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Whistling in Silence: The Implications of Arbitration on Qui Tam Claims Under the False Claims Act

Mathew Andrews*

ABSTRACT

For nearly twenty years, corporate defendants have sought unsuccessfully to use arbitration to roll back protections for whistleblowers suing under federal law. The state and federal judiciaries have long stymied these efforts, on the grounds that defendants cannot force the Government’s claims into the secretive forum of arbitration. In January 2013, this protection came to an end. A federal court ruled for the first time that a whistleblower suing on behalf of the United States must pursue its action in arbitration. Five months later, this trend continued as federal courts have compelled arbitration of state law qui tam actions. This article argues that while the courts foundered in their reasoning, their holdings were legally correct based on Supreme Court case law and a legislative loophole in the Dodd-Frank Amendments of 2010. As a result, arbitration could fundamentally alter the way that whistleblower actions are investigated and prosecuted, and may blunt what has been described as the “government’s primary litigation tool for recovering losses sustained as the result of fraud.”
I. INTRODUCTION

Nearly two years ago, Justice Kagan dissented that “arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.” The Justice’s words are concerning because it is the Supreme Court that has pushed the boundaries of arbitrable disputes. Over the past two decades, the Court has stretched the Federal Arbitration Act (FAA) to allow companies to condition employment on workers signing arbitration clauses. As a result, employees increasingly face a dilemma: either forfeit their right to a judicial forum or lose their chance at employment.

Congress responded to this threat in 2010. As part of its landmark legislation following the 2008 financial crisis, Congress overhauled the use of pre-dispute arbitration by employers. The Dodd-Frank Act of 2010 amended nearly all of the federal government’s whistleblower statutes to prohibit companies from forcing whistleblowers into arbitration. Its anti-arbitration provisions are meant to ensure that those who seek to uncover
wrongdoing do not “los[e] the court system as a means of publicizing their claim[s],” and serve to protect both “investors” and the public. 6

The legal literature has failed to notice that Congress left a debilitating loophole in the nation’s whistleblower laws when it passed the Dodd-Frank Act. 7 In particular, Congress failed to add anti-arbitration provisions to the Government’s “primary litigation tool for recovering losses sustained as the result of fraud”: the False Claims Act (FCA). 8

Through a unique legal mechanism called qui tam litigation, the FCA authorizes individuals to bring civil suits on behalf of the federal government. 9 In return, these “relators” receive a share of the recovery. 10 Since the FCA was amended in 1986, whistleblowers have brought nearly ten thousand complaints under the act, 11 recovering nearly $26 billion in settlements and judgments. 12 In 2012, a whistleblower helped the U.S. Department of Justice (DOJ) obtain the largest health care fraud settlement in U.S. history. 13

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7. To the extent that the legal literature acknowledges this situation, it merely comments that Congress did not amend the False Claims Act. See Mark J. Oberti, New Wave of Employment Retaliation and Whistleblowing, 38 T. MARSHALL L. REV. 43, 99 (2012). The literature has not considered whether qui tam claims are arbitrable as a result of this omission, how defendants would go about compelling arbitration of such claims, and what the policy consequences of such arbitration would be.
10. Id. § 3730(d).
12. Id.
Congress’s failure to amend the FCA is understandable. For nearly twenty years, defendants have sought to use arbitration to limit the effectiveness of the statute. Nonetheless, the state and federal judiciaries have long blocked their efforts. As the courts have reasoned, the Government, not relators, owns the qui tam claims. Defendants, therefore, could not compel the Government’s claim into arbitration because the Government is not a signatory to relators’ arbitration contracts. Against this background of judicial protection, it may have been unnecessary for Congress to amend the FCA in 2010 to bar arbitration.

In January 2013, this protection came to an end. A federal court ruled for the first time that a whistleblower suing on behalf of the United States must pursue the action in arbitration. Five months later, another federal court held similarly and compelled arbitration of a California state law qui tam action. The district courts’ rationales were identical. Although a qui tam action is necessarily “brought in the name of the Government,” the action “still represents a claim belonging to the plaintiffs themselves.” Defendants can therefore force relators into arbitration on their qui tam claims. These district courts are not alone in their reasoning. In July 2014,


the California Supreme Court acknowledged that plaintiffs may be contractually obligated to arbitrate state law qui tam actions, and several federal courts have required plaintiffs to do so. This article is the first to address this shift toward qui tam arbitration. It is also the first to demonstrate that qui tam claims are arbitrable under prevailing Supreme Court precedent. By failing to include anti-arbitration provisions in the FCA, Congress set the groundwork for corporate defendants to oust whistleblower suits from court, and employers are obliging. Corporations have begun to prevail in federal court and are creating precedent in favor of qui tam arbitration. Employers are amending their boilerplate arbitration clauses to include language covering “private attorney general” actions—another name for qui tam actions. As the number of qui tam suits in federal courts continues to grow, defendants will have every incentive to push for the cheaper, faster, and quieter avenue of arbitration. As a result, corporate defendants in the coming years can blunt the Government’s primary weapon in the fight against fraud, and tip the scales in defendants’ favor.

The rest of this piece shows how defendants might go about compelling qui tam claims into arbitration, and demonstrates the public policy consequences of their doing so. The article proceeds in six parts. Part II provides background on the False Claims Act and the Federal Arbitration Act, and describes how an individual dispute involving qui tam arbitration might arise.

21. See Iskanian v. CLS Transp. L.A., LLC, 59 Cal. 4th 348, 391 (2014) (“The arbitration agreement gives us no basis to assume that the parties would prefer to resolve a [qui tam] claim through arbitration . . . . The parties have not addressed these questions and may do so on remand.”).


Part III analyzes why lower courts have split on whether qui tam claims are arbitrable, and demonstrates that courts have disagreed on whether relators “own” the qui tam claims. As the argument goes, if the Government (and not the relator) owns the claim, then a relator cannot sign a contract binding the Government’s claim into arbitration. As a result, qui tam claims would not be arbitrable.

Part IV argues that lower courts on both sides of the debate have erred in reasoning about whether relators “own” the claims. Lower courts have failed to reach a principled answer because they have ignored the Supreme Court’s jurisprudence on how relators bring their claims. By utilizing the Court’s standing jurisprudence, Part IV makes a unique argument for why qui tam claims are arbitrable based on relators’ status as “partial assignees” under the FCA.

Part V then shows that if relators “own” the qui tam claims, principles of contractual interpretation would mandate arbitration. Because arbitration is a matter of contract, a court cannot compel arbitration of a dispute that the parties have not agreed to arbitrate. While the circuits use three different standards to determine whether parties have agreed to arbitrate a particular type of claim, Part V shows that with a bit of clever defense lawyering, qui tam suits would be arbitrable under each standard.

Part VI demonstrates the significant and detrimental policy implications of qui tam arbitration. Given the complexity of qui tam claims, relators must cooperate extensively with the Government and have full access to discovery in order to prosecute their qui tam actions. Arbitration conflicts


27. See *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992); Michael Loucks, *Impacts of the Affordable Care Act and Anti-Kickback Legislation on Health Care Industry Clients*, ASPATORE, June 2013, at 1, 10, available at 2013 WL 3772666.
with both of these endeavors. Because this conflict is likely not “inherent” under Supreme Court case law, corporate defendants can blunt the effectiveness of the FCA without losing their ability to arbitrate. Congress, therefore, left a significant loophole in the nation’s whistleblower laws by failing to amend the FCA to include anti-arbitration provisions.

Part VII concludes by examining the broader policy consequences of qui tam arbitration. Qui tam arbitration could tip the balance in defendants’ favors by doing more than limiting relators’ rights. Qui tam arbitration could also limit the Government’s right to a judicial forum. Should the DOJ intervene into a relator’s action, defendants might be able to compel the agency into arbitration as well. Likewise, if the DOJ intervenes after an adverse judgment in arbitration, the agency could be barred from relitigating the claims or issues. In short, qui tam arbitration could do what no arbitrable claim has done before—limit the Government’s right to prosecute actions based on an arbitration clause signed only by private individuals.28

28. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 297 (2002) (declining to decide whether an adverse judgment against an individual bringing a claim under the ADEA would bar an executive agency from bringing a claim for the same conduct under the act).
II. BACKGROUND ON THE FALSE CLAIMS ACT AND THE FEDERAL ARBITRATION ACT

The FCA was originally enacted during the Civil War to deter fraud by defense contractors. Nonetheless, the statute was relatively toothless until Congress amended it in 1986. Pursuant to the amendments, the FCA imposes civil liability upon “[a]ny person” who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.” Further, the FCA mandates treble damages and a civil penalty of up to ten thousand dollars per claim.

The FCA’s qui tam procedure begins when a private person, the relator, brings a civil action “for the person and for the United States Government” against the alleged false claimant. To initiate the action, the relator delivers a copy of the complaint and any supporting evidence to the Government, which then has sixty days to intervene and assume primary responsibility for prosecution. If the Government declines to intervene within that sixty-day period, the relator has the exclusive right to conduct the action, and the Government may subsequently intervene only on a showing

30. See Am. Civil Liberties Union v. Holder, 673 F.3d 245, 248 (4th Cir. 2011) (“The 1986 Amendments expanded the FCA’s scope, increased the penalties, lowered the requisite standard of knowledge and intent, revised the process for a qui tam relator to file suit, and expanded the number of qui tam relators permitted to sue.”).
32. Id.
33. Id. § 3730(b)(1).
34. Id. § 3730(b)(2).
35. Id. § 3730(b)(2), (4).
36. Id. § 3730(c)(1).
37. Id. § 3730(b)(4).
Regardless of the DOJ’s intervention decision, the relator is entitled to a court hearing should the DOJ attempt to dismiss the suit and to a court determination of reasonableness prior to the DOJ’s settlement of the claim.

The relator will receive a share of any proceeds from the action. By statute, this share ranges from fifteen to twenty-five percent if the Government intervenes, and from twenty-five to thirty percent if the government does not—plus attorney’s fees and costs. It is ultimately the court’s responsibility to determine what is reasonable.

Like the False Claims Act, the Federal Arbitration Act (FAA) has a long history. The FAA was originally enacted in 1925 and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to oppose longstanding judicial hostility towards arbitration agreements and to give such agreements the same legal footing as other contracts. The FAA provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration. The statute further allows for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. As the Supreme Court has held, these provisions to manifest a “liberal federal policy favoring arbitration agreements.”

38. Id. § 3730(c)(3).
39. Dismissal prevents a relator from carrying out the action on his or her own and is distinct from declining to intervene. While there is judicial review of the former decision, there is none for the latter. Id. § 3730(c)(2)(A)-(B), (c)(3).
40. Id. § 3730(c)(2).
41. Id. § 3730(d)(1)-(2).
45. 9 U.S.C. § 3.
46. Id. § 4.
Based on these statutes, a typical dispute raising qui tam arbitration could proceed as follows. Prior to hiring an individual, a company would require that the person sign an employment agreement with a boilerplate arbitration clause. Ordinarily, such clauses state that the employee and the company agree to arbitrate “[a]ny controversy or claim arising out of or relating to this [employment] Agreement or the breach thereof.” These clauses are typically non-negotiable.

Sometime later, the company would enter into a separate contract with the Government for the provision of some type of good or service. In the course of that contract, the company would fraudulently bill the Government. The frauds could include any range of activities, from charging the Government for meals not actually served to troops in Iraq to requesting Medicare compensation for non-existent medical procedures. After an employee witnesses the alleged fraudulent activity, she would file a claim under seal with the DOJ. The DOJ would then decide whether to intervene. Should the DOJ decline, the relator would bring the action on her own in court. Should the DOJ intervene, the agency and the relator would bring the claims jointly in a judicial forum. In either case, the defendant would receive judicial notice of the allegations following the Government’s intervention decision. The defendant would then seek to compel the relator into arbitration based on the clause in whistleblower’s employment agreement—and spark the litigation that is the subject of the rest of this article.

III. THE LOWER COURTS ARE SPLIT ON WHETHER QUI TAM SUITS ARE ARBITRABLE BASED ON WHETHER RELATORS “OWN” THEIR CLAIMS

The solidly entrenched, though little discussed, judicial principle that qui tam actions cannot be arbitrated is now in doubt. The principle originated nearly twenty years ago in *Mikes v. Strauss*, where a federal district court for the first time rejected qui tam arbitration. As the court held, a relator “stands as a private representative of the [G]overnment” in her qui tam actions. Thus, the Government, and not the relator, owns the claim, because the whistleblower participates only in the “recovery to which the [G]overnment may be entitled.” The court therefore was “not convinced that [the] plaintiff, suing on the government’s behalf, [was] necessarily bound by [the arbitration clause’s] terms,” given that the “[G]overnment was not a party” to the relator’s employment agreement.

During the next two decades, federal courts adopted the *Mikes* “ownership” rationale in both holdings and dicta. As the courts have held, qui tam disputes cannot be arbitrated because the dispute is not

53. *Id.*  
54. *Id.*  
55. *Id.*  
56. See *Morgan v. Sci. Applications Int’l Corp.*, 612 F. Supp. 2d 81, 84 (D.D.C. 2009) (a relator’s qui tam action cannot “be subject to arbitration inasmuch as an FCA relator stands in the shoes of the United States and the United States has not agreed to arbitrate FCA claims”); *United States v. Cancer Treatment Ctrs. of Am.*, 2002 WL 31497338, at *1-2 (N.D. Ill. Nov. 7, 2002) (holding that qui tam suit could not be arbitrated because it was not a dispute “between the parties” to the arbitration contract, because the relator brings suit “on behalf of the United States”).  
between relators and corporate defendants, but between the Government and those that have allegedly defrauded it. 58 Thus, a relator cannot waive the Government’s right to proceed in court.

The secondary literature has joined the courts in arguing that qui tam claims are not arbitrable. 59 As Professor Janet Alexander has recently argued, qui tam actions cannot be compelled to arbitration because such suits “do not involve claims belonging to private individuals at all.” 60 Instead, the claims belong to the Government. 61 Because the FCA provides the relator only a “financial stake in the recovery” and a “right of action,” a relator cannot be forced to bring the state’s claim in arbitration. 62 As a result, Professor Alexander proposes that states cabin employers’ use of arbitration clauses by passing qui tam statutes like the California Private Attorneys General Act (“PAGA”). 63

Despite the recent scholarly attention and nearly two decades of judicial precedent, the legal literature has overlooked a significant development. In 2013, federal courts began to curtail their protection of qui tam suits. The case, Deck v. Miami Jacobs Bus. Coll. Co., was not much different than any other qui tam suit. 64 Several relators brought a qui tam action against a private college for making allegedly false certifications to the federal

58. See supra notes 56-57 and accompanying text.
59. E.g., Sean Estes, Can You Be Forced to Arbitrate Your FCA Claims?, JAMES HOYER (June 13, 2014), http://www.jameshoayer.com/can-you-be-forced-to-arbitrate-your-fca-claims/ (“[Y]our underlying FCA fraud case will certainly go to court because that claim belongs to the government and is therefore beyond the scope of any employment agreement you might sign.”).
60. See Alexander, supra note 15, at 1228; id. at 1224-25 (“The relator does not sue to recover group members’ individual claims for compensatory damages. Rather, a qui tam suit seeks to recover on the state’s own claim, measured by the number of violations, and payable to the state.”).
61. Id. at 1228.
62. Id. at 1234.
63. Id. at 1234-35.
government. The defendant subsequently sought to compel arbitration based on the relators’ contracts with the college. The Southern District of Ohio nonetheless became the first court to compel arbitration of a qui tam claim. The court cited no precedent for its holding. Instead, it relied solely on the FCA’s text. As the court found, the statute states that qui tam actions are “for the person and for the United States Government” (emphasis added). The court, therefore, interpreted this to mean that even though a qui tam suit is “brought in the name of the Government,” it still represents a claim belonging to the plaintiffs themselves. As a result, the relator was bound to arbitrate.

The reasoning in Deck was incomplete. The court pointed to no case law for the holding that relators own their claims. Likewise, the court neither indicated whether arbitration would be binding on the relator, nor whether the Government would be barred by precluded from relitigating claims or issues. In short, the Deck opinion raised more questions than it answered.

Five months later, the federal district court for the Central District of California similarly compelled arbitration of a qui tam action in Cunningham v. Leslie’s Poolmart, Inc. The decision did not cite Deck. In this case, the plaintiff brought its claim under Professor Alexander’s

65. Id
66. Id
67. Id.
68. Id. (citing 31 U.S.C. § 3730(b) (2012)).
69. Id.
70. The court stated that “[a]fter arbitration on all claims, the parties shall either request that the Attorney General consent to the resolution of the FCA claims . . . or resume litigation on the FCA claims in this Court.” Id. at *8. This holding does not clarify whether the court would review the FCA claims de novo or under the FAA’s “extremely deferential standard.” Dluhos v. Strasberg, 321 F.3d 365, 370 (3d Cir. 2003).
aforementioned, “unarbitrable” California PAGA. 72 In compelling the
PAGA claim into arbitration, the district court noted that PAGA suits “are,
in essence, a form of qui tam action.” 73 As with qui tam suits, a PAGA
plaintiff pursues civil penalties “on behalf of the government” and receives a
twenty-five percent portion of any settlement or judgment. 74 As a result, a
PAGA plaintiff “seeks to vindicate her own right to a substantial portion of
an award of civil penalties, not the rights of other[s].” 75 Accordingly, the
court concluded that this “individual” claim “against the Company” was
subject to the arbitration clause. 76

The federal judiciary has not been alone in its holdings. Most recently,
the California Supreme Court in Iskanian v. CLS Transportation Los
Angeles acknowledged that qui tam claims brought under PAGA could be
subject to arbitration. 77 The acknowledgment arose in the context of another
issue: whether California can ban arbitration clauses requiring employees to
waive their right to bring PAGA claims in any forum, including arbitration. 78
In upholding the California statute, the Court ruled that PAGA “lies outside
the FAA’s coverage” and is therefore not preempted. 79 As the Court
reasoned, a qui tam claim is “not a dispute between an employer and an
employee.” 80 Instead, it “is a dispute between an employer and the state.” 81
As such, “qui tam plaintiffs” cannot waive the state’s right to bring its
claim. 82

72. Id.
73. Id.
74. Id.
75. Id.
76. Id. at *11.
78. Id. at 360.
79. Id. at 386.
80. Id.
81. Id.
82. Id. at 387.
Despite this holding, the Supreme Court left open the possibility that the parties could arbitrate the claims. As the Court found, the specific “arbitration agreement gives [the Court] no basis to assume that the parties would prefer to resolve a representative PAGA claim through arbitration.”

The Court, therefore, remanded the case so that the parties could address whether to arbitrate the claim. In the months that followed, several federal courts have followed the California Supreme Court’s lead and have compelled arbitration of these state law qui tam claims.

As the foregoing cases demonstrate, state and federal courts have split as to whether qui tam suits are arbitrable. Yet these decisions suffer from a similar flaw. In coming to opposite conclusions as to who “owns” the qui tam claim (or “dispute”), courts both for and against qui tam arbitration have conspicuously failed to ground their analysis in Supreme Court precedent. As a result, lower courts have failed to come to a principled answer as to whether qui tam claims are arbitrable.

The California Supreme Court’s decision in Iskanian exemplifies the problem. While the majority purported to leave open the issue of whether qui tam claims are arbitrable, Justice Chin concurred on the grounds that the majority actually foreclosed such an outcome. As Justice Chin argued, the Court’s holding that qui tam claims “are not disputes between employers and employees” not only is a “novel theory, devoid of case law support,” but also would permit California to “ban arbitration of [qui tam] claims.” The concurrence thus called for the Court to “limit [itself] to an analysis firmly

83. Id. at 391.
84. Id.
86. The term “claim” and “dispute” are synonymous. See BLACK’S LAW DICTIONARY 472 (6th ed. 1990) (“dispute: conflict or controversy; a conflict of claims of rights; an assertion of a right claim or demand on one side, met by contrary claims or allegations on the other”).
87. Iskanian, 59 Cal. 4th at 396 (Chin, J. concurring).
grounded in high court precedent, rather than needlessly adopt a novel theory that renders the FAA completely inapplicable.\textsuperscript{88} Unfortunately, the concurrence failed to fill in that analysis.\textsuperscript{89}

This shortcoming is not inevitable. This article is the first to provide an analysis, firmly grounded in high court precedent, for why qui tam claims are arbitrable. As the next section of this article demonstrates, under current Supreme Court case law, employers can compel relators to arbitrate the qui tam claims, because those claims belong to relators as “partial assignees” under the FCA.

IV. DEFENDANTS CAN COMPEL QUI TAM CLAIMS INTO ARBITRATION BECAUSE RELATORS OWN THE CLAIMS

Despite their inconsistency, lower court decisions regarding the arbitrability of qui tam claims have agreed on one point. If a relator owns the qui tam claim, she can be compelled into arbitration. If the Government owns the claim, she cannot.

Nonetheless, decisions on both sides of the issue—as well as the litigants’ briefs—have failed to cite any Supreme Court jurisprudence to

\textsuperscript{88} Id.

\textsuperscript{89} The concurrence argues that qui tam plaintiffs have a “statutory right” to their claim. Id. at 395. Further, under Supreme Court case law, a provision in an arbitration agreement may not “forbid[] the assertion of certain statutory rights.” Id. (citing Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013)). Thus, the concurrence concludes that PAGA waivers are unenforceable because they deny qui tam plaintiffs their statutory rights. Id. at 396-97. The concurrence, however, does not explain why—under Supreme Court case law—qui tam plaintiffs have a statutory right to their claim. If a PAGA plaintiff is, as the majority and concurrence say, an “agent or proxy of the state,” id. at 394, then they would have no statutory rights of their own. See Willcox & Gibbs Sewing-Mach. Co. v. Ewing, 141 U.S. 627, 637 (1891) (“[T]he principal has a right to determine or revoke the authority given to his agent at his own mere pleasure; for, since the authority is conferred by his mere will, and is to be executed for his own benefit and his own purposes, the agent cannot insist upon acting when the principal has withdrawn his confidence, and no longer desires his aid.”). This article fills in the conceptual gap by arguing that qui tam plaintiffs have a “statutory right” as partial assignees rather than agents of the state.

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support their positions on who owns a qui tam claim. This Part fills that
interpretive gap by looking to the Supreme Court’s jurisprudence on
relators’ standing. It is impossible to understand whether a relator owns her
claim without knowing how she brings a claim: in other words, how a
relator has standing. By tracing the Supreme Court’s standing
jurisprudence, this Part demonstrates that relators own their claims as
“partial assignees”—and therefore can be compelled into arbitration.

A. The Supreme Court’s Decisions on Standing Demonstrate that Relators
Own Their Claims as Partial Assignees under the FCA

The issue of relators’ standing goes back to the 1986 amendments to the
FCA, which left federal courts with a constitutional problem. Article III
limits the judicial power of the United States to the resolution of cases and
controversies.90 In turn, courts use the doctrine of standing to determine
whether such a case or controversy exists.91 Standing requires several
elements, of which one is critically important.92 The plaintiff must suffer an
injury herself.93

Relators, therefore, faced a constitutional dilemma. While Congress
authorized them to bring civil actions, the relators themselves had suffered
no injury—and therefore needed a theory to support their standing.

The Supreme Court put to rest the debate on how relators have Article
III standing nearly fourteen years ago in Vermont Agency of Natural
Resources v. United States ex rel. Stevens.94 The Court rejected the
widespread assumption, offered by appellate courts and litigants, that
relators serve as agents of the federal government,95 holding that such an

93. Id. at 100.
95. Id.
agency “analysis is precluded . . . by the fact that the statute gives the relator himself an interest in the lawsuit, and not merely the right to retain a fee out of the recovery.” 96 This interest included the right to bring the suit “for the person and for the United States Government, . . . the right to continue as a party to the action,” even when the Government has intervened, “the right to a hearing before the Government’s voluntary dismissal of the suit . . . and the right to a judicial determination of ‘fairness, adequacy and reasonableness’” prior to the government settling the suit. 97

The Court found an answer to the question of the relators’ standing in the doctrine of partial assignment. 98 As the Court concluded, “The FCA can reasonably be regarded as effecting a partial assignment of the Government’s damages claim.” 99 Unlike a contract, which creates a legal right, an assignment transfers a legal right. 100 Accordingly, a partial assignment is a partial transfer of a right. 101 When the Government transfers part of its “damages claim,” the relator gains a form of “representational standing.” 102

This landmark holding consisted of four sentences and a footnote and provided no further explanation of how the FCA makes a “partial assignment” or what the implications of such an assignment might be. 103 As a result, the legal literature has puzzled over the decision for over a decade. 104 Given the  Stevens  decision’s brevity, it is unsurprising that

96.  Id.
97.  Id.
98.  Id.
99.  Id. at 773.
100.  E. ALLAN FARNSWORTH, CONTRACTS § 11.3, at 58 (2d ed. 1998).
101.  6A C.J.S. Assignments § 129 (2013).
102.  Stevens, 529 U.S. at 773.
103.  Eric S. Askanase,  Qui Tam and the False Claims Act: Criminal Punishment in Civil Disguise the  Qui Tam  Provisions of the FCA Are a Serious Threat to American Industry, and They Are Subject to Constitutional Challenges on Several Grounds, 70 DEF. COUNS. J. 472, 478 (2003).
104.  See Nathan D. Sturycz, The King and I?: An Examination of the Interest Qui Tam Relators Represent and the Implications for Future False Claims Act Litigation, 28 ST. LOUIS U. PUB. L. 220
litigants and lower courts have either avoided or ignored the opinion. Neither federal courts nor the secondary literature on the topic of whether qui tam claims are arbitrable mentions Stevens or even uses the term “partial assignment.”

While the California Supreme Court in Iskanian purports to rely on Stevens for its conclusion that state law qui tam plaintiffs are “agents” of the state, the Court fails to take any notice that Stevens actually rejected a principal-agent relationship between relators and the Government.

The plain language of Stevens and two subsequent Supreme Court decisions demonstrate that relators own their claims. Based on Stevens, the FCA effects a partial assignment of the Government’s damages claim. Such an assignment is different from a principal-agent relationship. A partial assignment fractures the Government’s single and entire claim into two, and transfers one of those pieces to the assignee. Following this transfer, the claim becomes the relator’s property and is her “own” claim. As a result, the partial assignment becomes arbitrable.

The Supreme Court’s later decision in Sprint Communications Co., L.P. v. APCC Services, Inc. confirms the interpretation that relators own their claims.

105 See Alexander, supra note 15, at 1228.
107 Stevens, 529 U.S. at 773.
109 RESTATEMENT (FIRST) OF CONTRACTS § 156 (1932) (“An assignment of either a fractional part of a single and entire right against an obligor . . . is operative . . . to the same extent and in the same manner as if the part had been a separate right.”).
110 Sprint Commc’ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269, 289 (2008) (“There is an important distinction between simply hiring a lawyer and assigning a claim to a lawyer (on the lawyer’s promise to remit litigation proceeds). The latter confers a property right (which creditors might attach); the former does not.”).
claims. While Sprint was not itself about qui tam actions, the Court did address when an assignee has Article III standing. The Court relied on Stevens in holding that standing does not depend on what the plaintiff “ultimately intends to do with the money he recovers.” Rather, standing turns on whether the assignment transfers the assignee’s “injury in fact.” As the majority explained, under the FCA, relators have standing “because the Act ‘effect[s] a partial assignment of the Government’s damages claim’ and that assignment of the ‘United States’ injury in fact suffices to confer standing on [the relator].” Because that assignment also grants a property right to the assignee, the “injury in fact” becomes the assignee’s property. In other words, when relators sue, they sue on their own injuries and their own claims—not the Government’s.

The Sprint Court’s interpretation that the qui tam claim is a relator’s property cannot be explained away as dicta. One year later, the Court underscored its understanding that the FCA confers a claim upon relators in U.S. ex rel. Eisenstein v. City of New York. There, the Court addressed whether the Government is a “party” in declined qui tam actions. By ruling that the Government is not a party for procedural purposes, the Court acknowledged that the Government is “a real party in interest” in declined actions. As the Court held, under a partial assignment, “the assignor and the assignee each retain an interest in the claim and both are real parties in

111. Id. at 272-73.
112. Id. at 286-87.
113. Id.
114. Id. at 286.
115. Id. at 289.
117. Id.
118. Id. at 934 (citing 6A FED. PRAC. & PROC. CIV. § 1545, at 351–53 (2d ed.1990)).
Both entities are, therefore, actors with “substantive right[s] whose interests may be represented in litigation by another.”

_Eisenstein_ is significant because the Court acknowledged that both assignors and assignees are “real parties in interest” in partial assignments. By definition, a relator must own her claim to be a real party in interest. A real party in interest is someone who possesses a “substantive right.” A relator would not have a “substantive right” if the FCA only granted whistleblowers procedural rights and a stake in the recovery. A procedural right is not substantive. Neither is the “portion of recovery,” because that right does not “materialize until the litigation is completed and the relator prevails.” A relator’s substantive right must come from somewhere else—its piece of the FCA damages claim. Combined, the Court’s decisions in _Stevens_, _Sprint_, and _Eisenstein_ therefore point to one conclusion: a relator owns the qui tam claim as a partial assignee of the Government’s injury and claim, and this is evidenced by the fact that relators are real parties in interest in qui tam suits.

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119. _Id._

120. _Id._ at 934-35. Nonetheless, because status as a “real party in interest” is not necessarily synonymous with status as a “party,” the Court ruled that the Government was not a “party” in declined actions. _Id._ at 937.

121. The Court refers to the Government four times as “a real party in interest.” _Id._ at 930, 934-35. The use of the indefinite article (“a real party in interest”) is important because it denotes that there are two real parties in interest rather than one. See _U.S. ex rel._ Laird v. Lockheed Martin Eng’g & Sci. Servs. Co., 336 F.3d 346, 358 (5th Cir. 2003); United States v. Texas Tech Univ., 171 F.3d 279, 295 (5th Cir. 1999).

122. See 1 F. R. CIV. P., RULES AND COMMENTARY RULE 17.

123. _Eisenstein_, 556 U.S. at 934-35.

124. BLACK’S LAW DICTIONARY 1437 (9th ed. 2009) (“procedural right: A right that derives from legal or administrative procedure; a right that helps in the protection or enforcement of a substantive right”); see _id._ at 1438 (“substantive right: A right that can be protected or enforced by law; a right of substance rather than form”). A right to relief is a procedural right. Chapman v. Hous. Welfare Rights Org., 441 U.S. 600, 617-18 (1979).

A. The Lower Courts’ Jurisprudence on Pre-Filing Releases Confirm that Relators Can Contract Away Their Qui Tam Claims

The view that relators own the qui tam claims is consistent with how courts have treated qui tam suits in other contexts. For nearly twenty years, lower courts across ten circuits have held that relators can sell their qui tam claims to third parties. These transactions, called “pre-filing releases,” occur when a relator assigns her claim to a third party rather than filing a complaint. These sales are rarely made to disinterested entities. Ordinarily, a relator sells the action to the defendant for a substantial sum. Because a defendant will not bring suit against itself, the sale effectively settles the relator’s claim.

Such settlements invalidate the theory that the Government owns the qui tam claims. While only a handful of courts have cited Stevens, those that have made the leap have recognized that relators own their claims. As the courts have ruled, under Stevens, “Article III standing in qui tam cases is founded in a statutory assignment of the government’s injury-in-fact to the


127. A release is an assignment of a claim from the plaintiff to the defendant. See BLACK’S LAW DICTIONARY 1315 (8th ed. 2004) (“release: the act of giving up a right or claim to the person against whom it could have been enforced”).

128. Id.

129. See Gebert, 260 F.3d at 913.
As such, a pre-filing release “divests the relator of the ability to retain an injury-in-fact assignment from the United States” and renders the “relator’s right to the claim (including any money damages) . . . the property of the [recipient’s] estate.” The few other courts considering Stevens in the context of pre-filing releases have come to the same conclusion—the relator owns the claim. Indeed, pre-filing releases could not exist otherwise; if the Government owned the qui tam claim, the relator would have nothing to release.

B. Lower Court Decisions Rejecting Relator Ownership Have Misinterpreted Supreme Court Precedent

Despite the Second and Ninth Circuits’ decisions enforcing pre-filing releases, the two appellate courts have issued contradictory opinions on who owns the qui tam claims. Both circuits have held that relators may not sue pro se because they do not own the qui tam claims. These holdings came in the course of interpreting 28 U.S.C. § 1654, which governs when parties may proceed without legal counsel. Since the statute allows parties suing without counsel to “plead and conduct their own cases,” a

130. Id. at 914.
131. Id. (emphasis added).
132. Purdue, 600 F.3d at 329 (“[O]nce the government suffered an injury (and [the relator] became aware of the fraud causing the injury), [the relator] had a statutory claim, and the necessary legal standing as partial assignee, to file a qui tam lawsuit.”); Ritchie, 558 F.3d at 1167 (“[The relator] argues the FCA claims are not claims she ‘might have’ because they belong to the United States. This argument is undercut by the language of the FCA and by Supreme Court precedent.”); Longhi, 481 F. Supp. 2d at 823 (“Contrary to relator’s claim that the action does not belong to relator, the Fifth Circuit has expressly held that relator is a party to the suit.”).
133. Northrop, 59 F.3d at 965; see Brown, 393 F.3d at 338.
relator suing *pro se* must demonstrate that she is “litigating an interest personal to h[er].”

Like the few courts in their pre-filing release jurisprudence, the Second and Ninth Circuits have looked to *Stevens* to adjudicate the question of qui tam claims ownership. The two circuits, however, have come to a different outcome. Both have concluded that, while a relator is a partial assignee in a qui tam suit, “the injury . . . belongs to the United States.” So while the FCA partially assigns to relators certain “procedural guarantees” and a portion of the recovery, “[t]he claim itself belongs to the United States.” As further evidence of this proposition, the courts have pointed to the text of the FCA, which provides that “the Government may elect to pursue *its claim* through any alternate remedy.” Because relators do not own their claims, the courts have concluded that relators must also lack the personal interest required to proceed *pro se*.

As these decisions demonstrate, the Second and Ninth Circuits have interpreted *Stevens* as distinguishing the assignment of a “claim” from the assignment of a “damages claim.” While a partial assignment of the “claim” grants a property right in the Government’s injury in fact, a partial assignment of the “damages claim” grants procedural rights and a monetary bounty. This reading, however, is attenuated. A “claim” is a right to relief. Thus, a damages claim is a right to relief for damages. By stating that the FCA partially assigns the “Government’s damages claim,” the

137. *Id.* (quoting Iannaccone v. Law, 142 F.3d 553, 558 (2d Cir. 1998)).

138. *Id.* at 93 (citing Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 774-75 (2000); *Stoner*, 502 F.3d at 1127 (quoting *Stevens*, 529 U.S. at 771 (The relator “is suing to remedy an injury in fact suffered by the United States.”))).

139. *Stoner*, 502 F.3d at 1127 (citing *Stevens*, 529 U.S. at 772)).

140. *Mergent Servs.*, 540 F.3d at 93.

141. *Id.* (emphasis added) (quoting 31 U.S.C. § 3730(c)(5)); *Stoner*, 502 F.3d at 1126 (citing same).

142. *Mergent Servs.*, 540 F.3d at 93; *Stoner*, 502 F.3d at 1126.

143. BLACK’S LAW DICTIONARY 282 (9th ed. 2009) (“claim: the part of a complaint in a civil action specify what relief the plaintiff asks”).
Supreme Court did not mean that the Act assigns a “portion of the proceeds” and a “cause of action.” Rather, it meant that the FCA partially assigns the Government’s legal claim to damages, rather than the Government’s equitable claim for injunctive relief.\textsuperscript{144} Basic principles of assignment law confirm this interpretation. While the Government can assign its proprietary rights to private individuals, it cannot assign its sovereign rights.\textsuperscript{145} In turn, non-pecuniary rights (e.g. injunctions) are sovereign rights.\textsuperscript{146} The court in Stevens was therefore distinguishing proprietary rights from sovereign rights when it used the phrase “damages claim,” not between claims and non-claims.

The FCA’s statutory text is not contrary to Stevens. The lower courts in their pro se jurisprudence are correct that the FCA states that “the Government may elect to pursue its claim through any alternative remedy.”\textsuperscript{147} Nonetheless, a partial assignment effectively fractures a single and entire right into two.\textsuperscript{148} The text of the FCA therefore establishes that the Government can pursue “its claim” through alternative remedies—not that the Government owns the relator’s suit.

The Supreme Court’s later decisions in Sprint and Eisenstein demonstrate this point. If the FCA both assigns the Government’s injury in fact (Sprint) and turns the relator into a real party in interest (Eisenstein), the relator must also own the claim.\textsuperscript{149} The Second and Ninth Circuit opinions are therefore unsupported by either the text of Stevens or the Supreme Court’s subsequent decisions on relators’ standing.

\textbf{C. Because Relators Own Qui Tam Claims, Relators Can Also Be}

\begin{itemize}
  \item \textsuperscript{144} Gilles, supra note 104, at 344 (“Under the traditional formulation of assignment . . . claims seeking to vindicate the government’s non-proprietary, sovereign interests are not assignable.”).
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} See id.
  \item \textsuperscript{147} 31 U.S.C. § 3730(c)(5) (2012) (emphasis added).
  \item \textsuperscript{148} See \textsc{Restatement (First) of Contracts} § 156 (1932).
  \item \textsuperscript{149} Supra Section III.A.
\end{itemize}
Compelled into Arbitration

The Supreme Court’s decisions in Stevens, Sprint, and Eisenstein establish that the FCA partially assigns both the Government’s injury and claim to relators. A relator bringing a qui tam claim, therefore, does not sue on the Government’s rights. Rather, the relator’s partial assignment functions as if it “had been a separate right” from that of the Government. As a result, when a relator sues under the FCA, it is as if she sues on her own injuries and her own claims. Under Supreme Court precedent, the relator-partial assignee has a property right over the claim and can sell, or otherwise limit her expression of that right, through contract. Given these circumstances, it follows that a relator can agree to arbitrate her claim. After all, arbitration is a form of contract.

The fact that the Government is a “real party in interest” to the relator’s qui tam suit does not change this outcome. There is no rule that prevents arbitration when there are multiple real parties in interest. Instead, the rule is that arbitrators may only adjudicate the claims of the parties to the

150. Restatement (First) of Contracts § 156 (1932).
151. See id.
152. Supra note 110 and accompanying text.
154. See Sauer v. U.S. Dep’t of Educ., 668 F.3d 644, 650 (9th Cir. 2012) (holding that the Department of Education could engage in arbitration even though real party in interest to the suit was not included as a party); Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843, 849 (6th Cir. 2003) (holding that the real party in interest that had signed the arbitration agreement could be compelled into arbitration, but that arbitrators could not bind a real party in interest that was a non-signatory); Tuminello v. Richards, No. C11-5928BHS, 2012 WL 750305, at *2-3 (W.D. Wash. Mar. 8, 2012), aff’d, 504 F. App’x 557 (9th Cir. 2013) (ruling that plaintiff could proceed into arbitration even though there were other unnamed, real parties in interest to the suit); Data-Stream AS/RS Techs., LLC v. China Int’l Marine Containers, Ltd., No. 02 Civ. 6530 (JFK), 2003 WL 22519456 (S.D.N.Y. Nov. 6, 2003) (ruling that assignor could proceed into arbitration even though assignee was a real party in interest and not captioned in the suit); In re Chi-Chi’s, Inc., 338 B.R. 618, 627 (Bankr. D. Del. 2006) (finding that one real party in interest could pursue its claim in arbitration even though the other real party in interest brought its claim in court).
arbitration.\textsuperscript{155} Under lower court precedent, defendants can compel a relator’s qui tam claim into arbitration, and arbitrators can dismiss the relator’s action.\textsuperscript{156} Yet if the Government is not a party to the arbitration, arbitrators cannot dismiss the Government’s claims.\textsuperscript{157}

This standard makes sense. Arbitration is a creature of contract and subject to the same limitations as other contractual agreements.\textsuperscript{158} As previously noted, a relator can contract to sell her qui tam claim even though the Government is a real party in interest.\textsuperscript{159} A relator cannot, however, purport to sell the Government’s claim.\textsuperscript{160} By analogy, it follows that a relator can arbitrate her qui tam claim despite the Government’s interest in the suit. Given the Supreme Court’s admonition that the FAA “places arbitration agreements on an equal footing with other contracts,”\textsuperscript{161} it would be contradictory to hold that the Government’s status permits relators to sell their claims (to the very defendant’s that are alleged to have committed fraud) but bars relators from arbitrating them.\textsuperscript{162}

Finally, the understanding that relators “own” their qui tam claims does not conflict with the maxim that relators sue “on behalf of” the Government.\textsuperscript{163} The text of the FCA does not use the language “on behalf of.” Rather, the FCA states that a relator “bring[s] a[n] action . . . for the person and for the United States.”\textsuperscript{164} A relator suing on its own claim does precisely that. When a relator brings an action, both the person and the

\textsuperscript{155}. Nationwide, 330 F.3d at 848–49.
\textsuperscript{156}. See id.
\textsuperscript{157}. See id.
\textsuperscript{158}. Rent-A-Ctr., 561 U.S. at 67.
\textsuperscript{159}. Supra Section III.B.
\textsuperscript{160}. Id.
\textsuperscript{161}. Rent-A-Ctr., 561 U.S. at 67.
\textsuperscript{162}. To the extent that there are unique public policy reasons for rejecting arbitration, those reasons are confined to the circumstances addressed in Part VI of this article.
\textsuperscript{163}. Stevens, 529 U.S. at 787.
United States become real parties in interest to the suit. A relator then sues “on behalf of” the Government because she remedies an injury that is identical to one suffered by the state—not because the relator legally serves as the Government’s “representative” in the qui tam action.

In sum, the understanding that relators own their claims is consistent with Supreme Court jurisprudence and the broader field of qui tam law. As the next part of this article demonstrates, before defendants can compel qui tam claims into arbitration, they must also prove that relators have agreed to arbitrate their claims by signing arbitration clauses. While the circuits use three different tests to determine whether this is the case, relators’ claims likely fall within the contractual scope of their arbitration clauses under each test.

V. QUI TAM CLAIMS FALL WITHIN THE SCOPE OF RELATORS’ ARBITRATION CLAUSES AS A MATTER OF CONTRACTUAL INTERPRETATION

Corporate defendants must do more than demonstrate that relators own the qui tam claims in order to compel arbitration. They must also show that the qui tam claims fall within the scope of relators’ arbitration clauses. Because arbitration is a matter of contract, a court cannot compel arbitration


166. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 298 (2002) (holding that the Equal Employment Opportunity Commission (EEOC) could bring a claim “on behalf of” a private employee even though the agency did not act in any representative capacity). Furthermore, the FCA’s requirement that a relator bring the claim “in the name of the Government” is immaterial. 31 U.S.C. § 3730(b)(1). The question of in whose name an action must be brought is procedural, not substantive. 6A Fed. Prac. & Proc. Civ. § 1544 (3d ed. 1988). Thus, the naming requirement has no bearing on whether a relator has a substantive right (e.g., an injury and a claim).
of a dispute that the parties have not agreed to arbitrate. It is up to the courts to determine in the first instance whether an arbitration clause covers a particular claim. This part shows that qui tam claims fall within the scope of standard arbitration clauses.

As an initial matter, defendants are already taking a simple measure to ensure that arbitration clauses cover FCA claims; namely, including qui tam suits in the list of disputes covered by the arbitration clause. Boilerplate arbitration agreements now include language covering “private attorney general” actions: another name for qui tam actions. Under such circumstances, courts cannot avoid compelling a relator’s qui tam claim into arbitration. As the Supreme Court has held, “Absent some ambiguity in the agreement it is the language of the contract that defines the scope of disputes subject to arbitration.” Explicitly specifying “private attorney general” or “qui tam” claims removes any such ambiguity.

Given that arbitration clauses have retroactive effect, defendants in the coming years can easily amend their employees’ contracts to include the new terms. Of course, whistleblowers with pending qui tam claims would likely object. But if forced to choose between a judicial forum and continued employment, relators might very well sign the new contracts.

170. Id.
174. Firing the relator for not signing the new agreement would likely not give rise to a colorable retaliation claim. Buboltz v. Residential Advantages, Inc., 523 F.3d 864, 869 (8th Cir. 2008), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011) (rejecting claim of retaliation because policy change “required all employees to work every other
As the rest of this part demonstrates, even if corporate defendants do not uniformly adopt the naming or retroactive application strategy, qui tam claims would still fall within the language of standard arbitration clauses. A relator’s arbitration clause generally says that the parties agree to arbitrate “[a]ny controversy or claim arising out of or relating to this [employment] Agreement or the breach thereof.”175 As the appellate courts have recognized, this language “is the paradigm of a broad clause.”176 Thus, courts have limited discretion to deny arbitration because all doubts must be resolved in favor of arbitrability.177 As a result, relators face an uphill battle in proving their qui tam suits do not “relate to” their employment agreements and, therefore, fall outside the scope of relators’ arbitration clauses.

Presently, only a handful of courts have gotten far enough in their analysis to determine whether qui tam claims “relate to” relators’ arbitration clauses.178 Those that have addressed the issue have split into two lines of thought. As one line of decisions has held, qui tam claims “in no way” relate to a relator’s “employee status,” because even if the relator “had never been employed by defendants, assuming other conditions were met, the relator would still be able to bring a suit against them for presenting false claims to the government.”179 In other words, relators’ qui tam claims fall outside of the scope of their contracts because under a set of hypothetical facts, relators could still file their claims.

weekend”); Uddin v. City of New York, 427 F. Supp. 2d 414, 429 (S.D.N.Y. 2006) (finding no adverse action where all employees were subjected to the same change in company policy).
177. AT&T, 475 U.S. at 650.
In contrast, the district courts in favor of qui tam arbitration have focused on the fact that qui tam claims (and their PAGA equivalents) “belong[] to the [p]laintiffs themselves.” As the courts reasoned, qui tam

claims are “nothing more” than “claim[s] that [the plaintiffs] may have against the Company” and “should be compelled” into arbitration.  

Neither of these explanations is persuasive because they ignore that circuit courts have very specific tests for determining the scope of arbitration clauses. Indeed, the aforementioned decisions concerning qui tam arbitration fail to cite a single appellate decision for their conclusions. Presently, the courts of appeals utilize at least three different formulae for determining when a claim “relates to” an employment agreement. Under each of the configurations, qui tam claims would be arbitrable.

A. Qui Tam Claims Require Relators to Make Factual Allegations Relating To Their Employment Contracts

The majority of circuit courts use a similar test to determine when a dispute “relates to” the parties’ employment contract. A dispute falls within the parties’ arbitration agreement if the factual allegations underlying the claim “touch matters in” or “significantly relate to” the employment contract. Circuits employing the factual allegations standard look to the facts actually pled in the complaint and whether those facts reference the

183. 3M Co. v. Amtex Sec., Inc., 542 F.3d 1193, 1199 (8th Cir. 2008); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987).
184. Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999); Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). The Seventh Circuit’s standard is also synonymous with the “significant relationship” test. Gore v. Alltel Commc’ns, LLC, 666 F.3d 1027, 1033 (7th Cir. 2012) (quoting Kiefer Specialty Flooring, Inc. v. Tarkett, Inc., 174 F.3d 907, 909 (7th Cir. 1999)).

plaintiff’s employment agreement. Under these circumstances, it is unlikely that relators could avoid arbitration.

To begin, relators must provide significant information about their employment status in order to plead fraud with particularity under Rule 9(b) of the Federal Rules of Civil Procedure. The reason is that a relator’s insider status significantly enhances the reliability of her accusations. Courts have thus required relators to “give[] precise and credible information on how [they] know[] what [they] allege,” including where they were employed, how long they had worked there, the scope of their professional duties, whether they had company-wide access to files, whom they supervised, and who supervised them. In this respect, the inquiry in a qui tam suit is much like that in a trade secret dispute, where courts examine how the parties “gained access to the . . . information” claimed to be confidential. Under such circumstances, the courts have held that disputes fall within the scope of arbitration clauses, because the employee “would not have had access to the alleged . . . information but for the employment relationship with [the company].” This same rationale applies to qui tam suits, and demonstrates that qui tam claims fall within the scope of relators’ employment agreements.

185. *Stimula*, 175 F.3d at 721; *Am. Recovery Corp.*, 96 F.3d at 93; see *Gore*, 666 F.3d at 1036; *3M Co.*, 542 F.3d at 1199; *Genesco*, 815 F.2d at 846.

186. *Atkins*, 470 F.3d at 1359; *Clausen*, 290 F.3d at 1314.


188. *Id.*; U.S. ex rel. *Atkins v. McInteer*, 470 F.3d 1350, 1359 (11th Cir. 2006); *Hill v. Morehouse Med. Assoc.*., Inc., No. 02-14429, 2003 WL 22019936 (11th Cir. Aug. 15, 2003); U.S. ex rel. *Clausen v. Lab. Corp. of Am.*., Inc., 290 F.3d 1301, 1314 (11th Cir. 2002); see *Corsello v. Lincare*, Inc., 428 F.3d 1008, 1014 (11th Cir. 2005) (dismissing on 9(b) grounds where relator “conceded that he ‘did not have access to company files outside his own offices’”); see also *Yuhasz v. Brush Wellman*, Inc., 341 F.3d 559, 567 (6th Cir. 2003) (citing portions of relator’s complaint outlining relator’s duties).


Additionally, even if relators could meet Rule 9(b)’s requirements without providing such facts, savvy defendants could induce relators to amend their complaints to include information “relating to” their employment agreements (and force relators to arbitrate). In particular, defendants would raise one of the most commonly litigated issues in qui tam claims: the public disclosure bar.\(^{191}\) The FCA bars suits where facts about the fraud have been publicly disclosed and the relator is not an original source of the information.\(^{192}\) To prove that he or she is an original source, a relator must plead facts showing that she (1) “has direct and independent knowledge of the information on which the allegations are based”; and (2) “has voluntarily provided the information to the Government before filing an action.”\(^{193}\) These requirements give artful defendants an opportunity to force relators to reference their employment agreements and trigger the arbitration clauses that govern employment disputes.

A defendant might do so in the following manner: after the relator files her initial complaint, the defendant would file only a motion to dismiss (and not a motion to compel arbitration). Within the motion to dismiss, the defendant would argue that the court lacks subject matter jurisdiction because the alleged frauds have already been publicly disclosed. The defendant would further allege that the relator is not an “original source” for two reasons. First, the relator could not have had “direct and independent knowledge” of the alleged fraud because her job responsibilities did not give her access to the relevant documents and personnel.\(^{194}\) Second, the relator


\(^{193}\) Rockwell Int’l Corp., 549 U.S. at 467.

\(^{194}\) Prather v. AT&T Inc., 2013 WL 5947131 (N.D. Cal. Nov. 5, 2013); see U.S. ex rel. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 524-25 (9th Cir. 1999) (The Court previously dismissed a suit where the relators “did not discover firsthand the information underlying their allegations of fraud. They did not see the fraud with their own eyes or obtain their knowledge of it through their own labor unmediated by anything else.”).
did not “voluntarily” make her submission, because the terms of the relator’s employment require her to disclose potential frauds to the government (such as an auditor agreement). In either case, the relator would have to plead facts from her employment agreement relating to her professional responsibilities, and amend her complaint. As soon as the relator does, the defendant would file a motion to compel arbitration based on the new factual allegations.

In short, whether by intention or by clever lawyering, relators in qui tam suits must demonstrate how they obtained their information about the alleged frauds. This will often require relators to allege facts that “touch matters in” or “significantly relate to” their employment contracts, and would be sufficient to meet the standard for arbitrability in the majority of circuits.

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198. Filing a motion to dismiss does not waive a parties’ right to compel arbitration. Sharif v. Wellness Int’l Network, Ltd., 376 F.3d 720, 726-27 (7th Cir. 2004); Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 661-62 (5th Cir. 1995); Rush v. Oppenheimer & Co., 779 F.2d 885, 888 (2nd Cir. 1985); Lake Commc’ns, Inc. v. ICC Corp., 738 F.2d 1473, 1477 (9th Cir. 1984).
B. Relators’ Qui Tam Claims Are a Foreseeable Result of Relator’s Contractual Duties

The second standard, adopted by a minority of circuits, establishes that a claim “relates to” an employment agreement where it is “an immediate, foreseeable result of the performance of contractual duties.” Relators’ qui tam claims easily meet this foreseeability analysis. Relators ordinarily obtain evidence about alleged frauds “as a fairly direct result” of their contractual duties as supervisors and supervisees. Indeed, the relators in some instances even participate in the fraud. Of course, non-employees could theoretically submit qui tam claims. But these instances are rare and often discouraged by the courts. For the most part, if the relator had never worked for the company, she would never have discovered the alleged frauds and could not have filed suit.

C. Qui Tam Claims Are Likely Legally Dependent on Relators’ Employment Contracts

The final test, adopted by the Fifth and Sixth Circuits, offers relators the best opportunity to escape their arbitration clauses. Instead of focusing on

203. See U.S. ex rel. Atkins v. McInteer, 470 F.3d 1350, 1359 (11th Cir. 2006); U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301, 1314 (11th Cir. 2002).
“whether the complaint happens to reference the contract,” this test looks to whether the elements of the plaintiff’s claim are “legally dependent on . . . the underlying contract.”\(^\text{204}\) In other words, the two circuits look to whether “an action could be maintained without reference to the contract or relationship at issue.”\(^\text{205}\) Relators have a persuasive argument under this standard that complying with Rule 9(b) is insufficient to warrant arbitration.\(^\text{206}\) Pleading requirements are a procedural rule and not an actual element of the plaintiff’s claim.\(^\text{207}\) Thus, while a complaint may happen to reference the relator’s employment contract in order to plead fraud with particularity, this alone is insufficient to warrant arbitration.

Nonetheless, relators cannot evade arbitration should defendants raise the public disclosure bar, because the elements of an original source defense are legally dependent on the relator’s employment responsibilities. In turn, it is unlikely that a relator could prove her employment responsibilities without reference to his or her employment contract. A person’s employment status is an individual matter of contract, and the Sixth Circuit has often turned to employment agreements to determine a party’s professional responsibilities before compelling arbitration.\(^\text{208}\) Given this

\(^{204}\) Ford v. NYLcare Health Plans of the Gulf Coast, Inc., 141 F.3d 243, 250-51 (5th Cir. 1998); Fazio v. Lehman Bros., Inc., 340 F.3d 386, 395 (6th Cir. 2003).

\(^{205}\) Fazio, 340 F.3d at 395.

\(^{206}\) Id.


\(^{208}\) See Panepucci v. Honigman Miller Schwartz & Cohn LLP, 281 F. App’x 482, 487-88 (6th Cir. 2008) (holding that court could not determine whether a plaintiff qualified as an “employee” under anti-discrimination laws without looking at her arbitration agreement); Fazio v. Lehman Bros., Inc., 340 F.3d 386, 395 (6th Cir. 2003) (holding fraud claim could not be adjudicating without
precedent, relators face an uphill battle to show that they have “direct and independent knowledge of the information on which the allegations are based” and have “voluntarily provided the information to the Government” without providing documentation of their employment contracts. Thus, while the “without reference” standard offers relators the best opportunity to evade arbitration, defendants can still likely compel relators into arbitration no matter the circuit, as relators’ qui tam claims “relate to” their employment contracts and are therefore arbitrable.

VI. QUI TAM ARBITRATION COULD UNDERMINE ENFORCEMENT OF THE FCA

As this article demonstrates, relators not only own their claims, but those claims also ordinarily fall within the scope of relators’ arbitration clauses. As with any statutory claim, however, qui tam actions cannot be compelled into arbitration if Congress has “evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”209 “If such an intention exists, it will be discoverable in the text of the [FCA], its legislative history, or an ‘inherent conflict’ between arbitration and the [FCA]’s underlying purposes.”210 As demonstrated below, by failing to add anti-retaliation provisions to the FCA when it passed the Dodd-Frank Act in 2010, Congress has implicitly—and detrimentally—authorized arbitration of qui tam suits.

Congress understood the perils of arbitration when it overhauled its whistleblower statutes following the financial crisis. As part of the Dodd-Frank Act of 2010, Congress amended four different statutes to prohibit arbitration of whistleblower suits brought under the acts.211 While Congress...
concurrently amended the FCA, it did not add an anti-arbitration provision for qui tam claims.212

The legislative history of Dodd-Frank never clarified why Congress amended only the four statutes to include anti-arbitration provisions and not the FCA. The Senate Report on Dodd-Frank states more generally that arbitration often “is unfair” because it involves “high upfront costs, limited access to documents and other key information, limited knowledge upon which to base the choice of arbitrator, the absence of a requirement that arbitrators follow the law or issue written decisions, and extremely limited grounds for appeal.”213

Despite Congress’s generalized concern, lower courts have refused to read Dodd-Frank’s prohibition on arbitration to encompass the FCA or other federal statutes.214 As the canon of statutory interpretation dictates, “When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”215 Courts, therefore, held that Congress forwent its opportunity to prevent FCA claims from being arbitrated, by strengthening the FCA’s anti-retaliation measures without also adding anti-arbitration provisions.216

212. James v. Conceptus, Inc., 851 F. Supp. 2d 1020, 1029 (S.D. Tex. 2010) (“Dodd–Frank’s antiarbitration amendments to other statutes cannot be extended by implication to the antiretaliation provisions of the False Claims Act, especially when Dodd–Frank amended other parts of the False Claims Act but not the provision at issue.”).
216. James, 851 F.Supp.2d at 1029.
Congress’s failure to amend the FCA cannot be explained away on the grounds that the statute already prohibited arbitration. The standard for establishing a congressional intent against arbitration based on a statute’s text or legislative history is a weighty one. As the Supreme Court has held, a plaintiff must show that “the text of the [statute] or its legislative history explicitly precludes arbitration.”\textsuperscript{217} The text of the FCA is largely silent on the issue. While the act states that any action “may be brought in any judicial district,”\textsuperscript{218} courts have long recognized that the word “may” does not require that actions be brought in a judicial forum.\textsuperscript{219} Similarly, the act provides that an “action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”\textsuperscript{220} Nonetheless, a motion to compel arbitration is distinct from a motion to dismiss. The former stays court proceedings for the duration of the arbitration;\textsuperscript{221} the latter terminates the action without further hearing.\textsuperscript{222} While courts have never addressed the issue, the FCA does not appear to require the Attorney General to consent to arbitration of a qui tam claim.

The legislative history of the FCA is equally silent on arbitration. The words “arbitrate” or “arbitration” appear three times in the legislative materials surrounding the 1986 Amendments: (1) in a copy of a boilerplate arbitration agreement;\textsuperscript{223} (2) in a written submission from a Los Angeles

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{217} Id.
\item \textsuperscript{218} 31 U.S.C. § 3732 (2012).
\item \textsuperscript{219} Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991).
\item \textsuperscript{220} 31 U.S.C. § 3730(b).
\item \textsuperscript{221} Teressa L. Elliott, Responsibility of the Courts in Motions to Compel Arbitration, 32 OHIO N.U. L. REV. 89, 94 (2006).
\item \textsuperscript{222} BLACK’S LAW DICTIONARY 482 (7th ed. 1999).
\end{enumerate}
\end{footnotesize}
based lawyer critical of the Administrative Law Judge (ALJ) system;\textsuperscript{224} and (3) in written testimony from an attorney for a utilities company (also criticizing the ALJ system).\textsuperscript{225} In short, because the text and legislative history of the FCA neither permit nor prohibit arbitration, they fail to show that Congress intended qui tam claims to be unarbitrable.

Relators’ best chance at escaping their arbitration clauses, therefore, will be to demonstrate that there is an “inherent conflict” between arbitration and the FCA’s underlying purposes. Nonetheless, relators face an uphill battle, as the Supreme Court addressed and rejected many of relators’ strongest arguments in its 1991 decision in \textit{Gilmer v. Interstate/Johnson Lane Corp}.\textsuperscript{226} There, the Court held that claims under the Age Discrimination in Employment Act (ADEA) can be subject to arbitration, even though arbitration conflicts with the statute’s social purposes, is agreed to on a take-it-or-leave-it basis, impairs cooperation between plaintiffs and the Government, and severely limits discovery.\textsuperscript{227}

The rest of this part addresses the sources of conflict raised in \textit{Gilmer} and examines whether relators can sufficiently distinguish the FCA from the ADEA so as to keep their claims in court. In doing so, it shows that while arbitration would significantly impair qui tam litigation—and potentially blunt relators’ ability to litigate their claims—that conflict is not so “inherent” under prevailing Supreme Court case law as to render arbitration clauses unenforceable. As a result, defendants can undermine enforcement of the FCA without losing their ability to arbitrate.

\textsuperscript{224} Program Fraud Civil Penalties Act of 1985, Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, 99th Cong. 339 (June 18, 1985) (statement of J.H. McQuiston).

\textsuperscript{225} Overview of False Claims and Fraud Legislation, Hearing Before the Committee on the Judiciary, United States Senate, 99th Cong.123 (June 17, 1986) (statement of Edward Sneeden).


\textsuperscript{227} \textit{Id.} at 27-33.
A. The Broad Social Purposes of the FCA Do Not Invalidate Arbitration

The first source of conflict is also the most intuitive—arbitration interferes with the social purposes of the FCA. Whistleblowing furthers societal interests by breaking the “conspiracy of silence” surrounding frauds and “bring[ing] such wrongdoing to light.”228 Arbitration, on the other hand, protects individual interests by ensuring secrecy, brevity, and inscrutability.229 The combination of the two seems untenable: how can a relator blow the whistle if no one can hear?

This difficulty with this argument is that the FCA achieves its social goals without bringing wrongdoing to public light. Whistleblowers are barred from publicly disclosing their allegations prior to filing a complaint with the DOJ230 and from publicly discussing their complaints while their filings remain under seal with the agency.231 In addition, the text of the FCA permits the Department of Justice to “pursue [FCA claims] through any alternate remedy available to the Government,” including arbitration, and agency guidelines favor the use of alternative dispute resolution (ADR) in qui tam cases.232 As the DOJ’s “Policy on the Use of Alternative Dispute Resolution” establishes, almost 90% of FCA actions settle and approximately half of those do so prior to the agency’s filing a complaint in court.233 Thus, “[t]he nature of the cases indicates that they are good candidates for ADR mechanisms.”234

228. U.S. ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ., 161 F.3d 533, 539 (9th Cir. 1998).
234. Id.
Given that the FCA serves its deterrent function by revealing wrongdoing to the DOJ, not necessarily to the general public, the social policy argument fails to show that qui tam arbitration inherently conflicts with the purposes of the FCA. As the Supreme Court held in Gilmer, "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 235

B. Arbitration Clauses in Qui Tam Actions Are Not a Unique Form of Adhesion Contract

The second argument against qui tam arbitration is that relators should not be bound by adhesion contracts when suing on behalf of the Government. The court in Gilmer left open whether in some circumstances a contract of adhesion would render an arbitration contract unenforceable. 236 Subsequently, one lower court has held that qui tam actions are not arbitrable because arbitration clauses in qui tam actions are a unique form of adhesion contract. 237 As the argument goes, arbitration clauses in employment contracts are ordinarily non-negotiable. 238 Additionally, while a relator is not an officer of the Government, she does act on its behalf. Given this relationship, the rationale in favor of federal court jurisdiction is like the rationale behind 28 U.S.C. § 1442(a), 239 which allows removal from state to federal court of any case in which an officer of the United States is a defendant for "the protection of agents of the government when they do the Government’s business." 240

236. Id. at 32-33.  
238. Id.  
239. Id.  
240. Id.
This argument suffers from several problems. First, this type of adhesion contract is “unfair” only if the court assumes that arbitrators will be biased against the Government or relators. The Supreme Court in *Gilmer*, however, “decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” 241 Second, the argument that relators are pseudo-agents of the Government creates a double standard. The only reason that relators can release (or sell) their claims is that they are not government officials. 242 It is therefore contradictory to bar relators from arbitrating their claims on the grounds that they are effectively government officials, while at the same time permitting them to sell their claims because they are not. The adhesion contract objection is thus unavailing.

C. While Arbitration Would Impair Cooperation Between Relators and the DOJ, This Is Not an “Inherent” Conflict Sufficient to Prevent Arbitration

The strongest argument against qui tam arbitration is its effect on the DOJ. In order to enforce the FCA, the DOJ depends on “cooperation” from “individuals who are either close observers or otherwise involved in the fraudulent activity.” 243 Relators’ assistance covers a range of tasks, such as providing the Government factual and legal research, drafting internal government position papers, interviewing fact witnesses, preparing the Government’s expert witnesses, reviewing documents produced by defendants, and supplying paralegals and other clerical help to the

242. As a general rule, a public officer cannot assign unearned salary or fees of his or her office. *See Farnsworth, supra* note 100, at 77-79. The rule prevents public officers from being deprived of their means of support, which might impair performance of their services.
government. As a result, courts have described relators’ cooperation as “crucial to the ‘successful resolution of the [DOJ’s] case’.”

Arbitration undermines this “informal coordination among individual claimants.” Through confidentiality provisions, arbitration clauses would likely prevent relators from arranging with the Government to produce common research and reports. Further, even if the Government did go to trial, whistleblowers would not be able to act as co-litigants in the case. Thus, even if the DOJ were to intervene in a qui tam suit, the agency would have to litigate alone and without the relator’s assistance at trial.

This conflict, although significant, is likely not so “inherent” under Supreme Court case law as to render qui tam arbitration unenforceable. The Supreme Court in Gilmer rejected a similar cooperation-based objection in

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247. Id. at 2316. Recently, the SEC has cracked down on employers’ use of confidentiality provisions to limit whistleblowers from filing complaints with the agency. James Burns et al., SEC Brings First Whistleblower Enforcement Action for Overly Restrictive Confidentiality Agreements, Wilkie Farr & Gallagher LLP 1 (2015), http://www.willkie.com/-/media/Files/Publications/2015/04/SEC_Brings_First_Whistleblower_Enforcement_Action_for_Overly_Restrictive_Confidentiality_Agreements.pdf. The SEC did so pursuant to Rule 21F-17, which prohibits any person from enforcing, or threatening to enforce, a confidentiality agreement that impedes an employee’s ability to reports a possible securities law violation to the SEC. Id. The DOJ lacks a similar rule to enforce reporting under the FCA, and therefore is unlikely to be able to police the use of confidentiality agreements as aggressively as the SEC.

248. Id. (“The agreement also disallows any kind of joinder or consolidation of claims or parties.”).
the context of the ADEA. While the ADEA does not contain a qui tam provision, the statute creates a mechanism through which an individual brings a private cause of action. In order to bring suit, an aggrieved individual must first file a charge with the EEOC and then wait at least 180 days. If the EEOC declines to bring a charge, the individual may litigate the case on her own. If the EEOC files suit, the employee loses her cause of action but may intervene in the EEOC’s case. The statute, therefore, envisions that the individual and agency will cooperate extensively during the litigation.

As the Gilmer Court held, the fact that arbitration may impair cooperation between individuals and the Government does not necessarily render the conflict “inherent.” For a cooperation-based conflict to foreclose arbitration, an arbitration clause must do more than undermine those select disputes in which the Government and individuals cooperate. Instead, plaintiffs must demonstrate “that Congress intended that the [Government] be involved in all . . . disputes,” such that arbitration would conflict with all litigation brought under the statute.

Relators face an uphill battle under this standard. The FCA contemplates instances in which the Government would not be involved in litigation. For example, the FCA allows relators to proceed independently when the DOJ declines a suit—the situation in the majority of qui tam actions.

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251. Id.
255. Id.
Moreover, even where the DOJ does intervene, the FCA enables the Government to limit relators’ assistance. The statute provides that the Government upon intervening assumes “primary responsibility for prosecuting the action,” and grants the DOJ the ability to restrict the relator’s involvement in the litigation. Accordingly, even if the Government did have a role in all qui tam litigation, relators arguably do not (other than serving as a named party in the dispute). The fact that the DOJ is “heavily involved” in the enforcement of the FCA therefore is likely “not sufficient to preclude arbitration.”

The DOJ’s enforcement of the FCA does differ in one significant way from the EEOC’s enforcement of the ADEA. The DOJ has the right to intervene in the private litigant’s action, and may intervene either initially when a relator files a complaint, or later when the agency has declined a complaint but shows “good cause” for entering the suit. Qui tam arbitration raises a unique dilemma under the latter scenario. Should the DOJ intervene once the suit has been declined and the relator has been compelled into arbitration, it would appear that the agency would also have to enter arbitration. After all, there are no ongoing court proceedings into which the DOJ could intervene. Thus, qui tam arbitration raises the possibility that the Government—as a non-signatory to a private arbitration agreement—could lose its right to a judicial proceeding.

Despite this concern, the DOJ can most likely pursue its action in court. When a court compels arbitration it ordinarily does not dismiss the action. Instead, the judge stays the proceedings for the duration of the arbitration.

257. 31 U.S.C. § 3730(c)(1).
258. Id. § 3730(c)(2)(C)-(D).
259. Id.
260. 31 U.S.C. § 3730(c)(1), (3).
261. Supra Section I.
262. MediVas, LLC v. Marubeni Corp., 741 F.3d 4, 9 (9th Cir. 2014).
As a result, the DOJ does not intervene in the arbitration itself when it intervenes in a relator’s suit. It intervenes in the stayed court proceeding.263

Under these circumstances, a cooperation-based challenge would likely be unsuccessful unless an arbitration clause prevents a relator from filing a complaint with the DOJ.264 An arbitration agreement concerning the FCA, however, likely would not prohibit a relator from filing a complaint.265 Even if a defendant were to draft an arbitration clause prohibiting DOJ filings, that clause would be impossible to enforce in practice. Since relators file complaints with the DOJ under seal, defendants do not discover the pendency of a qui tam action until after the DOJ unseals the action.266 By that time, it is too late to un-inform the Government of the relator’s allegations.

263. See THOMAS H. OEHMKE, 3 COMMERCIAL ARBITRATION § 61:19 (2013) ("[W]hile a nonsignatory to an arbitration agreement has no right to participate in arbitration . . . intervention may be requested if and when that arbitral proceeding enters the judicial system (e.g., motion to compel arbitration, to appoint an arbitrator, to vacate or confirm an award, and the like.).") The Supreme Court’s decision in Rockwell International Corp. v. United States, 549 U.S. 457, 477 (2007) (quoting United States Steel Corp. v. EPA, 614 F.2d 843, 845 (C.A.3 1979)). There, the Court held that the public disclosure bar prevented a relator from proceeding in court because the relator had disclosed information about the alleged frauds to the FBI, which then transmitted the information to the media. The Court concluded that the inability of the relator to bring suit did not prevent the DOJ from intervening in the action. Id. As the Supreme Court ruled, “an intervenor’s claim does not rise and fall with the claim of the original party.” Id. Instead, as an intervenor, the DOJ can proceed in court even if a relator cannot.

264. As the Gilmer court recognized, plaintiffs have a stronger argument that “arbitration will undermine the role of the [Government]” should arbitration disrupt plaintiffs’ “freedom to file a charge with [a Government agency].” Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).


D. FCA Claims Do Not Require Greater Discovery Than Other Arbitrable Claims

The final argument against qui tam arbitration is that arbitral proceedings would hinder discovery and prevent relators from vindicating their actions. Qui tam suits often involve allegations of thousands of false claims made by over a hundred defendants across dozens of states. Thus, plaintiffs must obtain a “massive number of documents” in order to prove their claims.

It is no secret that arbitration diminishes discovery. As one court has put it, “A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process.” Arbitral houses, therefore, give “almost total discretion to arbitrators” to grant or deny discovery in large commercial proceedings. Arbitration clauses often limit the number of available depositions, and it is unclear whether arbitrators can compel non-party discovery. As a result, relators face the specter of a significantly curtailed discovery process in arbitration. Indeed, the very fact


268. See Wang v. FMC Corp., 975 F.2d 1412, 1416 (9th Cir. 1992); Michael Loucks, Impacts of the Affordable Care Act and Anti-Kickback Legislation on Health Care Industry Clients, ASPATORE, June 2013, at 1, 10, available at 2013 WL 3772666 (predicting that the scope of discovery will increase with the passage of the Affordable Care Act and the statute’s additional reporting requirements on health care organizations).


270. David W. Lanetti, Protecting Contracting Parties in Construction Arbitrations Based on the Availability—or Nonavailability—of Nonparty Discovery, CONSTR. LAW, Fall 2009, at 24, 24-25.


that defendants wish to compel qui tam claims into arbitration appears to evidence this threat.

Despite these risks, it is unlikely that relators would prevail on discovery-related objections to arbitration. The Supreme Court has required arbitration of numerous complex commercial disputes requiring substantial discovery, including securities cases, antitrust suits, and RICO claims. While complex, it is unclear that qui tam cases require more documentation than other arbitrable disputes. And as the Supreme Court held in Gilmer, courts will not deny arbitration “based on speculation that the arbitrator may not allow adequate discovery.”

VII. POLICY IMPLICATIONS OF ARBITRATION ON THE DOJ

As the previous part demonstrates, qui tam arbitration would not “inherently” conflict with the purposes of the FCA. Nonetheless, there is still significant conflict. Arbitration impairs the DOJ’s ability to cooperate with whistleblowers, and limits the amount of discovery available to relators. Given the complexity of qui tam claims, compulsory arbitration could blunt the effectiveness of the FCA and tip the scales in defendants’ favor. The extent to which this will occur is an empirical question.

Empirics aside, corporate defendants will likely aggressively seek qui tam arbitration in the coming years. The reason relates to a “new procedural development” in how the DOJ investigates and intervenes in suits.


274. In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 285-87 (4th Cir. 2007) (quoting In re Uranium Antitrust Litig., 480 F. Supp. 1138, 1155 (N.D.Ill.1979)) (compelling arbitration of antitrust claim even though “the heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case.”).

275. Id.

276. Grayson Yeargin & Conor S. Harris, Government’s Increased Use of Noncommittal Intervention Filings Complicates Qui Tam Proceedings Under the False Claims Act, NIXON
originally envisioned by Congress, a qui tam complaint remains under seal for sixty days upon filing, during which time the DOJ investigates and decides whether to intervene. While Congress intended a prompt investigation, the agency’s limited resources have made this impossible. The DOJ instead has aggressively moved the courts to lengthen the seal period for pending claims and grant the agency more time to investigate.

While courts initially complied with the DOJ’s requests, judges have grown increasingly impatient with the agency as seal times have grown to six times the original length contemplated by the FCA. As a result, the DOJ has shifted tactics. Instead of moving to extend the seal period, the agency has begun unsealing cases while issuing notices that DOJ will not intervene “at this time.” Under the DOJ’s new approach, relators will be expected to carry cases forward by beginning discovery and shouldering the costs themselves, with the hope that the DOJ will eventually intervene.

The DOJ’s change in policy could create an arbitrable tipping point. Given the DOJ’s backlog of over one thousand sealed complaints—and

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278. Id. (“The government must substantiate any claims of ‘good cause’ before an extension may be granted. In its consideration of what constitutes ‘good cause,’ Congress specifically rejected justifications such as the prosecutor’s workload or the mere existence of a criminal investigation.”).
279. In recent years, the number of complaints filed with the DOJ has skyrocketed, leaving the agency with over 1,300 sealed cases as of January 2011. See John T. Bentivoglio et al., False Claims Act Investigations: Time for a New Approach?, SKADDEN (May 12, 2011), http://skadden.com/Index.cfm?contentID=51&itemId=2421 (“We predict that there will be an increase in the number of cases where the government delays an intervention decision, and the litigation is pushed forward by the whistleblower and his/her attorney.”).
280. Id.
281. Id.; see Yeargin & Harris, supra note 276.
282. Yeargin & Harris, supra note 276, at 2.
283. Id.
284. See Bentivoglio et al., supra note 279.
judicial pressure on the agency to make more rapid intervention decisions—a considerable number of qui tam actions will enter the judiciary in the short term. In response, defendants will likely try to contain the costs of defending such actions by aggressively seeking arbitration. Since the federal courts have already begun to hold qui tam claims arbitrable, judges have an alternative to letting declined actions mount on their dockets: compel arbitration. Indeed, it is telling that the decision in Deck—the first judicial opinion compelling qui tam arbitration—came within three months of the DOJ’s change in policy.

As the rest of this part demonstrates, qui tam arbitration could tip the balance in defendants’ favor by doing more than simply limiting relator’s rights. While an adverse judgment in arbitration almost certainly would be binding on a relator, qui tam arbitration could also limit the right of the Government to a judicial forum. Should the DOJ intervene into a relator’s action, defendants might be able to compel the agency into arbitration. Likewise, if the DOJ intervenes after an adverse judgment in arbitration, the agency could be barred from relitigating the claims or issues. If either of these scenarios were to occur, qui tam arbitration could do what no arbitrable claim has done before. It could limit the Government’s right to prosecute actions based on an arbitration clause signed only by private individuals.


287. See E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 297 (2002) (declining to decide whether an adverse judgment against an individual bringing a claim under the ADEA would bar an executive agency from bringing a claim for the same conduct under the act).
A. An Adverse Judgment in Arbitration Would Be Binding on Relators

The district court in Deck (the first decision to order qui tam arbitration) left open a significant question—whether an adverse judgment in arbitration would be binding on relators. The court compelled what it called “mandatory” arbitration, which is an ambiguous term that could be either binding or non-binding.288 Despite this oversight, relators are unlikely to avoid an adverse judgment should the arbitration not go in their favor. As previously noted, parties can be bound by an adverse judgment in arbitration even if there are other “real parties in interest” that did not participate.289 Furthermore, district courts lack discretion to order non-binding arbitration where the parties’ contracts specifically call for binding arbitration.290 Thus, given that arbitration clauses ordinarily mandate binding arbitration,291 it is unlikely that qui tam arbitration would be non-binding.

Additionally, it is unlikely that the DOJ could release relators from arbitration by intervening in the suits.292 On the one hand, the FCA does state that if the Government intervenes, it “shall not be bound by an act of the person bringing the action.”293 Nonetheless, the FCA does not state that the relator shall not be bound. The Supreme Court’s decision in Rockwell

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289. Supra note 154.

290. McKee v. Home Buyers Warranty Corp. II, 45 F.3d 981, 983-84 (5th Cir. 1995); O’Hara v. Dist., 56 F.3d 1514, 1522 (D.C. Cir. 1995); St. Lawrence Explosives Corp. v. Worthy Bros. Pipeline Corp., 916 F. Supp. 187, 190 (N.D.N.Y. 1996) (holding arbitration can be non-binding only if the parties explicitly state so in their contract); see Com. Enterprises v. Liberty Mut. Ins. Co., 958 F.2d 376 (9th Cir. 1992) (compelling non-binding arbitration because contract was ambiguous); Centurion Air Cargo, Inc. v. United Parcel Serv. Co., 300 F. Supp. 2d 1281, 1286 (S.D. Fla. 2004) aff’d, 420 F.3d 1146 (11th Cir. 2005) (compelling binding arbitration in the “absence of language in the policy indicating that the arbitration clause was non-binding).


292. The DOJ declines to intervene in the majority of qui tam actions—meaning this scenario would be a rarity. Broderick, supra note 256, at 971.

(described in Part VI.B.) illustrates this point. There, a relator made a public disclosure that disqualified him from bringing a claim. The DOJ then intervened in the action, and argued that its participation should absolve the relator of its public disclosure. The Supreme Court nonetheless barred the relator from participating in the suit. If the DOJ’s intervention decision cannot cure a public disclosure made by a relator, it also cannot wipe away an arbitration agreement. Thus, the DOJ’s degree of participation in a qui tam suit cannot release a relator from binding arbitration.

B. If the DOJ Declines an Action but Later Intervenes, Defendants Might Be Able to Compel the Agency into Arbitration

As the previous discussion demonstrates, relators are unlikely to escape enforcement of their arbitration clauses. There is a remaining question, however, as to whether a relator’s arbitration agreement could limit the Government from litigating its own FCA claims in court. As a general rule, a court can compel into arbitration only those parties that are signatories to an arbitration agreement. Nonetheless, federal courts have recognized a number of theories, arising out of common law principles of contract and agency, under which nonsignatories may be bound to the arbitration agreements of others. Among these theories, a nonsignatory can be forced

295. Id.
296. Id.
297. Id.
to arbitrate if it “knowingly seek[s] and obtain[s] ‘direct benefits’ from the contract” containing the arbitration clause. Based on this doctrine of equitable estoppel, defendants potentially could compel the DOJ into arbitration should the agency initially decline to intervene in qui tam action but later change its mind.

When the DOJ intervenes in a declined suit, it ordinarily does so based on information produced in the legal proceedings. The FCA itself states that “[i]f the Government so requests, it shall be served with copies of all pleadings filed in the [declined] action and . . . copies of all deposition transcripts.” By the same token, if the DOJ intervenes in a suit that has gone to arbitration, it likely will have done so based on materials from the actual arbitration.

There is an open question as to whether the DOJ, by knowingly seeking and obtaining this information, receives a “direct” benefit from the contract containing the arbitration clause sufficient to warrant arbitration of the agency’s claims. Like any issue of causation, “directness” is not black and white concept but rather operates on a sliding scale. This ambiguity gives defendants the opportunity to compel the Government into arbitration.

The Fifth Circuit’s recent decision in Blaustein v. Huete illustrates the point. There, a company signed a fee agreement (containing an arbitration clause) for legal services from a law firm. An employee of the company later sued the law firm for malpractice and other claims, based on the employee’s “separate attorney-client relationships with the [law firm] . . .

300. Id.
301. Bentivoglio et al., supra note 279; Yeargin & Harris, supra note 276, at 2.
303. Rashad v. Walsh, 300 F.3d 27, 34 (1st Cir. 2002) (“The inquiry into causation involves a sliding scale: deliberately dilatory tactics must be weighed more heavily against the state than periods of delay resulting from negligence.”).
305. Id. at 349-50.
not the relationship embodied in the fee agreement.” 306 The Fifth Circuit nonetheless compelled arbitration of a non-signatory employee’s claims. 307 As the court held, the non-signatory “embraced” the arbitration contract because he “obtained the same sort of benefits from the fee agreement that a client would have received: research, reasoning, drafting, and filing, all informed by the [attorney’s] legal training.” 308 Had the contract not existed, the non-signatory “would have had to hire his own . . . attorney to perform these tasks.” 309 Further, because some of the employee’s allegations referred to the company “by name,” these allegations “invite[d] [the court] to reference the fee agreement” and the arbitration clause therein, and therefore made it appropriate for the court to compel arbitration. 310

The relationship between the DOJ and a relator bears some similar characteristics. The DOJ is not an employee of a relator. However, by using the FCA’s statutory provisions to seek and obtain arbitration materials, the DOJ receives benefits from arbitration through access to materials that would ordinarily be confidential. 311 Without the relator’s arbitration clause, these documents would not exist, and the agency “would have had to hire [its] own . . . attorney to perform these tasks.” Further, given that the DOJ would undoubtedly reference the relator “by name” during the litigation,
since the relator is a party to the action, this may also invite the court to reference the relator’s employment contract and the arbitration clause therein.

This argument does suffer from its flaws. Receiving a benefit from a contract containing an arbitration clause is not sufficient to compel a non-signatory into arbitration. The benefit must be “direct,” and a benefit is merely indirect “where the nonsignatory exploits the contractual relation of parties to an agreement, but does not exploit (and thereby assume) the agreement itself.”

The Second Circuit’s decision in *Thomson-CSF, S.A. v. Am. Arbitration Ass’n* is exemplary. There, two companies contracted to trade with each other and signed an arbitration clause. A third-party competitor then acquired one of the companies. The Second Circuit held that the competitor could not be later compelled into arbitration. As the court reasoned, if the competitor had “directly benefitted from the . . . Agreement by seeking to purchase equipment . . . it would be estopped from avoiding arbitration.” Nonetheless, the competitor’s benefit derived solely from the purchase of one of the companies and not from the contract itself—therefore, rendering the benefit “indirect.”

Based on this decision, the DOJ has a strong argument that any benefit it derives from the arbitration clause is indirect. Like the competitor in *Thomson-CSF*, the DOJ has purchased the services of an entity—the relator.

314. Id.
316. Id. at 775-76.
317. Id.
318. Id. at 778-79.
319. Id. at 779.
320. Id.
In turn, when the DOJ requests information from the relator, it “exploits” the contractual relationship between the relator and the defendant rather than the employment agreement itself. Since the DOJ is a passive recipient of information from the relator, any benefit it derives would be indirect.

This argument is persuasive and, in isolation, would likely lead a court to reject an attempt to compel the DOJ into arbitration. Nonetheless, courts adjudicating the issue of “direct benefits” estoppel should be mindful that “directness” is only a proxy for a more fundamental inquiry: whether it would be inequitable to allow a non-signatory to derive benefits from arbitration, but still permit that entity to proceed in court. And in this equity analysis, defendants have a potential advantage.

Common law rules of partial assignment allow a defendant to join the assignor and partial assignee to the same lawsuit.\(^{321}\) This right protects the defendant’s interest in being “free of successive and repeated suits growing out of the same basic facts.”\(^{322}\) Based on this principle, a defendant could request the court to join the Government to the arbitration. Even if the Government’s benefit is arguably “indirect,” a separate judicial action raises the specter of repeated suits based on the same operative facts. Regardless of the merits of arbitration, a court may find it inequitable to allow the Government to use information from a confidential arbitral proceeding to bring its own judicial proceeding for the same conduct and on the same claims. As a result, a court might join the Government to the relator’s arbitration.

Compelling arbitration in the context of a partial assignment is not unprecedented. Only one federal court has considered arbitration based on

\(^{321}\) Restatement (Second) of Contracts § 158 (Tent. Draft No. 3, 1976); 4 A. Corbin, Contracts § 889 (1951) (“[U]nless the obligor has consented, the partial assignee may not maintain the original suit against the obligor unless all parties having the collective right to the entire claim are joined in the proceeding.”); In re Fine Paper Litig. State of Wash., 632 F.2d 1081, 1091 (3d Cir. 1980) (quoting same).

\(^{322}\) Fine Paper Litig., 632 F.2d at 1091.
In sum, both defendants and the Government have strong arguments as to whether the benefit that the state derives from relators is sufficiently direct to compel arbitration. In light of the common law right to join assignors and partial assignees into the same proceeding, however, courts could logically conclude that the balance of the equities would favor arbitration. As a result, corporate defendants could prevent the DOJ from avoiding arbitration’s limitations on discovery and blunt the agency’s ability to intervene and prosecute qui tam suits.

C. If the DOJ Does Not Intervene, the Agency Could Be Bound by an Adverse Judgment Against a Relator

Given the risks of intervening while the relator’s arbitration is ongoing, the DOJ may decide to intervene only once the arbitration has concluded. The agency could then enter the suit when the relator appeals the arbitration judgment in federal district court. This approach could free the agency to relitigate the claims and issues decided in the relator’s suit de novo, as the agency was a non-party to the arbitration and therefore would not bound by doctrines of preclusion.

324. Id.
325. Id.
Preclusion doctrines prevent parties from relitigating the same claims or issues finally decided in a prior adjudication.\textsuperscript{327} Generally, a person who was not a party to the previous action will not be bound by the judgment, as he or she “has not had a ‘full and fair opportunity to litigate’ the claims and issues settled in that suit.”\textsuperscript{328} Thus, at first glance, the Government would not be bound by an adverse judgment against a relator in arbitration, since it was never a party to the action.

Nonetheless, the DOJ’s freedom to relitigate in district court is not as clear as the rules on non-party preclusion may seem. There are exceptions to the general rule that non-parties are not bound by prior adjudications. In particular, nonparties can be barred from relitigating claims or issues if they share a substantive legal relationship justifying preclusion with the previous legal party (“privity”).\textsuperscript{329}

The Supreme Court has determined that the United States shares such a relationship with relators—at least where a whistleblower proceeds in court.\textsuperscript{330} As the Court recently held in Eisenstein, the “United States is bound by the judgment in all FCA actions regardless of its participation in the case.”\textsuperscript{331} Whether this statement applies to arbitration is difficult to decipher, as the Court did not fully elaborate on its rationale. The Court stated only that if “the United States believes that its rights are jeopardized by an ongoing qui tam action, the FCA provides for intervention.”\textsuperscript{332}

Despite the Supreme Court’s brevity, its justification echoes an exception to nonparty preclusion. As the Court has recognized, a nonparty that has “assumed control” over litigation will be bound by the judgment, since the nonparty has had “the opportunity to present proofs and argument”

\textsuperscript{328} Id.
\textsuperscript{329} Id. at 894.
\textsuperscript{331} Id.
\textsuperscript{332} Id.
and “had his day in court.”

Thus, even if the Government declines to intervene in a suit, is not a party, and takes no active role in the case other than requesting service of the pleadings, it will still be bound by the judgment. Indeed, the lower courts have used the same rationale for nearly twenty years to prevent the Government from relitigating issues or claims already decided in relators’ suits.

Eisenstein and lower court precedent raise significant questions of whether an adverse judgment against a relator in arbitration would preclude the Government from relitigating issues or claims in court. On the one hand, those decisions were not in the context of arbitration, and both courts and commentators have disagreed on whether arbitration should have any preclusive effect on statutory claims. Over the years, lower courts have struck “a case-by-case balance” in determining when preclusion principles apply to final determinations in arbitration. This balancing reflects the courts’ longstanding tendency “to be suspicious of relaxed arbitration procedures” and the “murdiness or absence of an arbitral opinion.” While many of the courts have rejected preclusion stemming from arbitration, others have “yielded.”

334. Id. at 928.
335. Stauffer v. Brooks Bros., Inc., 619 F.3d 1321, 1329 (Fed. Cir. 2010) (citing Stoner v. Santa Clara Cty., Office of Educ., 502 F.3d 1116, 1126 (9th Cir. 2007)); U.S. ex rel. Mergent Servs. v. Flaherty, 540 F.3d 89, 93 (2d Cir. 2008) (citing same); Stoner, 502 F.3d at 1126 (citing In re Schimmels, 127 F.3d 875, 882 (9th Cir. 1997); Schimmels, 127 F.3d at 884.
337. Id.
338. Id. (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974)); Mathews v. Denver Newspaper Agency LLP, 649 F.3d 1199, 1203 (10th Cir. 2011); Johnson v. Univ. of Wisconsin-Milwaukee, 783 F.2d 59, 62 (7th Cir. 1986)).
339. 18B Wright, supra note 336, § 4475.1 (citing Cent. Transp., Inc. v. Four Phase Sys., Inc., 936 F.2d 256, 257 (6th Cir. 1991)); Benjamin v. Traffic Executive Ass’n E. R.Rs., 869 F.2d 107, 115 (2d Cir. 1989)).
Further complicating the issue, the Supreme Court has declined to address whether a judgment in arbitration between individuals could have preclusive effect on the Government. On the one occasion where the Court had the opportunity to resolve the issue, the Court left “open” the question of whether an “arbitration judgment would affect the validity of the [Government’s] claim or the character of relief the [Government] may seek.” In short, whether an adverse judgment in qui tam arbitration would preclude the Government from relitigating is a matter of first impression for the federal courts.

Developing a grand theory of preclusion is beyond the scope of this article. Suffice to say, if a court were satisfied with an arbitration’s procedures and opinion, the principles warranting preclusion broadly in qui tam claims would also apply to the arbitration. Since the United States retains its right to intervene, it can protect its interests in the suit and, therefore, has effectively had its “day in court.” Qui tam arbitration could therefore compel lower courts to do what no court has done before. It could limit the Government’s right to relitigate actions based on an arbitration clause signed only by private individuals.

The DOJ appears to have been aware of this risk in Deck (the first decision compelling qui tam arbitration). In a limited statement of interest filed with the court, the DOJ argued that “any arbitration ruling as to such a claim must necessarily be deemed a non-binding recommendation.” The six-sentence statement failed to fully elaborate on the agency’s rationale. Nonetheless, the Government pointed to the text of the FCA and the fact that

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341. Id.
a qui tam claim “may not be settled without the consent of the Attorney General.”

The district court in Deck declined to resolve the preclusion question. Nonetheless, even if the court had reached the issue, the Government’s statement of interest casts little light on whether the Government would be precluded from relitigating an adverse judgment in arbitration. The Government’s recitation of the FCA is correct: a claim may not be settled without consent of the Attorney General; but this has little to do with preclusion. An adverse judgment in arbitration is not a “settlement.” It is a dismissal. And if a dismissal in arbitration has the same preclusive effect as a judgment of a court, a judge would have to dismiss a subsequent claim brought by the DOJ because the agency is a nonparty who is in privity with the relator. Thus, the Attorney General’s veto power over settlements is largely irrelevant to the question of whether the DOJ is in privity with relators. As a result, the text of the FCA does not prevent the DOJ from being bound by an adverse judgment against a relator in arbitration.

The Government could avoid preclusion on an alternative ground. As previously noted, the lower courts have held that the Government is in privity with relators because of the state’s statutory right to intervene and control qui tam suits. Yet the FCA does not offer an explicit mechanism for the Government to intervene in the arbitration. Since the Government has no means to “present proofs and argument” in the arbitral hearings, the state should not be bound by an adverse judgment arising from the proceedings.

344. Id.
345. The district court in Deck posed its response solely as a hypothetical. “Even if mandatory arbitration of the Plaintiffs’ FCA claim is not binding on the United States, arbitration is appropriate given the substantive and procedural posture.” Deck, 2013 WL 394875, at *6-7.
This argument has persuasive value. Yet the constraints that arbitration places on the DOJ are not so uncommon. The agency’s ability to control relators is always limited. For example, the DOJ cannot unilaterally control relators’ participation in court proceedings. Instead, the Government must petition the court to limit the relator’s activities. The judge may then limit a relator’s participation upon a showing by the DOJ that the relator “would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment.”

Furthermore, the DOJ still has several means to control the relator’s arbitration. To begin, the agency could use the aforementioned provision of the FCA. Since the relator’s claims in arbitration are likely identical to those in the court proceedings, the DOJ would have a strong argument that the relator’s “unrestricted participation during the course of the litigation” would interfere with the agency’s prosecution. Since the FCA grants the court broad discretion to “otherwise limit[] the participation by the [relator] in the litigation,” this provision could reasonably be construed as authorizing the court to stay the relator’s outside proceedings (including arbitration). Additionally, some jurisdictions grant district courts statutory authority to stay arbitration proceedings at the request of third parties. Thus, even if the FCA lacks a means to stay a relator’s arbitration, state law may provide a way. The DOJ therefore has several potential avenues by which to prevent the arbitration from proceeding to judgment.

In sum, while any court determination on arbitration would be made on a “case-by-case basis,” there is the chance that a judge would rule that principles of preclusion bar the Government from relitigating an adverse judgment in arbitration against a relator. Further, although the Supreme

349. Id.
350. See id.
351. Id. § 3730(c)(iv)(4).
Court has once dodged the issue of arbitration’s effect on the Government, it is unclear that the Court would do so again when considering fraud allegations reaching into the billions of dollars. Until the Court decides the issue, however, qui tam arbitration could pose a significant impediment to the DOJ’s ability to enforce the FCA, should the agency not aggressively exercise its right to intervene and limit relators’ participation in arbitrations.

VIII. CONCLUSION

Qui tam arbitration raises fundamental questions about how far arbitration should extend to statutory claims. This article demonstrates that Congress left a significant loophole when it passed the Dodd-Frank amendments in 2010. By failing to include anti-arbitration provisions in the FCA, Congress set the groundwork for corporate defendants to force whistleblower suits into the secretive forum of arbitration. Employers are now building quickly. As the DOJ continues to push more qui tam suits into the federal courts, the costs of defending such actions has incentivized defendants to push for the cheaper, faster, and quieter avenue of arbitration. As part of this strategy, companies have started adding “private attorney general” actions to boilerplate arbitration clauses: a synonym for qui tam suits. Corporations also are prevailing on their motions to compel, and are creating precedent in favor of qui tam arbitration. As a result, corporate defendants in the coming years are developing a regime to blunt the United States’ primary weapon for recovering frauds against the Government. This article demonstrates that it is time for Congress to respond—and to amend the FCA to include the same prohibitions against arbitration as the nation’s other whistleblower statutes.