal without intervening which allows the suit to proceed.⁶⁴ This effectively takes the power away from the court—as a neutral arbitrator—and places it with the government who stands as an interested party.

Commentators and the circuit courts that have addressed the jurisdictional nature of the public disclosure bar in the 2010 amendments do not agree on the jurisdictional nature of the public disclosure bar.⁶⁵ The

⁶⁰ *Id.*

⁶¹ Patient Protection and Affordable Care, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119 (Mar. 23, 2010).

⁶² 31 U.S.C. § 3730(e)(4)(A) (2010).

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *See, e.g.,* Robert T. Rhoad & Jason C. Lynch, *New Questions Regarding The Jurisdictionally Of The FCA's Public Disclosure Bar: Potential Hurdles And Increased Costs In Defending Against Parasitic Qui Tam Actions*, 55 THE GOV'T CONTRACTOR 1 (March 27, 2013); *United States ex rel. Absher v. Momence Meadows Nursing Ctr., Inc.*, 764 F.3d 699, 706 (7th Cir.

courts that have addressed the jurisdictional nature of the new bar have reached different conclusions in deciding the meaning and impact of the “unless opposed by the Government” language in the new statute.⁶⁶

C. The Public Disclosure Bar: Why the 1986 Version Still Matters Today

Because § 10104(j)(2) of PPACA, which amended the FCA (31 U.S.C. § 3730(e)(4)), did not mention retroactivity the current circuit split over the interpretation of the 1986 public disclosure bar is still highly relevant.⁶⁷ Retroactivity would have been necessary for the amendments to apply to pending cases because it would eliminate the petitioners’ defense to a *qui tam* lawsuit.⁶⁸ Because the PPACA did not mention retroactivity, the most recent amendments to the FCA do not apply to cases filed before the effective date of the amendments and the courts must apply the version of the statute in place when the suit was filed.⁶⁹

Evidenced by the staggering amounts of money recovered by the DOJ under the FCA, the FCA has proven to be a very useful tool in the arsenal of fighting fraud and abuse. The DOJ and *qui tam* relators have targeted the health care industry with the DOJ reporting record-breaking recoveries against health care companies through *qui tam* claims.⁷⁰ Notable examples of these staggering recoveries against health care companies include:

- \$800 million (\$438 federal and \$361 to states that opt-in) from Eli Lilly and Company in 2009 to resolve allegations that the pharmaceutical manufacturer promoted Zyprexa for off-label uses and for indications the drug was not

2014) (“it is no longer clear” that the Supreme Court’s holding that §3730(e)(4) is jurisdictional “is still good law” after the 2010 amendment).

⁶⁶ See Rhoad & Lynch, *supra* note 65.

⁶⁷ Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 283 n.1 (2010).

⁶⁸ *Id.*

⁶⁹ See Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 404 n.1 (2011).

⁷⁰ Press Release, U.S. Department of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (November 20, 2014), <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014> (reporting \$2.3 billion in FY 2014 which marks the fifth year in a row the DOJ has recovered more than \$2 billion in cases involving false claims against federal health care programs).

approved by the FDA.⁷¹ The four *qui tam* relators received \$78.9 million from the federal share of the settlement amount.⁷² Also, with the civil suit Eli Lilly agreed to pay a criminal fine of \$515 million and forfeit assets of \$100 million, bringing the total payment to \$1.415 billion.⁷³

- \$1 billion (\$669 million federal and \$331 million to states) from Pfizer Inc. in 2009 to resolve allegations that the pharmaceutical company illegally promoted the off-label use of four drugs causing false claims to be submitted to government health care programs.⁷⁴ The six *qui tam* relators received payments totaling more than \$102 million from the federal share of the recovery.⁷⁵ Besides the civil fine, Pfizer agreed to pay and forfeit \$1.3 billion in criminal fines, bringing the total payment to \$2.3 billion.⁷⁶
- \$600 million in civil penalties from GlaxoSmithKline in 2011 to resolve allegations that the company manufactured adulterated drugs and subsequently caused false claims to be submitted to Medicare and Medicaid for the adulterated drugs that failed to conform with the strength, purity or quality specified by the FDA.⁷⁷ The lone *qui tam* relator—a former quality assurance manager for GlaxoSmithKline—received \$96 million.⁷⁸ Besides the civil penalties, GlaxoSmithKline paid \$150 million to resolve criminal

⁷¹ Press Release, U.S. Department of Justice, Eli Lilly and Company Agrees to Pay \$1.415 Billion to Resolve Allegations of Off-label Promotion of Zyprexa (Jan. 15, 2009), <http://www.justice.gov/opa/pr/2009/January/09-civ-038.html>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Press Release, U.S. Department of Justice, Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009), <http://www.justice.gov/opa/pr/2009/September/09-civ-900.html>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Press Release, U.S. Department of Justice, Justice Department Recovers \$3 Billion in False Claims Act Cases in Fiscal Year 2011 (Dec. 19, 2011), <http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html>; Gardiner Harris and Duff Wilson, Glaxo to pay \$750 Million for Sale of Bad Products, N.Y. TIMES (Oct. 26, 2010), <http://www.nytimes.com/2010/10/27/business/27drug.html?pagewanted=all>.

⁷⁸ Harris & Wilson, *supra* note 77.

allegations related to the manufacture of adulterated drugs.⁷⁹

- \$1.5 billion from GlaxoSmithKline in 2012 to resolve allegations that the pharmaceutical company engaged in off-label promotion and kickbacks to health care professionals to induce them to prescribe and promote GlaxoSmithKline's drugs for off-label indications, made false and misleading statements regarding the safety of Avandia, and reported false best practices and underpaid rebates owed under the Medicaid Drug Rebate Program.⁸⁰ The four *qui tam* relators received payments of more than \$150 million from the federal share.⁸¹ Besides the *qui tam* civil claim, GlaxoSmithKline paid an additional \$1.0 billion in criminal fines and forfeitures, bringing the total recovery to \$3 billion.⁸²
- \$800 million (\$575 federal civil recoveries and \$225 million in state civil recoveries) from Abbott Laboratories Inc. in 2013 to resolve allegations that the pharmaceutical company illegally promoted the drug Depakote for indications not approved by the Food and Drug Administration.⁸³ Besides the \$800 million in civil recoveries, Abbott agreed to pay \$700 million in criminal fines and forfeitures, bringing the total recovery to \$1.5 billion.⁸⁴

⁷⁹ *Id.*

⁸⁰ Press Release, U.S. Department of Justice, Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>.

⁸¹ Richard Blackden, *Glaxo Whistleblowers to Share \$250m Windfall*, THE TELEGRAPH (July 4, 2012), <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/9374104/Glaxo-whistleblowers-to-share-250m-windfall.html>.

⁸² Press Release, U.S. Department of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (July 2, 2012), <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>.

⁸³ Press Release, U.S. Department of Justice, Justice Department Recovers \$3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), <https://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013>.

⁸⁴ *Id.*

- \$1.1 billion from Johnson & Johnson and its subsidiaries, Janssen Pharmaceuticals and Scios, to resolve False Claims Act claims that the pharmaceutical company engaged in off-label marketing paying kickbacks to both physicians and to Omnicare, Inc., the nation's largest provider of pharmaceuticals to nursing homes and long-term care facilities.⁸⁵
- \$495 million from DaVita Kidney Care, a division of DaVita Healthcare Partners, Inc. in 2015 to resolve allegations by two former employees that DaVita Kidney Care would consistently discard excess medicine and charge Medicare and Medicaid the full amount rather than utilize the unused portion of medicine for other patients.⁸⁶ This settlement is the third whistle-blower lawsuit for DaVita Healthcare Partners since 2012 totaling nearly \$1 billion in settlement funds.⁸⁷

Trial courts continue to issue rulings and judgments for cases filed before the effective date of the 2010 amendments.⁸⁸ Besides trial courts issuing rulings, circuit courts are also actively deciding appeals concerning cases filed before the effective date of the 2010 amendments.⁸⁹ The proper application of the public disclosure bar between the circuit and district courts remains highly relevant.

III. THE MAJORITY APPROACH INTERPRETING “BASED UPON”

The majority of the circuit courts read the phrase “based upon” in § 3730(e)(4)(A) more broadly than the minority. In deciding if information

⁸⁵ Press Release, *supra* note 70.

⁸⁶ Tamara Chaung, *DaVita will pay \$495 Million to Settle Atlanta Whistle-Blower Case*, THE DENVER POST (May 4, 2015), http://www.denverpost.com/business/ci_28046592/davita-will-pay-495-million-settle-atlanta-whistleblower.

⁸⁷ *Id.*

⁸⁸ *See, e.g.*, United States *ex rel.* Bogina v. Medline Indus., Inc., No. 11 C 05373, 2015 WL 1396190, at *2 (N.D. Ill. Mar. 24, 2015) (applying the Majority position to claim under the pre-2010 version of the FCA).

⁸⁹ *See, e.g.*, United States v. Chattanooga-Hamilton Cty. Hosp. Auth., 782 F.3d 260, 264, 270 (6th Cir. 2015) (reversing the decision of the trial court by holding that a hospital's fraudulent inpatient billing practices were not “publicly disclosed” under the pre-2010 amendments as result of an administrative audit and investigation and remanding the case to the trial court).

is “based upon” information that has already been publically disclosed the majority uses the “substantially similar to” and “supported by” tests.⁹⁰ The broad interpretation of “based upon” providing for these two tests is significantly less permissive to *qui tam* plaintiffs than the approach used by the minority.

Applying the “substantially similar to” and “supported by” tests, courts utilizing the majority approach have held that public disclosures need not match the specificity of the FCA allegations.⁹¹ In *United States ex rel. Gear v. Emergency Medical Associates of Illinois*, the Seventh Circuit held that Government Accounting Reports and news reports about improper Medicare billing were public disclosures sufficient to trigger the public disclosure bar, even when the reports did not specifically name the defendant.⁹²

The majority of the circuit courts uniformly agree that Congress intended the phrase “based upon” to be read broadly as a bar to parasitic lawsuits.⁹³ However, the reasons given by the various circuit courts for this broad interpretation are varied. Part III.A discusses the reasoning given for a plain meaning interpretation of “based upon” to support the majority’s interpretation, followed by Part III.B which reasons for interpreting “based upon” so as to avoid rendering the original source exception meaningless. Part III.C details why the majority’s approach to based upon is correct because this interpretation provides for Congress’s intended purpose for the public disclosure bar. The differing reasons given in support of the majority’s interpretation of “based upon” creates the question that this Comment seeks to answer: Which is the proper interpretation of the public disclosure bar and why?

A. *A Plain Meaning Argument Supporting the Majority’s Interpretation of “Based Upon”*

One of the basic tenants of statutory construction is that “[t]he starting point in every case involving [the] construction of a statute is the language itself.”⁹⁴ In *United States ex. rel. Precision Co. v. Koch Industries Inc.*, the

⁹⁰ *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 334 (3d Cir. 2005).

⁹¹ See *United States ex rel. Gear v. Emergency Med. Assocs. of Ill., Inc.*, 436 F.3d 726, 729 (7th Cir. 2006).

⁹² *Id.*

⁹³ See *Paranich*, 396 F.3d at 334.

⁹⁴ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

Tenth Circuit utilized the plain meaning of “based upon” by defining the term “based upon” to mean “supported by.”⁹⁵ Utilizing this meaning of “based upon” the court held that a *qui tam* action is based upon public disclosure even if the information is “even partly based upon” prior public disclosures.⁹⁶ In defining the term “based upon” the court determined that “as a matter of common usage, the phrase ‘based upon’ is properly understood to mean supported by.”⁹⁷ The court cited no source for their common usage definition of “based upon.”⁹⁸ The court noted that Congress chose not to insert the word “solely” into the statute and doing so would dramatically alter the statute’s plain meaning.⁹⁹ To support the broad interpretation the court noted that “[n]ot only are we governed by the plain meaning of the statute, we must also be mindful that ‘statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.’”¹⁰⁰

This unsupported definition of “based upon” provided by the Tenth Circuit in defining “based upon” has received little support from other circuit courts. The minority interpretation directly conflicts this interpretation with citations to a dictionary definition that demonstrates this interpretation is out of line with the actual plain meaning of “based upon.”¹⁰¹ The majority of the circuit courts agree with the minority’s interpretation that reading the word “solely” into the statute to effectuate the purpose is not correct in applying the plain meaning of “based upon.”¹⁰² Thus, the end result is the same, but the unsupported definition of “based upon” in *Precision* has failed to garner additional support among the majority of circuit courts.

⁹⁵ United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (quoting F&S Construction Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964)).

¹⁰¹ *See* United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347–48 (4th Cir. 1994).

¹⁰² *See* United States *ex rel.* Mistick PBT v. Hous. Auth., 186 F.3d 376, 386 (3d Cir. 1999) (“We agree with the Fourth Circuit that in ordinary usage the phrase ‘based upon’ is not generally used to mean supported by.”).

B. Reading the Statute In Such a Manner As to Not Render the 'Original Source' Exception Meaningless

In *Corley v. United States*, the Supreme Court stated that “one of the most basic [statutory] interpretative canons [is] ‘that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant’”¹⁰³ In *United States ex rel. Findley v. FPC–Boron Employees’ Club*, the D.C. Circuit agreed with the broad reasoning of the statute adopted by the majority, but advanced an alternative reason why this is the correct interpretation of the statute.¹⁰⁴ The holding in *Findley*—with which several circuit courts in the majority agree—is supported because a narrow reading of the statute renders the original source exception to the public disclosure bar largely superfluous.¹⁰⁵ The court supported their interpretation of “based upon” through Congressional intent as evidenced by Congress’s repeated amendments to the FCA.¹⁰⁶

In 2009, the Seventh Circuit switched from the minority to the majority by adopting the “substantially similar” test and holding that the minority position is “problematic because it essentially eliminates the ‘original source’ exception to the public disclosure bar”¹⁰⁷ To support this position, the court held that an interpretation eliminating the original source exception to the public disclosure bar upsets the delicate balance sought by Congress in preventing parasitic lawsuits while also encouraging lawsuits by whistleblowers with firsthand knowledge of the fraud.¹⁰⁸ Incorporating the original source exception into the public disclosure bar fits with the understanding of the majority rather than the minority. Under the majority interpretation, if allegations in a *qui tam* lawsuit are substantially similar to information already publically disclosed, the relator can only avoid the public disclosure bar if the relator is an original source.¹⁰⁹ If the information has been publically disclosed and the relator is not an original source, the

¹⁰³ *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

¹⁰⁴ *See United States ex rel. Findley v. FPC–Boron Emps.’ Club*, 105 F.3d 675, 683 (D.C. Cir. 1997).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 683–84.

¹⁰⁷ *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

jurisdictional bar applies and the court dismisses the parasitic lawsuit for lack of subject matter jurisdiction.¹¹⁰

Under the minority approach, with a narrow reading of the statute, the original source exception is meaningless when a FCA lawsuit is “based upon” publically disclosed information.¹¹¹ The Seventh Circuit reasoned that the minority interpretation renders the original source exception meaningless because “once a court concludes that a lawsuit is actually derived from publically disclosed information, asking the original-source question never affects the jurisdictional result.”¹¹² The Seventh Circuit abandoned the minority position in favor of interpreting the statute as a whole.¹¹³

The First Circuit also agreed with this reasoning finding that a narrow reading of “based upon” by the minority renders the “original source” provision largely superfluous.¹¹⁴ Citing the same reasoning as the Seventh Circuit in *Glaser*, the First Circuit argues that the interpretation by the majority is the correct approach because it gives all provisions of the statute effect, even going so far as to state that “there are situations in which rigid adherence to semantic orthodoxy must yield to common sense.”¹¹⁵

In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, the Third Circuit agreed with the minority interpretation that the ordinary meaning of the phrase “based upon” is not generally used to mean “supported by.”¹¹⁶ However, the Third Circuit failed to join the minority position and sided with the majority of circuit courts.¹¹⁷ To support this position the court noted that “the inescapable conclusion is that the *qui tam* provision does not reflect careful drafting.”¹¹⁸ The court found the term “based upon” to be syntactically ambiguous because of uncertainty that the drafters of this provision focused on the difference in precise usage between two different lawsuits: a suit based upon a public disclosure of an allegation

¹¹⁰ *See id.*

¹¹¹ *Id.*

¹¹² *Id.* at 916.

¹¹³ *See id.* at 917.

¹¹⁴ *United States ex. rel. Ondis v. City of Woonsocket*, 587 F.3d 49, 57 (1st Cir. 2009).

¹¹⁵ *Id.*

¹¹⁶ *United States ex rel. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 386 (3d Cir. 1999).

¹¹⁷ *Id.* at 387.

¹¹⁸ *Id.* at 388.

or transaction and a suit based upon an allegation or transaction and that has been publicly disclosed.¹¹⁹

C. Interpreting “Based Upon” to Effectuate Congress’s Intended Purpose for the Statute

To support the majority approach courts have read “based upon” in such a manner as to correlate with the courts’ interpretation of Congress’s intent in passing the public disclosure bar. In *United States ex rel. Precision Co. v. Koch Industries, Inc.*, the Tenth Circuit held that a broad interpretation of “based upon” in the public disclosure bar effectuates the purpose of the statute.¹²⁰ The court stated that Congress sought to achieve two goals through the public disclosure bar: encouraging whistleblowers with first-hand knowledge of fraud against the government to report the fraud and preventing parasitic lawsuits by opportunists lacking first-hand knowledge of the fraud.¹²¹ Further, the court determined that Congress intended the language “based upon” to trigger a two-step analysis by courts in determining jurisdictional issues.¹²² In the first step the court “must determine whether the action is based upon the public disclosure of allegations or transactions.”¹²³ If the court answers yes to the first inquiry this triggers a second inquiry by the court asking whether the “plaintiff qualifies as an original source.”¹²⁴ The Tenth Circuit held that the “fair reading” of the public disclosure bar, as it fits within the entire statutory scheme, provides that: “Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute.”¹²⁵

Similarly, the Eighth Circuit stated that the majority reading of “based upon” in § 3730(e)(4) follows Congress’s apparent policy in passing the

¹¹⁹ *Id.*

¹²⁰ See *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992).

¹²¹ *Id.* (citing *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir.1991) for support of Congress’s dual purpose for the public disclosure bar).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 553.

1986 FCA Amendments.¹²⁶ In reaching this conclusion, the court viewed the public disclosure bar as it fits within the entire FCA statutory scheme.¹²⁷ The Eighth Circuit stated that the “based upon” provision in the statute “serves the concern of utility” by only paying for useful information while the “original source” exception to the public disclosure bar “serves the concern of fairness” by rewarding the individual coming forward with information.¹²⁸ Thus, a court must interpret the public disclosure bar with the original source exception in such a manner that these two provisions strike a healthy balance between profiteers and whistleblowers.¹²⁹

In *United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, the Third Circuit relied on alternative reasoning in their holding, but mentioned in dicta that portions of the legislative history reveal that two sponsors of the 1986 FCA amendments, Senator Grassley and Representative Berman, supported the broad interpretation of “based upon.”¹³⁰ Senator Grassley stated that “jurisdiction for *qui tam* actions based on information that has been publically disclosed will be limited to those people who were ‘original sources’ to the information.”¹³¹ Representative Berman stated that “[o]nce, the public disclosure of the information occurs . . . then only a person who qualifies as an ‘original source’ may bring the action.”¹³² The court did not base their holding on the legislative history but nonetheless mentioned this aids in demonstrating the overall intent of Congress in passing the amendments containing the public disclosure bar.¹³³

IV. THE MINORITY APPROACH TO INTERPRETING “BASED UPON”: LOOKING AT THE PLAIN MEANING

The Fourth Circuit’s interpretation of “based upon” provides the basis for the minority approach and is currently only supported by the Fourth

¹²⁶*Minn. Ass’n of Nurse Anaesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1047 (8th Cir. 2002).

¹²⁷*Id.*

¹²⁸*Id.*

¹²⁹*Id.*

¹³⁰*United States ex rel. Mistick PBT v. Hous. Auth.*, 186 F.3d 376, 388 n.9 (3d Cir. 1999).

¹³¹*Id.* (quoting 132 Cong. Rec. S11238-04 (Aug. 11, 1986)).

¹³²*Id.* (quoting 132 Cong. Rec. H9382-03 (Oct. 7, 1986)).

¹³³*See id.*

Circuit.¹³⁴ The minority approach to the public disclosure bar favors a narrower interpretation of the statute and reads “based upon” to mean “actually derived from.” This narrow interpretation of the statutory language allows relators to proceed with *qui tam* claims even when their information is partially derived from publically disclosed information. The “actually derived from” test is a very permissive standard for *qui tam* relators because only claims that are “actually derived from” publically disclosed information will be barred. Relators can often liberally phrase their allegations in such a manner as to prevent their claim from being barred under the more liberal “actually derived from” test. The minority approach is a textualist interpretation supporting a narrow interpretation.¹³⁵

In *Siller v. Becton Dickinson & Co.*, the Fourth Circuit held that the proper interpretation of “based upon” as provided in the FCA is “derived from.”¹³⁶ In reaching this conclusion, the Fourth Circuit stated that the plain language of the statute is “susceptible to a straightforward textual exegesis.”¹³⁷ Relying on the 1986 version of *Webster’s Third New International Dictionary* the court applied the definition of “base upon” to mean “use as a basis for.”¹³⁸ Applying this definition to the analysis of “based upon,” a “relator’s action is ‘based upon’ a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based.”¹³⁹ The minority position believes this interpretation of “based upon” gives the full effect to

¹³⁴ *Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 915 (7th Cir. 2009); *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999). The Fourth Circuit has not always been alone in their interpretation of “based upon.” The Seventh Circuit originally supported the Fourth Circuit’s stringent adherence to the plain meaning of the phrase “based upon.” See *Bank of Farmington*, 166 F.3d at 863, *overruled by Glaser*, 570 F.3d 907 and *United States ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 739 (7th Cir. 2007). In overruling *Farmington*, the Seventh Circuit in *Glaser* stated that adhering only to the plain language of “based upon” gives “undue weight to the ‘dictionary’ interpretation of § 3730(e)(4) without considering the phrase ‘based upon’ in the context of the rest of the public-disclosure bar—particularly the original-source exception.” *Glaser*, 570 F.3d at 920.

¹³⁵ See *Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348, 1351 (4th Cir. 1994). For a thorough discussion on textualism as it applies to the courts, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006).

¹³⁶ *Siller*, 21 F.3d at 1348.

¹³⁷ *Id.*

¹³⁸ *Id.* (citing *Base*, *Webster’s Third New International Dictionary* 180 (1986) (definition no. 2 of verb “base”)).

¹³⁹ *Id.*

the actual language chosen by Congress and furthers Congress's goal of preventing 'parasitic' actions.¹⁴⁰

The Fourth Circuit has steadfastly upheld their narrow interpretation of "based upon" stating that: "[u]nder this Court's precedent, a qui tam action is based upon publically disclosed allegations *only if the qui tam plaintiff's allegations were actually derived from the public disclosure itself.*"¹⁴¹ In stark contrast to the substantially derived from test in the majority, the Fourth Circuit will not dismiss a *qui tam* action if the claims are similar or identical to the publically disclosed information if the relator has independent knowledge and did not derive his allegations from the public disclosure itself.¹⁴² To determine if the allegations originated from the relators independent knowledge or public disclosure of information the district courts must make a finding of fact.¹⁴³

The design of the jurisdictional nature of the public disclosure bar is to prevent opportunist whistleblowers from proceeding with lawsuits when their claims lack merit.¹⁴⁴ The minority's strict reliance on a dictionary definition of one phrase—as opposed to giving effect to the entire statutory scheme—allows lawsuits that Congress clearly intended to fall out under the jurisdictional bar to continue. This aberration from the expressed intent of Congress only wastes valuable judicial resources and attorney's fees in unnecessary litigation. The public disclosure bar, with the original source exception, provides a delicate balance of encouraging litigation with merit while discouraging frivolous litigation. The interpretation of "based upon" by the Fourth Circuit clearly does not effectuate Congress's intent with the public disclosure bar.

Besides the arguments set forth by the Fourth Circuit, and formerly by the Seventh Circuit, Jonathan Ursprung has advanced that a new form of linguistic analysis provides further support for the minority interpretation of "based upon" as the correct interpretation.¹⁴⁵ Ursprung utilized linguistic analysis based on a rigorous analytical framework, adopted in linguistics, to

¹⁴⁰ *Id.*

¹⁴¹ *United States ex rel. Rostholder v. Ominicare, Inc.*, 745 F.3d 694, 699 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 85 (2014) (emphasis added).

¹⁴² *Id.*

¹⁴³ *See Siller*, 21 F.3d at 1349.

¹⁴⁴ *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 910 (7th Cir. 2009).

¹⁴⁵ Jonathan Pierce Ursprung, Comment, *Based Upon: Deriving Plain Meaning From the False Claims Act's Jurisdictional Bar*, 157 U. PA. L. REV. 923 (2009).

extract the meaning of “based upon” by Congress.¹⁴⁶ Persuasively, Ursprung argues that the current reliance on plain meaning by courts is cursory at best, thus utilizing a linguistic model in statutory construction achieves a more reasoned result than simple “dictionary shopping.”¹⁴⁷

The model utilized by Ursprung utilizes a syntax tree to map out a sentence, a technique used in formal linguistic analysis to study human language.¹⁴⁸ The analysis required a two-step inquiry, wherein the first step involved a semantic construction of the phrase “based upon” to discern its correct meaning, followed by “construction of the phrase’s syntactic structure in order to identify each element’s role and its relation to each other element.”¹⁴⁹ Forming syntax tree maps for both the “right-hand argument” and “left-hand argument,” Ursprung finds that linguistic analysis supports the minority’s approach.¹⁵⁰

To date, this approach has not received any appreciable amount of attention from the courts and it does not appear as though linguistic analysis will play a significant role, if any, in resolving the circuit split over “based upon.”¹⁵¹ The study seeks to provide support to the Seventh Circuit’s—now overruled—holding in *Fowler* to support the minority approach.¹⁵² Linguistic analysis is a complex and highly technical field of study conducted by professionals specializing in linguistic analysis. Tasking courts with undertaking linguistic analysis in statutory construction unduly burdens the court, whereas the rules of statutory construction provide a sound and predictable basis of constructing statutes. Linguistic analysis of a statute is an interesting academic exercise; however due to the complexity involved in conducting linguistic analysis in statutory construction, a court is not likely to utilize this tool in deciphering Congressional intent in the face of more applicable canons of construction.

¹⁴⁶*Id.* at 925.

¹⁴⁷*Id.* at 931.

¹⁴⁸*Id.* at 939.

¹⁴⁹*Id.* at 941.

¹⁵⁰*Id.* at 949–50.

¹⁵¹ See, e.g., Reply Brief for Appellant-Petitioner at n. 17, *West Bay Builders, Inc. v. Standard Elevator Co.*, 2011 CA App. Ct. (1st Dist. 2011) (No. A126187) 2011 CA App. Ct. Briefs LEXIS 198; Brief for Respondent at 71, *State v. Bay Builders*, 2010 CA App. Ct. (1st Dist. 2010) (No. A124892) 2010 CA App. Ct. Briefs LEXIS 5352.

¹⁵² Ursprung, *supra* 145, at 941.

V. CONCLUSION

With the substantial increase in the number of *qui tam* lawsuits and sheer burden on the courts and the government prosecuting these lawsuits, it is of paramount importance that courts give effect to one of the major limitations on lawsuits filed under the FCA—the public disclosure bar. Considering the totality of arguments advanced by both the majority and the minority in deciding the meaning of “based upon,” the majority presents the stronger case why a broader interpretation of the statute controls the day. The majority reading of the statute, with the broad interpretation to prevent parasitic lawsuits, fits within the context and understanding of the history and evolution of the FCA, the statutory scheme, and the purpose Congress originally implemented the public disclosure bar.

The minority’s view, partially evidenced by their inability to garner additional support outside of the Fourth Circuit is not the correct interpretation of “based upon.” Adopting the minority’s reading of the statute would render the original source exception largely meaningless because suits which should be barred under the public disclosure bar may proceed. A broad adoption of this approach would have a drastic effect on the effectiveness of the FCA in encouraging *qui tam* suits which provide “good” information without resorting back to the original, unamended FCA, which allowed relators with no meaningful information to sue. The public disclosure bar is clearly intended to prevent opportunistic whistleblowers from filing frivolous lawsuits when the *qui tam* plaintiff who is not an original source only gleans the information from a previous public disclosure. All the circuit courts should adopt the majority position rather than the holdout minority ignoring the obvious checks and balances in the FCA through various amendments for an interpretation of *United States ex rel. Marcus v. Hess* which Congress explicitly overruled through the passage of the 1943 amendments to the FCA.¹⁵³ Such an interpretation risks reversing over 70 years of Congressional fine-turning.

For health care providers and legal practitioners advising clients regarding their possible exposure in the face of a CID and governmental investigation, interpreting the words “based upon” is significant. With the current circuit split, the analysis for advising clients regarding the viability of a *qui tam* lawsuit varies wildly depending if the lawsuit is filed in the Fourth Circuit or elsewhere. For the reasons stated herein, the Fourth

¹⁵³*Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 412 (2011).

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Circuit should adopt the interpretation of “based upon” as relied on by the majority.