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Text

[*629] INTRODUCTION

In July 2006, the Justice Department settled a fraud case for $ 900 million, the largest recovery to date. 1 Tenet Healthcare, the defendant, was accused of submitting improper Medicare claims and paying kickbacks to physicians in exchange for referrals. 2 The Tenet case is emblematic of the serious and costly problem of fraud on the government. 3 As government spending on health care services 4 and defense 5 continues to escalate, vigilance in guarding against fraud is increasingly necessary. The government's primary tool in deterring and remedying fraud is the False Claims Act ("FCA"). 6 The Act enables a whistleblower, called a "relator," to file a civil qui tam action in federal court on behalf of himself and the United States. 7 In a typical qui tam complaint, the


3 See Alissa M. Nann, Janine C. Ashe & Kimberly H. Levy, Health Care Fraud, 42 AM. CRIM. L. REV. 573, 575 (2005) (describing health care fraud as costing taxpayers $ 12 billion per year and accounting for as much as 10% of total health care spending).


Frederick M. Oberlander
The relator alleges that the defendant submitted a false claim for payment to the government. Health care organizations and defense contractors are the most frequent targets of FCA lawsuits.

After a relator initiates a qui tam action, the complaint remains under seal while the government investigates the allegations. If the government concludes that the claim is meritorious, it will often elect to intervene--although the government also emphasizes the amount of the potential recovery in making its decision. When the government intervenes, it takes over primary responsibility for the action. If the government declines intervention, however, the relator retains the right to pursue the action on his own. When the claim is settled or results in a verdict for the government, the relator is entitled to a share of the settlement as an award for bringing the suit, regardless of whether the government intervenes. This policy encourages whistle-blowing and private enforcement of the FCA.

The relator's status as plaintiff has not been without controversy. Fraud injures the proprietary interest of the government, not the relator's interest. Accordingly, the relator has not suffered a "cognizable injury-in-fact" that is typically a prerequisite to standing to sue in federal court. Instead, the relator acts as a "private attorney general" enforcing the federal law in the name of the United States. At the same time, the relator is not an officer of the United States, and the relator's financial stake in the outcome of the case may influence how the relator conducts the action.

purposes of deciding an issue of federal court abstention, and have not actually authorized an FCA lawsuit to proceed in state court. See id. at 633.


The government can also initiate an action under the False Claims Act. 31 U.S.C. § 3730(a) (2006).

Id. § 3730(b)(2).

Caldwell, supra note 4, at 385. The government intervenes in 20% to 25% of qui tam cases. Id.

§ 3730(c)(1).

§ 3730(c)(3).

§§ 3730(d)(1)-3730(d)(2). The percentage of the settlement allocated to the relator varies based on whether the government has intervened and the extent of the relator's participation in the case. Id.

SENATE REPORT, supra note 6, at 25.


See United States ex rel. Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1995).

See id. at 1211-12 (noting that relator has not personally suffered a "cognizable 'injury-in-fact'").


This proposition has been the subject of some debate, but the courts have rejected the notion that a relator is an "officer" within the meaning of the Appointments Clause. See United States ex rel. Foulds v. Tex. Tech Univ., 171 F.3d 279, 292 n.21 (5th Cir. 1999); United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1041 (6th Cir. 1994); United States ex rel. Kelly v. Boeing Co., 9 F.3d 743,757-59 (9th Cir. 1993).

Frederick M. Oberlander
Consequently, tensions between the relator’s private interest and the government’s interest occasionally lead to conflict. There may be disagreements between the parties over whether to settle the claim and how to structure the settlement. 23 Aware of these potential issues, 24 Congress gave the Justice Department significant statutory control over the relator’s right to settle, even when the government declines to intervene. 25 Nevertheless, because the relator serves the public interest as well as his own pecuniary interest, attorneys representing relators may confront ethical and practical dilemmas when these public and private interests conflict. 26

This Note explores this ethical tension. Part I examines the types of ethical tensions that may arise during the course of the qui tam action. Part II discusses when, in general, attorneys have a duty to individuals or entities that are not direct clients, and then discusses those general duties in the context of qui tam actions. Part III explores the relationship between the relator and the government in a qui tam action and the judiciary’s struggle to define this relationship. Part IV looks at how the structure and history of the FCA shed light on the ethical conflicts that often arise in qui tam actions and the role that these conflicts have played in court decisions. Finally, this Note concludes by suggesting an ethical standard that courts should adopt in qui tam cases.

I. RELATORS’ ABILITY TO ADVANCE THEIR PERSONAL INTERESTS

Relators increasingly have advanced their private interests to the detriment of the government when litigating qui tam actions. 27 There are several ways this can occur. This Part explores some of the instances in which this conflict may arise.

A. SETTLEMENTS

When the government does not intervene, the relator is entitled to "conduct" the action. 28 Courts have interpreted this statutory provision to include the authority to settle the case. 29 Settlements provide qui tam plaintiffs with the opportunity to benefit themselves at the government’s expense. Specifically, relators can assert not only fraud claims, but also claims in which the relator is entitled to keep the entire payment. Relators can then structure the settlement to allocate most of the total payment to the non-fraud claims. For example, relators frequently join claims for retaliation in bringing the qui tam action; 30 the FCA prohibits defendants from retaliating against relators

26 See infra Part I.
27 BOESE, supra note 23, § 4.01 [C], at 4-34.3 (Supp. 2005-1).
29 See, e.g., United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715, 722 (9th Cir. 1994) ("The right to conduct a qui tam action obviously includes the right to negotiate a settlement in that action."); see also BOESE, supra note 23, § 4.07[B][2], at 4-160.4 (2005-1 Supp.) ("The 'right to conduct the action' inherently includes the decision of when to conclude it.'"). The extent of this authority, however, is not unlimited. See infra Part IV.

Frederick M. Oberlander
employed by the defendant. Unlike the main FCA action, the retaliation claim is personal to the relator. Thus, in contrast to the fraud claim, the relator is entitled to the entire payment in settlement of the retaliation claim and does not have to share the recovery with the government. Consequently, a relator has a strong incentive to structure the settlement agreement to appropriate as much of the payment as possible to the retaliation claim at the expense of the fraud claim. Although courts can, and do, refuse to approve settlements that deprive the government of its appropriate share of the recovery, relators nevertheless retain substantial control over the terms of the settlement agreement when the government does not intervene. In recent years, the government has objected to relator-negotiated settlements with increasing frequency in order to guard against such abuse.

B. CLAIM AND ISSUE PRECLUSION

The structure of settlements has also led to conflicts between relators and the government in ways other than merely the allocation of the recovery. As part of the settlement, relators typically release defendants from liability arising out of their actions. Although broad releases may enable relators to maximize the settlement amount, these settlements could preclude the government from subsequently bringing civil or criminal actions under the FCA or other statutes. While the FCA requires the Attorney General's consent to any settlement agreement, some courts will approve a settlement over the government's objection. One district court in California, for example, approved a settlement that resulted in a $350,000 recovery for the government when the

32 See id.
33 See id. (relator "entitled to all relief necessary to make the employee whole").
34 For example, if the defendant-company is willing to settle for $10 million, the relator keeps the entire amount if the settlement purports to designate it for the retaliation claim. However, if the same amount is designated as settlement for the FCA claim, then, under 31 U.S.C. § 3730(d)(2), the relator can keep at most 30%, which in this case is $3 million.
35 See, e.g., United States ex rel. Gibeault v. Tex. Instruments Corp., 104 F.3d 276, 277 (9th Cir. 1997) (where part of $300,000 settlement labeled as "legal fees" was turned over to relators, district court appropriately concluded that this was a settlement of the FCA action, and the government was entitled to its share). Court approval of settlements and the government's right to object are discussed infra Part IV.
36 See BOESE, supra note 23, § 4.07[B][2], at 4-160.4 to 4-160.5 (Supp. 2005-1).
37 Id. § 4.07[B], at 4-157 (2004-2 Supp.).
38 See, e.g., Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 155 (5th Cir. 1997) (release covered "all claims and counterclaims asserted in any pleading or other filing in this action, or which could have been asserted by the parties in this action, arising out of the transactions and occurrences that are the subject matter of this action").
39 See, e.g., id. at 160 (recognizing the "danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States").
original claim was potentially worth hundreds of millions of dollars. This outcome demonstrates the concerns expressed by a panel of the Fifth Circuit, which explained that a “relator may make sweeping allegations that, while true, he is unable effectively to litigate. He thereby can bind the government, via res judicata, and prevent [the government] from suing over those concerns at a later date when more information is available.” Although two courts of appeals have held that the government has an unconditional right to veto relator-negotiated settlements, these courts “fail[] to explain the practical question of how a court or the government can force parties to continue to litigate.” Regardless of the legal rule in the jurisdiction, the relator will necessarily influence and shape the scope of the release when the government chooses not to enter the action.

C. CONDUCT DURING LITIGATION

Although settlements present the clearest opportunity for conflicts of interest between the government and the relator, relators may also hamper the government's interest in the action in other ways. In particular, a relator's (or counsel's) particularly poor conduct during the course of qui tam litigation may prejudice the interests of the government. For example, in Minotti v. Lensink, the Second Circuit dismissed a qui tam case with prejudice because the relator repeatedly failed to comply with discovery requests. Furthermore, in cases where the government intervenes, relators could theoretically disrupt the government's litigation by calling their own witnesses or pursuing their own discovery in ways that interfere with the government's presentation. The FCA mitigates this problem because it permits the government--upon a showing that "unrestricted participation" by the relator would "interfere with … the Government's prosecution of the case"--to limit the relator's participation. There are, however, no reported cases addressing this issue. Therefore, while relators' interference with the government's litigation of the case remains only a hypothetical possibility at this point, it is settled that relators' incompetent representation can preclude the government from later litigating the case on the merits.

D. ADVERSE PRECEDENT

Finally, potentially harmful conduct of qui tam plaintiffs is not always limited to their own case. Relators who pursue marginal cases or institute qui tam actions for an improper purpose often end up creating precedent that proves detrimental to the government in subsequent qui tam cases. Although the Justice Department can unilaterally move

43 Alliant Techsystems, Inc., 50 F. Supp. 2d at 945. The court concluded that the Justice Department had already investigated the case for three years, a sufficient amount of time, and its previous decision to decline intervention essentially precluded the government from objecting to the settlement on this basis. Id. at 948.


46 BOESE, supra note 23, § 4.07[B][2], at 4-160.4 to 4-160.5 (2005-1 Supp.).

47 895 F.2d 100 (2d Cir. 1990).

48 Id. at 101-02. The court ruled that the Attorney General's consent is only required when the relator seeks to dismiss the case voluntarily. Id. at 103. In Searcy v. Philips Electronics N. American Corp., 117 F.3d 154 (5th Cir. 1997), the Fifth Circuit held that the Attorney General has an unconditional right under the consent provision of the False Claims Act to veto (or refuse to consent to) a settlement reached between the relator and defendant. Id. at 157. Despite its main holding, the court held that consent is not required when the dismissal is not voluntary. Id. at 158.


50 BOESE, supra note 23, § 4.05[C], at 4-140 (2000 Supp.).

Frederick M. Oberlander
to dismiss cases initiated by relators, it rarely takes this action when it has not intervened. These marginal or otherwise improper qui tam cases have led to a body of precedent that is adverse to the government. As one respected commentator has observed, "[a]cross the country, in almost every circuit, there are cases interpreting the federal FCA adversely to the government, almost all of which were litigated by private qui tam attorneys, which are regularly cited against the government in arguably legitimate fraud cases."  

As Part IV of this Note discusses, Congress clearly considered the possibility that relators would frustrate rather than assist the government's antifraud efforts and built statutory safeguards into the FCA to minimize such a result. However, the opportunity for relators to negotiate harmful settlements and to engage in other actions injurious to the government still exists. Therefore, the extent to which relators and their counsel owe the government a legal duty is still highly relevant. The next Part will discuss this legal duty in detail.

II. ATTORNEYS NEED NOT CONSIDER ONLY THEIR QUI TAM CLIENTS' INTERESTS

As the foregoing discussion demonstrates, relators have the ability to benefit themselves at the expense of the government. In litigating the case, therefore, qui tam attorneys may face opportunities to advance their client-relator's interests rather than those of the government. Before considering the extent to which relators' counsel are under a duty to prosecute the case in a manner that does not injure the government, it is important to consider whether, and to what extent, the law requires attorneys to respect the interests of individuals who are not their direct clients ("nonclients"). The next section discusses the legal duties attorneys owe nonclients in general, and then considers how those duties apply to the relator-government relationship.

A. THE MODEL RULES OF PROFESSIONAL CONDUCT

The American Bar Association's Model Rules of Professional Conduct ("Model Rules") expect attorneys to assiduously represent their clients, but also to respect nonclient interests. Under the Preamble to the Model Rules, the attorney-advocate "zealously asserts the client's position under the rules of the adversary system." However, the Model Rules also note that zealous representation does not necessarily require the attorney to employ every weapon in her legal arsenal to achieve her client's desired goal. The Preamble to the Model Rules begins by defining a "lawyer" as a "representative of clients," but also as "an officer of the legal system and a public

51 31 U.S.C. § 3730(c)(2)(A) (2006). If the government moves to dismiss over the relator's objection, the relator is entitled to a hearing. Id. Moreover, the Ninth Circuit requires the government to demonstrate that dismissal is related to a valid governmental purpose, and that there is a "rational relation between dismissal and accomplishment of the purpose." United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Co., 151 F.3d 1139,1145 (9th Cir. 1998).

52 BOESE, supra note 23, § 4.06, at 4-142 to 4-142.1 (2004-2 Supp.).


56 Boese & Haralson, supra note 54, at 35.

57 MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (2004) [hereinafter MODEL RULES]; see also MODEL RULES R. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

Frederick M. Oberlander
citizen having special responsibility for the quality of justice." 58 Furthermore, the comments to Model Rule 1.3 recognize that an attorney "is not bound … to press for every advantage that might be realized for a client." 59

As "public citizen[s]," 60 attorneys representing private interests should be especially cautious when a public interest is at stake. The public interest is most directly affected when the client is the government because the government [*636] brings civil actions to vindicate public rights. 61 Although the relator's counsel is hired by the relator and not by the government, relator's counsel represents the government's interest by virtue of her client's status as a plaintiff for the United States. 62 As the Seventh Circuit commented, relators act "as private attorneys-general as 'representatives of the public interest.'" 63 Further, the historical origins of qui tarn actions reinforce their public nature. The phrase "qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which is Latin for "who brings the action as well for the king as for himself." 64 The Fifth Circuit has noted that the portion of the qui tarn recovery for "the king" was occasionally assigned to the poor or another "public use." 65 Thus, because of the public nature of qui tarn suits, the Model Rules' definition of attorneys as "public citizen[s]" 66 is especially pertinent.

**B. THE RESTATEMENT OF THE LAW GOVERNING LAWYERS**

The Restatement (Third) of Law Governing Lawyers ("Restatement") also recognizes that attorneys may owe a duty to nonclients. The Restatement would impose liability on attorneys for violating a duty of care to nonclients in several situations. First, the Restatement imposes a duty when the attorney or his client invites the nonclient to rely on the attorney's provision of legal services, and the nonclient accepts the invitation. 67 For example, both the Restatement and case law impose a duty of care on the attorney for an insured to a liability insurer. 68 When an insured has been sued by a third-party, the insurer's interest is also at risk because the insurer must pay the judgment if the insured loses the case. Therefore, in this situation, the insurance company relies on the insured's attorney to defend its interest. 69

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58 MODEL RULES pmbl.
59 MODEL RULES R. 1.3 cmt. 1.
60 MODEL RULES pmbl.
61 See 28 U.S.C. § (a) (2006) (authority of Attorney General to conduct legal proceedings); United States v. San Jacinto Tin Co., 125 U.S. 273,279 (1888) (The Attorney General is "undoubtedly the office who has charge of the institution and conduct of… the litigation which is necessary to establish the rights of the government").
64 United States ex rel. Kelly v. Boeing Co., 9 F.3d 743,746 n.3 (9th Cir. 1993).
66 MODEL RULES pmbl.
67 The Restatement imposes a duty when "the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's … provision of… legal services, and the nonclient so relies." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51(2)(a) (2000) [hereinafter RESTATEMENT].
68 See id. § 51 cmt. g; id. § 51, Reporter's Notes to cmt. g.
The relationship between the lawyer for an insured and the insurance company is somewhat analogous to the relationship between a qui tam attorney and the government. In both relationships, one party (the insurer or government) must rely on the attorney for the other party (the insured or relator) to represent its interest in the litigation. The client-relator and her attorney arguably invite the United States to rely on the attorney's representation: the relator sues in the name of the United States Government, and the action is brought for the relator and "for the United States Government." Part I of this Note described the various ways in which the government must rely on the relator's legal representation. When the government does not intervene, the success of the case—and therefore the amount of recovery to the government—depends almost entirely on the quality of legal representation provided by relator's counsel. Even where the government intervenes and takes over primary responsibility for litigating the action, the relator's (and counsel's) conduct during the case, such as their compliance with court orders, can substantially affect the outcome of the action.

However, this Restatement "reliance test" cannot, standing alone, support the existence of a robust duty between the qui tam attorney and the government. First, the Restatement makes clear that attorneys can limit the scope of their duty to the nonclient by informing the nonclient that the attorney's services are only intended to benefit the client. Thus, the qui tam attorney could simply inform the government that her legal services are intended only for the benefit of the relator. Moreover, where a duty is imposed, the duty is one of care; it is not a fiduciary duty. A duty of care would obligate the relator's counsel to provide competent legal representation. However, it would not require relator's counsel to act for the benefit of the government rather than her client, the relator. That is, this Restatement "reliance test" does not address the duty of loyalty. This test, therefore, would support a legal malpractice claim brought by the government where, for example, relator's counsel fails to comply with discovery orders and the case is dismissed with prejudice, such as in Minotti v. Lensink discussed in Part I. The test would not, however, support a claim against counsel for furthering the relator's interest at the expense of the government.

The Restatement also imposes a duty to nonclients in other situations. The provision most relevant to the qui tam attorney-government relationship would impose a duty on an attorney when her client is acting in a fiduciary capacity. The Restatement recognizes a duty to nonclients "when and to the extent" that "the lawyer's client is a ... fiduciary acting primarily to perform similar functions for the nonclient," so long as the nonclient "is not reasonably able to protect its rights," and "such a duty would not significantly impair the performance of the

71 Id.
72 The relator "conduct[s] the action" when the government does not intervene. Id. § 3730(c)(3).
73 See supra Part I.C.
74 RESTATEMENT § 51 cmt. e.
75 Id. § 51; id. § 51 cmt.
76 See id. § 52(1).
77 See id.; cf. id. § 49 (breach of fiduciary duty).
78 Id. § 48.
79 895 F.2d 100, 101-02 (2d Cir. 1990). The relator in Minotti, however, acted pro se. Id. at 101.
80 RESTATEMENT § 51(4).
81 Id. § 51(4)(a).
82 Id. § 51(4)(c).
lawyer's obligations to the client.” 83 Although the Restatement supports only a duty of care to beneficiaries of the fiduciary-client, 84 cases cited by the Restatement have recognized that the attorney has fiduciary responsibilities to the beneficiaries when the client is a fiduciary. 85 For example, in a case brought by trust beneficiaries (the nonclients) against the trustee (the client-fiduciary) and his attorney, the Nevada Supreme Court explained, “when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties toward the beneficiaries as a matter of law.” 86 The Restatement does not purport to establish when the relationship between the client and nonclient is a fiduciary one. 87 As the comments to the Restatement provision explain, “[t]he duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length.” 88 Part III of this Note discusses whether the relationship between the government and the relator is in fact a fiduciary relationship. If it is, then, under this Restatement test, counsel for the relator may owe a fiduciary duty to the government as well as to the relator.

As the foregoing analysis indicates, both the Model Rules and the Restatement provide a basic yardstick by which to measure the existence and extent of relator’s counsel’s duties to the government. First, where the government relies on the representation of relator’s counsel, the attorney owes the government a duty of care. Second, if there is a fiduciary relationship between the relator and the government, relator's counsel may also owe a fiduciary duty to the government. A fiduciary duty carries with it a duty of loyalty, which may preclude the attorney from subordinating the government's interest to that of the client-relator. 89 However, even if the relator is a fiduciary, the Restatement would limit the duty the attorney owes the government “to the extent that” 90 the relator is acting in her fiduciary capacity, 91 the government “is not reasonably able to protect its rights,” 92 and imposing a duty “would not significantly impair the performance of the lawyer's obligations to the” 93 relator. Part III of this Note considers the question of whether the relator is acting in a fiduciary capacity in the context of qui tam actions, and Part IV explores the extent of the qui tam attorney's duty to the government.

III. DEFINING THE RELATOR-GOVERNMENT RELATIONSHIP

The scope of the ethical obligation that qui tam attorneys owe to the government will necessarily depend on the characterization of the relationship between the relator and the government. 94 The nature of this relationship has

83 Id. § 51(4)(d).
84 Id. § 51.
85 Id. § 51, Reporter’s Notes to cmt. h.
87 RESTATEMENT § 51 cmt. h.
88 Id.
89 See id. § 16 cmt. b.
90 Id. § 51(4).
91 See id. § 51(4)(a).
92 Id. § 51(4)(c).
93 Id. § 51(4)(d).
94 The FCA does not define the relationship. United States ex rel. Foulds v. Tex. Tech Univ., 171 F.3d 279, 289 (5th Cir. 1999). While Department of Justice policies encourage government attorneys to cooperate with relator's counsel, the policies apparently do not attempt to establish the expected conduct of the relator or her counsel. See GOVT ACCOUNTABILITY OFFICE, supra note 9, at 2.

Frederick M. Oberlander
implications for both the duty of care--because it determines whether the government relies on the relator--and also for the duty of loyalty. The relevant inquiry, therefore, is whether the relator is the government's representative, a fiduciary of the government, or something else entirely. In Vermont Agency of Natural Resources v. United States ex rel. Stevens, the United States Supreme Court held that the relator is a partial assignee of the government for purposes of standing. While Stevens resolves the issue of relator standing, the analogy to a partial assignment may not be useful for analyzing the relator's legal duty to the government. Before the Court decided Stevens, lower courts analogized the duties implicated by the relator-government relationship to traditional common law duties, including those of agents or fiduciaries. These analogies, although imperfect, have important implications for determining the extent of the duty relators owe to the government and, by extension, the duty relator's counsel owes to the government as well.

A. CIRCUIT COURT ANALOGIES PRIOR TO STEVENS

1. ANALOGIES IMPLICATING FIDUCIARY DUTIES

Before the Supreme Court issued its decision in Stevens, courts differed as to the proper definition of the relator-government relationship. The only court to squarely address the issue rejected the existence of any duty. The Fifth Circuit held that "an attorney owes important fiduciary duties to his client that the qui tam plaintiff does not owe to the United States. No legal duty prevents the qui tam [640] plaintiff from furthering his own interests to the detriment of the United States' interests." Expanding on this point, Judge Jerry Smith, dissenting from an en banc decision of the Fifth Circuit upholding the constitutionality of the qui tam provisions of the FCA, concluded that "[t]he relator does not have to follow Department of Justice . . . policies, has no agency relationship with the government, has no fiduciary or other duties to it, and has no obligation whatsoever to pursue the best interests of the United States." Other courts, however, have characterized the relator-government relationship in ways which, when taken to their logical conclusion, would create a fiduciary duty and duty of care to the government. The Second and Fourth Circuits have held that the relator is akin to an attorney working for the government on a contingent fee. If the relator is an attorney for the government, then the government would be considered a client. Attorneys owe their clients both a duty of care and a fiduciary duty. Thus, if the relator is a fiduciary to the government, then many courts would hold that the relator's counsel also owes fiduciary duties directly to the government.

95 See Foulds, 171 F.3d at 289 (noting that the question "allows no easy answer").


97 Id. at 773. A "partial assignment" is an "immediate transfer of part but not all of an assignor's right." BLACK'S LAW DICTIONARY 129 (8th ed. 2004).

98 See infra Part III.A.

99 Foulds, 171 F.3d at 291 n.18.


101 Id. at 762 (Smith, J., dissenting).


103 RESTATEMENT § 16; Id. cmt. b.

104 See supra Part II.B.

Frederick M. Oberlander
Courts have also analogized the relationship between the relator and the government to one of a shareholder who sues on behalf of a corporation in a derivative action. 105 This analogy is conceptually appealing and perhaps most reflective of the relator-government relationship. In a shareholder derivative action, a corporate stockholder sues on behalf of the corporation to redress an injury to the corporation. 106 Any recovery under the action goes to the corporation and not to the plaintiff-shareholder. 107 There are obvious similarities between derivative suits and qui tam actions: in both, a self-appointed plaintiff sues on behalf of an entity to remedy an injury sustained solely by that entity. Although the shareholder is nominally an owner of a corporation, 108 whereas a relator is not nominally an officer of the United States, 109 in many cases the shareholder owns so few shares 110 that recovery by the corporation does not [641] provide a tangible benefit to the shareholder.

Significantly, courts have held that when a shareholder sues on behalf of the corporation, she is not entitled pursue only her self-interest. 111 As one leading treatise has explained, "[b]ecause the representative shareholder seeks to protect interests that are broader than his or her own stake in the corporation, the representative stands in a fiduciary relationship with the corporation and the other shareholders." 112 Accordingly, if the relator is akin to a shareholder suing derivatively, then the highest duty--a fiduciary one 113 --attaches to the relator's relationship to the government.

2. ANALOGIES TO AGENCY RELATIONSHIPS

Other courts have defined the relator-government relationship as one of agency. 114 One district court, summarizing the case law on this relationship, concluded that the majority position of the courts 115 is that "the relator is authorized by the FCA to act as the government's representative or agent." 116 If the relator is merely an agent of the government, then the qui tam attorney's "real" client would be the government, because agents represent only the principal (the government in this case) and not themselves. 117 Further, an agent must loyally represent the principal's interest. 118 Therefore, analogizing the relator-government relationship to an agency

109 See discussion supra note 21.
110 Meg Shevach, Comment, Deciding Who Should Decide to Dismiss Derivative Suits, 39 EMORY L.J. 937, 963 n.3 (1990) (quoting W. KLEIN & J. COFFEE, BUSINESS ORGANIZATION AND FINANCE 165 (2d ed. 1986)).
112 Id.
115 Id. at 352.
116 Id. at 351.
117 See BLACK'S LAW DICTIONARY 68 (8th ed. 2004).
118 RESTATEMENT (SECOND) OF AGENCY § 387 (1958).
would support the notion that there is a fiduciary duty and duty of care that relator's counsel owes to the government.

B. FIDUCIARY DUTY: RELATORS' RELATIONSHIP WITH THE GOVERNMENT CONTAINS ASPECTS OF FIDUCIARY DUTIES

Relators are not, however, typical agents. Agents, unlike relators, represent and are subject to the complete control of the principal. 119 In Stevens, the Supreme Court recognized this difference when it expressly rejected characterizing the relator-government relationship as one of agency. As the Court explained, "the statute gives the relator himself an interest in the lawsuit, and not merely a right to retain a fee out of the recovery." 121 The Court reasoned that the relator is not merely an agent because Congress bestowed the relator with certain rights [*642] which permit the relator to act independently of the government, and often contrary to the government's express wishes. 122 For example, the Stevens Court specifically mentioned the relator's right to continue as a party after the government intervenes, and the relator's right to object to a proposed settlement negotiated by the government. 123 Further, as previously discussed, courts will sometimes approve settlements negotiated by the relator over the objection of the government. 124 Clearly, in these circumstances, the relator is not acting as an agent of the government.

A pure fiduciary relationship between the relator and the government is likewise incompatible with the provisions of the FCA. Fiduciaries are endowed with the responsibility to act for the benefit of the principal, not for their own benefit. 125 As one court explained, "[a] fiduciary relation exists when confidence is reposed on one side, and there is resulting superiority and influence on the other. . . ." 126 Moreover, "a fiduciary relationship involves discretionary authority and dependency." 127 These standards are not met by the relator-government relationship to the same extent that they are present in a typical fiduciary relationship, such as attorney-client 128 or guardianship. 129 The government does not place its trust in a relator nor depend on him to the same degree that

119 Id.

120 Id. § 14.


123 Stevens, 529 U.S. at 772.

124 See supra Part I.B.

125 BLACK'S LAW DICTIONARY 658 (8th ed. 2004) ("A person who is required to act for the benefit of another person on all matters within the scope of their relationship.") (emphasis added).


128 See RESTATEMENT § 16 cmt. b.

a client reposes his trust in his attorney. The government has its own attorneys and may elect to take over the action from the relator.

Further, the relator does not have "superiority" over the government. The relator's discretionary authority is subject to approval (or acquiescence) by the government, even when the government does not intervene; for instance, the government can withhold its consent to settlement and dismiss the action over the relator's objection. Finally, the relator does not act solely for the benefit of the government. In contrast to a shareholder in a derivative action, for example, a relator is entitled to a substantial portion of the recovery. As the statute states, the relator brings the action not only for the government, but also "for the person" (himself).

Nonetheless, the relator's relationship with the government is fiduciary-like. The relationship can be characterized as imposing a "quasi-duty" on the relator, a more limited duty that is recognized in many contexts. Courts have found that certain relationships contain important aspects of fiduciary relationships even if they do not actually meet the standard of a typical fiduciary. The nature of the duty is generally described as one of good faith and fair dealing. For example, many courts have held that a liability insurer is a quasi-fiduciary of the insured when the insured is sued by a third-party, at least when the insurer controls the defense of the claim. As the Colorado Supreme Court explained, "the quasi-fiduciary nature of the insurer-insured relationship stem[s] from the insurer's ability … to control the handling of a third-party claim and the defense against it." The insurer's representation of the insured and control over the litigation reflects the elements of reliance, trust, and superiority that define the fiduciary relationship.

Because the relator's relationship with the government reflects to a certain degree the traditional elements in a fiduciary relationship, it may be sufficient to support a quasi-duty, such as the one between an insurer and insured.

130 See BLACK'S LAW DICTIONARY 1569 (8th ed. 2004).
132 Id. § 3730(b)(1).
133 Id. § 3730(c)(2)(A).
134 See id. § 3730(b)(1) (action brought for the government and "for the person").
135 See Gadsden, supra note 107, at 47.
136 §§ 3730(d)(1)-(d)(2).
137 Id. § 3730(b)(1).

Frederick M. Oberlander
First, although the relator does not act solely for the government's benefit, he brings the action "for the United States Government," as well as himself, 143 and he represents the government's stake in the recovery when the government does not intervene. 144 Significantly, the relator brings the qui tam action to remedy fraud [644] against the government, and not himself. 145 Second, when the government declines to intervene, it has thereby chosen to "repose[]" its "confidence" 146 in the relator. As discussed in Part I, the relator has significant authority to negotiate settlements on behalf of the government when the government does not intervene. In addition, the relator's conduct during litigation may also substantially affect the direction and outcome of the case. 147 Third, in some circumstances the relator has "superiority" 148 over the government. Although the government can object to relator-negotiated settlements 149 or intervene in the case, 150 the relator's position may prevail over the government's objections. 151 Even if the government intervenes, the relator's continued participation provides him with an opportunity to significantly influence the course of the action. 152 Finally, the authority to prosecute the action and to negotiate settlements, including the amount of payment and scope of the release of liability, is certainly the type of substantial "discretionary authority" 153 enjoyed by fiduciaries.

Moreover, in Nebraska Press Ass'n v. Stuart,154 the Supreme Court suggested that private actors who are in a position to significantly affect the administration of core government functions may owe fiduciary-like duties not to substantially interfere with those functions. In Nebraska Press Ass'n, the Court considered whether a judicial order prohibiting the press from publishing facts about an accused violated the First Amendment guarantee of free speech. 155 The trial court voiced concern that the publication of damaging facts before a jury was impaneled would prejudice the community from which the jurors would be selected and thereby prevent an impartial trial. 156 Although the Court reversed the order, 157 it recognized that the press' position to adversely affect the administration of justice endowed it with a responsibility not to do so. The Court explained:

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145 See Gilles, supra note 17, at 341.
147 See supra Part I.C.
148 Wheeler, 239 P. at 558.
149 § 3730(b)(1).
150 Id. § 3730(b)(2).
151 See supra Part LB.
152 See id. § 3730(c)(1) (relator remains a party to the action).
155 Id. at 545-46.
156 Id. at 543.
157 Id. at 570. The trial had concluded by the time the issue reached the Supreme Court, but the issue was not moot because it was "capable of repetition." Id. at 546.

Frederick M. Oberlander
the extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly. . . . It is not asking too much to suggest that the press direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. 158

While not literally holding that the press owed a fiduciary duty to the criminal defendant, the Court nonetheless embraced the existence of an ethical obligation for those who occupy a unique position in which they are capable of significantly affecting the administration of an important government function.

Applying Nebraska Press Ass'n to the relator-government relationship strengthens the argument for finding a quasi-fiduciary duty. The qui tam plaintiff occupies a position of public trust which includes significant authority to affect the core government function of law enforcement. Law enforcement is usually conducted by public officials, not private citizens. 159 Under the FCA, however, the private relator is authorized to bring an action to enforce federal law. The relator's prosecution of the case and authority to negotiate settlements places the relator in a position to substantially and directly affect the government's law enforcement function. Therefore, relators hold positions of public trust, which provides another reason to impose quasi-fiduciary duties on them, and, by extension, their attorneys.

C. DUTY OF CARE: COMPETENT REPRESENTATION

Although the courts' characterizations of the relator-government relationship cannot withstand scrutiny as a pure fiduciary or agency relationship, each analogy recognizes that the relator undeniably represents an interest beyond his own, 160 which supports imposing on the qui tam attorney a duty of care to the government. Part II of this Note suggested that relator's counsel owes the government a duty of care under the Restatement test because the relator "invites" 161 the government to rely on his legal representation. Courts' various definitions of the relator-government relationship support this conclusion. In each analogy--attorney-client, plaintiff-stockholder to corporation, and agent-principal--the second party must rely on the representation provided by the first party.

Courts' concern with the quality of representation is especially apparent in cases considering relators' requests to litigate without assistance of counsel. 162 These decisions reflect the courts' belief that the government must be adequately 163 represented, 163 and they strongly support imposing a duty on relator's counsel to provide qualified, competent representation--an aspect of the duty of care. 164 As a leading treatise on the FCA explains:

[one] court noted that pro se relators are not constrained by ethical duties toward their "client," as licensed attorneys are. Moreover, the interests of the United States could be seriously impaired through the collateral estoppel and res judicata effects of decisions rendered in an action filed by a person who is not "subject to the

158 Id. at 560 (emphasis added).

159 See 7 AM. JR. 2D Attorney General § 52 (2006).


161 RESTATEMENT § 5 l(2)(a).

162 See BOESE, supra note 23, § 4.01[B][10], at 4-34 to 4-34.1 (2003-2 Supp. & 2005-1 Supp.).


164 RESTATEMENT § 52(1).
standards of ability, responsibility, liability and accountability required of members of the bar, as officers of me court and by the Code of Professional Responsibility."  165

As another court reasoned, "[t]he need for adequate legal representation on behalf of the United States is obviously essential... Considering what is at stake for the United States ... representation by a lay person is inadequate to protect [its] interests" 166 Courts clearly will not tolerate relators--who lack legal training--litigating on behalf of the government precisely because of the potential that the government will thereby suffer injury from incompetent representation. Conversely, counsel for relators are permitted to litigate the case precisely because they can provide qualified representation, not for the relator's benefit, but for that of the United States. Logically, therefore, counsel's representation of the relator comes with a duty to provide qualified, competent representation of the government's interest.

D. THE VERMONT AGENCY OF NATURAL RESOURCES V. UNITED STATES EX REL. STEVENS DECISION

In 2000, the Supreme Court ostensibly put the analogy debate to rest by holding that a qui tam relator is a partial assignee of the United States. 167 If the Supreme Court's analogy applies to every aspect of the relator-government relationship, then the Fifth Circuit's conclusion that a relator owes no duties whatsoever to the government would seem accurate. Accordingly, the relator would not owe either a quasi-fiduciary duty or a duty of care to the government. In a traditional partial assignment, the assignee can pursue his right of action as if it were a separate claim. 168 Moreover, in a partial assignment, both assignor and partial assignee are the real parties in interest for their respective parts of the entire claim. 169 Consequently, the assignee does not represent the assignor, 170 and thus a partial assignment does not typically give rise to a fiduciary relationship between assignor and assignee. 171 Given this, it is important to consider whether the Stevens decision prevents the application of the Restatement test to the relator-government relationship to find a duty of care or fiduciary obligation to the government.

The Supreme Court established the partial assignment analogy as a basis for concluding that the qui tam relator had Article III standing to sue. 172 However, expanding the analogy beyond the purpose for which it was created leads to conceptual difficulties. First, if the relator possesses unfettered discretion over the prosecution of his portion of the claim, then the President may not possess the required amount of control to enable him to "faithfully
execute[]" the laws of the United States as provided by the Take Care Clause in Article II of the Constitution. 173 The Supreme Court established this "control" principle in Morrison v. Olson. 174 In Morrison, the respondents challenged a subpoena issued at the request of the independent counsel, 175 an attorney who was appointed by the Attorney General to investigate crimes by high government officials. 176 The Supreme Court considered whether the Act authorizing appointment of independent counsel violated the Take Care Clause because it limited the President's discretion over the enforcement of the law. 177 The Court upheld the statute, noting that the Attorney General retained sufficient "control" over the independent counsel so that the President could fulfill his constitutional duties under the Take Care Clause. 178 In contrast, an assignor in a partial assignment cannot [*648] "control" the assignee. 179 Therefore, the relator cannot literally possess the same independence from the government as a partial assignee could without violating the "control" principle established in Morrison.

Second, analogizing the relator-government relationship to a partial assignment fails to recognize that the relator represents the government's interest when the government does not intervene. As previously discussed, this representation includes the authority to litigate and settle the case 180 and, consequently, creates the possibility that relators may injure the government by negotiating an inadequate settlement or by failing to properly follow court orders. This in turn may lead to the dismissal of the case with prejudice. 181 Several courts, citing this rationale, have rejected the notion that the partial assignment analogy announced in Stevens gives the relator complete ownership over his portion of the claim and thus entitles him to proceed pro se. 182 As one court explained, "[t]he idea that a relator can independently pursue what would amount to his or her personal part of a FCA lawsuit without affecting the United States' rights in the action is wholly inconsistent with the purpose behind the FCA." 183

173  U.S. CONST, art. II, § 3; see also BOESE, supra note 23, § 4.07[A][2], at 4-156.2 (2004-1 Supp.) (noting that "[t]he constitutionality of the qui tam provisions is frequently justified by pointing to the Executive Department's extensive control over the litigation").


175  Id. at 668.

176  Id. at 660-61.

177  Id. at 692-96.

178  Id.

179  See sources cited supra note 168.

180  See supra Part I.A.

181  See, e.g., Minotti v. Lensink, 895 F.2d 100,102-03 (2d Cir. 1990) (district court did not abuse discretion in dismissing case with prejudice where relator repeatedly failed to comply with discovery orders); United States ex rel. Jones v. Westwind Group, Inc., 417 F. Supp. 2d 1246 (N.D. Ala. 2006) (rejecting the United States' request to preserve its right to intervene and prosecute the case against defendant, when the court had already dismissed the case with prejudice for relator's failure to serve process within specified timeframe).

182  See United States ex rel. Rockefeller v. Westinghouse Elec. Co., 274 F. Supp. 2d 10, 18 (D.D.C. 2003); United States ex rel. Rogers v. County of Sacramento, No. CIV. S-03-1658 LKK DAD PS, 2006 U.S. Dist. LEXIS 42448, at *6 n.2 (E.D. Cal. June 23, 2006) (criticizing one court for allowing a pro se relator to litigate the case, and noting that it was the only case the court identified that permitted relator to proceed pro se).

183  Rockefeller, 274 F. Supp. 2d at 18.
Finally, partial assignments are distinguishable on at least two other grounds. First, unlike in a traditional partial assignment, the assignor—United States and not the relator remains the real party in interest to the entire FCA claim. Second, the FCA clearly gives the United States the power to limit the relator's authority to settle or otherwise conduct the action. No such power is conferred on an assignor under common law. These two differences between partial assignments and qui tarn actions provide additional reasons for interpreting Stevens as not preventing the application of the Restatement test.

IV. THE STRUCTURE OF THE FALSE CLAIMS ACT SUGGESTS A BALANCE OF AUTHORITY BETWEEN RELATORS AND THE GOVERNMENT

The relationship between the relator and the government is a creature of statute, not of common law. Therefore, it is important to look at the statute and legislative history to determine what type of relationship Congress intended. This Part explores how the drafters of the FCA envisioned the role of the relator in relation to the government. This history also assists in the application of the remainder of the Restatement test. Specifically, the Restatement calls for a determination of the "extent" to which the relator is performing fiduciary obligations, whether "the nonclient is ... able to protect its rights," and whether a duty to the nonclient would "significantly impair the performance of the lawyer's obligations to the client." At the same time, it is also important to remember that while the Restatement test is helpful, the statutory scheme will prevail in the case of conflict.

A. STRUCTURE AND HISTORY OF THE FALSE CLAIMS ACT

Neither the FCA nor its legislative history evince a clear understanding of the relator's relationship to the government. As discussed in the previous section, the FCA authorizes private plaintiffs to commence an action in the name of the government and the right, if the government does not intervene, to "conduct the action." Where the government does intervene, the relator retains a number of significant participatory rights. For example, the relator may continue as a party and object to government-negotiated settlements, if good cause is shown. These independent rights are inconsistent with a strict representative, agency, or fiduciary theory of the government-relator relationship because they permit the relator to control aspects of the litigation.

184 4 RICHARD D. FREER, MOORE'S FEDERAL PRACTICE-CIVIL § 17.11.[l][b] (3d ed. 2006).
185 BOESE, supra note 23, § 4.01[C], at 4-34.2 to 4-34.5 (2005-1 Supp.). But see id. at 4-37 (2003-1 Supp.) (noting that the Supreme Court suggested that the United States "may not always be the real party in interest in a qui tarn suit where the government and the relator have conflicting interests").
187 See supra note 168.
188 RESTATEMENT §§ 51(4), (4)(a), (4)(c)-(d).
189 See Biernacki v. Pa. R.R., 45 F.2d 677, 678 (2d Cir. 1930) (statute prevails over common law).
191 Id. § 3730(c)(3).
192 See, e.g., United States v. Health Possibilities, P.S.C., 207 F.3d 335, 340 (6th Cir. 2000) ("[T]he FCA provides private actors with a variety of incentives to bring qui tam actions, and significant influence over the ensuing development of qui tam suits...") (internal citations omitted).
193 § 3730(c)(1).
194 Id. § 3730(c)(2)(B).
notwithstanding the government's objection. 195 Moreover, the legislative history does not necessarily demonstrate that Congress considered the relator a representative of the government. In 1986, Congress amended the FCA to establish these additional rights for relators. 196 The report of the Senate Judiciary Committee that [*650] accompanied the bill referred to relators as "qui tarn plaintiff[s]," 197 "private litigant[s]," 198 or "qui tam relator[s]," 199 but not as government agents, representatives, or fiduciaries.

However, the Committee report demonstrates that the purpose of those rights is to ultimately benefit the government, and not the relator. The Senate Judiciary Committee explained that the new amendments allow the private individual who brought the false claims suit to take a more active role in the litigation if he chooses. . . Witnesses . . . testified that incentives for exposing false claims against the Government would be enhanced if individuals who make disclosures are able to more directly participate in seeing that the fraud is remedied.

The amendments were motivated by a perceived need to "increase[] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." 201 The Committee explained that the relator's continued participation after the government intervenes is useful as "a check that the Government does not neglect evidence, cause unduly [sic] delay, or drop the false claims case without legitimate reason." 202

Notably absent is any indication that the relator's new participatory rights are intended to benefit the relator only, and certainly not at the expense of the government. The Committee believed that "only a coordinated effort of both the Government and the citizenry" will achieve the goals of the FCA. 203 The House report, in fact, contemplated that relators could potentially interfere with the government's control of the case, particularly after the government intervenes. 204 Accordingly, Congress also included in the FCA tools which enable the government to limit the reach of problematic relators. For example, the government can dismiss or settle the case over the objection of the relator 205 and, if good cause is shown, limit the participation of the relator at trial 206 and during discovery. 207

What emerges from the legislative history, then, is a careful weighing and balancing by Congress, which appears to

195 See RESTATEMENT (SECOND) OF AGENCY § 14 (1958) (agent subject to principal's control); RESTATEMENT § 22(1) (client has authority to decide "when and on what terms to settle").

196 See SENATE REPORT, supra note 6, at 25-26.

197 Id. at 26.

198 Id. at 24.

199 Id.

200 Id. at 25.

201 Id. at 2.

202 Id. at 26.

203 Id. at 2 (emphasis added).

204 H.R. REP. NO. 99-660, at 24 (1986), as reprinted in Arnold & Porter LLP Legislative History: P.L. 99-562. For example, the Report notes that there were "concerns that discovery conducted by the relator may interfere with discovery being conducted by the Government." Id.


206 Id. § 3730(c)(2)(C).

207 Id. § 3730(c)(4).
have struck the balance in favor of granting relators limited independent rights, but only to the extent that [*651] the exercise of those rights ultimately benefits the government.

The statute and the legislative history strongly suggest that while Congress expected relators to act in their self-interest, Congress also anticipated that courts would not acquiesce in relators’ attempts to further that interest to the substantial detriment of the government. This policy guided the Ninth Circuit’s decision in United States ex rel. Killingsworth v. Northrop Corp. 208 In Killingsworth, the relator and defendant reached a settlement that appropriated most of the payment to the relator’s retaliation claim. 209 The government objected to the settlement on the ground that it deprived the government of its fair share. 210 The Ninth Circuit agreed, holding that the government has a right to object to a relator-negotiated settlement for “good cause,” 211 which includes the right to “ask the court to review a settlement for the purpose of determining whether the provisions of the settlement violate the False Claims Act by improperly allocating to the relator funds which should be paid to the government.” 212 However, the court also held that the court can approve the settlement over the objection of the Attorney General if the government has not intervened within a certain timeframe. 213 The court explained that “Congress’ intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government … is fundamentally inconsistent with [an] ‘absolute’ right of the government to block a settlement and force a private party to continue litigation.” 214

The Killingsworth decision holds important implications for the scope of the legal obligations of the relator’s counsel to the government. First, Killingsworth affirms the primacy of the government’s interest by ruling that the court has discretion to disapprove the relator’s settlement when the settlement is structured to deprive the government of the proper amount of the payment. 215 However, in holding that the court can approve the settlement over the objection of the Attorney General, 216 Killingsworth accepts that relators’ decisions over the prosecution of the action will prevail over those of the government in some circumstances. In this case, the relator’s decision to settle will overcome the government’s opposition if the settlement is fair to the government. 217 As a principle of legal ethics, the Killingsworth decision is instructive: qui tam attorneys can pursue their clients’ self-interest so long as their litigation of the [*652] case does not unfairly deprive the government of a proper recovery. 218 This principle provides an important limitation on relator’s counsel’s quasi-fiduciary duty to the government.

208 25 F.3d 715 (9th Cir. 1994). The Killingsworth court noted that the FCA “provides protection for the rights of both the relator and the government.” Id. at 720.

209 Id. at 718.

210 Id. at 720.

211 Id. at 725.

212 Id. at 720.

213 Id. at 722.

214 Id.

215 See id. at 720.

216 See id. at 722.

217 See W. at 720, 722.

218 One commentator argues that Killingsworth and a companion case should be read narrowly as permitting the government to object only to those settlements that unfairly allocate the proceeds to the relator. BOESE, supra note 23, § 4.05[B][1], at 4-160.1 (2003-1 Supp.). However, the Killingsworth court states that “when the government objects with good cause to a proposed settlement, it has a right to a hearing,” and then goes on to say that “[h]ere, the government’s objections to the proposed...
B. APPLICATION OF LEGISLATIVE HISTORY AND KILLINGSWORTH TO THE RESTATEMENT TEST

Applying the legislative history and result in *Killingsworth* to the Restatement test yields several conclusions. First, assuming the relator is endowed with quasi-fiduciary responsibilities, the "extent" of those duties is limited. Congress concluded that the best way to encourage whistleblowers to bring qui tarn actions was to appeal to their self-interest. Ultimately, relators are permitted to further their self-interest, but relator-negotiated settlements may not be structured to disproportionately advance their private interests at the expense of the government. Therefore, the relator acts as a fiduciary to the government only "to the extent" that the relator ultimately provides a fair recovery to the government when a settlement is reached. Congress intended, and *Killingsworth* recognized, that the relator's self-interest must not interfere with the FCA's public goal of remedying fraud. This balance, in fact, is consistent with the quasi-fiduciary relationship between an insured and insurer, where, as one court noted, unlike a true fiduciary such as a trustee, which must act "even to the exclusion of its own benefit, an insurer must act only in a way which will not interfere with the insured's right to benefit from its contract." 

Second, the Restatement test also limits the imposition of a duty to cases where the nonclient "is not reasonably able to protect its rights." The government has significant but not complete ability to "protect its rights." The government can withhold its consent from relator-negotiated settlements, limit the participation of the relator if the government intervenes, and settle the case over the relator's objections. *Killingsworth* demonstrates, however, that the government will be bound by a relator-negotiated settlement, despite its objections, so long as the settlement payment does not disproportionately benefit the relator. Other types of objections, such as an objection premised only on dismissal "with prejudice," may be insufficient to prevent court approval of the settlement.

settlement rest on good cause" because of the disproportionate allocation of the proceeds, *Killingsworth, 25 F.3d. at 725*. The clear import of the language is that the allocation of proceeds is just one example of "good cause," but not the only possible one. In support of his argument, the commentator cites *United States ex rel. Pratt v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 948 (CD. Cal. 1988)*, BOESE, supra note 23, § 4.05[B][1], at 4-160.1 n.586 (2003-1 Supp.). Although the court in *Alliant Techsystems* approved a settlement even though the government objected to the scope of the release and the total amount of settlement, *Alliant Techsystems, 50 F. Supp. 2d at 945*, the court did so because it found that the claims had been extensively investigated by the government, contrary to the government's suggestion, and thus in light of the facts before the court, the total amount of recovery was not unreasonable. *Id. at 948*. The case should not, therefore, be read in support of the proposition that courts should or will tolerate relators who release defendants from a wide range of fraudulent acts simply as a means to marginally increase the amount of recovery.

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219  RESTATEMENT § 51(4).
220  See supra Part IV.A.
221  See *Killingsworth, 25 F.3d at 720*.
222  RESTATEMENT § 51(4).
224  RESTATEMENT § 5 l(4)(c).
225  Id.
227  Id. § 3730(c)(1).
228  Id. § 3730(c)(2)(B).
229  See discussion supra Part IV.A.
230  BOESE, supra note 23, § 4.05[B][1], at 4-160.1 (2003-1 Supp.).
Even in circuits that have not accepted Killingsworth’s holding, the relator still likely retains significant authority where the government has not intervened. The Fifth and Sixth Circuits have held that the courts must always honor the government’s decision to withhold its consent from relator-negotiated settlements. Although an unconditional veto right theoretically empowers the government to block inappropriate settlements, it is not clear how a court can reasonably compel the relator and defendants to continue litigation of the case. In practical terms, relators still likely retain substantial authority to determine the total amount of recovery and the settlement terms.

Finally, the Restatement limits the fiduciary duty owed to nonclients in cases where it would not "significantly impair" the attorney's duty to the client. This provision, however, may conflict with the goal of the FCA to maximize recovery to the government. On the other hand, maximizing recovery for the relator may ultimately benefit the government: whistleblowers are more likely to file qui tam actions if there is a substantial reward for their activity. Under the balance apparent from the legislative history and under Killingsworth, however, the Restatement test is actually more appropriately reversed: qui tam counsel should zealously represent the relator, but where the representation "significantly impairs" the rights of the government, the relator has undermined the public trust the FCA bestows on him.

Even if courts recognize this provision in their consideration of whether the qui tam plaintiff owes a duty to the government, neither the Restatement nor case law would likely support the application of this provision in the context of relator-negotiated settlements, the scenario in which a duty is most significant. Rather, courts hold attorneys (or anyone else) liable for assisting a client-fiduciary in breaching the client's duties to the beneficiary, even if the attorney thereby benefits the client. Under this theory, counsel for relators could be held liable even if courts held counsel did not directly owe a duty to the government: because the client-relator must agree to the settlement, an attorney who negotiates a settlement agreement that would be a breach of the relator’s duty to the government would by definition assist the relator in breaching his quasi-fiduciary duty to the government.


233 BOESE, supra note 23, § 4.07[B][2], at 4-160.4 to 4-160.5 (2005-1 Supp.).

234 RESTATEMENT § 51(4)(d).

235 SENATE REPORT, supra note 6, at 1.

236 See id. at 2.

237 See supra Part I.A - B.

238 See RESTATEMENT § 51 cmt. h ("A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer."); id. § 51, Reporter's Notes to cmt. h.

239 See Chem-Age Indus. v. Glover, 652 N.W.2d 756 (S.D. 2002). In Glover, the court explained that while other jurisdictions recognized that attorneys directly owed fiduciary duties to nonclients in some situations, South Dakota did not. Id. at 772. However, it noted that “[l]egal authorities … are unanimous in expressing the proposition that one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby.” Id. at 773 (quoting Granewich v. Harding, 985 P.2d 788,792-94 (Or. 1999)) (second alteration in original). Accordingly, the court found that while the attorney-defendant "may not have directly breached a fiduciary duty … he may still be subject to liability" if he assisted his client in doing so. Id.

240 RESTATEMENT § 22(1).
This principle is illustrated by *Home Insurance Co. v. Wynn*. 241 In *Wynn*, the surviving spouse of the decedent brought a wrongful death action on behalf of herself and her sons, a claim for loss of consortium on her own behalf, and a claim for pain and suffering on behalf of the decedent's estate. 242 The spouse was the sole beneficiary of her husband's estate and, consequently, would receive the entire recovery for the pain and suffering claim. 243 In contrast, she would have to share the recovery for the wrongful death action with her sons. 244 In an effort to maximize recovery to herself at the expense of her sons, the spouse, with the assistance of her attorney, negotiated a settlement in which one-half of the payment was allocated to the claim made by the estate and her loss of consortium claim. 245

In an action by the sons against their mother and her attorney, the court upheld a jury verdict finding that the spouse breached her fiduciary duty to her sons by agreeing to the settlement. 246 The court also held her attorney liable for his role in preparing the settlement. 247 The court's ruling, therefore, subjects attorneys to liability for aiding a client-fiduciary in breaching the client's duty to the beneficiaries, even if the recovery to the client is thereby maximized. Thus, this [*655*] case illustrates that the Restatement's limitation on an attorney's duty to nonclients— the provision which limits the duty to cases that do not "significantly impair" the lawyer's duties to his client 248— does not operate when an attorney assists a client-fiduciary in a breach of duty.

Taking the Restatement test and the lessons of *Killingsworth* together, the qui tam attorney's duties to the government mirrors those of the client-relator. The attorney owes a quasi-fiduciary duty to the government, but that duty is limited in an important respect. So long as the attorney does not deprive the government of its fair allocation of the proceeds or unduly prejudice the interest of the government, he is otherwise free to maximize recovery to his client, the relator.

V. CONCLUSION: A BALANCED DUTY IN QUI TAM REPRESENTATION

Both the False Claims Act and the case law it has spawned demonstrate that the relationship between the relator and the government is not easy to classify. Relators are expected and permitted—at least to some degree—to pursue their self-interest, and they have a measure of control over the litigation independent from the government. At the same time, courts have expressed a demonstrable reluctance to permit the relator's conduct to infringe on the government's authority to prosecute the case or to approve settlement terms that undermine the government's interest in either the recovery or in pursuing additional action against the defendants. This Note has argued that relators have a quasi-fiduciary duty not to advance their own interest at the expense of the government.

Although courts should carefully evaluate each case to determine if qui tam attorneys have breached their quasi-fiduciary relationship to the government, it is appropriate to draw some general conclusions. First, in cases where relators also assert retaliation claims, settlements should not attempt to shift the settlement payment to the retaliation claim by undervaluing the fraud claim. Such agreements most clearly violate the *Killingsworth* rule and

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242 *Id.* at 625.
243 *Id.*
244 *Id.*
245 *Id.* at 626.
246 *Id.*
247 *Id.* at 627.
248 RESTATEMENT § 51(4)(d).

Frederick M. Oberlander
undermine the goals of the 1986 amendments. They deprive the government of the appropriate share of the recovery for the sole benefit of the relator.

Second, relator's counsel should be especially cognizant of the public interest at stake when crafting the scope of the release of liability. Counsel should not quickly agree to broad releases that extend beyond the claims in the pleadings, or to releases that would bar the government from seeking additional relief that is more appropriate. Qui tam attorneys should also avoid agreeing to releases which cover significant, potential liability not adequately reflected in the settlement amount. Where a broad release yields the relator only a marginal amount of recovery, the settlement may seriously impair the government's interest while achieving comparatively little for the relator. Counsel should consider the [*656] purposes of the 1986 amendments to the FCA, which extended the authority of relators to encourage private enforcement of the Act, but for the ultimate purpose of benefiting the government. If the settlement agreement does not, on the whole, benefit the government, then relator's counsel has undermined rather than represented the governmental interest. These settlements violate the intent of Congress in enacting the FCA.

In summary, relators and their counsel owe the government duties of qualified and competent representation and a good faith effort to litigate and settle the case on terms favorable to the public interest, in keeping with the spirit and purpose of the FCA. Essentially, relators are limited or quasi-fiduciaries for the government. Relators have significant discretion and ability to control the litigation, and the FCA entrusts relators to enforce the law and permits relators to bind the government with their decisions. Unlike a traditional fiduciary, relators prosecute the case for their own interest as well as for the government. The relator's pursuit of his own interest, however, must not deprive the government of the benefit of the action.