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FINDING EQUILIBRIUM: EXPLORING DUE PROCESS VIOLATIONS IN THE WHISTLEBLOWER PROVISIONS OF THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

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INTRODUCTION

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act (FERA).[1] The bill is designed to provide the federal government additional tools to "investigate and prosecute mortgage, corporate, and other financial frauds. . . . that contributed to the current subprime and economic crisis, and to recover taxpayers' money lost to these frauds."[2] A significant portion of the law amends the False Claims Act (FCA) in an attempt to combat fraudulent claims for payment submitted to the federal government.[3] The FERA amendments to the FCA will effectuate heightened government scrutiny over claims made by contractors to the government and will expand FCA liability.

The more dramatic change to the FCA directly responds to the unanimous Supreme Court decision in *Allison Engine Co. v. United States ex rel. Sanders*.[4] In *Allison Engine*, the Court held that contractors who unintentionally submitted fraudulent claims to the government for payment could not be prosecuted under the FCA.[5] The language of FERA, however, no longer requires that false claims made to the government be *intended* to result in the government's retention of payment.[6] Thus, the government

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[1] Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[2] SYED D. ALI ET AL., GOVERNMENT CONTRACTS AND WHITE COLLAR CRIME ALERT: FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009, at 1 (2009), *available at* http://www.klgates.com/files/Publication/19c4ac72-4ac4-41a5-973f-027cf3e59978/Presentation/PublicationAttachment/a3e1096c-fafd-4d38-ab1e-3bd74c616842/Alert_FERA_052609.pdf.

[3] *See* Fraud Enforcement and Recovery Act of 2009 (FERA) § 4(a) (codified at 31 U.S.C.A. § 3729 (West 2011)).

[4] 553 U.S. 662 (2008).

[5] *Id.* at 665.

[6] Section 4 of FERA provides that any person who

> knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government . . . .

Fraud Enforcement and Recovery Act of 2009 (FERA) § 4(a)(1). The statute no longer requires that there be an intent to defraud. *See id*.

may now prosecute not only those who intentionally sought to defraud the government, but also those contractors who may have accidentally made a false claim that seemed fraudulent. Furthermore, Congress stipulated that this provision must apply retroactively to claims pending in the federal courts as of June 7, 2008, two days before the Court's decision in *Allison Engine*.[7] That this provision expands liability and that it applies retroactively raises serious due process concerns which, combined with other provisions enacted by FERA, causes one to raise eyebrows at the manner in which the federal government has swept the rights of potential defendants under the table.

Indeed, an examination of the new provisions that FERA adds to the FCA regarding *qui tam* whistleblowers[8] demonstrates the government's lack of concern for the due process rights of potential defendants.[9] Specifically, for purposes of filing complaints in intervention, the government's complaint in intervention may now relate back to the *qui tam* whistleblower's complaint, regardless of the number of times the government renews the seal period during which it decides whether or not to intervene.[10] The renewal effectively expands the statute of limitations.[11] This provision settled the debate over whether a government complaint in intervention could relate back to the relator's complaint or if only amendments made by the relator could relate back. Further, prior to FERA, "relators were often denied access to" information produced by defendants in response to government subpoenas served on defendants during the seal period.[12] FERA, however, amends the FCA to read: "Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is

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[7] JONES DAY, FRAUD ENFORCEMENT RECOVERY ACT OF 2009 BECOMES LAW, EXPANDING EXPOSURE UNDER THE FALSE CLAIMS ACT AND FUNDING ANTI-FRAUD ENFORCEMENT 7 (2009), *available at* http://www.jonesday.com/files/Publication/ba69538b-ed12-4412-a08d-e4ed5aaca676/Presentation/PublicationAttachment/0d373005-e71d-4f4c-a59d-bc0ab830c07e/Fraud%20Enforcement.pdf.

[8] *Qui tam* whistleblowers are also referred to as "relators." *Id.* at 3.

[9] *See id.* at 7.

[10] *Id.*

[11] Section 4 provides:

> If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, *any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action*, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

Fraud Enforcement and Recovery Act of 2009 (FERA) § 4(b)(3) (emphasis added).

[12] JONES DAY, *supra* note 7, at 7.

necessary as part of any false claims act investigation."[13] The effect of this provision is to give sensitive information to non-government plaintiffs who could potentially abuse the information by supplementing originally speculative claims, avoiding a dismissal of what would have been a legally insufficient claim.[14]

FERA's amendments to the FCA not only increase government oversight and investigative ability, they also bring to the forefront concerns regarding the constitutionality of the amendments and their effect on sections of the FCA, which have already been regarded as constitutionally dubious.[15] While there are potential separation of powers, standing, and Appointments Clause issues that could be addressed in great detail, this Note primarily examines the treatment of a defendant's due process rights under the FCA and the effect of FERA's amendments on these rights.

Part I of this Note gives a general overview of the FCA and the *qui tam* filing process. Part II covers previous judicial discussion of the due process clause in the *qui tam* context. Part III discusses how the lack of notice under the FCA fails to qualify as a due process violation. Part IV contends that FERA exacerbates the lack of notice problem enough to create due process violations. Part V argues that, although the government would have prevailed in a due process contest with the defendant under the old FCA, FERA's procedural and substantive liability amendments to the FCA strip the defendant of procedural safeguards, resulting in a violation of his right to due process.

I. THE FALSE CLAIMS ACT

The False Claims Act was initially passed in 1863 to address cases of entrenched fraud that the Department of Justice (DOJ) was reluctant to prosecute.[16] Prior to FERA, the most recent significant amendments to the FCA occurred in 1986.[17] The amendments were intended to address heightened concerns about fraud in government

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[13] Fraud Enforcement and Recovery Act of 2009 (FERA) § 4(c)(1)(A)(ii)(II).

[14] JONES DAY, *supra* note 7, at 7.

[15] Frank A. Edgar, Jr., Comment, *Missing the Analytical Boat: The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO L. REV. 319 (1990) (discussing the problem of standing concerning *qui tam* plaintiffs and finding that, because a *qui tam* plaintiff has no injury in fact in a FCA suit, the *qui tam* provisions of the Act are unconstitutional under Article III's requirements of cases and controversies); Frank LaSalle, Comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, 28 AKRON L. REV. 497, 502–3 (1995) (arguing that, because the FCA tramples the defendant's due process rights, the burden of proof requirement should be heightened to "clear and convincing" evidence to protect defendants' rights); *see also* United States v. Baylor Univ. Med. Ctr., 469 F.3d 263, 270 (2d Cir. 2006) ("By design, the seal provision of [FCA] deprived the defendant . . . of the notice usually given by a complaint.")

[16] *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 555 (2000).

[17] False Claims Amendment Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

contracting.[18] Indeed, by the time Congress enacted the 1986 amendments, "it was suspected that the amount of public funds being lost" to fraud ranged from hundreds of millions to billions of dollars annually.[19] The 1986 amendments provided the anti-fraud statute which laid out the *qui tam* whistleblower process in effect before FERA's changes.

The *qui tam* whistleblower provisions of the FCA permit a private citizen to report misconduct that perpetuates a fraud on the government by bringing an action on behalf of the government against a defendant (either an individual or an entity) who the whistleblower believes has defrauded the government.[20] In exchange, the whistleblower may receive a portion of the funds recovered by the government in a successful suit.[21] A whistleblower must file a suit within a certain period under the FCA: the complaint must be filed by the relator either within six years of the violation's occurrence, or within three years of when DOJ discovers material facts.[22] Significantly, the FCA forbids the government and the relator from bringing an action "more than ten years after the date" of an alleged fraudulent act.[23]

Once the relator decides to bring a claim, he initiates a suit by filing a complaint with a federal district court and sending a copy of the complaint to the DOJ.[24] The complaint is served on the government, not on the defendant.[25] This complaint is filed in camera, and must be kept under seal by the court for at least sixty days.[26] The DOJ may, "for good cause shown," move the court for an extension of the sixty-day

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[18] *See* S. REP. NO. 99-345, at 1–2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266–67; SECTION OF PUB. CONTRACT LAW, AM. BAR ASS'N, QUI TAM LITIGATION UNDER THE FALSE CLAIM ACT 2 (Howard W. Cox & Peter W. Hutt, II, eds., 2d ed. 1999) [hereinafter ABA, QUI TAM LITIGATION].

[19] LaSalle, *supra* note 15, at 498.

[20] Beck, *supra* note 16, at 541.

[21] *Id.*

[22] 31 U.S.C. § 3731(b) (2006). The section provides:

> 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.

Id.

[23] *Id.* § 3731(b)(2).

[24] *Id.* § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government."); Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 391 (2001).

[25] 31 U.S.C. § 3730(b)(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 . . . .").

[26] *Id.*

examination period and may move for as many extensions as necessary to complete the investigation.[27] Although the legislative history suggests that Congress did not intend that these extensions be granted liberally, that is often the case.[28]

While the complaint is under seal, the Attorney General must investigate the relator's claim and decide whether or not to intervene in the suit and pursue an action against the defendant.[29] If the Attorney General decides to intervene, the government assumes full responsibility for prosecuting the action.[30] For his diligence in bringing the potential fraud to the government's attention, the relator may continue as a party and receive between fifteen and twenty-five percent of the damages, plus reasonable attorneys' fees.[31]

If the government elects not to pursue the claim, the relator can still pursue the action and receive up to thirty percent of the damages, plus reasonable attorneys' fees, with the caveat that if the government later decides to intervene, it may do so upon a showing of good cause.[32] Further, regardless of whether or not the government elects to intervene in the case, the relator will receive a portion of any settlement reached with the defendant.[33]

After sixty days, either the Government will file a complaint in intervention and take primary responsibility for the suit, or the relator may independently continue with

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[27] *Id.* § 3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal . . . .").

[28] See, for example, S. REP. NO. 99-345, at 24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289–90, stating:

> By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way . . . The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, "good cause" [as required for an extension] would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint.

[29] 31 U.S.C. § 3730(a) ("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.").

[30] *Id.* § 3730(c)(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 . . . .").

[31] *Id.* § 3730(d)(1) (assuming that the government continues with the action, the relator can expect "at least 15 percent but not more than 25 percent of the proceeds" and "reasonable attorneys' fees and costs").

[32] *Id.* § 3730(c)(3) ("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.").

[33] *Id.* § 3730(d)(2) ("If the Government does not proceed with an action under this section . . ." the plaintiff shall receive "not less than 25 percent and not more than 30 percent of the 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.").

the suit if the government chooses not to intervene.[34] Either way, at this point, the defendant is finally served with the complaint.[35] During the sixty day period while the government conducts one-sided discovery against the defendant by subpoenaing records and gathering information, the defendant may not question why the government is doing so, since he has not yet received notice of the suit.[36] "[T]he government can also conduct extensive pre-trial motions practice" which "would otherwise be subject to the defendant's responsive pleadings."[37] Even after FERA, there is no statutory cap on the number of extensions the government may seek.

II. *QUI TAM* SUITS AND THE COURTS

Prior to FERA's passage, courts occasionally considered questions raised by defendants concerning the failure of the FCA's *qui tam* whistleblower process to protect defendants' procedural due process rights. There have been three primary arguments raised which address this concern. First, if the government can relate its complaint in intervention back to the relator's initial complaint, this deprives defendants of notice of the suit.[38] Second, defendants are not given notice of the relator's complaint for at least sixty days after the complaint has been filed because it is under seal.[39] Third, because the relator stands to recover money from the suit, some defendants have contended that the relator, acting as a kind of prosecutor, has a conflict of interest in the case, which sacrifices the integrity of the process to the detriment of the defendant.[40]

A. Relation Back of the Government's Complaint in Intervention

Before FERA, courts debated whether the Government's complaint in intervention could relate back to the *qui tam* whistleblower's complaint and remain consistent with due process.[41] For example, in *United States v. Baylor University Medical Center*, the

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[34] *Id.* § 3730(b)(4)(B) ("[T]he person bringing the action shall have the right to conduct the action.").

[35] *Id.* § 3730(b)(2). The defendant has twenty days following service to respond to the complaint. *Id.* § 3730(b)(3).

[36] Keith D. Barber et al., *Prolific Plaintiffs or Rabid Relators? Recent Developments in False Claims Act Litigation*, 1 IND. HEALTH L. REV. 131, 139–40 (2004).

[37] *Id.* at 139.

[38] Kimberly A. Lucia, Note, United States v. Baylor University Medical Center*: Impact of FRCP 15(c)(2) on the False Claims Act's Seal Provision*, 42 U.C. DAVIS L. REV. 255, 260 (2008).

[39] 31 U.S.C. § 3730(a)(2) ("The complaint . . . shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

[40] Beck, *supra* note 16, at 608–09.

[41] United States *ex rel.* Deering v. Physiotherapy Assocs., 601 F. Supp. 2d 368, 375 (D. Mass. 2009) ("It is an open question, however, whether the concept of relation back applies to sealed qui tam actions at all.").

Second Circuit Court of Appeals considered whether the Government's action under the FCA commenced for statute of limitations purposes on the date it filed its complaint in intervention, or whether the Government's complaint in intervention related back to the date the relator filed his complaint.[42]

In *Baylor*, the relator filed a complaint "against 132 hospitals from 30 states," alleging "that the [h]ospitals had defrauded Medicare by seeking and obtaining reimbursement for hospital services provided to patients participating in clinical trials involving investigational cardiac devices."[43] Upon receiving the complaint, "the Government had an initial sixty days to investigate," which it subsequently renewed sixteen times over the next eight years.[44] The defendant hospitals argued that the Government's claims were time-barred because they were brought after the applicable FCA statute of limitations period.[45] The Government subsequently "argue[d] that its claims [were] not time-barred because they relate back to the original complaint pursuant to Fed R. Civ. P. 15(c)(2)."[46] The *Baylor* court found that "the secrecy required by 31 U.S.C. § 3730(b) is incompatible with Rule 15(c)(2), because (as is well settled) the touchstone for relation back pursuant to Rule 15(c)(2) is notice," and because of the sixty-day seal provision, the defendant had not received notice at the time the Government filed its complaint in intervention.[47]

Other courts considering the same question have ruled against the decision in *Baylor*. For example, in *United States ex rel. Serrano v. Oaks Diagnostics, Inc.*, a former employee sued Oaks Diagnostics Advanced Radiology of Beverly Hills, alleging that the clinic performed unnecessary diagnostic testing on patients, and submitted claims to Medicare for these tests, and received reimbursement.[48] After the initial sixty

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[42] United States v. Baylor Univ. Med. Ctr, 469 F.3d 263, 268 (2d Cir. 2006).

[43] *Id.* at 265.

[44] *Id.* at 266.

[45] *Id.* at 267.

[46] *Id.* at 268. The Federal Rules of Civil Procedures provide:

> An amendment to a pleading relates back to the date of the original pleading when . . . the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

FED. R. CIV. P. 15(c).

[47] *Baylor*, 469 F.3d at 270 (finding the key inquiry to be "whether the original pleading gave a party adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense . . ." and that "amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c)" (quoting 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1497 (2d ed. 1982 & Supp. 2007))).

[48] United States *ex rel.* Serrano v. Oaks Diagnostics, Inc., 568 F. Supp. 2d 1136, 1137–38 (C.D. Cal. 2008).

day seal period, the Government was granted five extensions of the period, for a total of 300 days before it finally intervened in the case.[49] "Five years after the original complaint, the Government filed the . . . Complaint in Intervention."[50] But not only did the complaint allege that the defendant violated the FCA, it also tacked-on common law claims that the relator had not included in his complaint.[51]

Distinguishing the case from *Baylor*, the court analyzed the relation back principle under Rule 15(c)(1), which states that "an amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[52] Based on this language, the court concluded that, because the relator stood "in the position of the Government until the Government decided whether" or not to intervene, the Government's complaint in intervention and its amendments to the original claim related back to the original complaint.[53] Further, the court noted that, even if notice was required by Rule 15, the defendants should have been aware "of the potential suit in light of the criminal investigation and prosecution of Advanced Radiology employees for involvement in this alleged scheme."[54]

In some sense, FERA effectively ended this debate over the relation back of government complaints in intervention by siding against *Baylor* and codifying that the government's complaint in intervention, and any amendments it makes to the relator's original complaint, relate back to the original complaint as long as the amendments "[arise] out of the conduct, transaction, or occurrence set out . . . in the original pleading."[55] However, the act of codifying this principle does not necessarily make it constitutionally sound. Indeed, a careful analysis reveals that it essentially tramples a defendant's procedural due process rights.

B. Renewal of Sixty Day Extension Periods

That the government can continually renew the seal period of the complaint without notice to defendants is a troubling proposition. Courts have struggled with the fairness of this provision and have questioned whether unlimited permission to renew the seal period is a violation of due process.[56] In *United States ex rel. Costa v. Baker*

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[49] *See id.* at 1138.

[50] *Id.*

[51] *Id.* (internal quotation marks omitted).

[52] *Id.* at 1139 (quoting FED. R. CIV. P. 15(c)(1)(B)).

[53] *Id.* at 1141.

[54] *Id.* at 1142.

[55] FED. R. CIV. P. 15(c)(1)(B).

[56] *See* United States *ex rel.* Ven-A-Care, Inc. v. Dey (*In re* Pharmaceutical Indus. Average Wholesale Price Litig.), 498 F. Supp.2d 389, 399 (D. Mass. 2007) ("[I] some circumstances egregious delay may be sufficiently prejudicial to trigger due process violations, this record is insufficient to address any constitutional concerns.").

& Taylor, *Inc.*, the relator charged the defendant booksellers with "fraudulently overcharging . . . federally-funded libraries."[57] The Government renewed the seal period three times before "the court issued an order to show cause why the seal . . . should not be lifted in its entirety and the complaint served upon the defendant."[58] The court lifted the seal, reasoning that:

> There is nothing in the statute or legislative history to suggest that, in evaluating requests for such extensions, the court should disregard the interests of the defendant and the public. Defendants have a legitimate interest in building their defense while the evidence is still fresh. The public has a right to monitor the activities of government agencies and the courts.[59]

Other courts have similarly noted the defendant's right to prepare an adequate defense and the potential for Government abuse of the seal extensions, especially considering the statute's failure to define what "good faith" means for the purposes of an extension. Indeed, the court in *Dey* discussed that the Government's extension of the seal period for nearly a decade was worrisome, and that "these long delays are quite troubling . . . [because] evidence spoils, memories fade, and prejudice may result."[60] Similarly, in *United States v. St. Joseph's Regional Health Center*, the court frowned upon the multiple extensions awarded to the Government, which appeared "to have no other justification than to allow the government to investigate and settle the multiple claims at its own pace" while keeping defendants in limbo.[61]

In addition, in *United States ex rel. Sarmont v. Target*, the Government asked for fifteen extensions of the seal period over the course of seven years, claiming that because the defendant was facing both criminal charges and separate civil charges under the FCA, "the Government needed more time to complete its criminal investigation before electing whether to intervene in the civil action."[62] The defendant claimed that

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[57] United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1189 (N.D. Cal. 1997).

[58] *Id.*

[59] *Id.* at 1189–90.

[60] *Dey*, 598 F. Supp. 2d at 399, n.6; *see, e.g.*, United States *ex rel.* Ramadoss v. Caremark, Inc., 586 F. Supp. 2d 668, 703 (W.D. Tex. 2008) (concluding that Congress did not envision investigations lasting for multiple years by continual extensions of the seal period and noting that "the government should not . . . be allowed to unnecessarily delay lifting the seal from the civil complaint or processing the qui tam litigation"); United States *ex rel.* Franklin v. Parke-Davis, No. 96-11651PBS, 2003 WL 22048255, at *7 (D. Mass. Aug. 22, 2003) (declining to consider "persuasive" government brief because government was "still not a party").

[61] United States v. St. Joseph's Reg'l Health Ctr., 240 F. Supp. 2d 882, 888 (W.D. Ark. 2002).

[62] United States *ex rel.* Sarmont v. Target, No. 02 C 0815, 2003 WL 22389119, at *2 (N.D. Ill. Oct. 20, 2003).

the long delay was prejudicial, resulting in a due process violation.[63] The court found that, in this case, the delay did not result in a due process violation because the statute of limitations had not yet run.[64] Although the court found that the defendant was not sufficiently prejudiced as to violate due process because the defendant did not adequately prove that the prejudice was "specific, concrete, and supported by evidence," the court left the door open to find a due process violation in similar situations.[65] Indeed, the court noted that the "defendant's objections to being haled into court almost a decade after filing of the complaint d[id] not fall upon deaf ears."[66] Given a better showing of prejudice, the court suggested, the defendant could have had a reasonable claim.

C. Conflict of Interest

Courts have occasionally considered relator actions in the light of conflict of interest. Indeed, defendants have argued that because whistleblowers have a financial stake in the outcome of the case, and yet are essentially prosecutors because they stand in the shoes of the government, their procedural due process rights are infected with bias.[67] Further, "the pursuit of substantively or procedurally defective FCA claims is an objective manifestation of the informer's conflict of interest."[68]

In *United States ex rel. Kelly v. Boeing Co.*, a former employee of Boeing "filed a complaint under seal alleging that Boeing" violated the FCA by "improperly charg[ing] to the government certain facilities lease costs . . . related to its work as a subcontractor on the Government's B-2 Bomber and Advanced Tactical Fighter programs."[69] After Kelly served his complaint on the Government, the Government continually renewed the seal period and investigated the allegations for over three years before deciding not to intervene in the case.[70] The court subsequently unsealed the case, and the relator proceeded as a private party, while Boeing claimed that the FCA *qui tam* process was unconstitutional.[71]

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[63] *Id.* at *3.

[64] *Id.* at *7. *See* United States v. Davis, 231 F. Supp. 2d 701, 707 (S.D. Ohio 2002) ("[I]f courts could conclude that a mere temporal delay were enough to give rise to a deprivation of due process even where the statutory period of limitations had not run, it would be tantamount to a judicial override of legislative prerogative.").

[65] *Sarmont*, 2003 WL 22389119 at *7 (quoting United States v. Sowa, 34 F.3d 447, 450 (7th Cir. 1994)).

[66] *Id.*

[67] *See* Beck, *supra* note 16, at 623.

[68] *Id.* at 624.

[69] United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 745 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994).

[70] *Id.*

[71] *Id.*

Specifically, Boeing contended "that the FCA violate[d] Boeing's right not to be deprived of property without due process because it permitted financially interested relators to prosecute the company on behalf of the government."[72] The FCA's "promise of a reward to relators for successful prosecution creates a conflict of interest between [the] relator's desire for pecuniary gain and duty as a prosecutor performing 'government functions' to seek a just and fair result."[73] Further, Boeing contended that, "[b]ecause the government is the real party in interest," and the relator just stands in the shoes of the Government, "a relator 'must place justice above competing objectives.'"[74]

Holding for the Government, the court found that, because the "qui tam action is taken on behalf of *both* the government and the relator, . . . the two share a single interest in successful litigation;" and thus, the court concluded that there was no conflict of interest.[75] Moreover, the court found that "the fact that relators sue in the name of the United States does not mean that they wield governmental powers and therefore owe the same type of duty to serve the public interest as government prosecutors."[76]

Other courts, however, have suggested that a conflict of interest on the part of one bringing the suit for the government who also benefits financially may result in a due process violation. By analogy, in *Marshall v. Jerrico*, the plaintiff brought an action "challenging the civil penalty provisions of the [Fair Labor Standards] Act."[77] The issue concerned whether § 16(e) of the Fair Labor Standards Act, which provides that "sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties,"[78] violated the Due Process Clause by "creat[ing] an impermissible risk of bias on the part of the assistant regional administrator."[79] Bias must be considered as a possibility because, under the FLSA, "a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office."[80]

Although the Court found that there was not a due process violation because the biasing influence was "too remote and insubstantial to violate the constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions," it also suggested that a bias could arise and violate defendant's procedural due process rights.[81] Indeed, the Court stated: "[a] scheme injecting a personal interest,

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[72] *Id.* at 759.
[73] *Id.*
[74] *Id.* (quoting Brief of Appellant at 10, *Boeing*, 9 F.3d 743 (No. 92-36660)).
[75] *Id.* at 760.
[76] *Id.*
[77] Marshall v. Jerrico, 446 U.S. 238, 241 (1980).
[78] *Id.* at 239.
[79] *Id.* at 241.
[80] *Id.*
[81] *Id.* at 243–44.

financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions."[82] Thus, while in this particular situation, the bias was too remote to seriously impact due process, where a relator who directly stands in the shoes of the Government for purposes of prosecuting the defendant, the Court may have found a connection concrete enough to result in a violation of due process.

Moreover, the Court noted that it decided against the defendant in part because "[n]o governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act."[83] But, in the context of a *qui tam* suit, it is undisputed that a relator stands to benefit greatly from the successful enforcement of the FCA because he is guaranteed some form of monetary reward for even bringing the suit. This guarantee is, in fact, written into the statute.[84]

III. DETERMINING A DUE PROCESS VIOLATION

The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law."[85] Courts have interpreted the Due Process Clause as having both a substantive and procedural component.[86] The relevant due process question pertaining to the *qui tam* provisions of the FCA and FERA, however, specifically raises procedural due process concerns. For instance, the Fifth Circuit noted:

> The "touchstone" of procedural due process is [the] protection of the individual against the arbitrary action[s] of the government. The goal of procedural due process analysis is to determine whether [the government] has provided adequate procedures to minimize efficiently the risk of arbitrary or erroneous deprivations of life, liberty, or property. In pursuing this goal, however, courts must also take into account society's interest in the efficient administration of government.[87]

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[82] *Id.* at 249–50; *see also* Young v. United States *ex rel.* Vuitton et Fils, 481 U.S. 787, 789 (1987) (holding that, while courts generally "may appoint private attorneys to prosecute criminal contempt" charges, "the District Court erred in appointing . . . attorneys" who were counsel for an interested party in the underlying litigation). Justice Blackmun concluded that this error amounted to a due process violation. *Id.* at 814–15 (Blackmun, J., concurring) ("[Due process] requires a disinterested prosecutor with the unique responsibility to serve the public, rather than a private client, and to seek justice that is unfettered").

[83] *Jerrico*, 446 U.S. at 250.

[84] 31 U.S.C. § 3730(d)(1)–(2) (2006).

[85] U.S. CONST. amend. V.

[86] *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1975).

[87] Thibodeaux v. Bordelon, 740 F.2d 329, 336 (5th Cir. 1984) (internal citations omitted).

In *Mathews v. Eldridge*, the Court devised a three-part test for determining the amount of process to be administered in a given situation:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[88]

The first question, then, is whether a defendant in a *qui tam* suit under the FCA is deprived of a life, property, or liberty interest when his suit, for which he has no notice, either drags on for years through renewal of the sixty day extension periods, or plaintiff's conflict of interest interferes with his process.[89] Conviction of an offense under the FCA results in treble damages, and civil monetary penalties for each false claim made to the government can be as great as $11,000 each.[90] Courts have held these provisions "to be punitive and are subject to an Eighth Amendment review."[91] Clearly, paying a penalty under the FCA results in a deprivation of property in that the defendant is forced to pay a large fine. "Courts have consistently held that people retain a property interest in the money they possess."[92] Further, not only will defendants be deprived of money through damages, they will also be deprived of property through payment of attorneys' fees and lost time. The issue of lost time is crucial because, without notice, defendants inevitably spend a sizeable amount of time, if they are even aware of the suit, trying to ascertain what the suit is about. Even if the case never comes to trial, instead of paying penalties, defendants may be forced to settle in order to keep costs down.[93]

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[88] *Mathews*, 424 U.S. at 335.

[89] Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: "Outsourcing" the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. REV. 837, 839 (2007).

[90] Kevin M. Comeau, *False Certification Claims in Light of* Allison Engine *and False Claims Act Amendments Introduced in the 111th Congress*, 18 FED. CIR. B.J. 491, 512 (2009).

[91] *Id.*; *see also* Hudson v. United States, 522 U.S. 93, 103–05 (1997) ("The Eighth Amendment protects against excessive civil fines . . . .").

[92] LaSalle, *supra* note 15, at 521 (citing Bd. of Regents v. Roth, 408 U.S. 564, 571–72 (1972) ("The Court has also made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.")).

[93] Fabrikant & Nwabuzor, *supra* note 89, at 838–39 ("[U]nduly prolong[ing] the seal period . . . enhance[s] the ability of the government and relator's counsel, often acting in consort, to extract unreasonable settlements from defendants."); *see also* Beck, *supra* note 16, at 625 ("[C]ases can prove to have a nuisance value, causing the defendant to settle to avoid the higher costs of defending a fraud claim.").

A. The Private Interest

The first prong of the *Mathews* Test considers the weight of the private party's interest at stake. Defendants in FCA actions have a great interest in receiving adequate process. The interest of defendants should be viewed taking into consideration the fact that the seal period, during which the government conducts one-sided discovery against the defendant, is often extended for years.[94] Defendants have an interest in ensuring that they do not waste time and money solving a mystery as to what suit they are fighting or spending time running around in needless circles trying to decipher the contents of a plaintiff's claim. Often these claims turn out to be completely without merit, are only filed with the relators' monetary interests in mind, and potentially drag on for years at the expense of defendant's time, money, and peace of mind.[95]

Additionally, defendants have an interest in protecting their reputations. As Frank LaSalle notes in his article, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, "[f]raud allegations are taken very seriously by the courts," and can be severely detrimental for a defendant's business reputation.[96] This is especially true where the plaintiff's complaint is under seal for an extended period of time, and the only real information the general public has about the complaint is in the form of vague whispering and rumors, often based on meritless accusations. Defendants should not have to risk business ruin because of false accusations and costly guesswork as to what claim to prepare for in potential litigation.

B. Current Procedures and Feasible Alternatives

The second prong of the *Mathews* Test requires an analysis of the current procedures in place and asks whether there are any feasible alternatives to these procedures.[97] Currently, as discussed above, the FCA provides for liberal sanctions and high damages in the event of conviction, so that it is necessary for procedural protections to be implemented to safeguard defendants' due process rights.[98] The current procedure allowing the government to continually renew the sixty day extension periods is important in

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[94] *See supra* note 89 and accompanying text.

[95] Beck, *supra* note 16, at 623–25.

[96] LaSalle, *supra* note 15, at 525.

[97] Mathews v. Eldridge, 424 U.S. 319, 335 (1975).

[98] Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1839–40 (1992) ("[L]abeling more-than-compensatory money sanctions punitive rather than deterrent would require the increased use of procedural protections. By calling the sanctions deterrent, compensatory, or simply debt collection devices, the Court has avoided developing procedural protections for settings in which punitive sanctions were imposed. . . . Abandoning the conventional paradigms would require the development of middleground procedure, specifically designed to respond to the punitiveness of middleground sanctions.").

that the government is given more time to investigate the relator's suit and prepare to file charges against a defendant.[99] However, it is also possible that this same procedure would be equally as effective if the courts played a more active role in checking the Government's ability to continually renew the sixty day seal periods. Indeed, currently the only check on the Government's ability to renew is that its request for renewal must be for good cause.[100] Instead of using this provision as a check, courts often grant these extensions liberally.[101]

With regard to the relator's conflict of interest, the current procedure, which allows relators to file suit in the name of the Government, is effective in increasing the number of prosecutions against those who have submitted false claims for payment to the Government.[102] The procedure encouraging relators to file suit is less of an issue than the lack of checks on their ability to do so, and the potential that their wide latitude in filing and conducting their cases may result in widespread abuse of the process at the expense of defendants.[103] Further, the FCA put limited procedures (now expanded by FERA) in place to protect relators from retaliatory actions taken by their employers, such as demotion and firing.[104] This means they have every incentive to file a suit, whether or not it is valid. Advocates of the whistleblower scheme argue that defendants are protected because, if the whistleblower's complaint is frivolous, the Government will most likely decline to intervene.

C. The Government Interest

The third and final prong of the *Mathews* test considers the Government's interest in the current procedure.[105] The Government does have several key interests in the procedures as they currently exist. The sixty day seal period during which the defendant has no notice of the suit, and the potential extensions of the seal period are key for

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[99] S. REP. NO. 99-345, at 24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289; *see also* JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS § 4.04(B) (3d ed. 2006) ("[W]hile there are no firm limits to the length of time a case may remain under seal, extensions may not be granted groundlessly or indefinitely.").

[100] 31 U.S.C. § 3730(b)(3) (2006).

[101] *See supra* note 89 and accompanying text.

[102] ABA, QUI TAM LITIGATION, *supra* note 18, at 2–3 (noting the three fundamental concerns that shaped *qui tam* enforcement procedure are: "(1) the detection of fraud, (2) the subsequent investigation of fraud, and (3) litigation hurdles that had evolved through case law which limited the government's ability to recover fraud losses").

[103] Marshall v. Jerrico, 446 U.S. 238, 249–50 (1980).

[104] *See, e.g.*, 31 U.S.C. § 3730(h) (stating that whistleblowers who are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" because of their *qui tam* complaints are entitled to "reinstatement [at] the same seniority, . . . [two] 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").

[105] Mathews v. Eldridge, 424 U.S. 319, 335 (1975).

several reasons. The Senate reports discussing the seal period noted that the provision served an important purpose in allowing the Government to maximize its ability to investigate the allegations in the complaint by keeping the allegations hidden.[106] This way the defendant cannot be tipped off that a charge has been filed and cause interference with the Government's investigation.[107] Indeed, the seal period allows the government to "avoid compromising any pending criminal investigation."[108]

Generally speaking, because the use of *qui tam* whistleblowers has increased the number of *qui tam* suits, the seal period also serves a purpose in "allow[ing] the government first to ascertain in private whether it was already investigating the claims stated in the suit and then to consider whether it wishes to intervene," based on this information.[109]

Further, although it is a potential conflict of interest, allowing relators to stand in the shoes of the Government in filing these *qui tam* actions serves several purposes as well. "[P]rivate informers supplement the activities of public law enforcement personnel, thereby boosting the number of enforcement actions filed."[110] The Government contended that because whistleblowers file more cases, they further protect the public treasury by bringing fraudulent behavior to light.[111] Indeed, in *United States v. United States ex rel. Thornton*, the court stated that "it is in the public interest to protect the federal treasury and ensure the integrity and honesty of those that receive payments from the government."[112] However, it is also worth noting that a relator's ability to file

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[106] The Senate Report for the False Claims Amendments Act of 1986 states:

> Keeping the *qui tam* complaint under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action. Nothing in the statute, however, precludes the Government from intervening before the 60-day period expires, at which time the court would unseal the complaint and have it served upon the defendant.

S. REP. NO. 99-345, at 24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289.

[107] An essential problem with this, of course, is that the point of the notice requirement is to give a defendant a "heads up" so they can begin preparing for litigation.

[108] S. REP. NO. 99-345, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N., 5266, 5281 ("In response to Justice Department concerns that *qui tam* complaints filed in open court might tip off targets of ongoing criminal investigations, the subcommittee adopted a 60-day seal provision for all *qui tam* complaints.").

[109] BOESE, *supra* note 99; *see also* United States *ex rel.* El-Amin v. George Washington Univ., No. 95-2000(JGP), 2007 WL 1302597 at *3 (D.D.C. 2007).

[110] Beck, *supra* note 16, at 609.

[111] United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 481 F. Supp. 2d 815, 818 (S.D. Tex. 2007) (noting that the FCA "create[s] incentives for potential whistle blowers to assist the government to discover fraud against the taxpayers" (quoting United States v. United States *ex rel.* Thornton, 207 F.3d 769, 771 (5th Cir. 2000))).

[112] United States v. United States *ex rel.* Thornton, 207 F.3d 769, 771 (5th Cir. 2000).

suit in the shoes of the Government is supplementary to the Government's ability to proceed on its own.[113] It is only if the Government cannot bring the case for some reason that a relator should be allowed to file a suit under the FCA.[114]

With regard to the public interest, the Government claims that in balancing its interest against that of a defendant in a *qui tam* action, the Government's role in serving the public interest must be considered.[115] However, how much the public interest has actually been benefitted by whistleblower suits is not a settled matter. Indeed, "no conclusive evidence shows that the qui tam provision of the FCA increases the deterrent effect of the statute."[116] Moreover, "the qui tam provision of the FCA is not as valuable in protecting the public interest as proponents claim, since it allows relators to receive funds that the government would otherwise earn."[117] The *qui tam* provision also "allows relators to recover funds that" are unfavorable to the Government.[118]

D. Balancing the Prongs

Prior to the revisions to the FCA set forth in FERA, the outcome of the *Mathews* balancing test would have been different than a subsequent balancing test after the adoption of FERA. Before the amendments in FERA, the Government interest most likely outweighed the lack of protection for a defendant's due process rights. This is because, while the defendant does have an interest in protecting his reputation and while the risk of monetary damage and wasted time are legitimate and compelling interests, the stakes are most likely not great enough to outweigh the Government interest in protecting the treasury against fraud.

Moreover, while the procedures in place do not provide a significant amount of protection for defendants, they do provide some degree of protection. For example, in a *qui tam* suit which the Government declines to join, the court may award the defendant attorneys' fees and expenses in certain situations where the whistleblower's complaint lacks credibility.[119] It is worth noting, however, that a court *may* award

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[113] United States *ex rel.* Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 702 (8th Cir. 1995) ("[T]he [FCA] must be analyzed in the context of its twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.").

[114] *Id.*

[115] United States *ex rel.* El-Amin v. George Washington Univ., No. 95-2000 (JGP), 2007 WL 1302597 at *5–6 (D.D.C. May 2, 2007) (considering the government's public policy reasons for the *qui tam* procedure and extension of the seal period).

[116] Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 980 (2007) (capitalization omitted).

[117] *Id.*

[118] *Id.* at 997.

[119] *See* Hudson v. United States, 522 U.S. 93, 105 (1997); *see also* 31 U.S.C. § 3730(d)(4) (2006) ("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

damages to the defendant, but does not have to.[120] In addition, the traditional hurdles of the litigation process and the need for relators to prove their claims by a preponderance of the evidence protect defendants against the worst—though by no means all—abuses.[121]

The Government interest in increasing the number of fraud cases prosecuted through the use of relators and the increased investigation time provided by the sixty day extension periods slightly outweighs the interest of defendants.[122] In part, this is because the "negative consequences for [defendants] are, at the very least, tolerable in comparison to the strong benefits of encouraging external whistle blowing under the qui tam provision."[123] Generally speaking, as between the party who may have been responsible for a fraud, and one who has nothing to do with the fraud, the party who may have perpetrated the fraud should bear the risk of the charge.

Moreover, the Government is often overloaded on cases resulting from its use of relators. It is not unreasonable that the government may need more than sixty days to thoroughly investigate a potential relator's complaint. Indeed, it is in some sense a benefit to the defendant for the complaint to remain under seal, in that it protects the defendant's reputation in not revealing the potential fraud to the public. Additionally, allowing the government more time to investigate the complaint assures that if a court removes the seal and the relator serves the complaint on the defendant, that the complaint is legitimate. However, given the potential for abuse inherent in both the allowance of sixty day seal extensions and the relators' conflict of interest in bringing these suits, the private interests at stake could, in certain situations, outweigh the Government interests and thus demand a set of procedures with more checks on relators and Government behavior during the seal period.

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expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.").

[120] *See, e.g.*, United States *ex rel.* Millner v. ITT Aerospace, No. 95-3545, 1997 U.S. App. LEXIS 19091, at *14–16 (7th Cir. July 21, 1997) (awarding attorneys' fees to defendant and granting summary judgment because plaintiff's claim was vexatious and frivolous); United States *ex rel.* Minna Ree Winer Children's Class Trust v. Regions Bank of La., No. 94-408, 1996 U.S. Dist. LEXIS 8779 (E.D. La. June 18, 1996) (awarding attorneys' fees "in light of the litigious history of [the suit's] instigators"); *cf.* United States *ex rel.* Gold v. Morrison-Knudsen Co., 870 F. Supp. 457, 460 (N.D.N.Y. 1994) (denying the defendant's request for attorneys' fees), *cert. denied*, 517 U.S. 1213 (1996).

[121] FALSE CLAIMS AMENDMENTS ACT OF 1986, S. REP. NO. 345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5296 ("The Committee believes that the appropriate burden of proof devolving upon the United States in a civil False Claims Act suit is by a preponderance of the evidence.").

[122] F. Paul Bland, *Why 'Qui Tam' is Necessary*, NAT'L L.J., Nov. 4, 1991, at 13, 14 ("[A] major reason for revitalizing qui tam suits was that public prosecutors did not have the time or resources to go after a high proportion of reported significant fraud.").

[123] 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 (1997).

IV. THE EFFECT OF FERA ON DEFENDANTS' DUE PROCESS RIGHTS

The amendments to the FCA set forth in FERA extend the rights of relators and the Government in FCA actions further than the existing procedures protect defendants' due process rights. FERA leaves open procedural questions which could provide some protection for defendants as against the extension of relators' and Government rights under FERA. For example, FERA does not address whether the continual extension of the seal period combined with the effective extension of the statute of limitations resulting from the government's ability to relate its Complaint in Intervention back to the relator's initial complaint results in a violation of defendant's procedural due process rights. Moreover, FERA never addresses the question of notice and how the defendants' lack of notice should be treated given the changes Congress has made to the FCA; nor does FERA address the relator's potential conflict of interest. As a result of the new privileges given to the Government and relators under FERA, and the omission of guidance on key procedural issues, under a subsequent *Mathews* analysis, the Government interest does not outweigh the defendants' interest.

To reiterate, FERA includes several amendments that directly impact the whistleblower provisions of the FCA. This discussion is split into two sections, the first discussing procedural changes in FERA, and the second highlighting the other relevant amendments.

A. Procedural Changes

There are several key procedural changes in FERA that significantly alter the whistleblower provisions in the FCA.[124] First, under FERA, the Government's complaint in intervention relates back to the relator's complaint for statute of limitations purposes, even if the seal period has been extended for years and years.[125] That the Government's complaint in intervention relates back to the relator's initial complaint, generally speaking, would not be a problem given that the relator stands in the shoes of the Government for standing purposes.[126] However, because FERA allows any addition of new Government claims after any amount of seal period extensions, even if the defendant can somehow gather at the beginning what the suit is about, without notice, he may have no idea what the suit will become or against what he must

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[124] JONATHAN L. DIESENHAUS ET AL., HOGAN LOVELLS, GOVERNMENT CONTRACTS UPDATE: NEW FALSE CLAIMS ACT AMENDMENTS IMPOSE LIABILITY FOR THE KNOWING AND IMPROPER RETENTION OF OVERPAYMENTS 2 (2009), http://www.hoganlovells.com/files/Publication/58bb8a0a-f182-4639-86b6-31a80e4962ac/Presentation/PublicationAttachment/8d2f8f83-cb66-47ca-975c-31ef9fb163b3/GKUpdate.pdf.

[125] *See* Fraud Enforcement Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(b)(3), 123 Stat. 1617, 1623.

[126] Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 774 (2000) (finding that injury to the United States suffices to confer standing on a relator).

defend. The statute of limitations is supposed to act as a procedural protection for the defendant as against his deprivation of notice during the seal period. But, in allowing relation back, Congress effectively extended the statute of limitations for as long as necessary for the Government to make its case.[127]

Second, at the discretion of the Government, relators now have access to all information obtained by the Government as part of the investigation of the claim, which the Government conducts through use of Civil Investigative Demands (CIDs).[128] "CIDs are requests for documents, interrogatory responses and/or testimony to facilitate investigations of FCA violations."[129] FERA removes procedural hurdles to authorizing use of CIDs to investigate *qui tam* allegations.[130] In part, FERA accomplishes this feat by allowing the Attorney General to delegate power to anyone in the DOJ to sign CIDs for information, whereas, before only the Attorney General could sign these demands.[131] As Kevin M. Comeau notes, "These amendments will upset the courts' careful balancing of government and contractor interests and usher in a new wave of relator-initiated litigation."[132]

Because relators may have access to information obtained by the Government as part of its investigation, even if the Government decides not to intervene in the suit, relators will have an additional advantage over the defendant because they will be able to benefit from Government resources. Indeed, "the standard seal imposed on FCA cases does not preclude the federal government *or* relator from sharing the complaint, any other pleadings, or the written disclosure with any state or local government entity named as a co-plaintiff."[133] Given this new provision, a hypothetical relator could continue an action as a civil suit against a defendant when the Government decides not to intervene in the action. Whereas, before, the relator would not have had the full advantage of Government resources and the fruits of the Government investigation on which to rely, now the relator, no longer in the shoes of the Government but instead acting

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[127] See JONES DAY, *supra* note 7, at 2 ("FERA seems to ignore the issue of notice and codifies an exception that, for purposes of the statute of limitations, treats the government's later-filed allegations as if they were filed when the case was initiated. This has the effect of expanding liability for the defendant and limiting the defendant's ability to defend itself. For example, if a whistleblower case was filed in 2005 and not made known to the defendant until 2009, the defendant could have to defend allegations dating back to 1995, which is four years more than the 10-year statute of limitations would allow in most other federal lawsuits.").

[128] *See* 31 U.S.C.A. § 3733 (West 2011).

[129] ALI ET AL., *supra* note 2, at 3.

[130] *Id.*

[131] 31 U.S.C. § 3733(a)(1) (2006) ("The Attorney General may delegate the authority to issue civil investigative demands [CIDs] under this subsection."); *see* Ali, *supra* note 2, at 3.

[132] Comeau, *supra* note 90, at 492–93 (adding that "[t]he current proposals are overbroad and will strip defendants of most of their jurisdictional defenses against relator-initiated fishing expeditions.").

[133] Christopher C. Burris et al., *Converging Events Signal a Changing Landscape in False Claims Act and Whistle-Blower Litigation and Investigations*, FED. LAW., Nov./Dec. 2009, 61.

as a private party, has a plethora of additional information to use in its case against the defendant.

That whistleblowers now receive Government information and the Attorney General's ability to delegate the authority to sign-off on CIDs combine to put the defendant at a severe disadvantage. Allowing other DOJ employees to sign off on CIDs "will increase the use of CIDs which enable the Government to engage in unilateral discovery (including interrogatories and depositions of targets and witnesses) prior to the defendant being served with the complaint."[134]

The combination of the procedural amendments results in a litigation climate which significantly favors whistleblowers. Not only can the government now engage in one-sided discovery against a defendant without the defendant's knowledge of the fact that either a suit has been brought or what the suit is about, the Government can now conduct more extensive discovery, some of which information may be confidential, and can share this discovery with the relator to be used later in a private suit.[135] Further, this one-sided discovery may continue for years while the Government renews the extension period, with any new claims the Government devises during the interim added to the initial complaint, regardless of the defendant's lack of notice. Significantly, these procedural amendments are applicable to cases pending on the date of enactment.[136]

B. Substantive Liability Changes

FERA's procedural changes are crucial to examining a defendant's due process rights; however, it is necessary to examine the new substantive liability provisions as well, to accurately determine what exactly a defendant now stands to lose under FERA's lesser procedural safeguards. It is worth noting that the substantive liability provisions of FERA have expanded the reach of the FCA, by expanding the definition of "claims" and lowering the materiality requirement.[137]

The first key substantive change eliminated the presentment clause, which required that in order for liability, a person must knowingly present a claim for payment to the

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[134] Mark R. Troy, *New Federal Fraud Law Implements Key Changes to False Claims Act*, COUNSEL'S ADVISORY (Wash. Legal Fund, Washington, D.C.), June 5, 2009, at 1, *available at* http://www.wlf.org/Upload/legalstudies/counselsadvisory/060509Troy_CA.pdf (noting further that "[b]ecause CIDs can be issued after a *qui tam* complaint has already been filed but before it is served, this form of discovery may deprive defendants of many of the protections afforded by the Federal Rules of Civil Procedure").

[135] *See* COOK, *supra* note 7, at 7.

[136] *See* Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(f)(1), 123 Stat. 1617, 1625 (requiring that relation back provisions "shall . . . apply to all claims under the [FCA] that are pending on or after [the date of enactment].").

[137] *See* Burris et al., *supra* note 133, at 60 ("The amendments would allow FCA suits on claims made to the federal government for money or property to which the United States does not have title but to which the U.S. government does have control, again expanding the reach of the FCA into largely new territory.").

Government.[138] After FERA, the section reads, "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," deleting the portion of the statute which required these payments to be made directly to the Government.[139] Thus, FERA establishes "liability for false and fraudulent claims submitted to government contractors and grantees 'if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest.'"[140] This expansion of liability means that anybody along the chain from subcontractor of a subcontractor, to subcontractor, to contractor, can be liable for presenting a false claim to the Government, regardless of intent. So, if a subcontractor presents a claim to a contractor and it turns out the claim is unintentionally fraudulent, both the subcontractor and the contractor may be liable to the Government under the FCA and both may face treble damages.

The second key substantive change involves the substitution of a "materiality" requirement for the requirement that one must intend to defraud the Government.[141] Through these changes, Congress specifically sought to overrule the Supreme Court's decision on June 9, 2008, in *Allison Engine Co. v. United States ex rel. Sanders*.[142]

In *Allison Engine*, two shipbuilders entered into a contract with the Navy "to build a new fleet of . . . guided missile destroyers."[143] In order to fulfill this contract, they entered into a subcontract with Allison Engine Co. to build generator sets.[144] Allison Engine then subcontracted with General Tool Co. (GTC) and GTC subcontracted with Southern Ohio Fabricators, Inc. (SOFCO).[145] The Navy's contract with the shipbuilders, and Allison Engine's contract with its subcontractors required "that every part of each destroyer be built in accordance with the Navy's baseline drawings and military standards."[146] Further, the subcontracts specified that each generator must be accompanied by a certificate of conformance.[147]

In 1995, two former employees of GTC brought suit against Allison Engine, GTC, and SOFCO as *qui tam* relators under the FCA, seeking to recover damages under

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[138] 31 U.S.C. § 3729(a)(2) (2006) provided that any person who "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" is liable.

[139] 31 U.S.C.A. § 3729(a)(1)(A) (West 2011), *amended by* Fraud Enforcement and Recovery Act of 2009 (FERA) § 4.

[140] Burris et al., *supra* note 133, at 60 (quoting Fraud Enforcement and Recovery Act of 2009 (FERA) § 4).

[141] *Compare* 31 U.S.C.A. § 3729(a)(1)(B) (West 2011), *with* 31 U.S.C. § 3729(a)(1)(B) (2006).

[142] Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008).

[143] *Id.* at 665.

[144] *Id.* at 665–66.

[145] *Id.*

[146] *Id.* at 666.

[147] *Id.*

31 U.S.C. § 3729(a)(1), (2), and (3).[148] The Court granted certiorari with respect to the latter two sections. The relators claimed that Allison Engine submitted its invoices, as well as GTC's and SOFCO's invoices, to the shipbuilders for defective work which did not conform to the "baseline drawings and military standards."[149] The relators, however, could not show that the shipbuilders had ever submitted the subcontractors' invoices to the Navy, nor did they show any evidence of any invoices that the shipbuilders had submitted to the Navy.[150]

With regard to 31 U.S.C. § 3729(a)(2), the Court held that "a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government'" to be held liable under this section.[151] Next, the Court discussed 31 U.S.C. § 3729(a)(3), finding "that a conspiracy to defraud a federally funded private entity does not constitute a 'conspiracy to defraud the United States.'"[152]

In explaining the reason for its unanimous holdings, the Court noted that without the element of specific intent to defraud the Government, the reach of 31 U.S.C. § 3729(a)(2) liability would be "almost boundless."[153] Further, the Court explained that in interpreting the statute in this manner, it intended to "giv[e] effect to Congress' efforts to protect the Government from loss due to fraud but also ensures that 'a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.'"[154] FERA deletes the former (a)(2) and adds a new section, 31 U.S.C. § 3729 (a)(1)(B), which provides that any person who "knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or

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[148] Prior to FERA, 31 U.S.C. § 3729(a) (2006) provided in part that:

> Any person who—
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . 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; [or]
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . . .

[149] *Allison Engine*, 553 U.S. at 666.

[150] *Id.* at 667.

[151] *Id.* at 668–69 (finding that "[e]liminating this element of intent, as the Court of Appeals did, would expand the FCA well beyond its intended role of combating 'fraud against the *Government*.'" (internal citation omitted)).

[152] *Id.* at 673.

[153] *Id.* at 669 (quoting United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 496 (D.C. Cir. 2004)); Gerald E. Wimberly et al., *The Presentment Requirement Under the False Claims Act: The Impact of* Allison Engine *& the Fraud Enforcement and Recovery Act of 2009*, 9 BRIEFING PAPERS 1, 5 (2009).

[154] *Allison Engine*, 553 U.S. at 672 (quoting Anza v. Ideal Steel Corp., 547 U.S. 451, 470 (2006)).

fraudulent claim" is liable.[155] This new provision means that the basis for the intent requirement—that a person must intend for the Government itself to pay the claim for liability to attach—has been eliminated.[156] Now, with the inclusion of the word "material" in the provision, the Government or relator must show only that the false claim or statement had "a natural tendency to influence" or was "capable of influencing" the payment of the claim.[157]

When read in combination with the new definition of "claim," which now encompasses "money or property . . . spent or used on the Government's behalf or to advance a Government program or interest,"[158] it seems evident that FERA seeks to expand liability by establishing clear liability for false or fraudulent claims submitted to government contractors and grantees, and not just to claims made directly to the Government.[159] Thus, FERA ignores the Supreme Court's concerns from *Allison Engine*, nearly guaranteeing that subcontractors will be answerable for more than "the ordinary and reasonable consequences of [their] conduct."[160]

Crucially, FERA's revisions to the FCA's substantive liability provisions apply prospectively to "conduct on or after the date of enactment [May 20, 2009]," with two exceptions.[161] First, 31 U.S.C. § 3729(a)(1)(B) (substituting the materiality requirement for the intent requirement), applies retroactively as if the provision had been enacted on June 7, 2008, two days prior to the decision in *Allison Engine*, to "all claims under the False Claims Act . . . that [were] pending on or after that date."[162] This application essentially negates the *Allison Engine* decision and has prompted discussion over whether it violates the Ex Post Facto and Due Process clauses of the Constitution.[163] Second, 31 U.S.C. §§ 3731(b), 3733, and 3732 of the FCA, which govern the ability of the United States to intervene in *qui tam* actions, the Government's power to conduct investigations, and the jurisdiction of the FCA, apply to any case pending on the date of enactment.[164]

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[155] Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1621 (emphasis added).

[156] Wimberly et al., *supra* note 153, at 7.

[157] 31 U.S.C.A. § 3729(b)(4) (West 2011) (defining "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.").

[158] *Id.* § 3729(b)(2)(A)(ii).

[159] *See* Burris et al., *supra* note 133, at 60 (explaining that in passing FERA, "Congress . . . sought to overturn the . . . ruling in *United States ex rel. Totten v. Bombardier Corporation* that 31 U.S.C. § 3729(a)(1) requires that a false claim be presented directly to the federal government, as opposed to a government grantee" (internal citation omitted)).

[160] Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 672 (2008) (quoting Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 470 (2006)).

[161] Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(f), 123 Stat. 1617, 1625.

[162] *Id.* (internal citation omitted).

[163] Wimberly et al., *supra* note 153, at 9.

[164] *See* Fraud Enforcement and Recovery Act of 2009 (FERA) § 4.

V. *MATHEWS V. ELDRIDGE* ANALYSIS AFTER FERA

Cases that have previously held that the lack of protective procedures used in *qui tam* actions did not rise to the level of a due process violation will have to reconsider the issue with both FERA's substantive liability and procedural amendments in mind. For example, the court in *Dey* found that the Government's continual extensions of the seal period were "worrisome" and caused due process "concerns," but did not result in a violation.[165] When considered in light of FERA's allowance of the relation back of Government complaints in intervention, increased rights of relators and ease of filing a *qui tam* complaint, due process concerns become more than worrisome.

A. Defendant's Interest

The substantive provisions of FERA no longer require intent but only that the fraud be material to the claim for payment.[166] Defendant's interest in having notice of the suit is significantly affected in that his liability is now much more expansive than before, to include not only active fraud, but also any fraud that may possibly have influenced a claim for payment.[167] That is, even if a contractor did not personally commit the fraud, he may be responsible for the actions of his subcontractors who may have committed an action which could be considered capable of influencing a claim. The problem is that the whole scheme at times makes a contractor responsible for actions once, twice, or three times removed from his conduct; and, without adequate notice, the defendant cannot possibly expect to adequately defend against such attenuated claims. At least under the old FCA, when a whistleblower filed an action against a contractor for defrauding the Government, the contractor probably had some idea what the suit was about, because the act required intent.[168] Now, the contractor does not even have to make a claim to the Government itself, but instead to grantees. This makes the connection between a fraudulent claim and the Government increasingly tenuous.[169]

B. Procedures in Place

The procedures in place to protect defendants' rights have become virtually nonexistent after FERA. Even as the Court in *Allison Engine* cautioned against the potential for boundless liability,[170] FERA extended liability to an extreme, without providing

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[165] United States *ex rel.* Ven-A-Care, Inc. v. Dey (*In re* Pharmaceutical Indus. Average Wholesale Price Litig.), 498 F. Supp. 2d 389, 399 (D. Mass. 2007).

[166] *See* Fraud Enforcement Recovery Act of 2009 (FERA) § 4.

[167] *See* DIESENHAUS ET AL., *supra* note 124, at 1.

[168] *See* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 671 (2008).

[169] *See* Matthew Titolo, *Retroactivity and the Fraud Enforcement and Recovery Act of 2009*, 86 IND. L.J. 257, 265–66 (2011).

[170] *Allison Engine*, 553 U.S. at 669.

new ways to protect defendants' right to notice and defense; and, indeed, without even acknowledging the lack of procedural protection or increased liability. Further, the treble damages provisions and punitive nature of the FCA have not been adjusted in FERA to take into account the new expansive liability for potentially lesser cases of fraud.

Consider the Government's ability to renew the seal period continually. FERA now allows all Government complaints and added claims to relate back to the initial relator's complaint regardless of the statute of limitations.[171] The Court in *United States v. Davis* declined to find a violation of defendant's due process rights because the statute of limitations had not run;[172] but now, Congress has essentially decided that for purposes of *qui tam* actions, the statute of limitations may be disregarded. This change suggests that courts may be more willing to find that procedure does not adequately protect defendants' rights.

Further, prior to FERA, commentators argued that a relator's "stand[ing] in the shoes of the Government" for standing purposes created a potential violation of defendants' due process rights because relators earned a reward for successful prosecution of defendants.[173] This "create[d] a conflict of interest between [the] relator's desire for pecuniary gain and duty . . . [of] seek[ing] a just and fair result" in performing government functions.[174] However, FERA potentially increases a relator's bias by giving him more of an incentive to file the suit to make his own personal lawsuit against the defendant more fruitful. Indeed, a relator now has access to all information obtained as part of the Government's investigation; so, even if the Government does not pursue the claim, the relator, acting as a private party, can continue the suit, with the advantage of knowing all the information gained in Government discovery efforts.[175] This increased incentive serves to heighten the number of "impermissible factors [brought] into the prosecutorial decision," thereby increasing the bias and raising "serious constitutional questions."[176]

Moreover, FERA increased the protections for whistleblowers filing suit by expanding a whistleblower's ability to sue for employer retaliation.[177] FERA also expanded the right of action to government contractors or agents, in addition to employees of contractors, who make an effort to stop an FCA violation, regardless of whether the

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[171] Fraud Enforcement Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(b)(3), 123 Stat. 1617, 1623.

[172] *Davis*, 231 F. Supp. 2d 701, 707 (S.D. Ohio 2002).

[173] *See* Daniel C. Lumm, Comment, *The 2009 "Clarifications" to the False Claims Act of 1863: The All-Purpose Antifraud Statute with the Fun Qui Tam Twist*, 45 WAKE FOREST L. REV. 527, 538 (2010). *But see* United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 759 (9th Cir. 1993).

[174] *Boeing*, 9 F.3d at 759; Lumm, *supra* note 173, at 538.

[175] *See* COOK, *supra* note 7, at 7.

[176] Marshall v. Jerrico, Inc., 446 U.S. 238, 249–50.

[177] Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 4(d), 123 Stat. 1617, 1625.

underlying efforts were made in furtherance of an FCA action.[178] Whistleblowers now not only have access to more government information and the potential for reward, thanks to procedural protections, they no longer have to worry about retaliation. So, why not file a complaint, frivolous or not, when there are really no ramifications for doing so? The way FERA has amended the statute basically ensures that whistleblowers may get something out of a suit, because the defendant may end up settling for the sake of its reputation. It is worth noting that, while FERA increased procedural protections for whistleblowers, it did not add new provisions with protections for defendants, or even mention their lack of notice.[179]

C. Government Interest

The Government interest is essentially the same as before. To recap: the Government has an interest in increasing accountability for perpetrating fraud on the Government and protecting the federal treasury.[180] Further, with the increased number of whistleblowers coming forward, the function of the seal periods, to give the Government time to investigate, still serves an important purpose.[181] In one respect, the increased number of whistleblower suits anticipated after the passage of FERA heightens the Government's interest in having extra time to investigate.

D. Balancing the Prongs

FERA's passage augments the defendant's interest, and adds procedures that increase the power of whistleblowers, while simultaneously stripping defendants of the statute of limitations in some cases and failing to address pre-existing procedural defects.[182] These defects threaten to upset what little balance between defendants and the Government previously existed.[183] Whereas before, the Government's claim that these provisions and any defects in defendants' due process was a reasonable price to pay in the public interest,[184] the weight on the scales has shifted. Indeed, in a recent case the American Civil Liberties Union (ACLU) challenged the whistleblower

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[178] *See* Edward J. Kinberg, *The Impact of Federal, State, and Local False Claims Acts on the Construction Industry*, FLA. BAR. J., Sept.–Oct. 2010, at 48, 49; COOLEY GODWARD KRONISH, LLP, FRAUD ENFORCEMENT AND RECOVERY ACT EXPANDS THE FALSE CLAIMS ACT 2 (2009), http://www.cooley.info/files/64949_ALERT_FERAandFCA.pdf.

[179] *See* Fraud Enforcement and Recovery Act of 2009 (FERA) § 4.

[180] *Supra* Part III.C.

[181] *See* BOESE, *supra* note 99, at § 4(B).

[182] FERA gives no guidance as to how defendants' right to notice should be addressed under these new provisions; nor does FERA say anything about the renewal of the seal period or the relator's potential conflict of interest. *See generally* Fraud Enforcement and Recovery Act of 2009 (FERA) § 4.

[183] Comeau, *supra* note 90, at 492–93.

[184] *See* Hamer, *supra* note 123, at 101.

provisions in FERA, claiming that they "violated the public's First Amendment right of access to information."[185] Considering that the Government tends to cite the public interest as one of the reasons for having these provisions, this kind of claim dilutes the Government's arguments for the seal period as a means of protecting the public.

Further, more whistleblowers will file actions because of the ease of filing and enhanced protections, which may be a reason to keep the seal periods so that the Government has more time to investigate a heavier load. However, the more cases DOJ must sift through, the more likely it is to increase the number of times it extends the seal period without giving notice to defendants. Thus, abuse of the seal period will become a more rampant problem. Because FERA also strips defendants of the protection of the statute of limitations when the Government continually renews the seal period, defendants cannot even rely on that procedural protection. The increase in whistleblower suits, then, tends to hurt defendants more than it helps the Government.

A court may still award a defendant attorneys' fees and damages if the whistleblower's complaint is frivolous; but, it is not required to do so.[186] It seems illogical that whistleblowers will inevitably recover something either under the statute, by settlement, or by filing private claims if the Government declines to intervene, when defendants are not guaranteed any kind of damages if the plaintiff files a frivolous suit. FERA does not include any procedural protections for defendants on this issue.

Given the holes in FERA where procedural protections could have been, but were not inserted for the protection of defendants, the substantial increase in the defendant's interest because of the expansive liability created by FERA, and the procedural defenses which take away the defendant's already meager protections, FERA's changes to the FCA create a due process violation where before there was an infringement.

CONCLUSION

There have been few cases decided since FERA's passage, and most of these cases have considered the ex post facto argument,[187] though defendants have made arguments that FERA's whistleblower provisions have violated the Due Process Clause as well.[188]

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[185] ACLU v. Holder, 652 F. Supp. 2d 654, 659 (E.D. Va. 2009), *aff'd*, No. 09-2086, 2011 WL 1108252 (4th Cir. Mar. 28, 2011). The ACLU further challenged FERA's whistleblower provisions by also arguing that the seal provisions under the FCA are content-based restrictions that prevent the relator from discussing the case in violation of the relator's First Amendment rights. *Id.* The district court ruled against the ACLU. *Id.* at 671.

[186] *See* Fraud Enforcement and Recovery Act of 2009 (FERA) § 4(d).

[187] See U.S. CONST. art. 1, § 9, which provides: "No Bill of Attainder or ex post facto Law shall be passed."

[188] *See* United States *ex rel.* Sanders v. Allison Engine Co., 667 F. Supp. 2d 747, 756 (S.D. Ohio 2009) (holding that "retroactive application of the amendments to the FCA violates the Ex Post Facto Clause because retroactive application of the amendments to the FCA would impose punishment for acts that were not punishable prior to the enactment of the amendments"); United States v. Aguillon, 628 F. Supp. 2d 542, 550 (D. Del. 2009) (finding that

Several commentators have argued that the new provisions will result in violations of the Due Process and Ex Post Facto clauses of the Constitution.[189] Because of FERA's new provisions expanding liability, it is crucial that defendants be given notice of the suit after a certain period of time. I suggest that, at the very least, the Government not be able to relate back its complaint in intervention and additional claims once the statute of limitations period has passed, or be required to give defendants notice if it intends to do so. While this procedure would not entirely solve the problems faced by defendants during the interim period, at least it would give them some certainty as to when one-sided discovery would end.[190]

In addition, because liability under the FCA has been drastically expanded, and because the FCA has been found by courts to be punitive in nature,[191] there should be some kind of flexibility in the fines doled out for a violation of the FCA. Instead of imposing treble damages and a fine of $11,000 per false claim made on all contractors who submit a false claim, it may make more sense to carry on the distinction from the old FCA with respect to *intent* in this regard.[192]

FERA provides many positive changes to the FCA that allow the federal government to go further than ever before to catch contractors perpetrating fraud upon the federal purse. These amendments will certainly have a beneficial, long ranging effect. However, some of the whistleblower provisions go too far given the current protections for defendants, and must be checked by amending the FCA to add new procedural protections for defendants. Whatever the procedural solution, it is clear that there is a very real danger that defendants' due process rights have and will be violated. These violations cannot continue.

FERA's amendments were not to be applied retroactively "because it would increase [a] defendant's liability for past conduct"); United States v. Sci. Applications Int'l Corp., 653 F. Supp. 2d 87, 106–07 (D.D.C. 2009) (reasoning that defendant's claims did not fall under the new definition of "claim" in FERA because the claims were pending prior to June 7, 2008).

[189] *See generally* JONES DAY *supra* note 7; Comeau, *supra* note 90, at 512 (arguing that FERA will give rise to constitutional challenges).

[190] It has also been suggested by Frank LaSalle in his comment, *The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture*, that increasing "the burden of proof required to prove a false claim by [shedding the] preponderance of the evidence standard" and imposing a clear and convincing evidence standard would remedy some of whistleblowers' worst abuses of the statute. 28 AKRON L. REV. 497, 500, 503 (1995).

[191] *See, e.g.*, Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784–86 (2000) (holding that the treble damages provisions under the FCA are "essentially punitive in nature"); *see also* United States v. Bornstein, 423 U.S. 303, 309 n.5 (1976) (noting that the FCA "was adopted 'for the purpose of publishing and preventing . . . frauds'") (internal citation omitted).

[192] That is to say, those with an "intent" to defraud the Government under 31 U.S.C. § 3729(a)(1)(A) (2006).