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TWO ROADS CONVERGED IN A LEGAL WOOD: THE INTERSECTION OF LITIGATION FUNDING AND THE FALSE CLAIMS ACT

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I. INTRODUCTION

In Robert Frost's famous poem, *The Road Not Taken*, a traveler encounters a fork in the road and chooses "the one less traveled by," which "made all the difference." Today's False Claims Act ("FCA") traveler encounters the opposite: the convergence of the well-worn roads of litigation funding and the FCA. This development has created new concerns in the FCA community. Will litigation funding alter the path of the FCA road? Must the FCA road be cleansed of litigation funding to remain stable? Or is it possible that the convergence, though initially bumpy, can continue smoothly into the horizon? The following hypothetical scenario illustrates how this convergence often occurs in practice:

Leslie is an LPN who works at a nursing home in a small town. She is twenty-four, single, and has two young children. She makes \$40,000 a year and depends on her employment to provide for her family. She has lived in her small town her entire life, and most of her extended family lives there as well. Lately, she has become concerned with the level of care the nursing home has been providing to residents. Also, Leslie's friend who works in accounting tells her that the nursing home overbilled Medicare by \$300,000 last year. She told Leslie that the administrator, who is close friends with the owner, hired an accountant friend to falsify records and prepare cost reports to avoid reimbursing Medicare for the overbilled amount. Leslie's friend suspects this practice has been going on for a few years and that the owner engages in similar practices with the other nursing homes he owns. Leslie is deeply troubled by this information, but she

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does not know how to respond. A short time later, this issue comes up during a home visit with her pastor and a deacon from her local church. The deacon, who is also a local attorney, puts her in touch with a friend who is a relator's counsel. Leslie calls the relator's counsel, and he informs her of the False Claims Act's *qui tam* provisions. The relator's counsel believes that Leslie has a good *qui tam* case with a reasonable likelihood of obtaining a significant recovery if she pursues the case. However, Leslie is uncomfortable with the fact that the case may take years to resolve, and she is concerned with the broader reputational consequences of pursuing the case. She is also concerned with the costs of litigation for which she may be liable. The relator's counsel informs her that companies exist that will provide her a degree of financial support in exchange for a percentage of her recovery. She contacts one of these companies and decides that their financial support will alleviate most of her concerns. She signs a litigation funding agreement with the company, and her relator's counsel soon files her *qui tam* case. Shortly thereafter, while discussing her decision with her mother, she mentions that she would have walked away from the case had the financial support not been available.

The service Leslie used is commonly known today as third-party litigation funding. This funding has existed for years, but it recently received attention in the FCA community in *Ruckh v. Salus Rehab., LLC*. In *Ruckh*, the Eleventh Circuit held that a relator's assignment of a portion of the *qui tam* bounty did not negate her standing or violate the FCA.¹ *Ruckh* quickly prompted concerns that its support for litigation funding would lead to a surge in FCA cases and otherwise threatened the structure of the FCA.²

The purpose of this Article is not to assess the validity of litigation funding in general. Plenty of others have engaged in that assessment.³ Instead, this Article will explore the concerns associated with litigation funding, as well as the older doctrines of champerty and maintenance, then view those concerns through an FCA lens. Part II of this Article will provide a basic overview of the history of

1. *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1101-03 (11th Cir. 2020).

2. See, e.g., Daniel Wilson, *3rd-Party Funding Ruling Opens Door for FCA Case Flood*, LAW360 (July 27, 2020, 10:10 PM), <https://www.law360.com/articles/1295611/3rd-party-funding-ruling-opens-door-for-fca-case-flood> [<https://perma.cc/57ZC-FP5F>]; and David Jochnowitz & Stephen Hasegawa, *Litigation Funding Attacks Pose Threat to FCA*, LAW360 (Aug. 21, 2020, 6:47 PM), <https://www.law360.com/articles/1302641/litigation-funding-attacks-pose-threat-to-fca> [<https://perma.cc/EMY5-BNHR>].

3. See, e.g., Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613 (2012); Christy B. Bushnell, *Champerty is Still No Excuse in Texas: Why Texas Courts (and the Legislature) Should Uphold Litigation Funding Agreements*, 7 HOUS. BUS. & TAX L.J. 358, 364 (2007); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010); Lee T. Nutini & Luke S. Smith, *Perfect Civil Enforcement? Litigation Financing in the Wake of Gawker Media v. Bollea*, 18 TRANSACTIONS: TENN. J. BUS. L. 169 (2016); and Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171 (2014).

both the FCA and litigation funding. Part III will look more closely at the appropriate analysis for litigation funding in FCA cases, applying principles from both champerty and maintenance jurisprudence and FCA jurisprudence. Part III will then explain why litigation funding is consistent with the FCA's principles and furthers its objectives and will conclude by proposing a framework for the Department of Justice ("DOJ") to use when assessing the impact of litigation funding in FCA cases. It will also propose simple amendments to both the Federal Rules of Civil Procedure and the FCA itself that will address litigation funding opponents' concerns.

II. THE LONG AND WINDING ROADS

A. The History of the False Claims Act's Qui Tam Provisions

Congress passed the FCA in 1863 during the Civil War.⁴ Though it has evolved over the years, it remains the United States' primary fraud-fighting tool. The FCA tasks the Attorney General with pursuing FCA violations,⁵ but *qui tam* actions have been central to the Act since its inception. A *qui tam* action is simply a lawsuit brought by a private citizen, commonly called a "whistleblower," on behalf of the government in exchange for a share of the proceeds, or a "bounty."⁶ The FCA uses its *qui tam* provisions "to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government."⁷

Initially the Act was used to combat war fraud related to goods such as defective rifles and gunpowder, but it was used sparingly in the years following the Civil War.⁸ The Act began gaining traction in the 1930s when plaintiffs started using publicly available criminal fraud indictments to file civil *qui tam* suits.⁹ Concerns with this practice reached a boiling point after *United States ex rel. Marcus v. Hess*, where the Supreme Court upheld the practice despite opposition from the DOJ.¹⁰ *Hess* prompted the Attorney General to seek repeal

4. For a thorough discussion of the history of the False Claims Act, see JOHN T. BOESE & DOUGLAS W. BARUCH, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* Ch. 1 (5th ed. 2020). It is currently codified at 31 U.S.C. §§ 3729-3733.

5. See 31 U.S.C. § 3730(a).

6. *Qui tam* actions are not limited to the FCA, and they predate the FCA by several centuries, starting in early English law. For a more thorough historical overview of *qui tam*, see generally *The History and Development of Qui Tam*, 1972 WASH. U. L. REV. 81. The phrase is an abbreviation of the longer phrase *qui tam pro domino rege quam pro seipso*, which literally means "he who as much for the king as for himself." *Id.* at 83.

7. See James B. Helmer Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1262 (2013).

8. See Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 123 (2007).

9. See BOESE & BARUCH, *supra* note 4, at § 1.01 ("The 1863 Act did not limit recovery solely to *qui tam* plaintiffs offering firsthand knowledge of previously unknown fraud. . .").

10. See *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); see also BOESE & BARUCH, *supra*

of the Act's *qui tam* provisions.¹¹ As a result, Congress amended the FCA in 1943, depriving courts of jurisdiction in cases where the government had prior knowledge of the conduct at issue and reducing the relator's bounty.¹² Once again, *qui tam* actions became dormant until Congress revived them in 1986.¹³

By 1986, the government's inability to effectively fight fraud solo was in the spotlight. For several years, members of Congress and the President had grown increasingly concerned with widespread fraud related to government spending.¹⁴ In a 1981 report to Congress, the Government Accountability Office ("GAO") analyzed over 77,000 known fraud and related cases from twenty-one federal agencies spanning a two-and-a-half-year period.¹⁵ It found that fraud against the government was a widespread problem that impacted every agency and every type of agency activity.¹⁶ GAO emphasized how widespread fraud threatens "confidence in the Government's ability to efficiently and effectively manage its programs," threatens the integrity of government programs, and can even threaten public health and safety.¹⁷ Agencies had weak internal controls, and managers generally lacked concern for fraud.¹⁸ Further, the DOJ had limited resources and "had not emphasized the civil aspects of fraud cases" in recent years.¹⁹ The Senate Judiciary Committee's report on the 1986 amendments echoed these concerns.²⁰ As a result, Congress amended the FCA by guaranteeing the relator a role in the case even if the government intervenes, increasing the relator's bounty, guaranteeing the relator some portion of the recovery, and adding anti-retaliation provisions.²¹ Congress also modified the prior knowledge limitation, permitting *qui tam* suits based on publicly disclosed information when the relator is an original source of the information.²²

Congress amended the FCA two more times after 1986, first in 2009 and again in 2010. The Fraud Enforcement and Recovery Act of 2009 ("FERA") amendments broadened the scope of the FCA's anti-retaliation protections, yet left the *qui tam* provisions mostly unchanged.²³ Two pieces of legislation

note 4, at § 1.02.

11. BOESE & BARUCH, *supra* note 4, at § 1.02.

12. *Id.* See also Act of December 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, 609.

13. See BOESE & BARUCH, *supra* note 4, at § 1.02.

14. See *id.* at §1.04.

15. U.S. GOV'T ACCOUNTABILITY OFF., AMFD-81-57, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT AND HOW CAN IT BE CONTROLLED? 2 (1981).

16. See *id.* at 4.

17. See *id.* at 15.

18. See *id.* at 16-24.

19. See *id.* at 28-32.

20. See generally S. REP. NO. 99-345 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266.

21. BOESE & BARUCH, *supra* note 4, at § 1.04.

22. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3157 (adding 31 U.S.C. § 3730(e)(4)).

23. See generally Pub. L. No. 111-21, 123 Stat. 1617, 1624-25 (2009), and see BOESE & BARUCH, *supra* note 4, at § 1.09.

amended the FCA in 2010: the Affordable Care Act (“ACA”)²⁴ and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).²⁵ The ACA added new limitations to the public disclosure bar for *qui tam* actions and expanded the original source exception, broadening the pool of potential relators.²⁶ The Dodd-Frank Act restored an earlier definition of protected conduct in the anti-retaliation provisions and added a statute of limitations for retaliation.²⁷

Over the years, *qui tam* actions have solidified their place in FCA enforcement. The number of *qui tam* cases steadily grew beginning in 1987, and the *qui tam* share of total FCA cases surpassed the non-*qui tam* cases in 1995.²⁸ *Qui tam* cases have continued to account for the majority of FCA cases since 1995 and have not dropped below 70% of total cases since 1997.²⁹ Total recoveries show a similar trend. Since 2000, *qui tam* recoveries average 75% of total FCA recoveries, accounting for \$43.7 billion of the \$58.2 billion recovered from 2000 through 2020.³⁰

B. The History of Third-Party Litigation Funding

Litigation funding has an even longer history than the FCA. Concern over the practice dates back centuries to medieval England and the common law doctrines of champerty and maintenance. Today, these concepts are often referred to collectively as “assignment,” but historically “maintenance is helping another prosecute a suit [and] champerty is maintaining a suit in return for a financial interest in the outcome.”³¹ These practices were prohibited due to concerns that they facilitated misuse of the legal system.³² Opponents of the practices feared that “the maintainer may, for personal gain, encourage frivolous litigation, incite quarrels, increase damages, resist settlement, or even suppress evidence and witnesses.”³³ The prohibition of these practices carried over to the United States, and litigation funding opponents raise similar concerns with the practices today.³⁴

24. See Pub. L. No. 111-148, 124 Stat. 119, 901-02 (2010).

25. See Pub. L. No. 111-203, 124 Stat. 1376, 2079 (2010).

26. See John T. Boese, *Review of False Claims Act Developments*, in 23RD ANNUAL NATIONAL INSTITUTE ON HEALTH CARE FRAUD E-15, E-28 (2013), and 124 Stat. at 901-02.

27. See Boese, *supra* note 26, at E-29, and 124 Stat. at 2079.

28. See *False Claims Act Fiscal Year 2020 Statistics*, U.S. DEP’T OF JUST. 1 (2020), <https://www.justice.gov/opa/press-release/file/1354316/download> [<https://perma.cc/P88W-M5FW>].

29. See *id.* at 1-2.

30. See *id.*

31. *In re Primus*, 436 U.S. 412, 424 n.15 (1978). See also 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 1 (2021).

32. See Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity*, 30 AM. BUS. L.J. 485, 487 (1992).

33. *Id.*

34. Cf. *Following the Money: Should Federal Law Require Litigants to Disclose Litigation Funding Agreements?*, CONG. RSCH. SERV., 1, 1-2 (2018) (“Opponents, however, maintain that the ready availability of litigation funding undesirably increases the volume and length of litigation by incentivizing litigants to initiate and prolong lawsuits even where doing so would otherwise not be

1. *State Treatment of Champerty and Maintenance*

States neither uniformly adopted nor uniformly implemented champerty and maintenance prohibitions.³⁵ In fact, some states never recognized them. For example, in 1873, the Supreme Court of Texas explained that, while some state legislatures had adopted them by statute, they had never been part of Texas law.³⁶ Where recognized, the prohibition is statutory in some states and part of the common law in others.³⁷ Common law definitions vary, and some states distinguish between an assignment of a claim itself and the assignment of the proceeds of a claim. For example, the North Carolina Supreme Court has held the former to be prohibited and the latter to be permissible.³⁸ Other states have recognized the prohibition more broadly, either rejecting or ignoring the claim-proceeds distinction altogether.³⁹

In states with common law prohibitions, the trend over time has been towards abrogation. In 1997, the Massachusetts Supreme Court abrogated its common law prohibition against champerty.⁴⁰ In 2000, the Supreme Court of South Carolina followed Massachusetts.⁴¹ In 2001, the Florida Court of Appeals reached a similar conclusion.⁴² Most recently, in 2020, the Minnesota Supreme Court abolished its common law prohibition in a case involving a litigation funding contract.⁴³

economically rational.”).

35. See, e.g., Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1333-41 (2002). See also *Saladini v. Righellis*, 687 N.E.2d 1224, 1225 (Mass. 1997) (“The doctrine has a long and, in this country, checkered history.”).

36. See *Bentinck v. Franklin*, 38 Tex. 458, 473 (1873).

37. See, e.g., MISS. CODE ANN. § 97-9-11 (2021); KY. REV. STAT. ANN. § 372.060 (LexisNexis 2021); and Bond, *supra* note 35, at 1335-36.

38. *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 455 S.E.2d 655, 657 (N.C. 1995). There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim. The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy and void. The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid. *Id.* (citations omitted). See also *Mut. of Omaha Bank v. Kassebaum*, 814 N.W.2d 731, 737 (Neb. 2012) (“Where only the proceeds of the litigation, and not control of the litigation, have been assigned, there is little or no concern of intermeddling as a reason for declining to allow the assignment of the claim.”).

39. See, e.g., *Quality Chiropractic, PC v. Farmers Ins. Co.*, 51 P.3d 1172, 1176-82 (N.M. App. 2002); and *Schwartz v. Eliades*, 939 P.2d 1034, 1036-37 (Nev. 1997). See also *Chun Yan Dong v. Royal Crown Ins. Corp.*, No. 09-0035, 2010 U.S. Dist. LEXIS 111917, at *55-63 (D. N. Mar. I. Oct. 18, 2010).

40. See *Saladini*, 687 N.E.2d at 1226.

41. See *Osprey, Inc. v. Cabana Ltd. Pshp.*, 532 S.E.2d 269, 277 (S.C. 2000).

42. See *Hardick v. Homol*, 795 So. 2d 1107, 1111-12 (Fla. Dist. Ct. App. 2001).

43. See generally *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235 (Minn. 2020).

2. Supreme Court Treatment of Champerty and Maintenance

Because champerty and maintenance are most often state law issues, they have no well-developed federal jurisprudence. United States Supreme Court cases primarily involve either interpreting state champerty law⁴⁴ or applying limitations imposed by Congress on the assignment of certain statutory claims against the United States.⁴⁵ Yet as early as 1893, the Court had already acknowledged that “the rigor of [these laws] has been relaxed.”⁴⁶

Sprint Communs., Co., L.P. v. APCC Servs. is the most recent Supreme Court demonstration of this relaxed rigor.⁴⁷ The plaintiffs in *Sprint* were a group of “aggregators,” billing and collection firms that had purchased dial-around claims from payphone operators.⁴⁸ The aggregators had sued various long-distance carriers, including Sprint and AT&T, in federal court seeking dial-around compensation.⁴⁹ AT&T argued that the aggregators lacked standing under Article III of the Constitution.⁵⁰ Thus, the question for the Court was whether assignees of a claim for collection have standing.⁵¹ The Court surveyed the history and tradition of assignment and ultimately concluded that assignees have standing, even when they have no contractual right to any of the proceeds of the assigned claim.⁵²

3. Litigation Funding as Champerty

Courts tend to view litigation funding agreements as champertous. In *Maslowski*, the Minnesota Supreme Court found a litigation funding contract to be champertous but then abolished the state’s champerty prohibition.⁵³ In *Boling v. Prospect Funding Holdings, LLC*, the Sixth Circuit applied Kentucky law to a litigation funding agreement in a diversity case.⁵⁴ After considering Kentucky’s champerty statute and related case law, the court affirmed the district court’s finding that the agreements at issue were void, explaining, “[W]e conclude that the Supreme Court of Kentucky would hold that the Agreements violate Ky. Rev. Stat. § 372.060, and that the Agreements are inconsistent with Kentucky’s public policy.”⁵⁵ In *Justinian Capital SPC v. WestLB AG, N.Y. Branch*, the Court of

44. See, e.g., *Watkins v. Sedberry*, 261 U.S. 571, 576 (1923) (discussing Tennessee’s champerty statute).

45. See, e.g., *Hager v. Swayne*, 149 U.S. 242, 247-48 (1893).

46. See *id.* at 248.

47. See generally *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269 (2008).

48. *Id.* at 271.

49. *Id.* at 272.

50. *Id.*

51. See *id.* at 274-75.

52. See *id.* at 275-85.

53. See *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 238 (Minn. 2020).

54. See *Boling v. Prospect Funding Holdings, LLC*, 771 F. App’x 562, 577 (6th Cir. 2019).

55. See *id.* at 577-82.

Appeals of New York similarly held that a litigation funding arrangement was champertous and thus prohibited by the state's champerty statute.⁵⁶

III. TWO ROADS CONVERGE

A. Litigation Funding in FCA Cases

Litigation funding recently gained the FCA spotlight in *Ruckh v. Salus Rehab., LLC*.⁵⁷ The *Ruckh* relator had assigned a small percentage of her bounty to a third-party funder.⁵⁸ The appellee argued that the funding arrangement was a partial reassignment of the relator's interest that violated the Constitution and the FCA and which ultimately forfeited her standing.⁵⁹ The Eleventh Circuit disagreed, finding that the agreement did not affect the relator's standing and was not proscribed by the FCA.⁶⁰ The court explained that *qui tam* relators are partial assignees of the United States and that a relator has standing as long as she remains an assignee of the United States and the United States has in fact suffered an injury.⁶¹ The *Ruckh* relator had retained a sufficient interest in the claim to maintain standing since she had assigned less than 4% of the bounty and had retained sole authority over the litigation.⁶²

After the Eleventh Circuit's decision, the appellees renewed their argument in a Petition for Rehearing *En Banc*, focusing specifically on the issue of whether the FCA "permits a person who receives a carefully limited statutory assignment to pursue the claims of the United States as a relator to reassign some or all of her interest in the government's potential recovery to a third party."⁶³ They described the Eleventh Circuit's holding as a "conversion of the FCA into a mercenary tool for quasi-criminal enforcement of secret investors' agendas [that] shatters the statutory partial assignment regime that *Vermont Agency* recognized and will inexorably corrupt the core sovereign power of prosecuting the government's claims."⁶⁴ Opponents of the practice also quickly expressed concern that the

56. See *Justinian Capital SPC v. WestLB AG, N.Y. Branch*, 65 N.E.3d 1253, 1257-59 (N.Y. 2016). The *Justinian Capital* arrangement was not the typical funding arrangement, but it was a sufficiently similar arrangement to demonstrate New York's classification of third-party funding as champertous. See also Lyra Gao, *Litigation Funding: The Case for New York to Revise Section 489*, COLUM. UNDERGRADUATE L. REV. (2020), <https://www.culawreview.org/journal/litigation-funding-the-case-for-new-york-to-revise-section-489> [<https://perma.cc/H9DZ-DPAZ>].

57. See *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089 (11th Cir. 2020).

58. *Id.* at 1100.

59. *Id.*

60. See *id.* at 1101-02.

61. See *id.* at 1101 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000)).

62. See *id.* at 1101-02.

63. Petition for Rehearing *En Banc* at 1, *United States ex rel. Ruckh v. Salus Rehab., LLC*, No. 18-10500 (11th Cir. filed July 16, 2020).

64. *Id.* at 3 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000)).

holding would prompt “litigation driven by desires such as funding cases against competitors” and “could potentially strain courts and the DOJ’s resources.”⁶⁵ They noted that third-party funders may not share the same goal as relators, and emphasized the importance of the motivations of the relator.⁶⁶ Are these concerns valid? The following section discusses the broader policy perspectives behind these concerns and the impact of the contemporary legal environment on them.

B. Policy Perspectives

The best approach to litigation funding agreements generally is to ask whether they are “opposed to any rule of law or public policy,”⁶⁷ and the FCA itself must provide the primary guidance on how this funding fits within FCA cases. However, contemporary treatment of champerty and maintenance can assist with the analysis insofar as it demonstrates how this funding fits within current public policy. While a full discussion of the pros and cons of litigation funding is beyond the scope of this Article, a brief survey of the various perspectives will assist the analysis by illustrating the pertinent policy considerations.

Some proponents of litigation funding point to its ability to level the playing field between often cash-strapped plaintiffs and wealthy, corporate defendants.⁶⁸ It helps ensure “that justice, although blind, is not also a beggar.”⁶⁹ Others point to broader concepts such as duties owed by a defendant to a plaintiff and the nature of a plaintiff’s right to seek redress.⁷⁰ For example, as one scholar explained,

“The right to seek redress was a product of the wrongdoing, and it is not clear why the right-holder cannot do what she wants with that right—destroy it, ignore it, or give it to someone else. The normative fact that gave rise to the right will not be undermined, and it is not clear why the courts should not respect the sovereignty of the right-holder to exercise unlimited control over that right.”⁷¹

The Supreme Court demonstrated a similar perspective in *Sprint* when it rhetorically asked, “What does it matter what the aggregators do with the money afterward?”⁷²

Opponents to litigation funding continue to voice the same concerns that champerty and maintenance opponents have voiced for centuries. Yet, as discussed above, courts and scholars have recognized for at least the past hundred

65. See Wilson, *supra* note 2.

66. See *id.*

67. Cf. Hager v. Swayne, 149 U.S. 242, 248 (1893).

68. Bushnell, *supra* note 3.

69. *Id.*

70. See Sebok, *supra* note 3, for a very thorough and fascinating discussion of these broader principles.

71. See *id.* at 133.

72. See *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 287 (2008).

years or more that these concerns are misplaced in American society or have been adequately neutralized through other means. One common concern is that litigation funding will flood the courts with frivolous lawsuits, but sufficient checks exist today to neutralize this threat. Senator William Langer's comments from the 1943 amendment debates still apply: "I submit that before any man can recover anything for himself he must go before a court and jury. How can that be a racket?"⁷³ Further, modern laws governing conduct such as abuse of process and malicious prosecution also address these concerns.⁷⁴ Finally, from a practical economic perspective, it is unlikely that funding companies would habitually waste money on frivolous lawsuits. As with any investment, funders would likely look for cases that provide a reasonably likely return on investment. Thus, if the concern really is frivolous lawsuits, these funders play a role in ensuring that only the meritorious cases are filed.

Courts that have rejected champerty and maintenance prohibitions also address these concerns. The Massachusetts Supreme Court explained, "We have long abandoned the view that litigation is suspect, and have recognized that agreements to purchase an interest in an action may actually foster resolution of a dispute."⁷⁵ The court was "no longer. . .persuaded that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. There are now other devices that more effectively accomplish these ends."⁷⁶ The Supreme Court of South Carolina similarly explained that "other well-developed principles of law can more effectively [address these concerns]."⁷⁷ The Minnesota Supreme Court, addressing these prohibitions in the context of a litigation funding agreement, explained, "Our review of changes in the legal profession and in society convinces us that the ancient prohibition against champerty is no longer necessary."⁷⁸

United States Supreme Court case law also provides some insight into how to consider these concerns. *Sprint* provides a model for determining whether an agreement is "opposed to any rule of law or public policy."⁷⁹ The *Sprint* Court was not concerned that the plaintiffs would remit the entire litigation proceeds to the non-party assignors:

Here, a legal victory would unquestionably redress the injuries for which the aggregators bring suit. The aggregators' injuries relate to the failure

73. 89 CONG. REC. 7,607 (1943).

74. See, e.g., *Hardick v. Homol*, 795 So. 2d 1107, 1111-12 (Fla. Dist. Ct. App. 2001); and *Bushnell*, *supra* note 3, at 365.

75. See *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997).

76. See *id.* at 1226-27.

77. See *Osprey, Inc. v. Cabana Ltd. Pshp.*, 532 S.E.2d 269, 273-77 (S.C. 2000). See also *Hardick v. Homol*, 795 So. 2d 1107, 1111-12 (Fla. Dist. Ct. App. 2001) (following the same rationale to reach a similar conclusion).

78. See *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 238 (Minn. 2020).

79. See *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 285-92 (2008); and *Hager v. Swayne*, 149 U.S. 242, 248 (1893).

to receive the required dial-around compensation. And if the aggregators prevail in this litigation, the long-distance carriers would write a check to the aggregators for the amount of dial-around compensation owed. What does it matter what the aggregators do with the money afterward? The injuries would be redressed whether the aggregators remit the litigation proceeds to the payphone operators, donate them to charity, or use them to build new corporate headquarters.⁸⁰

Despite this broad statement, the Court acknowledged that evidence that the assignments were made in bad faith or were made for reasons other than ordinary business purposes may trigger greater scrutiny.⁸¹ Yet the question remains as to how this general framework aligns with the FCA. The following section examines the FCA principles relevant to this analysis.

C. Relevant FCA Principles

1. Qui Tam Principles

Judicial and legislative approaches to the FCA's *qui tam* provisions provide a useful foundation for applying these broader considerations to FCA cases. From the FCA's inception, courts have consistently used basic statutory construction principles to analyze *qui tam*-related issues, focusing on the Act's chief purpose of protecting the government against fraud. One district court concisely described the *qui tam* provisions' role in that purpose in an early FCA case:

It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.⁸²

Courts have thus been hesitant to impose restrictions on relators beyond those clearly articulated in the Act. *Marcus v. Hess* illustrates this approach.⁸³ When the government and respondents argued that the relator had contributed nothing and merely based his case on a previous criminal indictment, the Court focused on the scope of the *qui tam* provisions – suits could be brought by any person – and the corresponding monetary incentives.⁸⁴ Ultimately, it was Congress's job to address the government's broader public policy concerns.⁸⁵ Courts continue to follow this

80. *Id.* at 286-87.

81. *See id.* at 292.

82. *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885).

83. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-48 (1943).

84. *See id.* at 545-47.

85. *Id.* at 546-47.

approach with *qui tam* issues.⁸⁶

From 1986 forward, Congress's intent has been to encourage maximum use of the *qui tam* provisions. In 1986, it effectively acknowledged the failure of the 1943 amendments to adequately protect the government from fraud. The Senate Judiciary Committee Report explained that the 1986 amendments were meant to "enhance the Government's ability to recover losses sustained as a result of fraud against the Government."⁸⁷ It reaffirmed the importance of the *qui tam* provisions in meeting the Act's objectives, explaining that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."⁸⁸ The Committee's goal was "to encourage more private enforcement suits."⁸⁹ The 2009 and 2010 amendments advanced this goal by strengthening the anti-retaliation provisions and expanding the pool of relators.⁹⁰

2. Standing Principles

The Supreme Court's analysis of relator standing also informs the analysis of litigation funding in FCA cases. In *Vermont Agency*, the Supreme Court based *qui tam* relator standing on the doctrine of assignment.⁹¹ The Court explained that the FCA's *qui tam* provisions are a partial assignment of the government's claim based on an injury in fact to the United States.⁹² Again, a relator has standing unless the facts show that the relator is no longer an assignee of the United States or that the United States did not suffer an injury.⁹³

The *Ruckh* appellees emphasized *Vermont Agency*'s assignment characterization, but they failed to distinguish between an interest in the claim itself and an interest in the proceeds of the claim. *Vermont Agency* explained that the FCA "gives the relator himself an interest *in the lawsuit*, and not merely the right to retain a fee out of the recovery."⁹⁴ The *Ruckh* appellees argued that the FCA does not permit relators to reassign the government's claims to third parties conflates the claim with the proceeds. Courts have historically recognized this

86. See, e.g., *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1208-12 (10th Cir. 2003); and *United States ex rel. Hagood v. Sonoma Cnty. Water Agency*, 929 F.2d 1416, 1419-20 (2d Cir. 1991). See also *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) ("Congress has let loose a posse of ad hoc deputies to uncover and prosecute frauds against the government. [Defendants] may prefer the dignity of being chased only by the regular troops; if so, they must seek relief from Congress.").

87. S. REP. NO. 99-345 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, *5266.

88. See *id.* at *5267.

89. S. REP. NO. 99-345, at 23-24 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5288-89.

90. See H.R. REP. NO. 111-97, at 2 (2009); and Boese, *supra* note 26, at E-28.

91. See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 770-87 (2000).

92. See *id.* at 773-74.

93. *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1101 (11th Cir. 2020).

94. See *Vt. Agency of Nat. Res.*, 529 U.S. at 772 (emphasis in original).

distinction,⁹⁵ including the Supreme Court in *Sprint*.⁹⁶ In fact, *Sprint* effectively held that a plaintiff need only an interest in the claim and could assign the entire interest in the proceeds to a third-party.⁹⁷ Typical litigation funding situations are not so extreme: the relator retains an interest in the claim and merely assigns a portion of the recovery.

3. FCA Principles Applied to Litigation Funding

The FCA's *qui tam* provisions are built upon the general concepts of a broad relator pool and monetary incentives. The Act began with no restrictions on who could serve as a relator.⁹⁸ After *Marcus v. Hess*, Congress added the prior knowledge limitation.⁹⁹ But when faced with pervasive fraud and the government's inability to fight it alone, Congress revitalized the *qui tam* provisions in 1986 and expanded the pool of relators.¹⁰⁰ In 2010, Congress expanded the pool further.¹⁰¹ Since 1986, Congress has consistently sought to only further incentivize relators to come forward through increased bounties and stronger whistleblower protections. This is the FCA path into which the litigation funding path has merged.

These FCA principles are consistent with the broader principles that have motivated courts to abolish or reject laws prohibiting champerty and maintenance. Congress wants more relators to come forward, and it continues to incentivize relators to do so. Litigation funding supports that goal by mitigating the initial risks and barriers average citizens often face.¹⁰² Nothing in the Act suggests that

95. See, e.g., *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 455 S.E.2d 655, 657 (N.C. 1995).

96. *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 280-81 (2008).

97. See *id.* at 289, and *id.* at 298 (“The majority concludes that a private litigant may sue in federal court despite having to pass back . . . all proceeds of the litigation. . . .”) (Roberts, C.J., dissenting).

98. Cf. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 546 (1943) (“Suits may be brought and carried on by ‘any person,’ says the Act, and there are no words of exception or qualification such as we are asked to find.”). “Even the district attorney” could be a relator. See *id.* (quoting CONG. GLOBE, 37th Cong., 3rd Sess. 955, 956).

99. See BOESE & BARUCH, *supra* note 4, at § 1.02; and Act of December 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, 609.

100. See False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3157 (adding 31 U.S.C. § 3730(e)(4)); and *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) (“In permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.”).

101. See Boese, *supra* note 26, at E-28.

102. Cf. *Metropolitan Life Ins. Co. v. Fuller*, 23 A. 193, 196 (Conn. 1891) (“It sometimes may be useful and convenient, when one has a just demand which he is not able from poverty to enforce, that a more fortunate friend should assist him, and wait for his compensation until the suit is determined, and be paid out of the fruits of it.”).

Congress is concerned with what the relator does with the bounty. Unless facts exist to indicate the funding agreement is somehow unscrupulous, courts should not be concerned either.¹⁰³ To the extent questionable agreements may exist, the DOJ can assess the impact of them in the context of its existing *qui tam* case review process.

D. A Proposed DOJ Review Framework

The DOJ can implement a review framework to adequately address concerns related to litigation funding in FCA cases. It has already begun publicly acknowledging these concerns. In January 2020, Deputy Associate Attorney General Stephen Cox briefly touched on litigation funding during a public address, explaining that the DOJ was evaluating the proposed legislation and amendments to the Federal Rules of Civil Procedure and related concerns.¹⁰⁴ In June 2020, Principal Deputy Assistant Attorney General Ethan Davis mentioned it as well in a similar forum.¹⁰⁵ Mr. Davis acknowledged that “the United States has an interest in knowing who is behind [*qui tam* cases]” and explained that DOJ attorneys had been instructed to begin asking questions about litigation funding during relator interviews.¹⁰⁶

The DOJ can use reasonable scrutiny to address litigation funding concerns in FCA cases.¹⁰⁷ It has already begun asking “for the identity of the funder, whether the relator has shared information relating to the *qui tam* allegations with the funder, whether a written agreement exists, and whether the agreement entitles the funder to exercise any direct or indirect control over the relator’s litigation or settlement decisions.”¹⁰⁸ It should also consider what share of the bounty the relator has assigned to the funder and the relationship between the

103. *Cf. Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 287 (2008) (“Finally, we note that in this litigation, there has been no allegation that the assignments were made in bad faith. We note, as well, that the assignments were made for ordinary business purposes. Were this not so, additional prudential questions might perhaps arise.”).

104. *See* Press Release, *Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement*, U.S. DEP’T OF JUST. (Jan. 27, 2020), <https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced> [<https://perma.cc/FKF8-8HNS>] (The proposed legislation and rules amendments are discussed below. They never progressed beyond the proposal stage.).

105. *See* Press Release, *U.S. Dep’t of Just. Principal Deputy Assistant Attorney General Ethan P. Davis Delivers Remarks on the False Claims Act at the U.S. Chamber of Commerce’s Institute for Legal Reform*, U.S. DEP’T OF JUST. (June 26, 2020), <https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims> [<https://perma.cc/HS77-KRC2>].

106. *See id.*

107. *Cf. Saladini v. Righellis*, 687 N.E.2d 1224, 1227 (Mass. 1997) (“Other States that no longer recognize the doctrine of champerty have continued to scrutinize an agreement to finance a lawsuit with care. . . We shall do likewise.”) (citation omitted).

108. Press Release, *supra* note 105.

funder and the relator.

Currently, the DOJ is focused on gathering information “for the purpose of studying the issues.”¹⁰⁹ The following three-part framework should guide how the DOJ uses this information in practice. First, the DOJ should ascertain whether the arrangement is subversive or predatory. Second, in the event the arrangement appears subversive or predatory, the DOJ must decide how that determination impacts its decisions related to dismissal and intervention. Finally, assuming a case with a potentially subversive or predatory funding arrangement moves forward and results in a settlement or judgment, the DOJ must decide how the arrangement impacts the relator’s share of recovery.

The DOJ should first determine whether a funding arrangement is subversive or predatory. Is the funder effectively attempting to use the relator as a puppet? Knowing the share of the bounty will help the DOJ identify these arrangements in two respects. First, it will provide data that, when aggregated over time, can provide a spectrum of normal percentages assigned. Second, it should provide insight into the significance of the relator’s role and whether the funder’s interest in the case is of such a level to be concerning. That said, it is not necessary that the DOJ attempt to identify some percentage at which an agreement becomes problematic. Potentially a relator could assign the entire bounty to a third-party without violating FCA principles, though such an arrangement would likely require a more extensive analysis of the other factors.¹¹⁰

Understanding the relationship between the relator and the funder is also important for identifying subversive or predatory funding arrangements. This inquiry should focus on how the relator and funder formed their agreement as well as their relationship prior to the agreement. The results of this inquiry should ordinarily address most funding concerns, even those associated with larger than normal assignments. Most cases will have similar facts to Leslie’s: a relator who came forward on her own initiative, had concerns with the personal financial risk associated with pursuing a *qui tam* action, was presented with the option of using litigation funding in exchange for a share of the bounty to minimize that risk, and voluntarily chose to enter into that business relationship. These agreements made for ordinary business purposes should not require further analysis.¹¹¹ This inquiry could also reveal some less common funding arrangements, such as where a friend or family member provided the relator with initial support in exchange for being reimbursed out of any recovery. These situations are unlikely to be concerning. A very small percentage of cases may trigger subversive or predatory concerns. Perhaps the funder is the defendant’s competitor and sought the relator out. Yet even in these situations, the DOJ can inquire further to ascertain the ongoing relationship and address any concerns that the funder’s motivations “may

109. *Id.*

110. *See Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1101 (11th Cir. 2020) (acknowledging that a more substantial assignment of the bounty could negate the relator’s status as an assignee of the United States for FCA purposes).

111. *Cf. Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 292 (2008).

be at odds with the government's,"¹¹² to the extent such a divergence is a problem.

Once the DOJ has identified whether the funding arrangement appears subversive or predatory, it should factor that determination into its dismissal and intervention analysis. Dismissal might be the best response in some cases. The FCA allows the government to dismiss *qui tam* actions over the relator's objection.¹¹³ In some jurisdictions this ability is absolute while others require the DOJ to provide some justification.¹¹⁴ The dismissal considerations outlined in the DOJ's 2018 "Granston Memo" could encompass suspect funding arrangements, and two of them are especially pertinent. The first is preventing parasitic or opportunistic *qui tam* actions.¹¹⁵ Although the memo's discussion on this point is narrow, the DOJ can apply it more broadly to suspect funding situations. For example, perhaps a funder used information already known to the government to track down a relator who could serve as an original source but would not otherwise have pursued a *qui tam* case absent the funder's urging. The second consideration is the goal of controlling litigation brought on behalf of the United States.¹¹⁶ Though procedurally and statutorily compliant, these cases may nevertheless arise in a way that Congress has not anticipated. Even in cases with some merit, the DOJ could reasonably conclude that these sorts of cases frustrate its broader FCA-related objectives. On the other hand, even cases with suspect arrangements can expose egregious fraud with the potential for significant recovery for the Treasury. These cases likely would not warrant dismissal.

In other cases, a suspect funding arrangement could indicate that intervention is more appropriate. Admittedly, the DOJ should not intervene in a case merely because of a questionable funding arrangement, but the existence of such an arrangement should factor into the DOJ's analysis. The FCA provides the DOJ with additional tools when it intervenes that should alleviate any concerns related to questionable funding. 31 U.S.C. § 3730(c)(1) grants the government "primary responsibility for prosecuting the action" when it intervenes and states that the government is not bound by the relator's actions. 31 U.S.C. § 3730(c)(2)(C)

112. Cf. Petition for Rehearing *En Banc*, *supra* note 63, at 10.

113. See 31 U.S.C. § 3730(c)(2)(A).

114. Compare *United States ex rel. Sequoia v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1345-46 (E.D. Ca. 1995) (developing a two-step analysis to test the government's justification for dismissal), *aff'd*, *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998), with *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (rejecting *Sequoia* and holding that the government possesses an unfettered right to dismiss a *qui tam* case). See also *United States ex rel. Health Choice All., L.L.C. v. Eli Lilly & Co.*, No. 19-40906, 2021 U.S. App. LEXIS 20175, at *22-27 (5th Cir. July 7, 2021) (refusing to adopt either test and instead holding that the government met *Sequoia's* more burdensome test).

115. See Memorandum from Michael D. Granston, Dir., Fraud Section, Com. Litig. Branch, Dept. of Just., to Fraud Section Att'ys & Assistant U.S. Att'ys Handling False Claims Act Cases (Jan. 10, 2018), <https://www.insidethefca.com/wp-content/uploads/sites/300/2018/12/Granston-Memo.pdf> [<https://perma.cc/GMV9-EZJJ>].

116. See *id.* at 5.

allows the government to limit a relator's participation when it might interfere with the government's prosecution of the case or "would be repetitious, irrelevant, or for purposes of harassment."

Finally, in cases with suspect arrangements that result in settlement or judgment, the DOJ should consider the nature of the arrangement when proposing the relator's share. The Senate Judiciary Committee Report to the 1986 amendments proposed three general considerations for determining a relator's share,¹¹⁷ and the DOJ has developed its own set of factors that can impact a proposed relator's share.¹¹⁸ The minimum share is 15% in cases where the government intervenes and 25% when the government does not intervene.¹¹⁹ A suspect funding agreement could weigh against an increase in that share, especially when the relator is more of a puppet and contributed very little to the case. Further, one of the DOJ's factors for a possible increase is whether the "filing of the complaint had a substantial adverse impact on the relator."¹²⁰ Even in less concerning funding situations, the funding could have mitigated all or most of this risk, indicating that the bounty played less of an incentive role in encouraging the relator to come forward.

E. Proposed FRCP and FCA Amendments

Although litigation funding concerns do not justify an absolute prohibition on the practice, amendments to the Federal Rules of Civil Procedure ("FRCP") and the FCA itself could help facilitate the government's review process and address residual concerns. After all, in some cases, relators may not be willing to disclose all the details of their agreements and the DOJ may not have sufficient legal mechanisms to force them to do so.

Legislation and FRCP amendments to facilitate disclosure of litigation funding agreements have been proposed before. In 2014, several organizations wrote a joint letter to the Advisory Committee on Civil Rules urging the committee to adopt an amendment to Rule 26(a)(1)(A).¹²¹ That amendment would have added a new subparagraph (v) requiring disclosure of agreements granting third parties "a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."¹²²

117. See S. REP. NO. 99-345 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5293.

118. See *DOJ Relator Share Guidelines*, U.S. DEP'T JUST. 1 (Dec. 11, 1996), https://www.vsg-law.com/wp-content/uploads/2016/08/doj_relator.pdf [<https://perma.cc/32PS-BE32>].

119. See 31 U.S.C. § 3730(d).

120. See *DOJ Relator Share Guidelines*, *supra* note 118, at 2.

121. See Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, et al., to Jonathan C. Rose, Sec'y Comm. on Rules Prac. & Proc. Admin. Office of the U.S. Ct. (Apr. 9, 2014), https://instituteforlegalreform.com/wp-content/uploads/media/4_-_FINAL_VERSION_-_TPLF_Disclosure_letter_4_9.pdf. [<https://perma.cc/8GTQ-JJQK>] (Rule 26 governs discovery generally, and Rule 26(a) governs the initial disclosures parties must make to other parties without the need of a discovery request.).

122. See *id.* at Appendix A. The proposed language excluded attorney contingency fee agreements.

A similar group of organizations proposed essentially the same amendment again in 2019.¹²³ Also in 2019, the Advisory Committee on Civil Rules' Multidistrict Litigation ("MDL") Subcommittee considered the role of litigation funding in MDL and concluded that rule amendments were not justified at that time.¹²⁴ On the legislative front, in February 2019, Senator Chuck Grassley introduced the Litigation Funding Transparency Act of 2019.¹²⁵ The bill died in the Senate, but it would have required counsel in class actions and MDL to disclose any agreement with an outside entity that entitled the entity to receive payment contingent on the outcome of the lawsuit.¹²⁶

Disclosure rules, either in the FRCP or the FCA, would address any ongoing litigation funding concerns. For example, the *Ruckh* appellees emphasized the "secret" nature of these agreements.¹²⁷ Concerns of secrecy in *qui tam* cases are valid, especially given the United States' interest in them.¹²⁸ The recently proposed amendments to Rule 26(a)(1)(A) would address these secrecy concerns, though the impact would not be limited to FCA cases. Some local rules already require these disclosures in certain cases.¹²⁹ An amendment to Rule 26(a)(1)(A) would provide a uniform solution as litigation funding becomes more common,¹³⁰ though perhaps relevant policy concerns may mitigate against a disclosure requirement in broader civil litigation.¹³¹ These broader policy concerns are less relevant in FCA cases where the government's interest is primary, so an FCA amendment requiring disclosure would more effectively address the FCA-specific concerns.

For the FCA itself, the Litigation Funding Transparency Act of 2019 provides a simple, workable template for an amendment. Congress could add the following language as a new paragraph (i) in 31 U.S.C. § 3730:

123. See Letter from Advanced Med. Tech. Assoc. et al., to Rebecca A. Womeldorf, Sec'y Comm. on Rules Prac. & Proc. Admin. Office U.S. Ct. (Mar. 27, 2019), https://www.uscourts.gov/sites/default/files/19-cv-i-suggestion_advanced_medical_et_al_0.pdf [<https://perma.cc/56ZR-7P39>].

124. *Meeting Minutes for Third Party Litigation Financing*, ADVISORY COMM. ON CIV. RULES, 1, 191 (Oct. 29, 2019), https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf [<https://perma.cc/E8H6-LPJA>].

125. See generally S. 471, 116th Cong. (2019).

126. See *id.*

127. See generally Petition for Rehearing *En Banc*, *supra* note 63, at 1-2.

128. Cf. Press Release, *supra* note 105 (explaining that the United States has an interest in knowing who is behind *qui tam* cases).

129. See, e.g., 11TH CIR. R. 26.1-2(a); N.D. CAL. CIV. R. 3-15.

130. Cf. James Anderson, *Is Increased Transparency into Litigation Financing on the Horizon?*, NAT'L L. REV. (Jan. 15, 2020), <https://www.natlawreview.com/article/increased-transparency-litigation-financing-horizon> [<https://perma.cc/EG6Y-HZ5W>] ("The market for litigation finance shows no signs of slowing down . . .").

131. See, e.g., Matthew Harrison & John Harabedian, *Claimants Shouldn't Be Forced to Disclose Litigation Funding*, LAW360 (June 11, 2018), <https://www.law360.com/insurance/articles/1052279/claimants-shouldn-t-be-forced-to-disclose-litigation-funding> [<https://perma.cc/MM2F-B2CJ>].

(i) Third-party litigation funding disclosure.

(a) In General.—In all actions brought under subsection (b), the person bringing the action shall—

(1) disclose in writing to the court and all other named parties to the action the identity of any person, other than a party or counsel of record for a party, that has a right to receive payment that is contingent on the receipt of monetary relief in the action by settlement, judgment, or otherwise; and

(2) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

(b) Timing.—The disclosure required by subsection (a) shall be made not later than the later of—

(1) 10 days after execution of any agreement described in subsection (a)(2); or

(2) the time of service of the action under subsection (b)(2).

This requirement would ensure that the DOJ has sufficient information to evaluate these agreements early while making its intervention and dismissal decisions.

IV. CONCLUSION: THE ROADS GO EVER ON

Though third-party litigation funding and the False Claims Act each have their own, unique histories and jurisprudence, they can merge smoothly. Opponents to litigation funding have reasonable concerns about the practice, but the American legal system has developed protections that already address those concerns. The FCA also has its own unique protections against FCA-specific concerns. Further, litigation funding supports Congress's goals for the FCA's *qui tam* provisions such as incentivizing whistleblowers to expose fraud against the government. To the extent concerns for litigation funding remain, the DOJ can use this article's proposed review framework to identify concerning cases and respond to them appropriately, and Congress can amend the FCA to facilitate the DOJ's review. These actions will maximize the benefits litigation funding provides to the FCA while neutralizing any residual concerns.