The Extent of a Corporation's Ability to Constitute an Original Source under the False Claims Act--Minnesota Ass'n of Nurse Anesthetists V. Allina Health System Corp.

Emily R. D. Pruisner

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/770

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Comment

The Extent of a Corporation’s Ability to Constitute an Original Source Under the False Claims Act—Minnesota Ass’n of Nurse Anesthetists v. Allina Health System Corp.

Emily R. D. Pruisner*

You are sick, tired, and frightened. An anesthesiologist enters your surgical holding area and reassures you that she will remain physically present throughout the procedure in case of an emergency. She accompanies you to the operating room and gently counts down until you fall trustingly into unconsciousness. Unbeknownst to you, as soon as the surgery is safely underway, she exits the operating room for an unknown destination and fails to monitor your return to consciousness. She finally reappears to greet you in the recovery area and pauses to fully bill Medicare as if she had been physically present throughout the entire operation, resulting in an overcharge to the government for her services and, consequently, an unnecessary expenditure of taxpayers’ money.

Fraudulent submissions of claims to the government in situations similar to the scenario just described occur daily throughout the United States, costing citizens billions of dollars per year.1 The False Claims Act2 (FCA) aims to prevent the submission of such fraudulent claims and recover the damages.3

* J.D. Candidate 2004, University of Minnesota Law School; B.A. 2001, Wartburg College, Waverly, IA. I extend sincere gratitude to all those who contributed to this Comment, including Professor Brad Clary, Jennifer Jacobs, Jeffrey Harrington, Lynne Wolf, Mary Pat Byrn, and the remaining members of the Minnesota Law Review. I dedicate this Comment to my parents, Paul and Kathy Decker; to my husband, Taylor Pruisner; and to God, who continues to bless me with the love and support of family and friends.


1247
As one of its primary vehicles for doing so, the FCA includes qui tam provisions that reward a person who reports fraudulent claims to the government with a percentage of its monetary recovery. The Eighth Circuit's analysis in *Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp. (Nurse Anesthetists)* involved such qui tam provisions. The Minnesota Association of Nurse Anesthetists (Association) alleged that a group of anesthesiologists and hospitals violated the FCA by mischaracterizing on Medicare claims the anesthesia services they provided in a manner similar to the scenario just described. In determining whether it could properly exercise subject matter jurisdiction over the Association's claims, the Eighth Circuit ruled as a matter of first impression on the correct interpretation of several key provisions of the FCA's subject matter jurisdictional requirements, ultimately holding in favor of jurisdiction. The Eighth Circuit's interpretation not only further deepened the circuit splits already involving these qui tam provisions, but also provided a relatively novel holding directly addressing if and when a corporation can constitute an original source. The court's analysis and holdings could thus considerably influence the way subsequent courts interpret the subject matter jurisdiction provisions and ultimately alter the scope of the FCA itself.

This Comment uses the Eighth Circuit's holdings in *Nurse Anesthetists* to identify the contentious issues surrounding the

---


5. 31 U.S.C. § 3730(d). A qui tam relator can share in ten to twenty-five percent of the government's recovery of damages. Id.

6. 276 F.3d 1032, 1040-52 (8th Cir. 2002) (providing a history and analysis of the subject matter jurisdiction requirements of the qui tam provisions of the FCA).

7. Id. at 1037-40. The factual scenario suggested at the onset of this Comment, however, is merely an example of the claims associated with FCA suits and not intended to suggest an opinion as to the validity of the Association's allegations in *Nurse Anesthetists*.

8. Id. at 1040-51.

9. See infra Part II for a description of many of these circuit splits currently surrounding the qui tam provisions of the FCA.

qui tam provisions and analyzes in particular the relationship between the original source provision and corporations. Part I reviews the historical evolution of the FCA, detailing the impetus for each set of amendments. Part II provides the context for the ensuing analysis through an overview of the various circuit splits that continue to envelop the qui tam provisions. Part III describes Nurse Anesthetists' place in the FCA debate. Part IV limits the scope of this Comment to a critique of the Eighth Circuit's reasoning in Nurse Anesthetists regarding whether and when a corporation may constitute an original source under the FCA. This Comment concludes that while a corporation can constitute an original source of a qui tam action, it only possesses the direct knowledge required to qualify as an original source in certain, limited circumstances not present in Nurse Anesthetists.

I. OVER ONE HUNDRED YEARS OF CONTROVERSY—THE HISTORY OF AND IMPETUS FOR THE FALSE CLAIMS ACT AND ITS QUI TAM PROVISIONS

Congress enacted the FCA as a broad, remedial statute aimed at preventing the submission of fraudulent claims for reimbursement to the federal government. The FCA imposes liability upon any person who "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." The Act, often implicated in situations involving the


12. 31 U.S.C. § 3729(a)(1) (2000). In its 1986 amendments to the FCA, Congress extended potential liability based on the FCA by broadening the definition of "knowingly" to a person who harbors merely one of the following requisite intents: "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." Id. § 3729(b).
fraudulent submission of Medicare claims, has assumed an increasing practical importance to citizens as the amount of damages incurred through fraudulent practices rises.

Notably, the ability to initiate civil actions against violators of the FCA is not limited to the federal government. The FCA provides that a person, often referred to as the "qui tam relator," also may bring a civil action against a violator of the FCA both on his or her own behalf and on the behalf of the federal government, provided that the individual properly brings the suit in the government's name. If successful in the action, these whistleblowers are entitled to a portion of the government's damages. In this manner, the Act provides a powerful monetary incentive for persons to discover and reveal fraudulent claim submissions.

13. See S. REP. NO. 99-345, at 4, reprinted in 1986 U.S.C.C.A.N. at 5269. The Senate Committee on the Judiciary explained that the proposed 1986 amendments to the FCA were intended to make the statute a more effective weapon against fraud and suggested a particular need for reform in two major federal programs: defense and health care benefits. See id. at 1-2, 4, reprinted in 1986 U.S.C.C.A.N. at 5266, 5269; see also Pamela H. Bucy, Civil Prosecution of Health Care Fraud, 30 WAKE FOREST L. REV. 693, 693 (1995) (noting that health care fraud alone is estimated to cost the public almost ninety billion dollars per year).

14. See S. REP. NO. 99-345, at 3, reprinted in 1986 U.S.C.C.A.N. at 5268. The Department of Justice estimated fraud as draining one to ten percent of the entire federal budget, costing taxpayers valuable money and "erod[ing] public confidence in the Government's ability to efficiently and effectively manage its programs." Id.

15. 31 U.S.C. § 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. The action shall be brought in the name of the Government."); see also In re Shimmels, 85 F.3d 416, 419 n.1 (9th Cir. 1996).

16. 31 U.S.C. § 3730(d). The FCA grants the government a choice in whether or not it will proceed in the FCA action. Id. § 3730(c)(3). A qui tam relator in a civil action through which the government does intervene can recover up to twenty-five percent of the proceeds, while a relator in an action in which the government chooses not to intervene can recover up to thirty percent of such proceeds. Id. § 3730(d)(1)-(2). In both situations, the percentage of recovery varies with the level of the relator's contribution to the action, and the relator is entitled to any reasonable expenses, attorney's fees, and costs incurred in the action. Id.

17. For example, during the fiscal year from October of 2000 through September of 2001, qui tam relators have collected in excess of $210 million. Press Release, United States Department of Justice, Justice Recovers Record $1.6 Billion in Fraud Payments: Highest Ever for One Year Period, at http://www.usdoj.gov/opa/pr/2001/November/01_civ_591.htm (Nov. 14, 2001). Additionally, from October of 2001 through September of 2002, qui tam relators collected more than $160 million. Press Release, United States Department of Justice, Justice Department Recovers Over One Billion in FY
A. THE ORIGINAL FALSE CLAIMS ACT OF 1863

The importance of these qui tam provisions is illustrated by the relevant history of the FCA. Qui tam actions migrated to the United States from England\(^\text{18}\) and were implemented almost immediately by the colonial government as a means of facilitating compliance with the new laws.\(^\text{19}\) Qui tam provisions acquired additional import in the United States when Congress, at the urging of Abraham Lincoln, enacted the False Claims Act of 1863\(^\text{20}\) as a tool to combat widespread fraud in sales to the government in the Civil War.\(^\text{21}\) Congress, angered by the number of contractors cheating the government during its time of need,\(^\text{22}\) aimed to create a statute that would effectively curb such fraud by

---

\(^{18}\) Dan D. Pitzer, *The Qui Tam Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415, 424 (1972) (noting that early cases in the United States “followed English common law precedent”). During the Middle Ages, England lacked an organized police force to protect its citizens from fraudulent practices and other crimes. Id. at 417-18. Therefore, the Crown authorized qui tam actions through which injured individual citizens could act on behalf of the sovereign to enforce the law. See Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 545 (5th Cir. 1999) (Stewart, J., dissenting) (citing Pitzer, supra, at 417-18). Such citizens could collect a bounty in recompense for their efforts, thereby creating a continued incentive for other citizens to bring similar suits. Id. (citing Pitzer, supra, at 417-18).

\(^{19}\) For example, the colonial government included qui tam provisions within ten of its first fourteen penal statutes. United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 (N.D. Cal. 1989) (citing United States ex rel. Adams v. Woods, 6 U.S. 336, 341 (1805)).


\(^{22}\) Examples of such fraudulent contractor practices included situations where “for sugar it [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys.” Newsham, 722 F. Supp. at 609 (quoting Robert Tomes, *The Fortunes of War*, HARPER'S MONTHLY MAG., June 1864, at 228, 228, quoted in 1 F. SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY, 1861-1865, at 55-56 (1965)). In angered response, Abraham Lincoln stated, “Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortune of the Nation while patriotic blood is crimsoning the plains of the South and their countrymen are mouldering [sic] in the dust.” Raegan A. McClain, *The Government, the Legislature and the Judiciary—Working Towards Remediying the Problems with the Civil False Claims Act: Where Do We Go From Here?*, 10 ANNALS HEALTH L. 191, 210 (2001) (citing 89 CONG. REC. 10,847 (1943) (statement of Rep. Miller)).
making it costly to perpetrators.\textsuperscript{23} Consistent with its English predecessors, the Act also contained a qui tam provision that allowed an individual citizen to bring a qui tam action on behalf of the government.\textsuperscript{24} As an effective incentive for such individual, the qui tam relator was awarded a generous fifty percent of the damages collected but could recover court costs only if successful against the defendant.\textsuperscript{25} Following the Civil War, however, the opportunities to defraud the United States grew as the economy flourished,\textsuperscript{26} and Congress eventually discovered that poor statutory drafting and overly lenient judicial interpretations weakened the FCA's effectiveness and created a need for substantive change.\textsuperscript{27}

\textbf{B. THE FALSE CLAIMS ACT AMENDMENTS OF 1943}

In 1943 the Supreme Court, stressing the remedial nature of the FCA, held in \textit{United States ex rel. Marcus v. Hess}\textsuperscript{28} that according to the plain language of the 1943 statute, a qui tam relator who merely copied allegations relating to the defendant's fraudulent actions from a criminal indictment and thereby added nothing to the discovery of the fraud would still be entitled to recover half of the proceeds collected by the government.\textsuperscript{29} This holding essentially allowed an individual to bring a qui tam action

\begin{itemize}
\item \textsuperscript{23} See \textit{United States v. Bornstein}, 423 U.S. 303, 309 (1976) (stating that "the Act was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War"); \textit{United States ex rel. Marcus v. Hess}, 317 U.S. 537, 547 (1943) (noting that one of the Act's chief purposes was to "stimulate action to protect the government against war frauds"). The statute imposed double damages and a $2000 civil fine per false claim on anyone "who shall make or cause to be made... for payment or approval... any claim upon or against the Government of the United States... knowing such claim to be false, fictitious, or fraudulent." Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 12 Stat. at 696, 698.
\item \textsuperscript{24} Act of Mar. 2, 1863, ch. 67, § 4, 12 Stat. at 698.
\item \textsuperscript{25} Id. § 6.
\item \textsuperscript{27} See S. REP. NO. 99-345, at 11, \textit{reprinted in} 1986 U.S.C.C.A.N. at 5276 (stating that court interpretations of the FCA, such as that expressed in \textit{United States ex. rel. Marcus v. Hess}, 317 U.S. 537 (1943), went so far as to prompt "then Attorney General Francis Biddle to request that Congress repeal the qui tam provisions of the act"); see also \textit{infra} notes 28-32 and accompanying text.
\item \textsuperscript{28} 317 U.S. 537 (1943).
\item \textsuperscript{29} \textit{See id.} at 545-46.
\end{itemize}
and recover a substantial amount of money without effectively assisting the government in combating fraud.\textsuperscript{30} In direct opposition to this ruling and in an explicit effort to curb parasitic suits,\textsuperscript{31} Congress amended the FCA to include additional subject matter jurisdictional requirements for actions brought by qui tam relators.\textsuperscript{32}

In one such relevant measure, Congress dictated that a court presiding over a qui tam action in which the government declined to intervene\textsuperscript{33} would lack subject matter jurisdiction over a qui tam suit "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."\textsuperscript{34} While this provision effectively limited parasitic qui tam actions, it was unfortunately interpreted to invalidate legitimate actions as well.\textsuperscript{35} Thus, courts' subsequent interpretations of this provision proved overbroad and frustrated Congress's intent once more, prompting Congress to again amend and thereby clarify the FCA.

C. THE FALSE CLAIMS ACT AMENDMENTS OF 1986

In the years following the 1943 amendments to the FCA, the

\textsuperscript{30} See Meador & Warren, \textit{supra} note 26, at 459.

\textsuperscript{31} "Parasitic" describes situations in which people bring qui tam suits to the attention of the government based upon information they have read or seen through publicly available sources rather than upon their own personal knowledge. See, e.g., Marcus, 317 U.S. at 545-46. A parasitic suit enables people to profit from a percentage of the FCA damages without providing the government any original information. See, e.g., Seal 1 v. Seal A, 255 F.3d 1154, 1158 (9th Cir. 2001); United States \textit{ex rel.} Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994).


\textsuperscript{33} See S. REP. NO. 99-345, at 12 (1986), \textit{reprinted in} 1986 U.S.C.C.A.N. 5266, 5277 (interpreting the 1943 qui tam subject matter jurisdiction provision as applicable only when the government opted not to prosecute the action).


\textsuperscript{35} See, e.g., Pettis \textit{ex rel.} United States v. Morrison-Knudsen Co., 577 F.2d 668, 673-74 (9th Cir. 1978) (denying subject matter jurisdiction even when the qui tam plaintiff was the person who originally disclosed the information to the government); United States v. Aster, 176 F. Supp. 206, 209 (E.D. Pa. 1959) (holding that the FCA's jurisdictional bar is "broad enough to cover information obtained by the government from any source whatever"), \textit{aff'd}, 275 F.2d 281 (3d Cir. 1960); \textit{see also infra} notes 37-41 and accompanying text.
The number of qui tam actions dropped significantly. This reduction in FCA suits, combined with an appellate decision in 1984, provided the final impetus for Congress's 1986 amendments to the FCA's qui tam provisions. In *United States ex rel. Wisconsin v. Dean*, the Seventh Circuit held that the prior disclosure by the State of Wisconsin to the federal government of the allegations underlying its qui tam action barred the state jurisdictionally from later filing a qui tam suit. In a direct response to both this holding and the amended FCA's decreased effectiveness in other areas, Congress substantially amended the FCA in 1986 to create a more effective weapon against fraud and enhance the federal government's ability to recover on its basis. Among the many changes Congress implemented, the amended FCA lifted some of the restrictions governing its qui tam provisions and created additional incentives for private individuals to bring qui tam actions. The revised statute bars qui tam claims that are

---

38. See H.R. Rep. No. 99-660, at 17-18 (1986) (noting the outdated nature of some of the FCA's provisions and admitting that evidence of fraud is "on a steady rise").
39. *Dean*, 729 F.2d at 1104-07. This case proved even more egregious in the eyes of Congress, because Wisconsin was statutorily required to disclose such information to the federal government as a condition of participation in a Medicare reimbursement program. *Id.* at 1106. The court deemed the existence of such a requirement irrelevant for the purposes of the suit, because Congress held the responsibility to create an exception for such circumstances rather than the courts. *See id.* at 1106-07.
41. S. Rep. No. 99-345, at 1-2, reprinted in 1986 U.S.C.C.A.N. at 5266. Included in its substantive changes, Congress broadened the requisite scienter to provide that actual intent to defraud is not necessary, clarified the burden of proof as the lowest standard of "a preponderance of the evidence," extended the FCA's statute of limitations, and increased the amount of recovery to treble damages plus $5000 to $10,000 per false claim. 31 U.S.C. § 3729 (2000); *see also supra* note 12 and accompanying text. For an extended analysis on these revised provisions, see Gregory G. Brooker, *The False Claims Act: Congress Giveth and the Courts Taketh Away*, 25 Hamline L. Rev. 373, 380-82 (2002).
42. S. Rep. No. 99-345, at 2, reprinted in 1986 U.S.C.C.A.N. at 5266-67. The Senate Committee on the Judiciary specifically noted the importance of these changes governing qui tam suits in its explanation of the amended FCA's purpose:

"The proposed legislation seeks not only to provide the Government's"
based upon information already publicly disclosed unless the relator has "direct and independent" knowledge regarding the alleged falsity of the claims.\textsuperscript{43} Through this amendment, Congress attempted to strike the delicate balance between its competing concerns of encouraging qui tam suits and preventing the parasitic suits that the 1943 amendments were originally enacted to curtail.\textsuperscript{44}

The broad 1986 amendments greatly increased the number of civil suits brought against FCA violators by private citizens.\textsuperscript{45} This increased popularity of qui tam suits consequently stirred additional controversy and dissention among the courts and academia regarding the accurate interpretation of the FCA's

---

\textsuperscript{43} 31 U.S.C. § 3730(e)(4)(A)-(B). The statute later defines the term "original source" as an individual who has "direct and independent" knowledge of the false claims and voluntary provides information regarding that knowledge to the government prior to filing suit. Id. § 3730(e)(4)(B).

\textsuperscript{44} See, e.g., United States ex rel. Devlin v. California, 84 F.3d 358, 362 (9th Cir. 1996) (stating that "the FCA has been shaped by Congress's 'sleeking the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own" (quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994)))

\textsuperscript{45} Jack W. Selden & Richard L. Sharff, Jr., Battling David and Goliath—Defending Qui Tam Lawsuits Brought Under the False Claims Act, 62 ALA. L. 326, 327 (2001). For example, the Department of Justice reported that while only thirty-three qui tam cases were filed in 1987, that number rose to as many as 533 in 1997. Press Release, United States Department of Justice, False Claims Act Recoveries Exceed $10 Billion Since 1986, at http://www.usdoj.gov/opa/pr/2002/December/02_civ_720.htm (Dec. 16, 2002). This increased number of qui tam civil suits has likewise led to a larger monetary recovery by both the government and qui tam relators. See id. (stating that over six billion of the ten billion dollars recovered by the government under the FCA since the 1986 amendments were attributable to actions filed under the qui tam provisions).
II. OVER A DECADE OF CONFUSION—COURTS' PRIOR INTERPRETATIONS OF THE QUI TAM PROVISIONS

Although the 1986 amendments to the FCA were an attempt by Congress to alleviate the confusion surrounding the qui tam provisions, they contained their own share of ambiguous statutory terms. Courts have consequently contemplated and debated the meaning and breadth of the FCA's subject matter jurisdiction requirements for years, creating substantial circuit splits on various jurisdictional issues. These issues can be divided and evaluated on the basis of three essential questions asked either explicitly or implicitly by most courts in determining the existence of qui tam subject matter jurisdiction: (1) whether the allegations of the relator were "publicly disclosed" prior to the time the qui tam suit was filed; (2) if so, whether the qui tam suit was "based upon" that public disclosure; and (3) if the qui tam suit was "based upon" the public disclosure, whether the qui tam relator was the "original source" of the allegations underlying the suit. Although this Comment focuses on a corporation's ability to constitute an original source, courts must address these first two questions before the third becomes relevant. Therefore, this Comment will briefly discuss the judicial interpretive debates raised by each question and then evaluate whether and when a corporation can constitute an original source within and outside of the context of Nurse Anesthetists.

46. This Comment does not attempt to exhaustively address all such controversies, although many of them remain unresolved. For recent valuable debates regarding issues that extend beyond this Comment's scope, see generally Richard A. Bales, A Constitutional Defense of Qui Tam, 2001 WIS. L. REV. 381 (2001) (evaluating the constitutionality of qui tam actions under the FCA, especially in light of certain Article II provisions); Evan H. Caminker, State Immunity Waivers for Suits by the United States, 98 MICH. L. REV. 92 (1999) (analyzing whether and when qui tam suits can be brought against states without implicating the defense of state immunity); 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 (1995) (debating whether clear and convincing evidence would be a more proper burden of proof for a FCA action than preponderance of the evidence).

47. See infra notes 49-88 and accompanying text.

48. See, e.g., United States v. Bank of Farmington, 166 F.3d 853, 859 (7th Cir. 1999); Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 565 n.4 (11th Cir. 1994) (per curiam).
A. THE EXISTENCE OF PUBLIC DISCLOSURE

The FCA only imposes subject matter jurisdiction limitations if the allegations underlying the qui tam action are "publicly disclosed."49 Thus, the question of whether a corporation can constitute an original source does not arise unless a public disclosure has occurred.50 The Act defines "allegations or transactions" as publicly disclosed if they are revealed in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."51 Unfortunately, however, the statute does not offer a definition of the term "public disclosure,"52 and multiple interpretive debates have arisen due to this omission.53

For example, many courts have employed the doctrine of expressio unius to hold that the jurisdictional bar of the FCA is invoked only when the allegation or transaction was disclosed in one of the sources listed in the statute, such as hearings, reports, or the media.54 These courts have reasoned that because Congress explicitly enumerated a number of potential sources of public disclosure, Congress intended for public disclosure to act as a bar to subject matter jurisdiction only when the information is publicly disclosed through those specified sources.55 Conversely, some courts and scholars argue that the majority of circuits have historically misinterpreted this provision by applying the doctrine of expressio unius.56

50. See id.
51. Id.
52. See id. §§ 3729-3733.
53. See infra 54-64 and accompanying text.
54. Expressio unius, short for "expressio unius est exclusio alterius," is an interpretive maxim often used by courts that means "the expression of one [thing] is the exclusion of others." United States v. Wells Fargo Bank, 485 U.S. 351, 357 (1988).
55. See, e.g., United States ex rel. Found. Aiding the Elderly v. Horizon West Inc., 265 F.3d 1011, 1014 (9th Cir. 2001), cert. denied, 122 S. Ct. 2292 (2002); A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243 (9th Cir. 2000); United States ex rel. Dunleavy v. County of Del., 123 F.3d 734, 744 (3d Cir. 1997); United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990); see also 31 U.S.C. § 3730(e)(4)(A).
56. See, e.g., Dunleavy, 123 F.3d at 744; United States ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1499-1500 (11th Cir. 1991).
57. See, e.g., United States ex rel. Fine v. Advanced Sci., Inc., 99 F.3d 1000, 1004 (10th Cir. 1996); Robert Salcido, Screening Out Unworthy Whistleblower Actions: An Historical Analysis of the Public Disclosure
Rather, they advocate that in enumerating these sources, Congress merely intended to provide courts numerous examples of common means of public disclosure.\textsuperscript{58}

Another source of friction exists regarding whether information is “publicly disclosed” if it is merely accessible to the public or if an affirmative act of disclosure must occur in order for the disclosure to invoke the jurisdictional bar.\textsuperscript{59} While some courts have held that theoretically accessible information is sufficient to constitute a public disclosure,\textsuperscript{60} most courts have rejected this theory, holding instead that “public disclosure occurs only when the allegations or fraudulent transactions are affirmatively provided to others not previously informed thereof.”\textsuperscript{61}

A third source of dissention revolves around how broadly or narrowly to interpret the phrase “upon the public disclosure of allegations or transactions.”\textsuperscript{62} Courts have recently interpreted this phrase fairly narrowly to the benefit of certain qui tam relators, specifically querying whether the public disclosure revealed either the actual “allegations or transactions” that gave rise to the qui tam relator’s claim or mere information.\textsuperscript{63}


\textsuperscript{58} See Salcido, supra note 57, at 266-68. But see Williams, 931 F.2d at 1499 (specifically denoting that “[t]he list of methods of ‘public disclosure’ is specific and is not qualified by words that would indicate that they are only examples of the types of ‘public disclosure’ to which the jurisdictional bar would apply”).

\textsuperscript{59} Compare, e.g., United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1157-60 (3d Cir. 1991) (holding that “potentially accessible” information is publicly disclosed), with United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994) (finding a public disclosure when discovery is “actually made public through filing” with a court, but not when discovery is “only theoretically available upon the public’s request”).

\textsuperscript{60} For example, in United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co., the Third Circuit held that two memoranda produced during the discovery process of a prior suit constituted a “public disclosure” in a civil “hearing.” 944 F.2d at 1157-60. The court based this decision on the fact that the information contained in the memoranda was “potentially accessible” to the public and thereby triggered the jurisdictional bar of public disclosure. See id. at 1158.


\textsuperscript{63} See, e.g., A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243
Other courts, however, continue to interpret this phrase in a broader and more attenuated manner in the interest of precluding potential parasitic suits, thereby creating yet another interpretive disagreement among the circuits.\(^{54}\)

### B. THE MEANING OF “BASED UPON”

Another issue courts must resolve before they can address the original source question involves the interpretation of the phrase “based upon” when determining whether the allegations or transactions in a suit were “based upon” the prior public disclosure.\(^{65}\) A minority of appellate circuits have attributed to “based upon” its plain meaning of “derived from,” thus holding that allegations or transactions can only be “based upon” a public disclosure if the allegations derive or directly result from that public disclosure.\(^{66}\) These courts adhere to the “derived from” interpretation because it both honors the plain meaning of the statute and abides by the aim of the 1986 FCA amendments to encourage and facilitate more qui tam suits while discouraging parasitic suits.\(^{67}\)

The majority of courts have criticized the minority view, maintaining that if the allegations underlying the qui tam action have been previously publicly disclosed, those allegations are “based upon” the public disclosure even if the qui tam relator acquired all or part of his or her knowledge independently.\(^{68}\) Under this theory, a qui tam suit is “based

---


\(^{56}\) See United States ex rel. Bank of Farmington, 166 F.3d 853, 863 (7th Cir. 1999); United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1348 (4th Cir. 1994). In other words, if a qui tam relator has derived his or her allegations from a source independent of the public disclosure, then jurisdiction does not act as a bar to suit. See id. at 1349.

\(^{57}\) See, e.g., United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 394-402 (3d Cir. 1999) (Becker, C.J., dissenting) (citing Siller, 21 F.3d at 1348); Bank of Farmington, 166 F.3d at 863; Jones, 160 F.3d at 336 (Gilman, J., concurring).

\(^{58}\) See, e.g., Mistick, 186 F.3d at 388; United States ex rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 522 (9th Cir. 1999); United States ex rel. Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ., 147 F.3d 821, 825-29 (9th Cir. 1998); United States ex rel. McKenzie v. BellSouth Telecomm., Inc., 123 F.3d 935, 940-41 (6th Cir. 1997); United States ex rel. Findley v. FPC-Boron Employees’ Club, 105 F.3d 675, 682-85 (D.C. Cir. 1997); Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 567 (11th Cir. 1994) (per
upon” a public disclosure whenever “the claim repeats allegations that have already been disclosed to the public.” These courts therefore attribute to the phrase “based upon” the meaning “supported by.” They argue that this departure from the plain meaning construction of the statute’s language is justified, because the FCA’s “original source” exception would be meaningless if “based upon” were interpreted according to the minority view. Accordingly, the majority theory gives the original source exception actual meaning and strikes a better balance between preventing parasitic suits and encouraging relators to bring valuable information to the government based on independent knowledge.

C. THE REQUIREMENTS FOR AN “ORIGINAL SOURCE”

Even in situations where the court determines that the allegations were both publicly disclosed and based upon the public disclosure, qui tam relators have one last opportunity to avoid a jurisdictional bar to their suits if they are the “original source” of the allegations. The Act later defines an “original source” as someone who has “direct and independent knowledge” regarding the allegations underlying the suit and voluntarily shares such knowledge with the government before filing suit.

The determination of what constitutes “direct and independent knowledge” of the information underlying the allegations has once again led to dissention among the courts.


69. Biddle, 147 F.3d at 826.

70. See, e.g., McKenzie, 123 F.3d at 940; Cooper, 19 F.3d at 567; Precision Co., 971 F.2d at 552.

71. See, e.g., Mistick, 186 F.3d at 386-87 (adopting the majority approach because the minority approach makes the original source language of the FCA unnecessary); Findley, 105 F.3d at 683 (rejecting the Fourth Circuit’s approach “because it renders the ‘original source’ exception to the public disclosure bar largely superfluous”). These courts contend that if a suit need be “derived from” the public disclosure in order to raise the jurisdictional bar, then the statute’s provision protecting someone who is an original source of the allegations would be superfluous, because no one could be an original source if his or her information derived or resulted directly from the public disclosure. See id. at 683.

72. See Biddle, 147 F.3d at 826-28.


74. Id. § 3730(e)(4)(B).
Many courts have interpreted the language as creating a two-prong test.\textsuperscript{75} The first prong requires that the knowledge is "direct," a term defined by courts in various ways, including "marked by absence of an intervening agency, instrumentality, or influence,"\textsuperscript{76} the plaintiff's "own labor unmediated by anything else,"\textsuperscript{77} and "knowledge gained by the relator's own efforts and not acquired from the labors of others."\textsuperscript{77} The second prong requires independent knowledge, a phrase generally defined by courts as knowledge not derived from the public disclosure.\textsuperscript{79}

Some courts have extended the definition of "direct and independent" beyond a two-prong analysis by requiring either that a successful relator be a person who actually directly or indirectly contributed to the public disclosure,\textsuperscript{80} or less strictly, that the relator must inform the government of the fraudulent allegations before those allegations are publicly disclosed.\textsuperscript{81}

\textsuperscript{75} See, e.g., United States ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995); Houck v. Folding Carton Admin. Comm., 881 F.2d 494, 505 (7th Cir. 1989).

\textsuperscript{76} United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1976)).

\textsuperscript{77} United States ex rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 525 (9th Cir. 1999) (quoting United States ex rel. Devlin v. Cal., 84 F.3d 358, 360 (9th Cir. 1996)); see also Barth, 44 F.3d at 703 (quoting Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992)).

\textsuperscript{79} See, e.g., Barth, 44 F.3d at 703; Houck, 881 F.2d at 505.

\textsuperscript{80} See, e.g., Wang, 975 F.2d at 1418-20; United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16-18 (2d Cir. 1990). In defining "original source," the FCA does not explicitly distinguish between one who has knowledge regarding the allegations underlying the suit at the time of the disclosure and one who comes upon such information independently and directly at a later date. See 31 U.S.C. § 3730(e)(4)(B) (2000) ("For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action . . . ."). The Second and Ninth Circuits have suggested that by adding this distinction their interpretation best effectuates Congress's intent to reward those who expose the fraud and encourages potential qui tam relators to come forward with their information at an early time. See Wang, 975 F.2d at 1419; Dick, 912 F.2d at 18.

\textsuperscript{81} See, e.g., United States ex rel. McKenzie v. BellSouth Telecommns., Inc., 123 F.3d 935, 942 (6th Cir. 1997); United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690-91 (D.C. Cir. 1997). Although these courts reject the requirement that the original source be the individual who caused the public disclosure, they have held that recognizing the validity of
Other courts, however, have dismissed these additional requirements as unsupported by anything in the statutory language and unnecessary to protect against parasitic suits.\textsuperscript{82} 

Most importantly for the ensuing analysis, some defendants in qui tam suits have further argued that the FCA mandates that the original source be a natural person.\textsuperscript{83} The rationale for this requirement stems from Congress's ambiguous use of the term “individual” in the original source provision in contrast to Congress's more frequent use of the term “person” throughout the remainder of the relevant statutory section.\textsuperscript{84} Historically, statutes and courts have interpreted “person” more broadly than “individual,” subsuming within the definition of “person” not only individuals, but also corporations, associations, and other like entities.\textsuperscript{85} Thus, Congress's use of the term “individual” only qui tam relators who bring claims to the government before public disclosure, regardless of whether those relators are responsible for the public disclosure, best honors the FCA's goal of encouraging relators who bring fraudulent allegations to the government first while discouraging parasitic suits by relators who can no longer contribute beneficial information. See McKenzie, 123 F.3d at 942-43. For an in-depth analysis on this specific debate regarding the proper original source analysis, see Susan G. Fentin, Note, The False Claims Act—Finding Middle Ground Between Opportunity and Opportunism: The “Original Source” Provision of 31 U.S.C. § 3730(c)(4), 17 W. NEW ENG. L. REV. 255, 299-301 (1995) (arguing that the FCA's subject matter jurisdictional requirements are already sufficient to guard against parasitical suits and therefore preclude the need for a requirement that the qui tam relator be responsible for the public disclosure).


83. See, e.g., United States \textit{ex rel.} Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 553 n.4 (10th Cir. 1992) (choosing not to rule on the defendants' contention that the corporate plaintiff was not an individual and thus could not constitute an original source). But see United States \textit{ex rel.} Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 657 (D.C. Cir. 1994) (holding that a corporation could qualify as an original source but failing to analyze the effect of Congress's use of “individual” within the statute).

84. See 31 U.S.C. § 3730(e)(4)(B) (stating that original source means “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action” (emphasis added)); see also id. § 3730 (using the term “person” forty-seven times while using the term “individual” only once).

85. See, e.g., 1 U.S.C. § 1 (2000) (defining the term “person” in the United States Code to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals” unless otherwise indicated in the context of a particular statute); Clinton v. City of New York, 524 U.S. 417, 428 n.13 (1998) (stating that the term “person” has generally been construed more broadly than the term
instead of "person" only once throughout § 3730 of the FCA when defining an original source has led some attorneys to argue that original sources can only include natural persons to the exclusion of corporations and other like entities.\textsuperscript{86}

Even if one assumes Congress intended that the terms "person" and "individual" be used interchangeably within the context of the FCA, this assumption does not resolve the question of whether a corporation that acts by necessity through its agents can truly have "direct" knowledge of the allegations underlying a FCA claim as required by the statute. In \textit{Federal Recovery Services, Inc. v. United States} and \textit{United States ex rel. Precision Co. v. Koch Industries, Inc.}, the Fifth and Tenth Circuits respectively refused to recognize corporations as original sources because the corporations lacked the requisite direct knowledge.\textsuperscript{87} In \textit{United States ex rel. Springfield Terminal Railway Co. v. Quinn}, on the other hand, the District of Columbia Circuit held that a corporation did have sufficient direct knowledge to qualify as an original source despite its corporate status.\textsuperscript{88} Thus, dissention may exist, or at the very least soon develop, as to whether and when a corporation can have "direct" knowledge within the meaning of the FCA's original source provision.

\textbf{D. The Next Step}

These circuit splits will continue to widen as more and more courts rule on the precise jurisdictional restrictions limiting those bringing a qui tam action. The Eighth Circuit, in fact, recently ruled on these jurisdictional issues as a matter of first impression in light of opposing statutory interpretations, the Act's legislative history, recent case law, and competing

\textsuperscript{86} See 31 U.S.C. § 3730(e)(4)(B); see also supra note 83.

\textsuperscript{87} Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 452 (5th Cir. 1995); \textit{Precision Co.}, 971 F.2d at 554.

\textsuperscript{88} \textit{Springfield Terminal Ry. Co.}, 14 F.3d at 657.
policy concerns. The court's jurisdictional holdings present a valuable example of contemporary court treatment of the FCA's qui tam provisions and provide the necessary context for an analysis of the Eighth Circuit's controversial decision regarding whether and when a corporation can constitute an original source.

III. THE EIGHTH CIRCUIT SPEAKS—MINNESOTA ASS'N OF NURSE ANESTHETISTS V. ALLINA HEALTH SYSTEM CORP.

A. PUBLIC DISCLOSURE

In Nurse Anesthetists, the Minnesota Association of Nurse Anesthetists (Association) initiated a qui tam suit against a group of anesthesiologists and hospitals alleging that they had submitted false claims to the federal government for reimbursement of essentially overcharged and mischaracterized services in violation of the FCA. Although the Association maintained that it acquired knowledge of these false claims independently and directly, the defendants argued that the information regarding the allegations had leaked twice to the public prior to the qui tam relator's filing of the FCA claim, thereby calling into question the court's subject matter jurisdiction over the case. In the first instance, the defendants argued that the Association's allegations had been publicly disclosed through a 1991 administrative audit.

89. See Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1040-51 (8th Cir. 2002).
90. This Comment's summary and analysis of Nurse Anesthetists is limited in scope to the Eighth Circuit's holdings regarding the requirements and existence of subject matter jurisdiction.
91. Nurse Anesthetists, 276 F.3d at 1036-37. The specific allegations asserted by the Association against the hospitals and anesthesiologists included billing on a reasonable charge basis while unqualified to do so, inaccurately billing services as personally performed, misrepresenting the number of cases handled concurrently, and falsely certifying the necessity of both an anesthesiologist and anesthetist in medical cases. Id. at 1037-40.
92. See infra Part III.C for the court's later analysis of whether the Association constituted an original source that possessed such independent and direct knowledge of the allegations.
93. Nurse Anesthetists, 276 F.3d at 1043-44.
94. Id. An audit does constitute one of the means of public disclosure explicitly enumerated in the statute. See 31 U.S.C. § 3730(e)(4)(A) (2000). Therefore, this case did not raise the expressio unius question that other courts have addressed. See supra notes 54-58 and accompanying text.
Circuit, however, concluded that this audit did not constitute a public disclosure within the meaning of the statute, because the practices the audit revealed were not the same practices the Association alleged were fraudulent. The second public disclosure asserted by the defendants and essentially acquiesced to by the Association resulted from the publicity surrounding the Association's earlier antitrust suit against the defendants. Various newspaper articles covering the antitrust case had revealed the allegations underlying the qui tam action prior to the filing of the action. Consequently, the court held that due to the allegations' prior exposure in the news media, the FCA allegations were publicly disclosed, thus necessitating further analysis under the qui tam provisions to ascertain proper subject matter jurisdiction.

B. "BASED UPON"

After engaging in a review of the statutory language and legislative history of the FCA, the court further queried whether the qui tam lawsuit was actually "based upon" the public disclosure. The court determined that if the qui tam lawsuit was not "based upon" the news media disclosure within the meaning of the statute, then the plaintiff would prevail as to subject matter jurisdiction and no further analysis would be warranted. If, on the other hand, the lawsuit actually was "based upon" the prior public disclosure, then the court would need to pose the further question of whether the Association constituted an original source of the allegations underlying the lawsuit.

In its analysis, the court noted that the minority

95. <cite>Nurse Anesthetists</cite>, 276 F.3d at 1044.
96. <em>Id.</em> at 1040, 1043. In 1994, the Association and several others sued these same defendants in a separate action alleging violations of certain federal antitrust and state laws stemming from the defendants' billing practices in the area of anesthesia. <em>Id.</em> at 1040.
97. <em>Id.</em> at 1040, 1043. These newspaper articles were published in early November, over a month prior to the current suit's filing under the FCA in late December. <em>See id.</em> at 1040.
98. News media is also a source enumerated in the statute. 31 U.S.C. § 3730(e)(4)(A).
99. <cite>Nurse Anesthetists</cite>, 276 F.3d at 1043-44.
100. <em>Id.</em> at 1040-43.
101. <em>Id.</em> at 1044; <em>see also</em> 31 U.S.C. § 3730(e)(4)(A).
102. <cite>Nurse Anesthetists</cite>, 276 F.3d at 1042.
103. <em>See id.</em>
interpretation of the phrase “based upon” as signifying “derived from” both adhered to the plain meaning of the statutory language and met the policy concern of avoiding the parasitic suits that the 1986 FCA amendments explicitly sought to prevent.  

Although the court took into account these considerations, it ultimately followed the majority's practice of attributing the meaning “supported by” to the phrase “based upon.” Expressing concern that the minority view's interpretation of the phrase rendered the statute's “original source” test useless, the court determined that the public disclosure provision's “overall design” supported the majority view, arguing that “[t]he 'based upon' clause serves the concern of utility, that is of paying only for useful information, and the 'original source' exception serves the concern of fairness, that is of not biting the hand that fed the government the information.”

Because the information underlying the allegations of the current suit and the information publicly disclosed to the media were one and the same, the court held that the Association's suit was “based upon” a previous public disclosure.

C. ORIGINAL SOURCE

Although the Eighth Circuit interpreted the “based upon” language in the defendant's favor, it determined that the FCA's “original source” provision afforded the plaintiff one last opportunity to avoid a subject matter jurisdictional bar. Noting that the original source provision's failure to distinguish between “those who first bring a claim to light and others who later make the same discovery independently” may not always protect the initial discloser of the claim, the court nonetheless refused to apply the Second and Ninth Circuits' additional requirement that an original source be the person who caused the public

104. Id. at 1044-45.
105. Id. at 1047.
106. Id. at 1045.
107. Id. at 1047. Thus, the court reasoned that because Congress's ultimate objective when adopting the 1986 amendments was to achieve a balance between the competing concerns of utility and fairness, the leniency of the original source provision justified the majority's more stringent interpretation of the “based upon” test. See id.
108. Id.
109. Id. (“If the ‘based upon’ clause threatens to kick relators out of court because the government does not need them, the ‘original source’ exception reopens the courthouse door for certain deserving relators.”).
110. Id. at 1048.
disclosure.\textsuperscript{111} It also refused to follow the District of Columbia and Sixth Circuits' added requirement that the "relator must have revealed the allegation to the government before the public disclosure in order to be an original source."\textsuperscript{112} According to the court, such requirements remained unsupported by the statutory language and contradicted much of the reasoning behind Congress's 1986 amendments to the FCA.\textsuperscript{113}

The Eighth Circuit also refused to comply with the defendants' request to impose a separate requirement that the original source be a natural person.\textsuperscript{114} The court cited Clinton v. City of New York\textsuperscript{115} for the proposition that the term "individual" need not be interpreted to include only natural persons if the statute's context indicates that such an interpretation would be "absurd."\textsuperscript{116} The court very generally stated that, given the FCA's statutory language and legislative history, such a result would be absurd, especially considering that Congress did not otherwise suggest such a restriction.\textsuperscript{117}

The Eighth Circuit also held that the original source test required that the Association's knowledge be both direct and independent of the public disclosure.\textsuperscript{118} The court defined independent knowledge as "knowledge not derived from the public disclosure,"\textsuperscript{119} and it defined direct knowledge as knowledge "marked by absence of an intervening agency, instrumentality or influence: immediate"\textsuperscript{120} and "unmediated by anything but [the plaintiff's] own labor."\textsuperscript{121} Although the court easily determined that the Association's knowledge was of an independent nature,\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{111} Id. at 1048 n.11 (citing Wang v. FMC Corp., 975 F.2d 1412, 1418-20 (9th Cir. 1992); United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16-18 (2d Cir. 1990)).
\item \textsuperscript{112} Id. at 1050-51 (emphasis in original) (citing Findley v. FPC-Baron Employees' Club, 105 F.3d 675, 690-91 (D.C. Cir. 1997); McKenzie v. BellSouth Telecommms., Inc., 123 F.3d 935, 943 (6th Cir. 1997)).
\item \textsuperscript{113} Id. at 1048 n.11, 1050-51.
\item \textsuperscript{114} Id. at 1048 n.12.
\item \textsuperscript{115} 524 U.S. 417 (1998).
\item \textsuperscript{116} Nurse Anesthetists, 276 F.3d at 1048 n.12 (citing Clinton, 524 U.S. at 429).
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id. at 1048.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id. (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991)).
\item \textsuperscript{121} Id. at 1049 (quoting Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992)).
\item \textsuperscript{122} Id. at 1048.
\end{itemize}
it devoted more analysis to the question of whether such knowledge was “direct.”

The defendants based their opposition to the direct nature of the Association’s knowledge on two primary arguments. The defendants first argued that the Association’s knowledge could not be direct because its knowledge necessarily came from its members. The court dismissed this argument, holding instead that an organization’s knowledge, though derived from its members, is neither parasitic nor rendered indirect by any intervening agency. The court supported this holding by noting that the Association’s status as an unincorporated association rather than an incorporated entity meant that it had no legal status distinct from its members. Therefore, its members’ direct knowledge legally constituted the Association’s own direct knowledge.

The defendants’ second argument centered on the earlier audit conducted of the anesthesiologists’ billing practices. The defendants contended that because the alleged fraudulent billing practices were revealed through this audit, the anesthetists derived their knowledge from the audit and thus lacked direct knowledge of the anesthesiologists’ practices. The court countered, however, that the record indicated personal knowledge of the anesthesiologists’ practices and that a relator need not possess “personal knowledge of all elements of a cause of action” in order to rightly qualify as an original source. Thus, the court held that the Association’s knowledge of the allegations underlying the action was both independent and direct within the meaning of the FCA.

Finally, the court decided that the Association fulfilled the last statutory condition of qualifying as an original source by voluntarily providing information regarding the defendants’

123. See id. at 1048-50. Perhaps this extended analysis was inspired in part by the lower court’s holding that the Association lacked direct knowledge because its information came from its members. See id. at 1049.
124. See id.
125. Id.
126. Id. (citing St. Paul Typothetae v. St. Paul Bookbinders’ Union, 102 N.W. 725, 727 (Minn. 1905)).
127. See id. at 1049-50.
128. See id. at 1050.
129. Id.
130. Id. (citing Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 656-57 (D.C. Cir. 1994)).
131. Id.
fraudulent practices to the government prior to filing suit.\textsuperscript{132} Therefore, the Eighth Circuit held that the Association qualified as an original source of the allegations underlying the current action and asserted subject matter jurisdiction over the suit.\textsuperscript{133}

IV. A NEGLECTED REALM—A CORPORATION CAN CONSTITUTE AN ORIGINAL SOURCE IF ITS KNOWLEDGE IS SUFFICIENTLY "DIRECT"

A truly comprehensive analysis of every holding and resolution of circuit splits within \textit{Nurse Anesthetists} would necessitate a treatise. Therefore, while this Comment introduces the many ambiguities, inconsistencies, and disagreements surrounding the qui tam provisions of the FCA, it does not endeavor to resolve them all. Instead, the remainder of this Comment focuses on an in-depth examination of the Eighth Circuit's decisions in \textit{Nurse Anesthetists} regarding two arguable requirements of the original source provision that rarely have been commented on, much less satisfactorily resolved. These arguable requirements relate to a corporation's ability to constitute an original source and the circumstances in which a corporation's knowledge can truly be direct within the meaning of the FCA. The court's analysis of both of these issues is inadequate, and its resolution of at least one issue is incorrect, thus rendering the court's final decision erroneous.

Debates regarding whether and when a corporate entity can constitute an original source under the FCA have arisen in several cases, including \textit{Nurse Anesthetists}.\textsuperscript{134} The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action."\textsuperscript{135} This definition raises three essential issues: (1) as a matter of statutory construction, whether an entity other than a natural person may ever constitute an "individual"; (2) if so, whether the term "individual" should be construed to include entities other than a natural person in the specific context of the FCA; and (3) if the

\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 1051.
\textsuperscript{134} \textit{See id.} at 1048-50; \textit{see also}, e.g., Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 451-52 (5th Cir. 1995); \textit{Springfield Terminal Ry. Co.}, 14 F.3d at 656-57; \textit{United States ex rel. Precision Co. v. Koch Indus., Inc.}, 971 F.2d 548, 553 n.4, 554 (10th Cir. 1992).
first two questions are answered in the affirmative, whether the natural person with information on the fraudulent submissions must be acting as an agent of the corporate entity at the time that person acquires such information in order for the corporation's knowledge to qualify as "direct" under the FCA. The answers to these questions determine if and when a corporate entity can constitute an original source under the FCA and thus play an important role in determining whether a corporate entity in a public disclosure situation can avoid a jurisdictional bar.

A. AN ENTITY OTHER THAN A NATURAL PERSON CAN CONSTITUTE AN "INDIVIDUAL"

Courts have historically attributed a broader meaning to the term "person" than to "individual" when interpreting statutory language.\(^{136}\) Even statutes have differentiated between the two terms, generally defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."\(^{137}\) In *Clinton v. City of New York*, however, the Supreme Court ruled that despite such traditional differentiation between the two terms, the term "individual" could and, in the case of the Line Item Veto Act, should be interpreted synonymously with the term "person."\(^{138}\) In support of its ruling, the Court noted that the structure of the Line Item Veto Act clearly indicated that "Congress did not intend the result that the word 'individual' would dictate in other contexts."\(^{139}\) Rather, the Court determined that construing the Line Item Veto Act to allow expedited suits for exclusively natural persons rather than granting that same privilege to corporate entities as well would produce an "absurd" and "unjust" result.\(^{140}\) Thus, in certain contexts where it appears Congress did not intend a distinction

---

136. See supra note 85 and accompanying text.
137. 1 U.S.C. § 1 (2000). This first section of the United States Code provides definitions that are to be applied in the remainder of the Code "unless the context [of a particular statute] indicates otherwise." *Id.*
139. *Id.* at 429 n.14.
140. *Id.* at 429 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 574 (1982)).
between "individual" and "person" or where such a distinction seems absurd, "individual" can be construed to include entities other than natural persons, such as corporations, associations, or partnerships.  

B. THE TERM "INDIVIDUAL" SHOULD BE CONSTRUED TO INCLUDE ENTITIES OTHER THAN A NATURAL PERSON IN THE SPECIFIC CONTEXT OF THE FALSE CLAIMS ACT

In Nurse Anesthetists, the Eighth Circuit in a single footnote declined to interpret the FCA as requiring that an "individual" be a natural person. The court cited Clinton for the proposition that the term "individual" should not be limited to a natural person if a review of the statute fails to indicate any possible reason why Congress would intend for only natural persons to qualify for subject matter jurisdiction to the ultimate exclusion of corporations and other like entities. According to the court's analysis of the FCA's history, such an intention to provide natural persons with special treatment was never expressed and, in the court's opinion, never contemplated by Congress.

The Eighth Circuit's analysis, however, was less comprehensive than warranted considering the substantial import of its decision to the ultimate outcome of the case. Because the court determined that the allegations underlying the present case had been publicly disclosed and that the present suit was "based upon" such public disclosure, the court's subject matter

---

141. See id. It should be noted that Justice Scalia and Justice O'Connor strongly dissented to the Court's broad interpretation of the term "individual." Id. at 453-55 (Scalia, J., dissenting). Justice Scalia admonished the Court for being so eager to reach the merits of the case as to ignore the fact that "corporations, cooperatives, and governmental entities . . . are not 'individuals' under any accepted usage of that term." Id. at 454 (Scalia, J., dissenting). Justice Scalia pointedly referred to 1 U.S.C. § 1 and another definitional section within the Line Item Veto Act itself, both of which distinguished "individual" from "person," as evidence of Congress's intent to differentiate between the two terms. See id. (Scalia, J., dissenting). Despite his disapproval of the Court's blatant departure from the plain meaning of the Act, however, Justice Scalia decided that given the public importance of the matter, the appellees should be granted expedited review on the basis of the Supreme Court's Rule 11. Id. at 455 (Scalia, J., dissenting).


143. Id. (citing Clinton, 524 U.S. at 429).

144. See id.

145. Id. at 1043-44; see also supra notes 91-99 and accompanying text.

146. Nurse Anesthetists, 276 F.3d at 1047; see also supra notes 100-08 and accompanying text.
jurisdiction rested solely on whether the Association constituted an original source. Had the court held differently and determined that the FCA’s use of “individual” was intended to include only a natural person, the court would have lacked jurisdiction, leaving the Association without a recoverable qui tam claim. Therefore, the importance of this holding, combined with the interpretive void left by the court’s treatment of the original source issue in a single footnote, necessitates further analysis.

1. Default Rule

The Eighth Circuit cited Clinton to support its proposition that “individual” should be construed broadly to include corporations, associations, and other like entities unless an examination of the statute reveals adequate justification for its dissimilar treatment of natural persons. The court, however, misconstrued Clinton by indicating through its phrasing and brief treatment of the issue that interpreting “individual” to include corporations and like entities constitutes the default rule rather than a departure from such. The opposite, however, proves true. The very first section of the United States Code (USC) states that “persons” include individuals, corporations, associations, and other like entities, thus indicating a clear distinction between the meaning of “individuals” and that of “persons.” If “individual” subsumes within its meaning corporations, associations, and other like entities, then the USC’s inclusion of “individual” in the same list with “corporations, companies, associations, firms, partnerships, societies, and joint stock companies” would constitute mere surplusage. Because statutes are to be construed to avoid surplusage, such an interpretation proves at the least improbably and at the most impermissible. Thus, given that the first section of the USC applies “[i]n determining the meaning of any Act of

147. See Nurse Anesthetists, 276 F.3d at 1042 (stating that an affirmative answer to questions regarding whether the allegations were publicly disclosed and whether such allegations were based upon the public disclosure meant that the qui tam relator must be an original source in order for a court to exercise jurisdiction); see also 31 U.S.C. § 3730(e)(4)(A) (2000).

148. Nurse Anesthetists, 276 F.3d at 1048 n.12 (citing Clinton, 524 U.S. at 429).

149. See id.


Congress, unless the context indicates otherwise,” interpreting “individual” to signify only natural persons is the default rule, and the plaintiff must affirmatively prove to the court why the context of a particular statute suggests a departure from this presumption.152

2. The Supreme Court’s Ruling in Clinton

The Supreme Court in Clinton also indicated that the presumed legal meaning of “individual” does not include corporations, associations, and other like entities.153 The Court stated, however, that the structure and particularly the purpose of the specific statute in question, the Line Item Veto Act, indicated that Congress had not intended to distinguish between “person” and “individual.”154 The Court repeatedly stressed that even though the section of the Act dealing with expedited review referred specifically to “individuals,” the section “evidences an unmistakable congressional interest in a prompt and authoritative judicial determination of the constitutionality of the Act.”155 The Court could not conceive of a reason why, in light of this explicit purpose, Congress would grant expedited review to natural persons and not to corporations and other like entities.156

The FCA, however, is structured differently from the Line Item Veto Act in a particularly relevant respect. While the section of the Line Item Veto Act under review in Clinton had a single, explicit underlying aim to expedite review in all cases,157 the FCA is structured to balance two competing concerns.158 Through the 1986 Amendments to the FCA, Congress attempted to strike a balance between encouraging additional

---

153. Clinton, 524 U.S. at 428 n.13 (stating that “person” usually has a broader meaning than “individual” in the law and citing 1 U.S.C. § 1 as proof of that proposition).
154. Id. at 428-29.
155. Id. In support of its contention that this is the overwhelming purpose of the Act, the Court cited multiple provisions of the Act, including subsection (a)(2) which provides that copies of a complaint “shall be promptly delivered,” subsection (b) which requires that an appeal be filed within ten days, and subsection (c) which provides that the courts have a duty “to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).” Id. at 429; 2 U.S.C. § 692 (2000).
156. Clinton, 524 U.S. at 429.
157. See id. at 428-29.
158. See supra note 44 and accompanying text.
qui tam relators and discouraging parasitic suits. While a majority of the Supreme Court could not conceive of a reason why Congress would differentiate as such in the Line Item Veto Act given its singular principal purpose, more plausible reasons exist for the distinction under the FCA due to the competing concerns it attempts to address.

In fact, a court only reaches the original source question if the allegations have already been publicly disclosed and were based on that public disclosure. In situations where the allegations have already been public disclosed, the information the qui tam relator possesses is already available to the government and arguably of no added utility. Therefore, the original source provision is an exception granted by Congress in the interest of preventing unfairness to those who have acquired their information directly and independently despite such information's current availability to the government in the public domain. Congress may have deemed the possibility of unfairness higher for natural persons than for companies, associations, or other like entities. Thus, it is not necessarily "absurd" that Congress, in the interest of balancing the reward of useful information with fairness concerns, would limit its "original source" exception to private individuals. Private individuals come forward with their own information, whereas corporate entities come forward with the information of their agents and usually benefit financially from the potential qui tam reward relatively less than a private individual.

159. See supra Part I.C.
160. See Clinton, 524 U.S. at 429.
161. See supra Part I.C.
163. Nurse Anesthetists, 276 F.3d at 1047. The Eighth Circuit itself recognized the countervailing concerns that the FCA attempts to address in its analysis of the correct interpretation of the "based upon" language of the statute by finding that "[t]he 'based upon' clause serves the concern of utility, that is of paying only for useful information, and the 'original source' exception serves the concern of fairness, that is of not biting the hand that fed the government the information." Id.
164. Granted, the amount of the qui tam reward would be the same whether bestowed upon a private individual or a corporate entity. See 31 U.S.C. § 3730(d) (providing qui tam rewards to "persons"). This argument merely points out that corporate entities usually already possess a plethora of resources and a qui tam reward of $100,000, for example, generally would not affect their financial status relatively as much as it could positively affect the financial status of a private individual. Congress has often taken such
Therefore, the Court's decision in *Clinton* does not conclusively determine the correct interpretation of the FCA in light of the distinct purposes of the Line Item Veto Act and the FCA. The default rule of differentiating between "individual" and "person" thus continues to apply unless the specific context of the FCA indicates otherwise, and the Eighth Circuit's seemingly complete reliance on *Clinton* is inadequate.

3. Statutory Interpretation

a. Support for the Plain Meaning of "Individual"

The fact that a differentiation between "individual" and "person" is not absurd given the FCA's countervailing purposes does not necessarily signify that Congress intended such a distinction. Therefore, a more thorough analysis of the FCA's statutory language is warranted. Although the FCA itself does not define either "person" or "individual" in § 3730, the Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* referred to the Program Fraud Civil Remedies Act of 1986 (PFCRA) for such definitions when determining whether "person" in § 3730 of the FCA included states. According to the Court, the PFCRA is "a sister scheme creating administrative remedies for false claims" that was enacted around the same time as the 1986 Amendments to the FCA. The Court accorded great weight to the fact that the PFCRA did not include a state within its definition of "person," noting that the PFCRA was intended to act in conjunction with the FCA and stating that "it is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." Interestingly, while the PFCRA's definition of "persons" does not include states, it does include "any individual, partnership, corporation, association, association, considerations into account. See *Clinton*, 524 U.S. at 454 (Scalia, J., dissenting) (noting that "Congress treats individuals more favorably than corporations and other associations all the time").

165. See supra Part IV.B.1.
166. 529 U.S. 765 (2000).
167. *Id.* at 786; see also 31 U.S.C. § 3801(a)(6).
168. *Stevens*, 529 U.S. at 786.
or private organization.” Thus, a statute that the Supreme Court itself authorized as an accurate source of FCA definitions explicitly distinguished between the meaning of “individual” and “person.” This indicates that perhaps a similar distinction should be applied to those terms as used in the FCA.

Portions of the FCA’s text also support this distinction. For example, § 3730 of the FCA, the relevant section regarding qui tam actions, contains the term “person” forty-seven times throughout the statute but uses the word “individual” only once. This reaffirms the implication offered by the PFCRA that Congress is not using “individual” and “person” interchangeably or haphazardly, but is rather pointedly and purposefully requiring that an original source be a natural person.

“Individual” is used only twice more throughout the entire FCA amidst repeated use of “person.” In § 3733 of the FCA, Congress uses “individual” when requiring that “[a] verified return by the individual serving any civil investigative demand . . . or any petition . . . setting forth the manner of such service shall be proof of such service.” One who physically serves a petition clearly must be a natural person, and thus Congress’s use of “individual” again supports an argument for limiting its meaning within the statute to natural persons. The remainder of the FCA’s statutory language, however, proves less reassuring of a congressional intent to distinguish between the meanings of “individual” and “person.”

b. Support for a Departure from the Plain Meaning of “Individual”

“Individual” is used once again in the FCA within § 3733 in a much more ambiguous manner. Under the subsection Custodians of Documents, Answers, and Transcripts, the statute states,

Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of

---

171. See id. § 3730.
172. See id. §§ 3729-3733.
173. Id. § 3733(e) (emphasis added).
174. See id. § 3733(i)(2)(C).
Justice authorized under subparagraph (B).\textsuperscript{175}

This section essentially states that "individuals" cannot have access to certain discovery materials unless they are employees of the Department of Justice. If "individual" is to be interpreted in this provision as excluding corporations, associations, and other like entities, then this provision would seem to imply that while "individuals" cannot have access to these documents, corporate entities, because they are not "individuals" according to the default rule, can examine them at will. Concededly, unlike the reasons supporting the use of "individual" in the original source provision, there is little reason why Congress would differentiate as such in this portion of the statute.\textsuperscript{176}

Thus, Congress's use of "individual" in this provision can lead to two possible conclusions. Congress may have truly intended that "individual" and "person" be interpreted interchangeably throughout the statute, thus according no significance to its use of "individual" rather than "person" in the original source provision. Under this argument, Congress's use of "individual" in this section indicates a need for a departure from the default rule of attributing separate meanings to the terms. On the other hand, Congress may have used "individual" in this specific provision because of its unique context. The term in this specific provision is qualified by a list of other individuals: "any individual other than a false claims law investigator or other officer or employee."\textsuperscript{177} Investigators, officers, and employees are natural persons.\textsuperscript{178} Perhaps Congress, by stating "individual" in this particular provision, merely did so because its specific context contained immediate references to natural persons.\textsuperscript{179} Based on this argument, even though the default rule provided by the first section of the USC states that "individuals" and "persons" are distinct in meaning,

\textsuperscript{175} Id. (emphasis added).
\textsuperscript{176} In fact, such a result would most likely be considered "absurd" under the analysis of the Supreme Court in \textit{Clinton}. See \textit{Clinton v. City of New York}, 524 U.S. 417, 429 (1998).
\textsuperscript{177} 31 U.S.C. § 3733(i)(2)(C) (emphasis added).
\textsuperscript{178} See supra note 85.
\textsuperscript{179} See 31 U.S.C. § 3733(i)(2)(C). One could also argue that only individuals can "examine" or look at documents while corporations cannot because corporations can only "examine" documents through the eyes of their agents. Multiple statutes within the United States Code, however, refer to a corporation's ability to examine. See, e.g., 12 U.S.C. § 2277a-8(b)(1)(A) (2000); id. § 2279aa-5(a)(2)(F); 16 U.S.C. § 831h(b) (2000); 36 U.S.C. § 150104 (2000).
the context of this particular provision, including the qualifying language surrounding it and the lack of a conceivable purpose for making such a distinction here, rebuts such a presumption in this particular provision without necessarily going so far as to rebut the presumption in the FCA's other provisions.\(^{180}\)

A few problems, however, exist with this second interpretation and with the general contention that Congress intended to attribute a different meaning to “individual” than to “person.” First, § 3733 of the FCA provides numerous definitions of terms.\(^ {181}\) Among these definitions, Congress defines “person” “[f]or purposes of this section,” to mean “any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State.”\(^ {182}\) Thus, in a FCA provision, instead of using “individual” to signify a natural person, Congress simply used the term “natural person” to distinguish between corporate entities and the traditional meaning of individual.\(^ {183}\)

Congress even applied these particular terms within § 3733 by distinguishing between permissible methods of service for “natural persons” and “legal entities,” such as corporations and associations.\(^ {184}\) Even though Congress limited this particular definition of “person” to only that specific section of the FCA,\(^ {185}\) its use of “natural person” instead of “individual” to describe a human being sheds doubt upon the interpretation that Congress intended to limit “individuals” to only natural persons. Had Congress intended to do so, the use of “natural

---

180. See 1 U.S.C. § 1 (2000). Such an argument is affirmed by the use of “person” throughout the remainder of the provision, which states that “[t]he prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts.” See 31 U.S.C. § 3733(i)(2)(C) (emphasis added).


182. Id. § 3733(i)(4) (emphasis added).

183. The definitions provided by a section within the actual FCA itself would most likely prove more authoritative as to Congress’s intention when writing the Act than the definitions provided by the PFCRA and supported by the Supreme Court in a different context in Stevens. See, e.g., Royal Foods Co. v. RJR Holdings, Inc., 252 F.3d 1102, 1106 (9th Cir. 2001) (“The first and most important step in construing a statute is the statutory language itself.” (citing Chevron USA v. Natural Res. Def. Council, 467 U.S. 837, 842-44 (1984))).

184. See 31 U.S.C. § 3733(d). For example, the title of the section is Service Upon Legal Entities and Natural Persons. Id.

185. Id. § 3733(i) (stating explicitly that the definitions are solely “[f]or purposes of this section”).
persons” would be unnecessary because the term “individuals” would convey the same meaning. Given that a similar argument exists to question why Congress would use “individual” instead of “person” in select parts of the statute if both were meant to convey the same meaning, this is certainly evidence of poor statutory drafting, leaving courts to sort out Congress’s intentions through further examination of the statute’s text and other sources.186

Fortunately, § 3730 of the FCA provides some additional guidance. It not only contains the original source provision, but also includes another provision that is very influential when determining the correct textual interpretation of “individual.”187 Subsection (d) of § 3730 provides differing award amounts to a qui tam plaintiff in an action under which the government elects to proceed.188 Generally speaking, a qui tam plaintiff is entitled to receive fifteen to twenty-five percent of the proceeds of the FCA action depending on the amount of the plaintiff’s participation or contribution to such action.189 The subsection further provides, however,

Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions . . . , the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.190

This subsection can only apply to those that are original sources of the allegations, because only an entity that is an original source can still bring an action if such action is “based primarily on disclosures.”191 Yet even though this particular subsection applies exclusively to original sources, it uses “person” multiple times rather than utilizing “individual” as would be consistent with the original source provision of

186. See Church of the Holy Trinity v. United States, 143 U.S. 457, 459-65 (1892) (evaluating the legislative history and other sources outside of the statutory text in order to determine the intention of Congress in drafting the statute).
188. Id. § 3730(d)(1).
189. Id.
190. Id. (emphasis added).
191. See id. § 3730(d)(1), (e)(4)(A); see also 132 CONG. REC. 29,322 (1986) (statement of Rep. Berman) (stating that “where the information has already been disclosed and the person qualifies as an ‘original source’ . . . the court may award up to 10% of the total recovery to the qui tam plaintiff”).
§ 3730(e)(4)(B). There is no reason why Congress would refer to an original source as a "person" in this subsection and thus allow natural persons, corporations, and other like entities to collect a reward for their participation in a qui tam suit as an original source while subsequently limiting an original source to only an "individual" or natural person in a later subsection. Thus, this section further supports the interpretation that Congress did not contemplate excluding corporations and like entities from the original source exception through its apparently incidental use of "individual" in the original source provision.

Finally, the very section of the FCA that contains the original source provision also strongly suggests that Congress did not intend to limit the original source exception to only natural persons. Section 3730(e)(4)(A) provides the statute's subject matter jurisdictional restrictions and states in relevant part that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." Through this provision, Congress essentially limits subject matter jurisdiction in a prior public disclosure situation to an action brought by either the Attorney General or a "person" that is an original source. Because Congress in this provision explicitly refers to an original source as a "person" and not an "individual," this subsection, notably situated in the same section as the original source definition itself, provides a powerful example of Congress's interchangeable use of "person" and "individual" in referring to original sources. Thus, this statutory provision also supports the proposition that Congress did not attribute special significance to its use of "individual" in § 3730(e)(4)(B), but rather intended the terms "individual" and "person" to be used interchangeably and interpreted identically within the context of this particular statute.

c. A Textual Conclusion

Even though the default rule restricts the definition of

193. See id.
194. Id.
“individual” to solely natural persons, the textual context of the FCA, while ambiguous, tends to support a departure from that default rule. “Individual” is used in the FCA in a context that implicates that the meaning intended by “individual” is one typically associated with “person.” In addition, the FCA in a definitional section differentiates between “person” and “natural person,” but does not include “individual” within the definition of “person.” This shows Congress’s affirmative departure from subsuming the term “individual” into “person” within this particular Act. Finally, the only other provisions of the FCA that apply exclusively to original sources refer to such sources as “person[s]” rather than “individual[s].” These arguments combine to tentatively overcome the presumption for the traditional legal meaning of the term “individual.” Because the statutory language is ambiguous, however, an evaluation of other interpretive sources is also necessary in order to ascertain whether Congress truly intended to rebut this presumption and use “person” and “individual” interchangeably.

4. Legislative History

The legislative history, however, does not afford courts much reprise from the confusion the statutory text elicits. The congressional reports barely mentioned the original source provision of the FCA, much less explained if any meaning should be attributed to its use of “individual.” In fact, nowhere did Congress indicate in the legislative history that it intended to bar corporations, associations, or other like entities

196. See supra notes 174-80 and accompanying text.
197. See supra notes 181-86 and accompanying text.
198. See supra notes 187-94 and accompanying text.
199. See S. REP. No. 99-345 (1986), reprinted in 1986 U.S.C.C.A.N. 5266 (mentioning the original source provision only once throughout the entire congressional report). Although the Senate Report refers at one point to individuals as separate from corporations by stating that “the Committee seeks to halt companies and individuals from using the threat of economic retaliation,” the Report otherwise generally uses the terms “individual” and “person” completely interchangeably throughout the remainder of the Report, thus leaving interpreters in the same conundrum. See id. at 34, reprinted in 1986 U.S.C.C.A.N. at 5299 (emphasis added). The House congressional record does not even mention “individual” in its explanation of the statute, but rather refers to an original source as a “person.” See 132 CONG. REC. 29,321 (1986) (statement of Rep. Berman).
In one pertinent portion of the congressional report, however, Congress mentioned United States ex rel. Wisconsin v. Dean as an example of a case restricting the recovery of a qui tam relator in a manner inconsistent with Congress's intent. The report implied, and many courts have held, that Dean's holding preventing Wisconsin from being a qui tam relator due to a previous public disclosure that the state itself caused helped prompt the 1986 Amendments and the original source provisions. The Eighth Circuit in Nurse Anesthetists thus reasoned that a rule to limit original sources to natural persons "would have disqualified the State of Wisconsin from proceeding as relator in Dean and so would defeat one of the announced motivations behind the 1986 Amendments Act." In other words, because Dean, a case in which the relator was not a natural person, provided an impetus for the original source provision, Congress most likely would not have passed an original source provision that essentially invalidated the state's right, or the right of any unnatural person, to constitute an original source. At the very least, it is curious that Congress failed to mention anywhere in its legislative history the inappropriateness of a state arguing its rights as an original source if Congress had determined that a state could not constitute one. Thus, through its very silence, the legislative history also indicates that the use of "individual" in the original source provision should be accorded no special


204. See id.

significance, but rather should be interpreted to include corporations and like entities.\(^{206}\)

5. Legislative Purpose

Given the ambiguity of the FCA's statutory language and the disappointing lack of interpretive illumination in the legislative history, however, determining Congress's intent in its use of "individual" also requires an analysis of the FCA's legislative purpose.\(^{207}\) Although an earlier, limited analysis of the statute's countervailing aims determined that the FCA passed the Supreme Court's "absurdity" test as laid out in \(*\text{Clinton}*,\(^{208}\) it did not reveal whether Congress's overall purpose supports the reasonable yet controversial contention that Congress intended for original sources to include solely natural persons. Thus, further analysis regarding the statutory purpose is required.

Congress, through its 1986 Amendments, broadened the qui tam provisions of the FCA in an effort to attract additional

---

\(^{206}\) This argument involves the "the dog that did not bark" interpretive canon. See \*Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." (quoting \*Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting))). Under this canon, if Congress had truly passed an important part of the bill restricting original sources to natural persons, it is presumed that Congress would have debated such an important restriction or at the very least referred to it. See \*id*. at 396. Because Congress did neither, this lends support to the argument that the use of "individual" in the FCA's original purpose provision was not meant to be especially important or noteworthy. See \*id*. More recent statements by the drafters of the 1986 amendments to the FCA encourage that the qui tam provisions be interpreted broadly and thus implicitly affirm this argument for a more inclusive interpretation of who can constitute an original source. See \*145 CONG. REC. E1546-47* (daily ed. July 14, 1999) (statement of Rep. Berman). In an address to the U.S. Attorney General, Representative Berman specifically expressed concern with courts' "crabbed interpretations of the public disclosure bar," urging the Attorney General's office to "consider seriously the Department's obligation to shape the courts' interpretation of the False Claims Act." \*Id*.  

\(^{207}\) See \*Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454-55 (1989) (stating that although "the words used... are the primary... source of interpreting the meaning of any writing," it is nevertheless important "not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning" (quoting \*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945))).  

\(^{208}\) See supra Part IV.B.2.
qui tam relators, hoping to thereby increase exposure of those submitting fraudulent claims and amplify the amount of overall damages collected by the government. Despite this desire to increase legitimate qui tam actions, Congress also did not want people to bring parasitic suits based entirely on previous public disclosures. The Eighth Circuit noted in *Nurse Anesthetists*, however, that an institutional entity's possession of direct and independent knowledge of the allegations is generally not any more parasitic than a natural person's possession of such original source knowledge. Thus, the interpretation of "individual" as interchangeable with "person" does not counter Congress's goal to prevent parasitic suits.

Nor does it counter Congress's competing goal to encourage persons to become qui tam relators. As repeatedly expressed in the Senate report, the government wants to encourage people to bring qui tam suits, because qui tam relators help combat fraud and provide the government with increased personal and monetary resources. Denying entities other than natural persons the right to qualify as original sources could work against this expressed purpose of Congress by discouraging such entities from revealing the fraudulent actions of others under the theory that if such information becomes publicly disclosed, these entities could not qualify to recover any damages. Because an interpretation of

---


210. *See 89 CONG. REC.* H10846 (1943) (statement of Rep. Walter); *see also supra* Part I.B (outlining the 1943 amendments).


214. Granted, there is a policy argument that Congress may not have been concerned that corporations, associations, and like entities would become discouraged, because not every member has personal information regarding the FCA allegations. Under this argument, Congress expressly used the original source provision to protect only natural persons in the case of a public disclosure. If the information of the entity is direct and independent as required by the statute, however, Congress may indeed have intended to protect such entities as well. *See 31 U.S.C.* § 3730(e)(4)(A)-(B) (2000). As Congress itself noted, the federal government lacks the resources to litigate every false claim and depends on the time and economic resources of qui tam relators in cases such as *Nurse Anesthetists* in which it declines to intervene.
"individual" as interchangeable with the term "person" does not hinder or defeat either of the FCA's competing concerns while a contrary interpretation may do so, the legislative purpose appears to support this "interchangeable terms" interpretation.

6. Congress Intended a Corporation to Constitute an Original Source Under Certain Circumstances

The FCA's underlying purposes, combined with its textual inconsistencies and legislative history, support a departure from the default rule defining "individual" as solely natural persons. Even though the Eighth Circuit provided an inadequate analysis, it was correct in holding that given the context of the original source provision, Congress apparently intended to use "individual" and "person" interchangeably without applicable differentiation in significance.215

C. A NATURAL PERSON MUST ACQUIRE INFORMATION WHILE ACTING AS THE CORPORATION'S AGENT IN ORDER FOR THE CORPORATION'S KNOWLEDGE TO BE "DIRECT" UNDER THE FALSE CLAIMS ACT

Even if pursuant to the above analysis an original source is not limited to natural persons, the FCA requires that an entity be more than an "individual" within the context of the statute in order to constitute an original source. Subsection 3730(e)(4)(B) defines an original source in part as an individual "who has direct and independent knowledge of the information on which the allegations are based."216 While the Eighth Circuit in Nurse Anesthetists contended that there was "no doubt" that the Association's knowledge was independent from the public disclosures,217 the question of whether the Association's

See S. REP. NO. 99-345, at 7, reprinted in 1986 U.S.C.C.A.N. at 5272 (citing the "lack of resources on the part of Federal enforcement agencies" as one of the impetuses for strengthening the qui tam provisions). Thus, discouraging entities that possess direct, non-parasitic knowledge by denying them the protection of the original source exception would work against Congress's express intention to encourage additional qui tam relators and the valuable resources they provide. See id. at 6-8, reprinted in 1986 U.S.C.C.A.N. at 5271-73. In addition, Congress has already provided additional protection for natural persons against possible retaliation from employers with a separate provision protecting employees' jobs when they instigate a qui tam action against their employers. See 31 U.S.C. § 3730(h).

215. See Nurse Anesthetists, 276 F.3d at 1048 n.12.
217. Nurse Anesthetists, 276 F.3d at 1048.
knowledge was "direct" required a more extensive analysis.\textsuperscript{218}

The Eighth Circuit cited multiple definitions of "direct" and settled on two\textsuperscript{219} that particularly reflect Congress's intent to "avoid parasitical suits in which the plaintiff contributed nothing."\textsuperscript{220} These definitions included "marked by absence of an intervening agency, instrumentality or influence: immediate"\textsuperscript{221} and "unmediated by anything but [the plaintiff's] own labor."\textsuperscript{222} The district court held that the Association lacked such direct knowledge and hence did not constitute an original source because its knowledge was derived from its members.\textsuperscript{223} In support of its ruling, the district court cited both United States ex rel. Precision Co. v. Koch Industries, Inc.\textsuperscript{224} and Federal Recovery Services, Inc. v. United States\textsuperscript{225} as cases in which the circuit courts refused to recognize corporations as original sources because they lacked the requisite direct knowledge.\textsuperscript{226} The Eighth Circuit, however, distinguished these cases on essentially two different bases, consequently holding that the Association's knowledge was direct.\textsuperscript{227}

As one of its bases, the Eighth Circuit stated that the qui tam plaintiff in the current case differed from the plaintiffs in Federal Recovery Services, Inc. and Precision Co. in that the Association was an unincorporated association while the plaintiffs in the other two cases were corporations.\textsuperscript{228} The court attributed considerable significance to the fact that unlike corporations, "a voluntary unincorporated association has no legal status separate from its members."\textsuperscript{229} The court additionally noted that because unincorporated associations' rights are derived from their members' rights, they have "standing to assert their members'
rights in court,230 while corporations lack such standing.231 Therefore, according to the Eighth Circuit, an unincorporated association's knowledge is not parasitic and hence direct within the meaning of the FCA.232

Although this analysis may be legally correct, it is factually wrong. The plaintiff in Nurse Anesthetists, referred to throughout this Comment as the "Association" for purposes of brevity, is actually an incorporated, nonprofit entity, not an unincorporated association.233 Therefore, the court's legal analysis in many ways works counter to its ultimate holding. According to the court itself, as a corporate entity, the Association has a legal status separate from its members and does not have standing to assert the rights belonging to them.234 This implies a much more attenuated connection between the Association and its members than the court had assumed in holding that the Association's knowledge was direct.

The court's second basis for distinguishing Federal Recovery Services, Inc. and Precision Co. from Nurse Anesthetists rested on the differences in the timing of the qui tam plaintiffs' incorporations.235 In both Federal Recovery Services, Inc. and Precision Co., the corporations' members acquired the knowledge underlying the allegations and later formed the corporations that eventually brought the qui tam actions,236 whereas in Nurse Anesthetists, the corporation was formed prior to its members' acquisition of knowledge regarding the defendants' fraudulent claim submissions.237 The Eighth Circuit cited this difference in the timing of the incorporations as the cause for the other circuits'
holdings that the corporations' knowledge was not direct. The court further noted that in United States ex rel. Springfield Terminal Railway Co. v. Quinn, the District of Columbia Circuit held that a corporation had sufficient direct knowledge to qualify as an original source despite its corporate status. Resting on this holding and the lack of any evidenced congressional intent disqualifying corporate relators, the Eighth Circuit stated that "[t]hough organizations must, of course, act through agents, this does not render their knowledge parasitic or their agency 'intervening' in the sense of interrupting the causal connection between the corporation's efforts and the knowledge."

In the case of the Association, however, the nurse anesthetists were not acting as agents of the Association when they acquired knowledge regarding the allegations underlying the qui tam action. Rather, they were acting in their capacity as employees of the defendants at the time they allegedly witnessed the anesthesiologists' submissions of fraudulent claims to the government. Thus, this particular situation is not a case in which nothing interrupted "the causal connection between the corporation's efforts and the knowledge" or a situation where the qui tam relator's knowledge is "unmediated by anything but [the plaintiff's] own labor." Rather, the majority of the personal knowledge prompting the allegations was not acquired by the corporation's own labor at all, but rather by its members at a time when they were not acting in their capacity as the Association's agents.

For example, in Springfield Terminal Railway Co., a case that the Eighth Circuit in Nurse Anesthetists cited with favor, the
corporate plaintiff's agents acquired knowledge of the defendant's fraudulent submission of claims while acting as agents for the corporation. Springfield, the plaintiff, was involved in a labor dispute before an arbitration panel and brought a FCA qui tam action alleging an overcharging of the government by one of the arbitrators. Springfield’s employees learned of this fraudulent action while representing Springfield and thus were acting as Springfield’s agents at the time they acquired the knowledge. Therefore, Springfield Terminal Railway Co. does not speak to whether knowledge acquired in one’s own employment while not acting as an agent of the plaintiff corporation can constitute "direct" knowledge on behalf of the plaintiff corporation.

In addition, both Precision Co. and Federal Recovery Services, Inc. can be read as disqualifying a corporate plaintiff as an original source primarily because the plaintiff's agents acquired the knowledge underlying the allegations while not acting as agents for the plaintiff. In fact, even if the Association’s members in Nurse Anesthetists conducted some of the lawsuit investigation in their capacity as the Association’s members after the nurses informed the Association of the fraudulent submissions, the Association’s knowledge may still not be “direct.” For example, the Tenth Circuit in Precision Co. held that an affidavit and numerous statements, interviews, and reports gathered by the plaintiff corporation itself were “best characterized as a continuation of, or derived from... individual investigations” and hence were not sufficient to “convince us it [the plaintiff corporation] possesses the requisite direct and independent knowledge of the information on which its FCA allegations are based.” Thus, under the analysis applied by the Tenth Circuit, any partial investigation conducted on the part of the Association most likely did not constitute “direct” knowledge of the Association, because the

246. Id. at 647-48.
247. Id.
248. See Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 452 (5th Cir. 1995); United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 554 (10th Cir. 1992). The plaintiffs in those cases acquired knowledge regarding the defendants' fraudulent submissions prior to the corporations' formations, and thus those plaintiffs could not have been acting as agents of the corporation at the time they acquired the information. See Fed. Recovery Servs., Inc., 72 F.3d at 452; Precision Co., 971 F.2d at 554.
249. Precision Co., 971 F.2d at 554.
vast majority of the knowledge regarding the allegations was acquired personally by the Association's members while working in their capacity as employees of the hospitals.250

This does not mean, however, that a corporation can never have "direct" knowledge and thereby never constitute an original source.251 Rather, Springfield Terminal Railway Co. illustrates that a corporation can have "direct" knowledge of the underlying allegations of an FCA action.252 Yet in order to have "direct" knowledge that is "marked by absence of an intervening agency, instrumentality or influence"253 and "unmediated by anything but [the plaintiff's] own labor,"254 a corporation must derive its information from people who learned of the fraudulent actions while acting in their capacity as the corporation's agents.255 Because the Association derived its knowledge from members that acquired their information while acting as employees of the defendants,256 Nurse Anesthetists presents a situation dissimilar to that of Springfield Terminal Railway Co. and the Association lacks the requisite "direct" knowledge to constitute an original source.257

250. See Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1050 (8th Cir. 2002).

251. This conclusion would essentially render the discussion of corporations as original sources moot, because if a corporation could never have "direct" knowledge as statutorily required, then a corporation could never constitute an original source even if Congress had intended "individual" to include corporations and like entities. See 31 U.S.C. § 3730(e)(4)(B) (2000); see also supra Part IV.B (arguing that an entity other than a natural person can be construed as an "individual" for FCA purposes).

252. See supra notes 245-47 and accompanying text.


254. Id. at 1049 (alteration in original) (quoting United States ex rel. Barth v. Ridgedale Elec., Inc., 44 F.3d 699, 703 (8th Cir. 1995)).

255. See supra notes 235-50 and accompanying text.

256. See supra notes 241-42 and accompanying text.

257. This does not mean, however, that the defendants will not face the fines imposed by the FCA if the allegations regarding their fraudulent actions prove true. Rather, the Attorney General could file suit against the defendants, or the nurses themselves who had independent and direct knowledge of the allegations underlying the lawsuit could later bring the suit as proper qui tam relators. See 31 U.S.C. § 3730(a) (2000); id. § 3730(b); id. § 3730(e)(4)(A)-(B); see also United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 554 (10th Cir. 1992) (stating that even though the plaintiff corporation did not have direct knowledge, "[n]otably, Precision is the qui tam plaintiff in the present action, not William Koch or William Presley"). If only the actual nurses who acquired the requisite information brought the lawsuit,
Thus, the Eighth Circuit, by relying upon the Association’s supposed status as an unincorporated association and *Springfield Terminal Railway Co.*, was incorrect in its ruling that the Association had “direct” knowledge regarding the allegations underlying the suit. Not only was the Association in actuality an incorporated entity, but it also brought a FCA claim based on knowledge indirectly acquired from members who had learned of the defendants’ fraudulent conduct while acting in their capacity as employees of the defendants rather than as agents of the Association. Therefore, the Association did not have “direct” knowledge as required by the FCA in order to qualify as an original source, and the Eighth Circuit wrongly exercised subject matter jurisdiction over the qui tam action.

**CONCLUSION**

*Nurse Anesthetists* addresses issues of national concern to all taxpayers. As the qui tam provisions of the FCA become progressively important and the amount of damages qui tam relators enable the government to recover increases dramatically, an established, consistent interpretation of these provisions is both necessary and entirely lacking amidst the various circuit splits. A careful, detailed analysis of each qui tam subject matter jurisdictional provision is essential to determine congressional intent and establish fair application of FCA law. *Nurse Anesthetists* engaged in a partial study of these provisions, ultimately holding that the corporate qui tam relator constituted a proper original source and that the court could therefore exercise subject matter jurisdiction.

The Eighth Circuit, however, engaged in an inadequate

---

258. See supra notes 216-50 and accompanying text.
259. See supra notes 228-34 and accompanying text.
260. See supra notes 235-50 and accompanying text.
262. Between 1996 and 2006, qui tam relators are expected to help recover between $6.9 billion and $9.3 billion. See Taxpayers Against Fraud, Tenth Anniversary 1986 FCA Amendments: An Assessment of Economic Impact, at http://www.taf.org/publications/anniversary5.html (Sept. 1996). The amount saved by the government due to the deterrence of fraud provided by the qui tam provisions, on the other hand, is much greater and is expected to amount to between $105.1 billion and $210.1 billion during those same ten years. *Id.*
analysis in resolving these important issues. The court should have conducted a much more detailed examination of the FCA's language, legislative history, and legislative purpose to assure that the term "individual" in the original source provision did not limit original sources to natural persons. Additionally, while the court was correct in holding that a corporate entity can constitute an original source, the court ultimately failed to correctly interpret the jurisdictional requirement that a corporation have "direct" knowledge. Because the qui tam plaintiff in Nurse Anesthetists was actually a corporation with members that did not acquire their knowledge of the fraudulent actions while acting in an agency capacity for the plaintiff, the court was both factually and legally incorrect in holding that the plaintiff had "direct" knowledge and thereby erroneous in exercising subject matter jurisdiction over the qui tam action. While the FCA does convey to corporations the right to constitute an original source, that right is properly limited to those corporations with "direct" knowledge acquired by people actually acting in their capacity as the corporations' agents.