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Torts - Cheh-Cheng Wang ex rel. the United States of America v. FMC Corp.: False Claims Act Bar May be Overturned by Pending Legislation

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TORTS

SUMMARY

CHEH-CHENG WANG EX REL. THE UNITED STATES OF AMERICA v. FMC CORP.: FALSE CLAIMS ACT BAR MAY BE OVERTURNED BY PENDING LEGISLATION

I. INTRODUCTION

In *Wang ex rel. The United States v. FMC Corp.*,[1] the Ninth Circuit held that a private individual (a *qui tam* plaintiff) cannot base a suit on behalf of the government under the False Claims Act[2] on publicly known information unless she played a role in making the allegations public. In doing so, the court affirmed dismissal of a suit brought by an engineer who had direct and independent knowledge of the information underlying the allegations. The court stated that "[*q*]*ui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot."[3]

The Ninth Circuit's holding is controversial. The False Claims Amendments Act of 1992, passed by the House in Au-

1. Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) (per Poole, J.; the other panel members were Fletcher, J., and Nelson, J.).

2. 31 U.S.C. § 3729 (1986).

3. *Wang*, 975 F.2d at 1419.

gust, 1992,[4] is incompatible with it. This note considers *Wang* in the light of prior and pending legislation.

II. FACTS

Dr.[5] Cheh-Cheng Wang worked as a mechanical engineer for FMC for fourteen years.[6] He was fired[7] in 1986. Wang claimed he was fired because he disclosed violations of the False Claims Act by FMC to the California Department of Fair Employment and Housing and to Congressman Norm Mineta.[8] FMC claimed Wang was terminated for good cause, stating that his performance was below standard[9] and that his attitude at work was arrogant and condescending.[10] Wang sued FMC, as a *qui tam* plaintiff, for violations of the False Claims Act. The district court dismissed the suit, holding that it lacked subject matter jurisdiction because Wang was not the original source of the information in his complaints.[11]

III. THE COURT'S ANALYSIS

A. BACKGROUND

The phrase *qui tam* comes from the Latin expression *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who brings the action for the king as well as for himself."[12] The *qui tam* plaintiff, called a relator, receives an award (such as a percentage of the amount recovered) for successfully prosecuting the suit.[13] The rest of the recovery goes to

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4. H.R. 4563, 102nd Cong., 2d Sess. 138 CONG. REC. H7978 (1992). At time of writing, this bill is still before the Senate Judiciary Committee, not yet passed by the Committee or by the Senate.

5. Brief of Appellee FMC Corporation in Opposition to Appellant's Opening Brief on Appeal at 6 [hereinafter *FMC's Brief*].

6. Appellant's Corrected Opening Brief on Appeal at 3-4.

7. Wang v. FMC Corp., 975 F. 2d 1412, 1415 (9th Cir. 1992).

8. FMC's Brief at 5.

9. *Id.*

10. *Id.* at 7.

11. Wang v. FMC Corp., No. C-87-20814-WAI, 1991 U.S. Dist. LEXIS 6683 (N.D. Cal. Apr. 23, 1991).

12. Erickson v. American Inst. of Bio. Sciences, 716 F. Supp. 908, 909 n.1 (E.D. Va. 1989) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (1768)).

13. Congress' grant of a financial interest in the recovery is the basis for the plaintiff's standing in these actions. There have been several unsuccessful challenges of the

the government.[14] *Qui tam* suits were conducted in English courts as early as the Fifteenth Century.[15] However, these suits are creatures of statute, not common law.[16] Thus, a federal court's jurisdiction to hear a *qui tam* complaint is determined by the statute establishing the *qui tam* cause of action.

1. *The False Claims Act of 1863: All Plaintiffs Welcome*

The False Claims Act was originally enacted in 1863 to combat rampant fraud by wartime contractors.[17] The statute provided criminal and civil penalties, including double damages and a $2000 forfeiture per violation.[18] "Any person" could bring a *qui tam* suit under the Act.[19] The successful relator was entitled to a 50% share of the recovery.[20] The Supreme Court has noted that the 1863 Congress intended the phrase "any person" to be interpreted broadly: even the District Attorney who prosecuted a criminal action against a fraudulent defendant could become the civil *qui tam* complainant.[21]

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standing of *qui tam* plaintiffs. Interesting discussions appear in James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and their Applications in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 OHIO N.U. L. REV. 35 (1991); Frank A. Edgar, Jr., Comment, *"Missing the Analytical Boat": The Unconstitutionality of the Qui Tam Provisions of the False Claims Act*, 27 IDAHO L. REV. 319 (1991); Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. CHI. L. REV. 543 (1990); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 251 (1989).

14. *See supra* note 13.

15. Sherr v. Anaconda Wire & Cable Co., 149 F.2d 680, 681 (2nd Cir. 1945).

16. United States *ex rel.* Rodriguez v. Weekly Publications, 144 F.2d 186, 188 (2d Cir. 1944) (*qui tam* awards under the Act (then popularly known as the "informer statute") were "of statutory creation . . . wholly within the control of Congress"). *See also* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943) (history of courts showing disfavor to such suits); Marra v. Burgdorf Realtors, Inc., 726 F. Supp. 1000, 1012-13 (E.D. Pa. 1989) (same).

17. Helmer & Neff, *supra* note 13 at 36; Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L. REV. 525, 526 (1989).

18. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991). *Stinson's* majority opinion by Sloviter, C.J., and dissent by Scirica, J., both provide scholarly reviews of the history of the False Claims Act. The history of the 1863 version of the Act also comes under particular scrutiny in the majority (Black, J.) and dissenting (Jackson, J.) opinions of United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943).

19. *Marcus*, 317 U.S. at 546.

20. *Id.* at 539.

21. *Id.* at 546 (citing CONG. GLOBE, 37th Cong., 3d Sess., 955-956 (1863)).

In the 1930's and early 1940's, several *qui tam* lawsuits were filed that capitalized on rampant fraud by depression-era and wartime government contractors.[22] These complainants did nothing to expose the fraud and provided no independent knowledge of the fraud.[23] Instead, they would copy the allegations from a criminal complaint filed by the government and use them as the basis for their own *qui tam* action. This was a new use of the Act.[24] In 1943, Attorney General Biddle characterized these actions as "parasitic."[25] In *United States ex. rel. Marcus v. Hess*, the key case of this period, Justice Jackson explained[26] that this practice limited the Government's ability to control criminal actions while providing a windfall to undeserving plaintiffs. Further, the law would become "downright vicious and corrupting"[27] if police, prosecutors or other government investigators could file suit as relators based on what they had learned on the job.[28] The Court's majority recognized these and further issues as "strong arguments of policy,"[29] but concluded that "the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not."[30] Relief had to come from Congress.

2. *The 1943 Amendments: Bar for Information in Possession of the Government*

Congress responded to *Marcus* with amendments to the Act. The House initially passed a bill to repeal the False Claims Act.[31] The original Senate bill barred *qui tam* suits that were based on information in the possession of the goverment, unless the information on which the suit was based was "original with such person."[32] Congress adopted the Senate bill, but without

22. S. REP. No. 345, 99th Cong., 2d Sess. 10 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5275.

23. *Id.* at 10-11 (1986), 1986 U.S.C.C.A.N. at 5275-5276. Several such cases are listed *infra* note 36.

24. *Marcus*, 317 U.S. at 559.

25. United States *ex rel.* John Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992).

26. 317 U.S. at 556-62 (Jackson, J., dissenting).

27. *Id.* at 560.

28. *Id.*

29. *Marcus*, 317 U.S. at 546.

30. *Id.* at 547.

31. *Stinson, supra* note 18, at 1153.

32. *Id.* (quoting 89 CONG. REC. 510, 744 (daily ed. Dec. 16, 1943)).

the original source exception.[33] This clause was dropped "without explanation."[34] As a result, *no one* (except the federal government) could bring a *qui tam* action if the government already knew about the underlying fraud.[35]

The initial effects of the amendment were as expected. Courts dismissed several suits in which the plaintiff relied on information already collected by the government.[36]

However, the 1943 bar also excluded legitimate actions. The first hint of mischief came in 1949.[37] The plaintiff in this case charged fraudulent claims by a business and corruption of the involved government officials. "The learned District Judge thought that, because plaintiff did not negative knowledge of the fraud on the part of government officials, but on the contrary charged their knowledge and complicity in the fraud, the court was without jurisdiction to entertain the suit."[38] The appellate court reversed: the guilty knowledge of wrongdoing government employees will not be imputed to the government for the purpose of barring a suit against the wrongdoers.[39]

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33. S. REP. No. 345, 99th Cong., 2d Sess. 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277.

34. *Id.* Few court opinions provide any explanation for the dropping of the clause, but in United States v. Aster, 176 F. Supp. 208, 210 (E.D. Pa. 1959), *aff'd*, 275 F.2d 281 (3rd Cir. 1960), *cert. denied*, Aloff v. Aster, 364 U.S. 894 (1960). Hastie, J., cited comments by Senator Langer, 89 CONG. REC. 10746-51, and Senate rejection of a corrective amendment, 89 CONG. REC. 10752, to show that this was a debated issue, not an accident.

35. S. REP. No. 345, 99th Cong., 2d Sess. 12-13 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277-78.

36. *See, e.g.*, United States *ex. rel.* Greenberg v. Burmah Oil Company Ltd., 558 F.2d 43 (2d Cir. 1977), *cert. denied*, 434 U.S. 967 (1977) (no jurisdiction when the suit is based on government-possessed information, not even on the basis of plaintiff's public service in assembling, organizing and integrating the information in the government's possession); United States *ex. rel.* Bayarsky v. Brooks, 154 F.2d 344 (3d Cir. 1946) (useful summary of the 1863 statute's legislative history and the 1943 amendments); Sherr v. Anaconda Wire & Cable Co., 149 F.2d 680 (2d Cir. 1945) (not an unconstitutional taking of the relator's property to eliminate subject matter jurisdiction, including jurisdiction over ongoing suits, for *qui tam* suits based on information in the possession of the government); United States *ex rel.* Rodriguez v. Weekly Publications, Inc., 144 F.2d 186 (2d Cir. 1944) (Congress has the right to change the terms of *qui tam* suits even for suits in progress); United States *ex rel.* McLaughlin v. American Chain & Cable Co., 62 F. Supp. 302 (S.D. N.Y. 1945) (no jurisdiction to hear *qui tam* suit when all material information elicited by the government, and no fees to relator for drawing the complaint).

37. United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949).

38. *Id.* at 736.

39. *Id.* at 738.

The *Rippetoe* court also expressed doubt that Congress intended the bar against suits based on information already known to the government to apply to the informer who gave that information to the government.[40]

Later decisions disagreed with the *Rippetoe* dictum. For example, in *United States v. Aster*,[41] in 1960, the Third Circuit ruled against an informer who sued under the False Claims Act after the government failed to do anything with the evidence he provided.[42] The informer's suit was barred because it was based on information (that he had provided) in the possession of the United States prior to the filing of the suit.[43] "The appellant here chose to impart his material information to the United States for its use rather than first bringing an action on his own initiative . . . By doing so he has brought himself within the jurisdictional prohibition."[44]

Aster was followed for the next 26 years: to be able to bring a *qui tam* suit, a person who knew about a fraud had to file the complaint without first reporting the details to the government.[45]

United States ex rel. Wisconsin v. Dean was a particularly disconcerting example of this line of cases. Wisconsin successfully prosecuted the defendant in a state court criminal action for making fraudulent claims for Medicaid reimbursements. The

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40. *Id.* at 736.

41. 275 F.2d 281 (3d Cir. 1960), *cert. denied*, 364 U.S. 894 (1960).

42. *Id.*

43. *Id.* at 283.

44. *Id.*

45. United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) (discussed *infra*); United States *ex rel.* Weinberger v. Florida, 615 F.2d 1370 (5th Cir. 1980); Safir v. Blackwell, 579 F.2d 742 (2d Cir. 1978), *cert. denied*, 441 U.S. 943 (1979) (expresses strong reservations about the rule but applies it because it is the law); Pettis *ex rel.* United States v. Morrison-Knudsen Co., 577 F.2d 673 (9th Cir. 1978) (United States has no ethical duty to warn an informer that he will lose the right to file a *qui tam* action if he divulges his evidence to the government); Oklahoma *ex rel.* Department of Human Serv. v. Children's Shelter, Inc. 604 F. Supp. 871 (W.D. Okla., 1985); United States *ex rel.* Lapin v. International Business Machines Corp., 490 F. Supp. 244 (D. Haw. 1980) (once informer has given the information to the government, she is barred from bringing suit even if the government makes no effort to investigate or take action).

Contrary court decisions were rare: United States *ex rel.* Davis v. Long's Drugs, Inc., 411 F. Supp. 1144 (S.D. Cal. 1976), broke with this rule but was overruled on this ground by *Pettis*.

state then brought a civil suit to recover damages under the False Claims Act in federal court, on behalf of the United States.[46] The United States declined to appear in the suit, leaving Wisconsin in control of the action.[47] In its statement of declination to the district court, the United States said that Wisconsin had "a special expertise" in investigating this type of fraud and was "the proper party to conduct this action."[48] The Seventh Circuit then ruled the suit barred because Wisconsin had already given the evidence of fraud to the United States.

This bar was a trap for the unwary honest citizen.[49] By 1986, there were only about six *qui tam* cases per year.[50] "*Qui tam* actions under the [False Claims Act] had gone in forty years from unrestrained profiteering to a flaccid enforcement tool."[51] Fraud, however, was still rampant — the Senate Report on the False Claims Amendments Act described the problems of fraud by government contractors as follows:

> Most fraud goes undetected. Of the fraud that is detected . . . the Government prosecutes and recovers its money in only a small percentage of cases. . . . The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget, . . . costing taxpayers anywhere from $10 to $100 billion annually. . . . DOD [Department of Defense] loses more than $1 billion just from fraudulent billing practices.[52]

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46. *Wisconsin*, 729 F.2d at 1102.

47. Before the 1986 amendments, when a private plaintiff brought a False Claims Act suit, the United States was required to either appear in the suit and completely take over prosecution of it, excluding the plaintiff from further participation in the suit, or to decline to appear, leaving all prosecution for the *qui tam* plaintiff. S. REP. at 25, 1986 U.S.C.C.A.N. at 5290. Section 3730 (c)(1) of the amended (1986) False Claims Act allows the *qui tam* plaintiff to continue as a party, subject to a few restrictions. *Id.*

48. *Wisconsin*, 729 F.2d at 1103.

49. *Pettis*, 577 F.2d at 673.

50. H.R. REP. No. 1015, 101st Cong., 2d Sess., at 173 (1991).

51. United States *ex rel.* John Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992).

52. S. REP. No. 345, 99th Cong., 2d Sess. 2 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 (citations omitted).

3. *Jurisdiction After 1986: The Original Source Requirement*

In 1986, in order to encourage more *qui tam* suits,[53] Congress revised the jurisdictional bar in the False Claims Act. Section 3730(e) of the Act lists the restrictions.[54]

The section relevant to *Wang v. FMC* is 3730(e)(4):

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

B. Application to Wang's Suit

In granting summary judgment against Wang's False Claims Act claims, the district court stated that

> [w]ith respect to most of the evidence offered by Wang, he is not an "original source" and thus has failed to satisfy the requirements of the False Claims Act as a matter of law. The evidence for which he is the original source is simply insufficient to support the claim that the Act was violated.[55]

Section 3730(e)(4) was the basis of the district court's ruling.

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53. *Id.* at 23, 1986 U.S.C.C.A.N. at 5288 ("The [Senate Judiciary] Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits.").

54. 31 U.S.C. § 3730 (1986).

55. Wang v. FMC Corp., No. C-87-20814-WAI, 1991 U.S. Dist. LEXIS 6683 at *5 (N.D. Cal. Apr. 23, 1991).

Wang alleged fraud on four different projects, one of which was the Bradley Fighting Vehicle.[56] This is the project of interest in the following discussion.

The Ninth Circuit affirmed the district court's holding that, in his allegations about the Bradley Fighting Vehicle, Wang had to, and did not, satisfy section 3730(e)(4)'s original source requirement.[57]

1. *Original Source Requirement: Direct and Independent Knowledge*

To meet the original source requirement of 3730(e)(4), Wang must have "direct and independent knowledge of the information on which the allegations are based."[58]

The district court ruled that Wang was not the original source of the Bradley information because that information had been publicly disclosed.[59] "[U]nder *Houck*, this evidence cannot be 'direct and independent' and thus cannot serve as proof of a violation of the False Claims Act."[60]

Houck was an attorney who represented late claimants to money set aside pursuant to a settlement order in a huge antitrust case.[61] In his suit, he alleged that the funds were being distributed in a way prohibited by the Seventh Circuit.[62] The Sev-

56. *Wang*, 975 F.2d at 1417. The other three allegations are of lesser interest. The court found that the source material on which Wang based these three complaints had not been previously publicly revealed, and therefore his suits were not jurisdictionally barred. 975 F.2d at 1416. But the suit failed on the merits because Wang "failed to produce sufficient evidence to support an inference of fraud by FMC." 975 F.2d at 1420. Under 31 U.S.C. § 3729(a)(1) and 3729(b), Wang had to prove that FMC acted "knowingly" (with actual knowledge, in deliberate ignorance of the truth, or in reckless disregard of the truth). "Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence." United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) (citations omitted). The *Wang* court held that "[f]or each of his surviving claims, Wang has no evidence that FMC committed anything more than 'innocent mistakes' or 'negligence,' if that." 975 F.2d at 1420.

57. *Wang*, 975 F.2d at 1417-20.

58. 31 U.S.C. § 3730 (e)(4)(B) (1986).

59. *Wang*, 1991 U.S. Dist. LEXIS 6683.

60. *Id.* at *5.

61. Houck on Behalf of United States v. Folding Carton Admin. Comm., 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990).

62. *Houck*, 881 F.2d at 503-04.

enth Circuit held that Houck's knowledge of the Administration Committee's practices was direct, by virtue of his direct relationship to, and interest in, the litigation.[63]

However, the Seventh Circuit also decided that Houck's knowledge was not independent of the public disclosure of the Committee's distribution method.[64] He could have learned what the Committee was doing from the Committee's public notices.[65] The court therefore ruled that Houck did not meet the original source requirement and affirmed the district court's dismissal of his suit.[66]

In *Wang*, the Ninth Circuit ruled that *Houck* stood for a narrower proposition than the one advanced by the district court:

> The district court, purporting to follow *Houck* . . . held that Wang's knowledge was not "direct and independent." This was error. . . . Wang had personal knowledge of Bradley's transmission problems because he worked (however briefly) on trying to fix them. The fact that someone else publicly disclosed the Bradley's transmission problems does not rob Wang of what he saw with his own eyes. Wang's knowledge of the transmission problems was "direct and independent" because it was unmediated by anything but Wang's own labor.

2. *Original Source Requirement: Voluntarily Provided the Information to the Government*

To meet 3730(e)(4)'s original source requirement, Wang must also show that he "has voluntarily provided the information to the Government before filing an action under this section which is based on the information."[67]

There is no indication, in the district and appellate opinions

63. *Id.* at 505.
64. *Id.*
65. *Id.*
66. *Id.*
67. 31 U.S.C. § 3730 (e)(4)(B).

or in the parties' appellate briefs[68] that Wang did not voluntarily provide the information to the government.

3. *The Whistleblower Requirement*

Even though Wang had direct and independent knowledge of information that he voluntarily revealed to the government, the Ninth Circuit was dissatisfied because Wang was "revealing what is already publicly known."[69] The court identified *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*[70] as a particularly detailed review of the history of the False Claims Act.[71] Citing *Stinson*, the *Wang* court stated that "[t]he paradigm *qui tam* plaintiff is the 'whistleblowing insider.' "[72] A whistleblower reveals damaging information that is not yet publicly known,[73] and therefore Wang was not a whistleblower. Someone else revealed the problems with the Bradley Fighting Vehicle: "[i]f there is to be a bounty for disclosing those troubles, it should go to the one who in fact helped to bring them to light"[74] not, the court held, to Wang.[75]

According to the statutory wording, an original source must have "direct and independent knowledge" and must have "voluntarily provided the information . . . to the Government."[76] There is no whistleblower requirement in the text of the statute.[77] This additional requirement was read into the statute by the *Wang* court, and by the court in *United States ex rel. Dick v. Long Island Lighting Co.*, as mandated by the legislative in-

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68. Appellant's Corrected Opening Brief on Appeal; Brief of Appellee FMC Corporation in Opposition to Appellant's Opening Brief on Appeal; Appellant's Reply Brief (No. 91-15789).

69. *Wang*, 975 F.2d at 1418.

70. 944 F.2d 1149, 1152-54, 1162-68 (3rd Cir. 1991).

71. *Wang*, 975 F.2d at 1418. The court also referred readers to United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1420 (9th Cir. 1991), for a detailed discussion of the history of the Act.

72. *Wang*, 975 F.2d at 1419.

73. *Id.*

74. *Id.* at 1421.

75. *Id.*

76. 31 U.S.C. § 3730 (e)(4)(B) (1986).

77. United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2nd Cir. 1990).

tent of Congress.[78]

As an example of the legislative intent, the *Dick* court cited a statement by Representative Berman, one of the drafters of the Act, that an original source has "some of the information related to the claim which he made available to the government or the news media *in advance of the false claims being publicly disclosed.*"[79] Also, Senator Grassley, who introduced the legislation in the Senate, stated that the original source requirements barred suits by anyone "who had not been an original source *to the entity that disclosed the allegations.*"[80] Finally, the *Dick* court quoted the House Report's statement of the purpose of the *qui tam* provisions: "to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."[81]

The *Wang* court cited *Dick* with approval[82] and added further legislative history: "the 1986 amendments are meant 'to encourage any individual knowing of Government fraud to bring that information forward.'[83] The Ninth Circuit concluded its analysis by stating that:

> It is important to note that under the rule we adopt today, all those who "directly or indirectly" disclose an allegation might qualify as its original source. . . . If, however, someone *republishes* an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence," and not their mimics."[84]

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78. *Wang*, 975 F.2d at 1419; *Dick*, 912 F.2d at 16.

79. *Dick*, 912 F.2d at 17 (emphasis original) (citing 132 CONG. REC. H9389 (daily ed. October 7, 1986)).

80. *Id.* (emphasis in original) (citing 132 CONG. REC. S20,536 (daily ed. Aug. 11, 1986)).

81. *Dick*, 912 F.2d at 18 (citing H.R. REP. No. 660, 99th Cong., 2d Sess. 22 (1986)).

82. *Wang*, 975 F.2d at 1419.

83. *Id.* (citing S. REP. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267).

84. *Wang*, 975 F.2d at 1419 (citations omitted).

III. CRITIQUE

The legislative history of the Act is not so clear as it might seem in the analyses[85] of *United States ex rel. Dick v. Long Island Lighting Co.*[86] and *Wang v. FMC Corp.*[87]

The *Wang* court highlighted *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*[88] as a source of detailed discussion of the history of the False Claims Act.[89] The *Stinson* majority had this to say about the legislative history of the 1986 amendment: "[t]he bill that eventuated in the 1986 amendments underwent substantial revisions during its legislative path. This provides ample opportunity to search the legislative history and find some support somewhere for almost any construction of the many ambiguous terms in the final version."[90]

A. The Legislative History does not Unambiguously Exclude Non-Whistleblowing Original Sources

A leading review of the history of the 1986 amendments to the False Claims Act says this about the original source requirement: "It is interesting that for such a significant portion of the Amendment, its legislative history is virtually non-existent."[91]

According to the Senate Report published as the legislative history of the False Claims Amendments Act of 1986,[92] the amendments were geared toward several related purposes, including the following: "[t]he purpose . . . is to enhance the Government's ability to recover losses sustained as a result of fraud against the government."[93] The purpose is "to encourage any individual knowing of Government fraud to bring that information

85. *See supra* notes 69-84 and accompanying text.

86. 912 F.2d 13 (2nd Cir. 1990).

87. Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992).

88. 944 F.2d 1149, 1152-54, 1162-68 (3d Cir. 1991).

89. *Wang*, 975 F.2d at 1418.

90. *Stinson*, 944 F.2d at 1154.

91. Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 Akron L. Rev. 525, 548 (1989).

92. S. Rep. No. 345, 99th Cong., 2d Sess., 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.

93. *Id.*

forward."[94] "The Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more private enforcement suits."[95]

The *Wang* court wrote that the False Claims Act "rewards those brave enough to speak in the face of a 'conspiracy of silence' and not their mimics. *Senate Report* at 6, 1986 U.S.C.C.A.N. 5271."[96] The Senate Report often referred to a "conspiracy of silence" or, more generally, to the desirability of encouraging whistleblowing.[97] However, the report did not explicitly state on page 6, or on any other page, that *qui tam* suits should only be filed by whistleblowers ("and not their mimics"[98]).

The original source requirement discussed in the Senate Report is slightly different from 31 U.S.C. 3730 (e)(4)—the Senate Report says that:

> [P]aragraph 4 disallows jurisdiction for *qui tam* actions based on allegations disclosed in a criminal, civil or administrative hearing, a congressional or General Accounting Office report or hearing, or from the news media, unless the action is brought 6 months after the public disclosure and the Government has failed to take any action.[99]

In other words, in the version of the bill described in the Senate Report, "mimics"[100] were explicitly allowed to bring suit six months after public disclosure.[101]

> New subsection (e)(4) of section 3730 prohibits a suit based solely on previous public disclosures unless the Government has failed to act within 6

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94. *Id.* at 2, 1986 U.S.C.C.A.N at 5266-67.
95. *Id.* at 23, 1986 U.S.C.C.A.N. at 5288-89.
96. *Wang*, 975 F.2d at 1419.
97. *See, e.g.*, S. REP. at 2, 1986 U.S.C.C.A.N. at 5266-67; S. REP. at 4, 1986 U.S.C.C.A.N. at 5269; S. REP. at 5, 1986 U.S.C.C.A.N. at 5270; S. REP. at 6, 1986 U.S.C.C.A.N. at 5271; S. REP. at 14, 1986 U.S.C.C.A.N. at 5279; S. REP. at 25, 1986 U.S.C.C.A.N. at 5290; S. REP. at 34-35, 1986 U.S.C.C.A.N. at 5299-5300.
98. *Wang*, 975 F.2d at 1419.
99. S. REP. at 30, 1986 U.S.C.C.A.N. at 5295.
100. *Wang*, 975 F.2d at 1419.
101. *Id.*

> months of the public disclosure. The Committee recognizes that guaranteeing monetary compensation for individuals in this category could result in inappropriate windfalls where the relator's involvement with the evidence is indirect at best. . . . *The Committee believes a financial reward is justified in these circumstances if but for the relator's suit, the Government may not have recovered.*" (Emphasis added.)[102]

The six month time limit does not appear in 31 U.S.C. § 3730 (e)(4).[103] Only the Attorney General or a person who is an original source of the information can bring the suit, not someone who obtained the information from public sources.[104] But the removal of this provision does not tell us whether Congress intended to imply a third requirement into the definition of "original source,"[105] that the source be a whistleblower.[106]

The Senate Report also stated the following:

> Perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies. . . . Allegations that perhaps could develop into very significant cases are often left unaddressed at the outset due to a judgment that devoting scarce resources to a questionable case may not be efficient. . . . The Committee believes that the amendments . . . which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort.[107]

Desirable assistance might come from a *qui tam* plaintiff whether or not that plaintiff was the first person to reveal the damaging information. Because the Judiciary Committee's "intent in amending the *qui tam* [provisions was] to encourage

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102. S. REP. at 28, 1986 U.S.C.C.A.N. at 5293.

103. *See Stinson*, 944 F.2d at 1163-69 (Scirica, J., dissenting), for an extended discussion of the evolution of the wording of the original source requirement.

104. 31 U.S.C. § 3730 (e)(4)(A) (1986).

105. 31 U.S.C. § 3730 (e)(4)(B) (1986).

106. *See supra* notes 76-78 and accompanying text.

107. S. REP. at 7, 1986 U.S.C.C.A.N. at 5272.

more private enforcement suits,"[108] a reasonable reader could conclude that Congress intended the definition of "original source" to be read broadly to include sources who are not whistleblowers.

B. Suits Like Wang's May Not Be Parasitic

"One difficulty in interpreting the 1986 amendments is that Congress was never completely clear about what kind of 'parasitic' suits it was attempting to avoid."[109]

In *United States ex rel. Marcus v. Hess*,[110] the government recovered a $54,000 fine from the defendant in a criminal prosecution[111] and an additional $150,000 from a *qui tam* suit[112] that is generally[113] cited as the trigger for restrictions on "parasitic"[114] lawsuits. Arguably, the government benefited in this case. The problem, though, is that if bounty hunters can file *qui tam* suits as soon as they read about a government investigation or prosecution, the government is forced to file its civil suit early.[115] Otherwise, it will have to split the proceeds with the bounty hunter(s). These "unseemly races [to the courthouse] for the opportunity of profiting from the government's investigations"[116] are undesirable.[117] The jurisdictional bar, restricting *qui tam* suits to plaintiffs who are original sources, was intended to eliminate parasitic lawsuits.[118]

However, the original source requirement has gone beyond eliminating parasitic lawsuits: it has been used to bar suits in at

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108. S. Rep. at 23-24, 1986 U.S.C.C.A.N. at 5288-89.

109. *Stinson*, 944 F.2d at 1163 (Scirica, J., dissenting).

110. 317 U.S. 537 (1942).

111. *Id.* at 545.

112. *Id.*

113. *See, e.g.*, *Wang*, 975 F.2d at 1418; S. Rep. at 10-11, 1986 U.S.C.C.A.N. at 5275-76.

114. *Stinson*, 944 F.2d at 1163 (Scirica, J., dissenting); James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and their Applications in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 Ohio N.U. L. Rev. 35, 38 (1991).

115. S. Rep. at 10-11, 1986 U.S.C.C.A.N. at 5275-76.

116. *Marcus*, 317 U.S. at 547.

117. S. Rep. at 10, 1986 U.S.C.C.A.N. at 5275.

118. *Stinson*, 944 F.2d at 1163 (Scirica, J., dissenting).

least two cases (*Stinson*[119] and *Dick*[120]) in which the government had not filed suit and would not otherwise recover any money. There is no indication of other pending legislation in the *Wang* court opinions and appellate briefs.[121] Because Wang's allegations related to events in 1983,[122] Wang's suit was probably the last opportunity for the government to recover damages from these events. Therefore Wang's suit was arguably not undesirable nor parasitic.

C. False Claims Amendments Act of 1992

On August 11, 1992, the House of Representatives passed H.R. 4563, the False Claims Amendments Act of 1992.[123] The bill amends § 3730(e)(4) to eliminate the ambiguity of the original source requirement.[124]

The accompanying report, from the House Committee on

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119. *See* Robert L. Vogel, *Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claims Act*, 21 Pub. Cont. L.J. 593, 604-05 (1992).

120. *Id.* at 603.

121. Appellant's Corrected Opening Brief on Appeal; Brief of Appellee FMC Corporation in Opposition to Appellant's Opening Brief on Appeal; Appellant's Reply Brief (No. 91-15789).

122. *Wang*, 975 F.2d at 1412.

123. 138 Cong. Rec. H7978, H7980 (daily ed. Aug. 11, 1992).

124. The new language for the jurisdictional bar, 31 U.S.C. 3730(e)(4) reads as follows:

> No court shall have jurisdiction over an action brought under subsection (b) in which all of the material facts and allegations are obtained from a news media report or reports, or a disclosure to the general public of a document or documents-
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> (i) created by the Federal Government;
>
> (ii) filed in a lawsuit to which the Federal Government is a party; or
>
> (iii) relating to an open and active investigation by the Federal Government;
>
> unless the person bringing the action is an original source of such facts and allegations.
>
> (B) For purposes of this paragraph, an individual is an 'original source' of material facts and allegations if such individual has knowledge, independent from the sources listed in subparagraph (A), of such facts and allegations and has voluntarily provided them to the Government. The person bringing the action shall also be considered an original source of any material facts or allegations developed as a result of information provided to the Government by that person.

138 Cong. Rec. H7979 (daily ed. August 11, 1992).

the Judiciary,[125] states:

> This amendment should eliminate any ambiguity in the statute which would lead a court to conclude that there are any additional requirements for qualifying as an original source. One court, for example, concluded that in addition to having independent knowledge of the information and providing it to the government to qualify as an original source, the plaintiff also "must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990).[126] The amendment clarifies that an original source is not required to be a direct or independent source to the entity that discloses the allegations.[127]

The report also states that the Third Circuit's majority opinion misconstrued the original source provision when it barred information obtained during discovery in a previous lawsuit in *Stinson*.[128]

H.R. 4563 is not yet law because it has not yet been passed by the Senate Judiciary Committee or by the Senate.[129] If it becomes law in its present form, it will overrule *Wang*.

There is some reason to wonder whether H.R. 4563's amendments to the original source requirement will come through the Senate without amendment. On October 3, 1992, the Senate passed S. 2652 (Health Care Fraud Prosecution Act).[130] The bill contains original source restrictions similar to the False Claims Act, but defines an "original source" as "a person who has direct and independent knowledge of the information that is furnished and has voluntarily provided the informa-

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125. H. R. REP. No. 837, 102d Cong., 2d Sess. 1 (1992).

126. The report cited only *Dick*, and not also *Wang*, because *Wang* was not filed for another month.

127. H.R. Rep. at 14.

128. *Id.* at 8.

129. A check of the BC database on Westlaw on January 18, 1993 indicated that the bill had not passed the Senate Judiciary Committee or the Senate, but the "Odds that bill will pass" these stages were rated at 100% and 95% respectively.

130. 138 CONG. REC. S16,526 (daily ed. October 3, 1992). According to the BC database on Westlaw, this bill has not yet passed the House Judiciary Committee.

tion to the Government *prior to disclosure by the news media.*"[131] If the *qui tam* original source definition were worded this way, it would accord with *Dick* and *Wang* and contradict the wording of H.R. 4563.[132]

IV. CONCLUSION

In their appellate briefs, the parties did not consider whether a party had to be a paradigmatic whistleblower to be an original source of False Claims Act information.[133] Wang argued that he was an original source because he was disclosing previously undisclosed information.[134] FMC argued that it had not committed fraud, that Wang's evidence did not support an inference of fraud, and that Wang submitted too little independent, non-public evidence to be considered an original source.[135] Neither party argued that Wang could have had direct and independent knowledge of the allegations, have reported them to the government, but still not be an original source because he was not involved in making them public. Neither party reviewed the Act's legislative history around this issue or corrected the other party's review. Lacking the benefit of this adversarial analysis, the *Wang*[136] court's holding might reasonably be subjected to a good-faith challenge.

Vogel stated that Congress might amend the False Claims Act before his paper was published.[137] There is no telling when the amendments will pass or what they will finally say. Until then, H.R. 4563 is yet another indication that Congress intended to allow suits like Wang's.[138] Combined with legislative history of the 1986 amendments,[139] a *qui tam* plaintiff's counsel has rea-

131. *Id.* (emphasis added).

132. *See supra* notes 124-27 and accompanying text.

133. Appellant's Corrected Opening Brief on Appeal; Brief of Appellee FMC Corporation in Opposition to Appellant's Opening Brief on Appeal; Appellant's Reply Brief (No. 91-15789).

134. *See, e.g.*, Appellant's Corrected Opening Brief on Appeal at 15.

135. Brief of Appellee FMC Corporation in Opposition at 8-11.

136. Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992).

137. Robert L. Vogel, *Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claims Act*, 21 PUB. CONT. L.J. 593, 594 (1992).

138. *See supra* notes 124-28 and accompanying text.

139. *See supra* notes 90-122 and accompanying text.

son to argue that *Dick*[140] and *Wang* should be ignored or overruled.

However, the wording of S. 2652 suggests that Congress *did* intend to bar suits similar to Wang's. This is supported by the legislative history cited in *Wang* and *Dick*.[141]

Congress' intended definition of an "original source" is therefore ambiguous. Arguments can be made to support two conflicting interpretations. Interpreting Congressional intent is often a controversial process.[142] When the intent is ambiguous and a "straightforward reading"[143] of the statute is possible, there is reason to argue that the straightforward reading should prevail over a suggestion of a different Congressional intent. In the present case, the straightforward reading indicates that "a *qui tam* plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based, and (2) have voluntarily provided the information to the government."[144] The additional requirement adopted by the *Dick* and *Wang* courts, that the plaintiff must be a whistleblower, was based on a review of questionable legislative intent. Though it carries significant moral force, I conclude that the addition of this requirement is inappropriate until Congress acts to clarify its intent.

*Cem Kaner, Ph.D.**

140. United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13 (2nd Cir. 1990).

141. *See supra* notes 69-84 and accompanying text.

142. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87 (1988); George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 (1990).

143. *Dick*, 912 F.2d at 16.

144. *Id.*

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