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The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations

ABSTRACT. While scholars have identified the growth of litigation finance in cases ranging from personal injury to securities fraud, none have examined the recent growth of alternative litigation finance in qui tam (whistleblower) claims. To the extent that the False Claims Act privatizes the enforcement of law, the participation of hedge funds and financial entities in qui tam actions has serious implications for our prosecutorial system. This Note addresses those implications.

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INTRODUCTION

The False Claims Act (FCA) is the “government’s primary litigation tool for recovering losses sustained as the result of fraud.”¹ In 2012 alone, the U.S. Department of Justice (DOJ) recovered nearly five billion dollars in settlements and judgments under the statute.² The agency did not work singlehandedly in the majority of these recoveries. Through a mechanism called “qui tam” actions, the FCA authorizes individuals to bring civil suits on behalf of the federal government.³ In return, these “private attorneys general,” known as “relators,” share in the monetary recovery of the lawsuit.⁴

The FCA’s controversial qui tam provision has been the subject of extensive scholarship.⁵ Nonetheless, a significant development has gone largely unnoticed: the increasing participation of third-party litigation finance in qui tam claims. Alternative litigation finance (ALF) refers to the practice of third parties financing lawsuits in exchange for a portion of the payout.⁶ Although scholars have identified the growth of ALF in cases ranging from personal injury to securities fraud,⁷ none have examined the implications of third-party financing in qui tam claims. To the extent that qui tam suits privatize the

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1. United States *ex rel.* Marcy v. Rowan Cos., 520 F.3d 384, 388 (5th Cir. 2008); *see also* Avco Corp. v. U.S. Dep’t of Justice, 884 F.2d 621, 622 (D.C. Cir. 1989) (“The False Claims Act is the government’s primary litigative tool for the recovery of losses sustained as the result of fraud against the government.”).
 2. Press Release, U.S. Dep’t of Justice, Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>.
 3. 31 U.S.C. § 3730(b) (2012).
 4. United Seniors Ass’n v. Philip Morris USA, 500 F.3d 19, 24 (1st Cir. 2007); *see* 31 U.S.C. § 3730(d).
 5. *See, e.g.*, Dan L. Hargrove, *Soldiers of Qui Tam Fortune: Do Military Service Members Have Standing to File Qui Tam Actions Under the False Claims Act?*, 34 PUB. CONT. L.J. 45 (2004) (arguing that federal employees and military service members have standing to sue under the FCA); Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949 (2007) (analyzing the costs and benefits of the FCA through empirical data); Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989) (examining the constitutional implications of qui tam actions).
 6. The term ALF was originally coined by Steven Garber of the Rand Institute. *See* Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, RAND INST. FOR CIV. JUST. (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf.
 7. Courtney R. Barksdale, *All that Glitters Isn’t Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 715 (2007).

enforcement of law, the participation of hedge funds and financial entities in such actions has serious implications for our prosecutorial system.

This Note argues that ALF has the potential to dramatically decrease the amount of fraud committed against the federal government. The reason relates to how the DOJ investigates and prosecutes fraud claims. As envisioned by the Act, the DOJ has primary responsibility for prosecuting FCA claims.⁸ Nonetheless, budgetary restraints are forcing the agency to outsource this task to relators and their counsel.⁹ Given the enormous costs and significant length of qui tam cases,¹⁰ relators and their attorneys will increasingly need financing. ALF entities can fill this gap and ensure that legitimate fraud claims are not ignored for lack of resources.

Despite this potential, investors in qui tam suits face a significant challenge: discovery. Several federal courts have held that ALF entities and recipients may not exchange privileged information without waiving protection from disclosure. Absent such protection, relators are unlikely to provide ALF entities with the information necessary for financiers to vet claims. As a result, ALF entities are unlikely to invest in qui tam actions.

This Note argues that ALF entities and relators may qualify for a common law exception to waiver. In particular, it appears that relators and financiers can likely demonstrate that they share a “common interest” in the litigation. This Note therefore proposes three strategies for doing so. First, courts have long protected exchanges of privileged information between relators and the Department of Justice. Since protecting exchanges between financiers and relators serves many of the same policy interests, ALF entities can cite case law

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8. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-320R, INFORMATION ON FALSE CLAIMS LITIGATION 2 (2006), <http://www.gao.gov/new.items/do6320r.pdf> (“Under the FCA, the federal government has primary responsibility for prosecuting a qui tam case and it is at the DOJ’s discretion to involve the relator on a case-by-case basis.”).
 9. See, e.g., Robert Fabrikant & Nkechinyem Nwabuzor, *In the Shadow of the False Claims Act: “Outsourcing” the Investigation by Government Counsel to Relator Counsel During the Seal Period*, 83 N.D. L. REV. 837, 852 (2007); Suzanne Durrell, *The Relator’s Role in False Claims Act Investigations: Towards a New Paradigm*, DURRELL L. OFF. 6-14 (2012), <http://www.thomasandassoc.net/Articles/FCA-Investigations-Relators-Role-FINAL-04-25-12.pdf>; D. Grayson Yeargin & Conor S. Harris, *Government’s Increased Use of Noncommittal Intervention Filings Complicates Qui Tam Proceedings Under the False Claims Act*, NIXON PEABODY LLP (Apr. 18, 2013), http://www.nixonpeabody.com/files/156465_GIWC_Alert_Qui_Tam_Proceedural_Developments_18APR2013.pdf.
 10. Suits can take as long as nine years. See Press Release, *P&C’s Glaxo Whistleblower Case Accounts for \$1.5 Billion Out of Glaxo’s Record \$3 Billion Settlement*, PHILLIPS & COHEN LLP (July 2, 2012), <http://www.phillipsandcohen.com/P-C-News/Whistleblowers-played-major-role-in-Glaxo-case-leading-to-Glaxo-s-record-settlement.shtml> (announcing the 2012 settlement of a qui tam case filed in 2003).

concerning the DOJ to argue against waiver. Second, through a quirk of qui tam law, relators can turn financiers into fellow whistleblowers by giving them non-privileged information about the fraud. As co-relators, co-parties in interest, and potential co-plaintiffs in the qui tam suit, the relator and ALF entity would likely share a common interest sufficient to prevent waiver. Third, relators can make revocable, gratuitous partial assignments of their claims to ALF entities. As co-owners in the qui tam claims, relators and ALF entities would likely share a common interest in the suit. Additionally, since the partial assignment is gratuitous (and therefore revocable), whistleblowers can terminate the assignment should ALF entities decline to fund the case.

This Note proceeds in five parts. Part I provides background on ALF and qui tam actions and documents ALF entities' recent but growing practice of financing qui tam claims. Part II suggests that ALF could substantially improve the DOJ's efforts to combat fraud by providing resources to whistleblowers and signaling which cases have merit. Part III analyzes how courts have addressed exchanges of privileged information between ALF entities and recipients and the challenges that ALF entities face in proving common interest. Part IV then proposes three solutions to this dilemma by utilizing case law concerning the DOJ and the doctrine of partial assignment. Finally, Part V responds to the potential public policy concerns of permitting third parties to finance suits made on behalf of the government.

I. THE RISE OF ALF AND QUI TAM ACTIONS

Alternative litigation finance “refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer.”¹¹ Although widespread in Australia and England,¹² litigation finance has been slow to develop in the United States due to common-law prohibitions on third-party financing.¹³ The most important of these prohibitions is the bar against champerty, defined as “maintaining a suit in return for a financial interest in the outcome.”¹⁴ The justification for this ban

11. ANTHONY SEBOK & W. BRADLEY WENDEL, N.Y.C. BAR, 20130415P NYC BAR 90, BORROWING FROM PETER TO SUE PAUL: LEGAL & ETHICAL ISSUES IN FINANCING A COMMERCIAL LAWSUIT § I (2013).

12. See Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 699, 703 (2011).

13. See SEBOK & WENDEL, *supra* note 11, § III.B.1.a.

14. *Id.*

stemmed from the belief that “third-party funding of litigation encouraged fraudulent lawsuits.”¹⁵ Over the past decade, American courts have relaxed these restrictions,¹⁶ and as a result, litigation finance has rapidly grown.¹⁷ That growth has also not gone unnoticed. The American Bar Association,¹⁸ law journals,¹⁹ state bar ethics committees,²⁰ and even the popular press have commented on the rise of ALF entities.²¹

As ALF has grown, so too has its target audience. Presently, financiers loan money to both attorneys and plaintiffs. For attorneys, the contributions ordinarily go toward overhead, operational expenses, and litigation costs.²² For plaintiffs, the funds often “cover their personal expenses while awaiting settlement or judgment.”²³ Typically, these loans are non-recourse, and in return, ALF entities receive a percentage of the recovery.²⁴

ALF is also expanding into new categories of claims. So far, commentators have identified two types of litigation.²⁵ The traditional category, “consumer funding,” involves relatively small personal claims related to personal injury²⁶

15. *Id.*

16. *See id.* § III.B.1.b (discussing the trend toward abandoning common law prohibitions on champerty in the United States).

17. *See* Jennifer Smith, *Investors Put Up Millions of Dollars to Fund Lawsuits*, WALL ST. J., Apr. 7, 2013, <http://online.wsj.com/news/articles/SB10001424127887323820304578408794155816934>.

18. *See* SEBOK & WENDEL, *supra* note 11.

19. *See, e.g.*, Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Barksdale, *supra* note 7.

20. *See, e.g.*, Comm. on Prof'l Ethics, *Opinion #769: Representing Client in Transaction with Entity Proposing to Lend Against Litigation Proceeds*, N.Y. ST. B. ASS'N (Nov. 4, 2003), <http://www.nysba.org/CustomTemplates/Content.aspx?id=5409>; Comm. on Prof'l & Judicial Ethics, *Formal Opinion 2011-2: Third Party Litigation Financing*, N.Y.C. B. ASS'N (June 2011), <http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02>; Ethics Comm., *Ethics Opinion KBA E-432*, KY. B. ASS'N (May 20, 2011), http://www.kybar.org/documents/ethics_opinions/kba_e-432.pdf.

21. *See, e.g.*, Vanessa O'Connell, *Funds Spring Up to Invest in High-Stakes Litigation*, WALL ST. J., Oct. 3, 2011, <http://online.wsj.com/news/articles/SB10001424052970204226204576598842318233996>; Roger Parloff, *Have You Got a Piece of This Lawsuit?*, CNNMONEY: FORTUNE (June 28, 2011, 2:06 PM), <http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit>.

22. Barksdale, *supra* note 7, at 708.

23. *Id.*

24. *Id.*

25. *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460 (2012).

26. *Id.*

and employment discrimination.²⁷ The newer category, “commercial funding,” involves business disputes, such as intellectual property, antitrust, business contracts, and international commercial and investment arbitration. These disputes are typically brought by sophisticated parties and for large sums of money. For example, in 2010, one of the largest ALF entities (Burford) agreed to finance Ecuadorian claimants in a multi-billion dollar dispute with Chevron.²⁸ The claimants’ attorneys, including lead attorney Steven Donziger, received fifteen million dollars to continue litigating the suit.²⁹

Litigation finance has not been the only burgeoning legal field in the last decade. Like ALF, *qui tam* actions have also recently risen to prominence. This newfound growth belies the actions’ old age. The False Claims Act, which establishes *qui tam* enforcement, was originally enacted during the Civil War to deter fraud by defense contractors.³⁰ For the next century, the FCA remained relatively toothless until Congress amended the Act in 1986.³¹ Those amendments imposed civil and criminal³² liability upon “[a]ny person” who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”³³ The punishment is also significant—treble damages and a civil penalty of up to ten thousand dollars per claim.³⁴

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.³⁵ To initiate the action, the relator delivers a copy of the complaint and any supporting evidence to the government,³⁶ which

27. See Barksdale, *supra* note 7, at 715.

28. Steinitz, *supra* note 25, at 466-67.

29. *Id.* at 467.

30. Michael J. Davidson, *Applying the False Claims Act to Commercial IT Procurements*, 34 PUB. CONT. L.J. 25, 26 (2004).

31. See *ACLU 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. Criminal sanctions are available under 18 U.S.C. § 287 (2012), which allows for punishment of up to five years in prison and a fine calculated under the United States Sentencing Guidelines. *Qui tam* relators, however, are unable to bring criminal cases. CHARLES DOYLE, CONG. RESEARCH SERV., R40785, *QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES* 23 (2009).

33. 31 U.S.C. § 3729(a) (2012).

34. *Id.*

35. *Id.* § 3730(b)(1).

36. *Id.* § 3730(b)(2).

then has sixty days to intervene in the action.³⁷ If the government intervenes, it assumes primary responsibility for prosecuting the action.³⁸ If the government declines to intervene within the sixty-day period, the relator has the exclusive right to conduct the action,³⁹ and the government may subsequently intervene only on a showing of “good cause.”⁴⁰ Regardless of the DOJ’s intervention decision, the relator is entitled to a court hearing prior to the DOJ’s dismissal of the suit,⁴¹ and to a court determination of reasonableness prior to the DOJ’s settlement of the action.⁴²

The relator also receives 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.⁴³ Although the DOJ has promulgated internal guidelines outlining factors supporting a higher or lower share of the recovery,⁴⁴ it is ultimately the court’s responsibility to determine what is reasonable.⁴⁵

Despite the simultaneous rise of *qui tam* and litigation finance over the last decade, it appears that financiers have only recently begun investing in *qui tam* suits. In May 2010, the *New York Times* ran one of the first reports on this development.⁴⁶ As the *Times* reported, “[w]hile the market in whistle-blower futures is in its infancy,” “hedge funds, private equity groups and other big investors are . . . agreeing to buy a percentage of those future payouts in

37. *Id.* § 3730(b)(2), (4).

38. *Id.* § 3730(c)(1).

39. *Id.* § 3730(b)(4).

40. *Id.* § 3730(c)(3).

41. 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).

42. *Id.* § 3730(c)(2).

43. *Id.* § 3730(d)(1)-(2).

44. See *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1333-34 (M.D. Fla. 2001) (discussing the level of deference courts afford to the DOJ guidelines).

45. See *United States ex rel. Shea v. Verizon Commc’ns, Inc.*, 844 F. Supp. 2d 78, 84 (D.D.C. 2012) (“While these Guidelines are not official federal regulations, and therefore not binding on the Court, they are often considered when district courts are deciding on the appropriate percentage of the proceeds to give a relator in an FCA case.”), *appeal dismissed*, No. 12-5215, 2012 WL 3062466 (D.C. Cir. July 13, 2012).

46. David Kocieniewski, *Whistle-Blowers Become Investment Option for Hedge Funds*, N.Y. TIMES, May 19, 2010, <http://www.nytimes.com/2010/05/20/business/20whistleblower.html>.

exchange for a smaller amount upfront to the whistle-blowers.”⁴⁷ In turn, whistleblowers are eager to sell, as they would otherwise “wait years to get their share of any reward.”⁴⁸ Although the exposé primarily focused on the third-party financing of the IRS’s whistleblower program, the *Times* also noted the presence of such ALF entities in “whistle-blower cases against government contractors” – that is, FCA qui tam actions.⁴⁹

Six months later, a leading European academic association, the Royal Society of Chemistry,⁵⁰ released another publication detailing financiers’ growing interest in qui tam suits.⁵¹ As the article noted, “Hedge fund managers say that US whistleblower lawsuits filed against drug companies could provide attractive investment opportunities. . . . [F]ailure to pay is unlikely [and] legal settlements do not correlate with market movements.”⁵² Given the outsized settlements involved with such cases—recently as much as three billion dollars⁵³—the returns for investors can be enormous. Thus, as one investor disclosed, “The investment community is already looking at those kinds of opportunities.”⁵⁴

Curiously, since January 2011, it does not appear that any other major periodical has written about ALF in qui tam suits. Nonetheless, the development has not been lost on investors. In October 2011, Australia’s largest finance company, IMF Ltd., launched its New York subsidiary—Bentham Capital Ltd. Among the suits that Bentham has announced it will pursue: qui tam actions.⁵⁵

The field of qui tam funding is not for hedge funds alone. A simple Google search reveals nearly a dozen third-party funders that specifically target qui tam

47. *Id.*

48. *Id.*

49. *Id.*

50. *About Us*, ROYAL SOC’Y CHEMISTRY, <http://www.rsc.org/aboutus> (last visited Mar. 8, 2014).

51. Andrew Turley, *Funding Pharma Whistleblowers*, ROYAL SOC’Y CHEMISTRY (Jan. 4, 2011), <http://www.rsc.org/chemistryworld/News/2011/January/04011101.asp>.

52. *Id.*

53. Office of Pub. Affairs, *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, U.S. DEP’T JUST. (July 2, 2012), <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>.

54. Turley, *supra* note 51.

55. Nate Raymond, *Top Australian Litigation Finance Company Opens New York Subsidiary*, AM. LAW. (Oct. 10, 2011), *reprinted at* <http://www.benthamimf.com/docs/default-document-library/top-australian-litigation-finance-company-opens-new-york-subsidiary.pdf>.

suits.⁵⁶ As these developments make clear, the market for litigation financing in qui tam suits is rapidly accelerating. The only field that has failed to keep up with the development is the legal literature.

II. LITIGATION FINANCE CAN SIGNIFICANTLY AID THE DOJ'S FIGHT AGAINST FRAUD

The demand for litigation finance is not for relators alone. Changes in how the DOJ prosecutes actions are rapidly raising costs for qui tam firms. As 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.⁵⁷ In turn, the seal provisions limit the relator from publicly discussing the filing of the qui tam complaint but not the existence of the fraud.⁵⁸

Although Congress intended for the DOJ to quickly investigate and decide whether to intervene in actions,⁵⁹ the agency's limited resources are increasingly widening the gap between aspiration and reality. The DOJ may for "good cause" move the court for extensions of the seal period,⁶⁰ and it appears that the agency has aggressively used its discretion to do so. As of January 2011, 1,341 qui tam cases remained under seal.⁶¹ For cases filed since October 1, 2006,

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56. GOOGLE, <http://www.google.com/#q=qui+tam+funding> (last visited Mar. 8, 2014). Examples include the Anglo-American Legal Finance Group, P&T Financial, Paul Sherman, Excalibur Funding Programs, LightHouse Legal Finance, US Claims, LawAdvance, CaseFunding, Law Max Legal Finance, and Lawsuit Financial Corp.
 57. See JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.04[B] (4th ed. 2013) (noting that the seal provision's "primary purpose was to allow the government to ascertain privately 'whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene'" (quoting Erickson *ex rel.* United States v. Am. Inst. of Biological Scis., 716 F. Supp. 908, 912 (E.D. Va. 1989))).
 58. ACLU v. Holder, 673 F.3d 245, 254 (4th Cir. 2011); see United States *ex rel.* Lujan v. Hughes Aircraft Co., 67 F.3d 242, 244 (9th Cir. 1995) (holding that the relator "clearly violated the seal provision of 31 U.S.C. § 3730(b)(2) by making statements to the *Los Angeles Times* about the existence and nature of her *qui tam* suit").
 59. See BOESE, *supra* note 57, § 4.04[B][2] ("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.").
 60. *Id.* § 4.04.
 61. John T. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (May 12, 2011), <http://skadden.com/Index.cfm?contentID=51&itemID=2421>.

the average wait time was thirteen months.⁶² That is more than six times the period envisioned by Congress.

During these months, complaints do not sit idly. Qui tam firms have a strong interest in convincing the DOJ to intervene. Should the DOJ agree to do so, the agency takes primary responsibility over the action.⁶³ Likewise, the DOJ has an interest in receiving a fully investigated and developed case, at which point the government can make an informed intervention decision without expending valuable resources. Thus, the DOJ has turned to relator's counsel to push investigations forward during the seal period. During this time, relator's counsel

conducts factual and legal research, drafts and reviews government letters to defense counsel, drafts and reviews internal government position papers, drafts and reviews government mediation briefs and presentations, participates in interviewing fact witnesses, and, unbeknownst to the defense, takes over responsibility for paying and preparing the government's expert witnesses, supplying paralegals and other clerical help to the government, and reviewing documents produced by defendants (including documents produced under compulsion).⁶⁴

Moreover, legal practitioners predict that the number of cases in which the DOJ "outsources" investigation will accelerate as qui tam filings increase each year.⁶⁵ As part of this trend, defense attorneys have recently noted another change in DOJ policy: "unsealing cases with a notice that [the agency] will not intervene 'at this time.'"⁶⁶ Thus, under the DOJ's new approach, qui tam firms will be expected to press cases forward into discovery and shoulder the costs, with the hope that the DOJ will eventually take the lead.⁶⁷

62. *Id.*

63. 31 U.S.C. § 3730(c)(1) (2012).

64. Fabrikant & Nwabuzor, *supra* note 9, at 843; see Durrell, *supra* note 9, at 8-14 (noting that relator's counsel plays a role in preserving and producing evidence, drafting subpoenas and interrogatories, reviewing documents and screening for privilege, locating and identifying potential witnesses, obtaining and assessing witness testimony, and retaining expert witnesses and consultants).

65. See Bentivoglio et al., *supra* note 61 ("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.").

66. Yeargin & Harris, *supra* note 9, at 2.

67. *Id.*

These costs are often significant. Presently, qui tam firms frequently spend millions on pre-discovery investigations.⁶⁸ Adding discovery would dramatically inflate those figures.⁶⁹ Qui tam suits often involve allegations of thousands of false claims, by over a hundred defendants, and across dozens of states.⁷⁰ Furthermore, legal practitioners have noted that discovery in qui tam suits is particularly vitriolic, with both sides using the process to bolster or to attack the other.⁷¹ The result is often years of expensive disputes over document production and depositions.⁷²

The FCA's fee-shifting provisions, which require defendants to pay prevailing plaintiffs their attorney's fees, are unlikely to address these costs.⁷³ Qui tam suits can take nearly a decade before a payout—leaving firms strapped for financing in the meantime.⁷⁴ Likewise, specialization is likely to exacerbate

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68. See, e.g., *Bagley v. United States*, No. CV 10-00483-RT, 2013 WL 4007774, at *1 (C.D. Cal. Aug. 5, 2013) (noting that the DOJ paid the relator \$9,407,295 in statutory attorney's fees following settlement of the case); *Miller v. Holzmann*, 575 F. Supp. 2d 2, 59 (D.D.C. 2008) (finding attorney's fees were \$7,245,169.07); *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1330 n.25 (M.D. Fla. 2001) (noting that attorney's fees were \$2.7 million); *United States v. Gen. Elec.*, 808 F. Supp. 584, 585 (S.D. Ohio 1992) (finding attorney's fees were \$2,416,464.75).
69. To be sure, the number of qui tam complaints filed with the DOJ has increased over the years, despite the DOJ's practice of outsourcing investigations. But this trend does not disprove the claim that lack of funding for qui tam firms will deter investigation of legitimate suits. Filing a complaint requires relatively little investigation (and relatively little cost). Once the DOJ shows preliminary interest, however, relators and their counsel must investigate the claims to the agency's satisfaction. Thus, even if the absolute number of claims filed with the DOJ is still increasing, the number of filed claims turning into investigated claims is likely to decrease. See JOHN E. CLARK, *No2CFCB ABA-LGLED I-1, ETHICS ISSUES IN QUI TAM LITIGATION: SOME THOUGHTS FROM THE PERSPECTIVE OF A RELATOR'S COUNSEL* (2001) (noting that while prudent counsel will fully investigate claims before filing, firms will often file without investigating in order to ensure that they are not precluded by the FCA's first-to-file bar).
70. See, e.g., *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 265 (2d Cir. 2006) (noting that the relator filed its complaint against 132 hospitals across thirty states); *United States ex rel. Ven-A-Care v. Actavis Mid Atl. LLC*, 659 F. Supp. 2d 262, 271 (D. Mass. 2009) (denying motion to dismiss where the qui tam relator's complaint alleged that pharmaceutical companies had filed tens of thousands of fraudulent Medicaid claims).
71. Marc S. Raspanti & Meredith S. Auten, *Why Is Qui Tam Litigation So Difficult to Resolve?*, 15 *AHLA CONNECTIONS* 22-24 (Sept. 2011), http://www.falseclaimsact.com/wp-content/uploads/2013/02/feature_sept2011.pdf.
72. *Id.* at 24.
73. See 31 U.S.C. § 3730(d)(1) (2012).
74. See, e.g., *Fast Facts*, *TAXPAYERS AGAINST FRAUD EDUC. FUND*, <https://www.taf.org/general-resources/fast-facts> (last visited Jan. 29, 2014) (noting that litigation against Columbia-HCA lasted nearly thirteen years and required more than eighty-five thousand hours from

these liquidity problems. Data suggest that firms working heavily on qui tam actions account for over a third of complaints filed with the DOJ.⁷⁵ This specialization, in turn, means that qui tam firms often lack other litigation practices that would ensure short-term financing (such as commercial disputes). Thus, while there is no publicly available information on qui tam firms' leverage, these firms will likely feel a significant squeeze on their monetary reserves.

Smaller qui tam offices will have the greatest difficulty shouldering this burden.⁷⁶ Even if such firms do have financial reservoirs, a significant increase in cost will likely force qui tam counsel to devote more resources to each case and to investigate fewer cases overall. This could potentially lead to meritorious suits being ignored for lack of money. In short, qui tam firms will likely face serious financial pressures into the future. This creates a unique situation in which third-party financiers are entering a market where both counsel and their clients are increasingly in need of resources. As the rest of this Part demonstrates, whether ALF increases the number of weak suits filed with the DOJ depends on whether qui tam firms and financiers properly vet claims.

A. *Qui Tam Firms Are Moderately Effective at Screening Claims*

ALF entities do not receive funding requests in a vacuum. Instead, relators reach financiers after convincing qui tam counsel to take the case. In turn, if qui tam firms can successfully predict a complaint's probability of success, ALF entities' due diligence is less important.

Qui tam counsel's predictive powers, however, appear to be limited. The DOJ has declined to intervene in the majority of qui tam actions—seventy-eight percent of cases between 1987 and 2004.⁷⁷ Additionally, if the DOJ intervenes primarily in strong cases, then a low intervention rate indicates a

the lead law firm); Press Release, *supra* note 10 (describing litigation lasting nine years before settlement).

75. See David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1299 tbl.4 (2012) (finding that firms that have filed over ten qui tam cases account for 1,613 of the 4,326 claims filed with the DOJ).
76. Additionally, specialization by qui tam firms is positively correlated with DOJ intervention rates. *Id.* It therefore appears that qui tam firms are more effective at screening and investigating cases than more diversified firms. Thus, even if more diversified firms would be less squeezed by an increase in costs, these firms are likely a less effective substitute for specialized firms.
77. Broderick, *supra* note 5, at 971.

high level of weak claims.⁷⁸ Thus, as one critic of qui tam actions has concluded, “Data on the disposition of false claims actions . . . indicate that the number of frivolous suits is high.”⁷⁹

Despite these statistics, low levels of DOJ intervention do not necessarily signal a large number of weak claims. The statistics fail to account for decisions not to intervene where relators adequately alleged fraud but were barred from bringing suit because another relator filed first⁸⁰ or the relator’s allegations had already been publicly disclosed.⁸¹ Similarly, there is also some evidence that the DOJ relies on a variety of factors (other than the actual existence of fraud) in determining whether to intervene, including “the harm of the offense, the precedential value of the case, the defendant’s liability under other statutes, agency resources, and perhaps political sensitivities.”⁸²

Despite these considerations, qui tam counsel appear to file at least a moderate number of weak complaints with the DOJ. If the DOJ regularly declined legitimate claims, qui tam firms should be relatively successful bringing the suits on their own. Nonetheless, between 1987 and 2004, courts dismissed ninety-two percent (2,384) of these privately brought suits.⁸³ Of course, many of these complaints were likely dismissed for the same reason that the DOJ declined to intervene: the first-to-file bar or the public disclosure bar. However, it is unlikely that these jurisdictional bars account for the whole of the dismissed suits. Thus, it appears that the DOJ is primarily declining suits because the relator has failed to adequately allege fraud, and courts are dismissing suits for the same reason. Given the significant number of DOJ-declined cases and the remarkable lack of success of such cases, there appears to be great room for improvement through the participation of third-party due diligence—ALF entities.

78. *Id.*

79. *Id.*

80. See 31 U.S.C. § 3730(b)(5) (2012).

81. See *id.* § 3730(e)(4)(A).

82. See David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L.J. 225, 236 (2013); Tara L. Ward, Note, *Amending the Qui Tam Intervention Provisions: Setting Debar Higher?*, 38 PUB. CONT. L.J. 297, 308-09 (2008); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 8, at 22 (“Many factors could affect the government-relator relationship, such as the amount of information the relator possesses about the potential fraud, the degree of experience possessed by the relator’s counsel, the existence of a criminal investigation and other issues involving sensitivity of data, such as privacy or national security, and interpersonal dynamics between the relator and defendant.”).

83. Broderick, *supra* note 5, at 974. This figure does not include cases that were still active.

B. The Degree of Due Diligence Conducted by the ALF Industry as a Whole Is Unclear

As with qui tam firms, the vetting procedures employed by the ALF industry as a whole are unclear. Funders have argued that the quickest road to bankruptcy is funding suits without a reasonable chance of success.⁸⁴ At least four particularly established financiers have taken this to heart, as demonstrated by the extensive due diligence process detailed in their public statements.⁸⁵

These four funders generally engage in a two-stage process of due diligence that begins with in-house counsel and ends with third-party counsel.⁸⁶ The vetting procedures vary somewhat between each of the four firms, and each entity prioritizes different factors when estimating the value of a claim. These factors include:

- the claim’s likelihood of success (based on the facts of the case and the relevant legal precedent);
- the potential value of a claim following adjudication;
- the ability to collect (based on the enforceability of an ultimate award and the financial condition of the defendant);
- the likely cost of litigating the claim;
- the estimated length of time to get through trial and final judgment (including the likelihood of appeal); and

84. JONATHAN MOLOT, TSUI03 ALI-ABA 95, SUBMISSION OF BURFORD GROUP LLC ON WORKING GROUP’S ISSUE PAPER CONCERNING ALTERNATIVE LITIGATION FINANCING 100 (2012); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 591-92 (2010).

85. See Jennifer Banzaca, *In Turbulent Markets, Hedge Fund Managers Turn to Litigation Funding for Absolute, Uncorrelated Returns*, HEDGE FUND L. REP. 2 (June 24, 2009), <http://www.juriscapitalcorp.com/images/Hedge%20Fund%20Law%20Report%20Article.pdf> (discussing the due diligence of CaseFunding, Juris, and Juridica); *Placing of 80,000,000 Ordinary Shares at a Price of 100 Pence per Ordinary Share and Admission to Trading on AIM 21*, BURFORD CAPITAL, LTD., <http://www.burfordcapital.com/wp-content/uploads/2012/10/burford-admission-document.pdf> (last visited Apr. 1, 2014) (“The Investment Adviser will conduct due diligence into each investment . . .”).

86. Banzaca, *supra* note 85, at 2.

- the timing and likelihood of settlement.⁸⁷

Ordinarily, ALF entities also avoid cases that are likely to go to trial—especially before a jury—because trials introduce an “element of unpredictability into a case.”⁸⁸

In addition to these factors, the four funders also consider matters beyond the legal merits. For example, the financiers will consider the “fit” between counsel and the claim, including whether the lawyers have litigated similar cases and possess successful track records.⁸⁹ The funders also consider the claim’s political and social repercussions, such as political pressures that could affect decisions by government agencies or “legislative changes that could affect the outcome of the case.”⁹⁰

In sum, any claims that come before these four entities are likely rigorously vetted. But the same may not be true for the ALF industry as a whole, due to the tremendous costs involved. For example, one established entity spends an average of seventy-five to one hundred thousand dollars on due diligence per claim.⁹¹ Thus, financiers with less capitalization may succumb to pressure to cut corners.

Finally, even if funders conduct rigorous due diligence, financiers may still back suits with low probabilities of success at trial.⁹² Where it is cheaper for a defendant to settle a claim than litigate it, ALF entities can generate significant profits from relatively weak suits.⁹³ This situation may also partly explain why ALF entities avoid cases that are likely to go to trial.⁹⁴ A full adjudication forces the parties to reach the merits of the underlying claims, thereby exposing the weaknesses in a plaintiff’s case. This is not to say that ALF entities invest in meritless suits. But it seems that ALF entities would prefer cases that offer timelier, pre-trial payoffs.

87. *Id.*

88. *Id.* at 3.

89. *Id.* at 2.

90. *Id.*

91. Garber, *supra* note 6, at 26.

92. John Beisner, Jessica Miller & Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, U.S. CHAMBER INST. FOR LEGAL REFORM 4-6 (Oct. 2009), <http://www.instituteforlegalreform.com/uploads/sites/1/thirdparty litigation financing.pdf>.

93. *Id.*

94. Banzaca, *supra* note 85, at 2.

C. ALF Entities Can Improve Incentives to Vet Qui Tam Actions

Although industry practice among ALF entities is unclear, financiers in qui tam suits will likely face particular pressure to conduct rigorous due diligence.⁹⁵ This pressure stems from the reputational costs of funding qui tam claims of dubious legitimacy—costs unique to litigating with the DOJ.

Proponents of ALF have recently argued that funders face reputational costs to investing in meritless claims. If a financier becomes associated with nuisance suits, its involvement in a case might suggest that the claim is weak and “undercut the plaintiff’s bargaining power.”⁹⁶ As a result, defendants can punish ALF entities for pursuing frivolous claims in the past. This argument generally ignores the realities of litigation. Contracts between an ALF entity and a plaintiff are often subject to non-disclosure agreements.⁹⁷ Additionally, even if a defendant were to discover the source of a plaintiff’s funding, that information would likely be covered by attorney-client privilege.⁹⁸ Given these hurdles, it is unlikely that a defendant would uncover ALF backing, let alone ascertain whether the financier’s previous cases were “frivolous.”

Likewise, the party most capable of punishing a plaintiff for accepting financing—the judge⁹⁹—has the least information about financiers.¹⁰⁰ While a defendant might devote a few sentences in a brief or motion to criticize an ALF

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95. Of course, qui tam suits rarely go to trial after the DOJ intervenes. However, it appears safe to assume that the DOJ’s intervention decision also takes into account the probability of success at trial, lest the DOJ put its money and reputation on the line only to lose in court.
96. Lyon, *supra* note 84, at 595.
97. See Steinitz, *supra* note 25, at 475-76 (noting that an indicative agreement “specifically prohibits any ‘announcement concerning the existence of th[e] Agreement, the funding of the Claim . . . , or the identity of the Funder[.]’” (quoting Funding Agreement Between Treca Financial Solutions, Friends of the Defense of the Amazon § 12.3 (Oct. 31, 2010))); Maya Steinitz, *Some Thoughts About Plaintiffs’ Due Diligence*, MODEL LITIG. FIN. CONT. (Aug. 5, 2013), <http://litigationfinancecontract.com/some-thoughts-about-plaintiffs-due-diligence> (noting that the lack of transparency in litigation finance contracts has undermined the growth of reputational markets for ALF entities).
98. See *infra* Part III.
99. See Bert I. Huang, *Litigation Finance: What Do Judges Need to Know?*, 45 COLUM. J.L. & SOC. PROBS. 525, 528 (2012) (“To use such tools most effectively, judges will need to understand how outside financing might press against (or in favor of) the plaintiffs’ interests in any given case.”).
100. See *id.* (“After decades of experience with contingency-fee class actions, the judiciary may have a good grasp of how to identify conflicting interests and other dangers, in that familiar setting. But third-party funding is newer and more complex, involving investors who may have no duty to the class members and whose interests may diverge from those of both counsel and class.”).

entity's history, the defendant is unlikely to show that the financier's previous cases were so without merit that the plaintiff's case is also frivolous. In short, it does not appear that a defendant could meaningfully influence the decision of a judge based on an ALF's reputation.

Qui tam claims, however, involve a repeat party that would be highly interested in the presence of an ALF entity—the DOJ. The agency's attorneys would likely want to know relators' sources of funding, as this could influence the success of litigation.¹⁰¹ Furthermore, agency attorneys have wide access to information and can gather evidence on a financier's history of funding.¹⁰² Finally, DOJ attorneys would likely be attuned to the reputation of an ALF entity, as the DOJ is often in the media spotlight and under congressional scrutiny.¹⁰³ In fact, Congress has demonstrated its willingness to haul the agency into legislative hearings concerning the DOJ's intervention decisions.¹⁰⁴ Accordingly, the DOJ's reputation would likely rise and fall with the reputation of the ALF entity. Thus, ALF entities are unlikely to fund qui tam suits of dubious merit, as funding such claims would likely alienate the DOJ and adversely affect the financier's reputation in any future qui tam claim.

The reputational argument does suffer from a drawback. If repeat player status with the DOJ is sufficient to incentivize rigorous due diligence, then qui tam counsel should also have high rates of DOJ intervention. As previously noted, that is not the case.¹⁰⁵ There are at least two potential explanations for this situation. First, qui tam counsel may be rationally calculating the expected value of claims. For many cases, the expected value of a claim with a low chance of intervention may still be greater than the expected loss to counsel's

101. See Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 438 (1993).

102. See, e.g., CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 10:70 (2013) (discussing the DOJ's authority to obtain information under the FCA's provisions for civil investigative demands (CIDs)).

103. See Pamela H. Bucy, *Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups*, 35 LOY. U. CHI. L.J. 1021, 1032 n.75 (2005) ("If you can develop a reputation for bringing meritorious cases, the reception you receive from the government will be far different than the one you will receive if you throw every *qui tam* claim you can find against the wall in the hope that something will stick." (quoting Mitchell R. Kreindler, *So You Wanna Be a Whistleblower's Lawyer?* 2 (n.d.) (unpublished manuscript))).

104. JOINT STAFF REPORT, 113 CONG., DOJ'S QUID PRO QUO WITH ST. PAUL: HOW ASSISTANT ATTORNEY GENERAL THOMAS PEREZ MANIPULATED JUSTICE AND IGNORED THE RULE OF LAW 1 (2013).

105. See *supra* notes 77-79 and accompanying text.

reputation. Second, even if qui tam counsel act with the best of intentions, qui tam claims may be uniquely difficult to vet.

In either case, ALF entities can improve the probability of legitimate claims reaching the DOJ. Given that litigation finance is relatively new to qui tam, financiers will likely wish to make good “first impressions,” as these initial cases will color future interactions with the agency.

Additionally, litigation finance can improve the incentives for qui tam counsel to vet claims. As previously noted, ALF entities examine the “fit” between lawyers and the case as part of their due diligence.¹⁰⁶ Thus, qui tam firms’ intervention rates will likely be a significant factor in whether a financier invests. Likewise, it is unlikely that qui tam firms would submit weak cases to ALF entities. If particular counsel gain a reputation of submitting duds to financiers, those firms are unlikely to draw funding when they submit stronger claims. At the very least, the terms of financing are likely to be less favorable because of the firms’ higher appearance of risk.¹⁰⁷

Finally, even if qui tam actions are particularly difficult to vet, ALF entities provides two additional tiers of due diligence. Dialogue between qui tam counsel and outside lawyers could expose weaknesses and ensure that only stronger claims proceed. Thus, on the whole, it appears that ALF-backed suits would be of greater rather than lesser quality.

D. It Appears that the DOJ Would Intervene More Often in ALF-Backed Suits

If ALF entities properly vet qui tam claims, their backing could substantially aid DOJ prosecutions in two ways. First, given the DOJ’s policy of “outsourcing” investigation to relators and their counsel, ALF entities could ensure that financial strains do not prevent legitimate claims from being filed. Second, given ALF entities’ reputational stake in the outcome of qui tam cases, the DOJ could use the presence of a financier as a proxy for merit. As previously discussed, ALF entities and the DOJ use similar metrics for determining whether to participate in a suit.¹⁰⁸ Where a qui tam relator has litigation financing, the DOJ could therefore expend fewer resources vetting the suit and more time prosecuting the action. Thus, the DOJ may intervene more frequently in ALF-backed suits and drive the market for litigation financing.

^{106.} See *supra* note 89 and accompanying text.

^{107.} See Barksdale, *supra* note 7, at 710.

^{108.} See *supra* Sections II.A–B.

Nonetheless, this outcome is not guaranteed. The DOJ might in fact intervene less frequently in ALF-backed suits. Although there is little publicly available information on how the DOJ chooses to intervene, at least one commentator has speculated that the agency often declines suits where the relator has significant financial resources.¹⁰⁹ In such cases, relators can likely effectively litigate on their own.¹¹⁰ The DOJ might therefore be less likely to intervene in an action if the relator has a third-party funder.

Similarly, litigation finance is still a controversial practice, and the DOJ might not risk its reputation by intervening in such claims. For example, an oft-noted criticism of litigation finance is that it allows third parties to gain undue influence over the litigation.¹¹¹ In practice, ALF entities have publicly disavowed the accusation.¹¹² Nonetheless, should it become public that the DOJ is bringing a suit financed by hedge funds, there may be public outcry that the agency has been captured by opportunistic actors.

If ALF were to decrease the probability of the DOJ intervening in a claim, this outcome would likely end the market for qui tam financing. Historically, the odds of winning a qui tam case significantly decrease should the DOJ decline to intervene.¹¹³ Without the DOJ, relators and their funders must shoulder the costs of discovery, motion practice, and trial. In turn, third-party funders actively avoid suits that could be tried before a jury. Thus, financiers are unlikely to fund actions should the DOJ become less likely to intervene.

The effect of ALF on the agency's intervention rates is hard to predict. Nonetheless, the DOJ may respond with a relatively straightforward risk-benefit analysis. The agency would calculate the amount of money and time it saves by relying, in part, on ALF entities to conduct due diligence on claims. The agency would then determine the marginal benefit of using these resources elsewhere. Lastly, the DOJ would weigh this marginal benefit against the potential monetary and reputational costs of intervening in an ALF-backed action.

The outcome of this cost-benefit analysis will likely be somewhat case dependent. On the whole, it appears that ALF should increase the probability of the DOJ intervening in an action. There is no question that the agency currently faces a growing backlog of qui tam claims. There is also no question

109. Kolis, *supra* note 101, at 438.

110. *Id.*

111. Beisner et al., *supra* note 92, at 7-8.

112. See Banzaca, *supra* note 85, at 5.

113. See Broderick, *supra* note 5, at 974; Civil Div., *Fraud Statistics*, U.S. DEP'T JUST. 2 (2013), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (using 2013 data).

that the agency lacks the resources to vet new complaints in a timely manner. Given the DOJ's resource constraints, the agency will likely seek to intervene in the most financed and investigated suits. These suits will most often be ALF-backed claims.

III. CHALLENGES TO ALF ENTITIES' PARTICIPATION IN QUI TAM CLAIMS

Assuming that ALF entities pursue qui tam financing, the funders still face a challenge in collecting sufficient information to vet relators' claims. In particular, ALF entities will likely need access to work product and attorney-client privileged information. Ordinarily, funders do not seek confidential information during their due diligence for risk of waiving privilege.¹¹⁴ Instead, ALF suppliers primarily use publicly available information, such as pleadings, motions, and trial records.¹¹⁵ These documents generally provide sufficient factual information to vet the claims.¹¹⁶

No such publicly available information is available for qui tam claims. As previously discussed, relators and their counsel are in greatest need of funding during the early phases of a qui tam investigation. During this period, there is no publicly available information about the frauds involved in the suit. If there were, the FCA's public disclosure bar would prevent the relator from filing in the first place.¹¹⁷ Similarly, while the relators must file a complaint with the court, the complaint remains under seal until the DOJ decides whether to intervene. Thus, much like investors in IRS whistleblower suits, financiers in qui tam actions "are left to gauge the strength, and potential payoff, of any

114. See Banzaca, *supra* note 85, at 4.

115. See *id.*; see also SEBOK & WENDEL, *supra* note 11, at n.117; MOLOT, *supra* note 84, at 104; Letter from Juridica Capital Mgmt Ltd. to ABA Comm'n on Ethics 20/20 (Feb. 17, 2011), in *Comments: Alternative Litigation Financing Working Group Issues Paper*, A.B.A., at 67, 68, http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.pdf.

116. Kocieniewski, *supra* note 46.

117. See 31 U.S.C. § 3730(e)(4)(A) (2012) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action of claims were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) 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.").

claim by reviewing the documentation provided by the informant and his lawyer.”¹¹⁸

The courts have recognized that under such circumstances, it is impossible to properly vet a suit without exchanging privileged information. For example, in *United States ex rel. Purcell v. MWI Corp.*, the federal district court for the District of Columbia addressed whether a relator’s counsel waived work product protection by giving materials authored by the attorney to the DOJ.¹¹⁹ The court concluded that work product protection remained, since “[w]ithout those communications, the government could not proceed with its case.”¹²⁰ Similarly, in *Miller v. Holzmann*, the court addressed whether disclosures of attorney-client privileged information waived protection.¹²¹ As the court reasoned, the attorney-client privilege encourages the full disclosure of all the facts from the client to the lawyer, while the False Claims Act furthers Congress’s intention that the whistleblower tell the government all that he or she knows. “Both policies would be negated if relator’s attorney-client privilege were forfeited.”¹²²

In sum, given that ALF entities and the DOJ use the same criteria for vetting suits, it is highly unlikely that financiers could conduct the same due diligence without privileged information. Individual funders have less experience than the DOJ with vetting qui tam suits, retain fewer lawyers, and cannot turn to other government agencies for assistance. Indeed, funders have publicly admitted as much. As one financier lamented about qui tam claims, “The key is visibility: how much can the fund find out about the case? Without a reasonable chance of quantifying the probability of success, the fund manager is unlikely to invest.”¹²³

As the rest of this Part demonstrates, there are significant unresolved questions about how much information third-party financiers can obtain. In particular, courts are split on whether a plaintiff’s disclosure of confidential information to an ALF entity waives attorney-client privilege and work product

118. Turley, *supra* note 51.

119. 209 F.R.D. 21, 27 (D.D.C. 2002).

120. *Id.*

121. 240 F.R.D. 20 (D.D.C. 2007).

122. *Id.* at 23; *see also* *United States ex rel. Minge v. TECT Aerospace, Inc.*, No. 07-1212-MLB, 2011 WL 1885934 (D. Kan. May 18, 2011) (protecting attorney-client privileged communications between relators, their attorneys, and agents for the government); *United States ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 173-74 (D.D.C. 2008) (noting that the relator’s disclosures to the government include documents covered by attorney-client privilege).

123. Turley, *supra* note 51.

protection.¹²⁴ Without such protection, adversaries can access the materials during discovery and uncover damaging information or litigation strategy.¹²⁵ In turn, relators and their attorneys are unlikely to share privileged information with ALF entities, and financiers will likely lack sufficient information to conduct their due diligence.

A. *Communications Likely Waive Attorney-Client Privilege*

The attorney-client privilege exists “to encourage full and frank communication between attorneys and their clients.”¹²⁶ As such, the privilege covers “(1) . . . communication[s] (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.”¹²⁷ Given this narrow purpose, disclosing attorney-client privileged documents to third parties waives the privilege.¹²⁸ This is the case even if the disclosure is made subject to a confidentiality agreement.¹²⁹ Thus, under privilege law in most jurisdictions, “sharing of privileged communications with an ALF supplier is a voluntary disclosure that may effect a waiver of the attorney-client privilege.”¹³⁰

Nonetheless, ALF entities may be able to avail themselves of a common law exception to waiver. In particular, communications will not waive privilege where the entities share a “common interest” in the litigation.¹³¹ Despite this rule, the courts’ definitions of “common interest” have been anything but common, making the exception difficult to apply.¹³²

Over the years, courts have embraced two schools of thought regarding common interest. Under the narrow view, courts have applied the common interest exception only if the interests at issue are identical and legal.¹³³ Other

¹²⁴. SEBOK & WENDEL, *supra* note 11, § IV.B.

¹²⁵. Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1124 (2012).

¹²⁶. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹²⁷. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

¹²⁸. SEBOK & WENDEL, *supra* note 11, § IV.B.

¹²⁹. *Id.*

¹³⁰. *Id.*

¹³¹. *Id.*

¹³². *Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007).

¹³³. George S. Mahaffey, Jr., *Taking Aim at the Hydra: Why the “Allied-Party Doctrine” Should Not Apply in Qui Tam Cases When the Government Declines to Intervene*, 23 REV. LITIG. 629, 666 (2004).

courts, however, have interpreted common interest broadly to cover numerous situations: “where litigation has yet to occur; where the interests at issue are not solely legal; where a lawyer is not present; where the clients have interests that may be slightly adverse; and where the parties’ only interests are in the outcome of the litigation.”¹³⁴ Thus, as one district court judge has concluded, “for every case construing the common interest narrowly, there seems to be a corresponding one reaching the opposite conclusion.”¹³⁵

The courts’ handling of common interest in the ALF context has been just as fragmented. To begin, ALF entities have sought to contract out of the privilege problem by adopting a tool from multi-defendant litigation: common interest agreements.¹³⁶ In theory, these agreements permit parties to share attorney-client privileged materials without risking waiver by demonstrating through contract that the parties intend to share a common interest. Thus, to be effective, common interest agreements cite case law and specifically outline the common interest, the types of protected communications, and the parties involved.

Although only a handful of courts have addressed the efficacy of such contracts in the context of litigation finance, they have split on the outcome.¹³⁷ The primary disagreement has been whether parties negotiating in an arm’s-length transaction can share a common interest. The first court to address the issue was the U.S. District Court for the District of Delaware in *Leader Technologies, Inc. v. Facebook, Inc.*¹³⁸ The decision arose as a review of a magistrate judge’s determination that ALF entities and plaintiffs do not share a common interest.¹³⁹ In its opinion, the district court acknowledged that “the law regarding common interest is unsettled and that this case presented a close question.”¹⁴⁰ Nonetheless, the court affirmed the magistrate judge’s

134. *Id.* at 668-69.

135. *Miller*, 240 F.R.D. at 22.

136. Michael D. Torpey et al., *Defending Securities Claims*, in A.L.I.-A.B.A. COURSE OF STUDY 607, 928 (2006).

137. Meriam N Alrashid et al., *Impact of Third Party Funding on Privilege in Litigation and International Arbitration*, 6 DISP. RESOL. INT’L 101, 109-11 (2012).

138. 719 F. Supp. 2d 373 (D. Del. 2010). Although the district court in this case was reviewing the decision of a magistrate judge under the highly deferential “clearly erroneous” standard, it appears that the district court largely agreed with the magistrate judge’s rationale. *See id.* at 377. Specifically, the court described the magistrate judge’s order as “thorough and well-reasoned,” and found that the party challenging the order “failed to argue that there are any specific deficiencies or flaws in the ruling.” *Id.*

139. *Id.*

140. *Id.* at 376.

determination that the communications were not protected.¹⁴¹ As the magistrate judge concluded, although ALF entities and recipients might share an identical legal interest *after* signing the funding arrangement, the parties lacked a common interest during the initial arm’s-length negotiations.¹⁴² Since the parties transferred the privileged documents as part of the negotiations phase, the plaintiff and financier lacked an “actual interest at that moment” and could not appeal to the common interest doctrine.¹⁴³

Commentators regularly cite *Leader Technologies* for the principle that disclosures waive attorney-client privilege.¹⁴⁴ But the literature ignores that the magistrate judge found immaterial the presence of a common interest agreement between the ALF funder and recipient.¹⁴⁵ This oversight is likely due to the fact that these observers do not examine, or cite, the transcript from the magistrate judge’s hearing with the parties.¹⁴⁶ There, the magistrate judge found that a “negotiation at arm’s length . . . precludes a finding that there’s a common legal interest,” regardless of the agreement.¹⁴⁷

Despite the decision in *Leader Technologies*, other ALF entities have had partial success with common interest agreements. For example, the U.S. District Court for the Eastern District of Pennsylvania has held that communications between an ALF entity and a recipient did not waive attorney-client privilege, since the parties “have a common interest in the successful

141. *Id.* at 379.

142. The magistrate judge recognized a long line of precedent holding that parties in negotiations over a business transaction do not share common interests. See Transcript of Oral Argument at 6-12, 67, *Leader Techs.*, 719 F. Supp. 2d 373 (No. 08-862-JJF-LPS) (citing *Net2Phone, Inc. v. Ebay, Inc.*, No. 06-cv-2469-KSH, 2008 WL 8183817, at *8 (D.N.J. June 26, 2008) (finding that the parties to a business transaction “had adverse interests because IDT and Net2Phone were negotiating the price IDT would pay for Net2Phone’s shares”), *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189, 190 (D. Del. 2004) (“[T]he Court views the negotiations between these two corporations to reveal that SRU’s disclosures to BD were made not in an effort to formulate a joint defense but rather to persuade BD to invest in SRU.”), and *Katz v. AT&T Corp.*, 191 F.R.D. 433, 438 (E.D. Pa. 2000) (“[T]he plaintiffs failed to prove that the parties to the negotiations shared an identity of interests such to invoke the common interest doctrine.”)).

143. Transcript of Oral Argument, *supra* note 142, at 12-13, 22.

144. See, e.g., *SEBOK & WENDEL*, *supra* note 11, § IV.B.2.c.

145. See Transcript of Oral Argument, *supra* note 142, at 6 (“The only argument that Facebook has to say that’s not a common legal interest is they say there’s an arm’s length negotiation. Well, in every common interest agreement, you’re going to have some type of negotiation.”).

146. See, e.g., *SEBOK & WENDEL*, *supra* note 11.

147. Transcript of Oral Argument, *supra* note 142, at 6-7, 67-71.

outcome of the litigation.”¹⁴⁸ As the court concluded, the plaintiff “may not have been able to pursue [the litigation against IBM] without the financial assistance of [the ALF entity].”¹⁴⁹ A Delaware district court has come to the same conclusion. Having “reviewed *in camera* the Advisory Services Agreement and the Common Interest Agreement between” the ALF entity and recipient, the district court found that the parties “do share a common legal interest.”¹⁵⁰

Despite their holdings, the two decisions finding common interest provide little guidance to practitioners. The courts gave no explanation of their reasoning other than the short quotes above, in part because the decisions came in the form of discovery orders.¹⁵¹ Such orders are ordinarily cursory given the low likelihood of reversal on appeal. As a result, neither the *Devon* nor *Walker* courts addressed why a common interest agreement can overcome the parties’ adverse and arm’s-length relationship. Thus, given the precedent from *Leader Technologies* and the limited analysis in *Devon* and *Walker*, the utility of common interest agreements for protecting attorney-client privilege is far from clear.

B. Whether Communications Waive Work Product Protection Remains Unresolved

Despite the uncertainty surrounding waiver of attorney-client privilege, it is less likely that disclosure would waive the protections of the work product doctrine.¹⁵² The purpose of this doctrine is to protect the thoughts, mental impressions, and strategies of attorneys from being discovered by opposing parties in litigation.¹⁵³ Because work product focuses on protecting the privacy of the attorney’s mental impressions, rather than encouraging communication between attorney and client, the standard for waiving work product differs from that for attorney-client privilege. Generally, only disclosures that substantially increase the likelihood of documents falling into the hands of an adversary in litigation will waive work product protection.¹⁵⁴

148. *Devon IT, Inc. v. IBM Corp.*, No. 10-cv-2899-JHS, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012).

149. *Id.*

150. Memorandum Order at 2, *Walker Digital, LLC v. Google Inc.*, No. 11-cv-309-SLR (D. Del. Feb. 12, 2013), ECF No. 280.

151. See *Devon IT, Inc.*, 2012 WL 4748160; *Walker Digital, LLC*, No. 11-cv-309-SLR.

152. SEBOK & WENDEL, *supra* note 11, § IV.B.3.

153. *Hickman v. Taylor*, 329 U.S. 495, 516-17 (1947); SEBOK & WENDEL, *supra* note 11.

154. 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2024 (3d ed. 2013).

As with attorney-client privilege, ALF entities have sought to avoid work product waiver through contract—non-disclosure agreements. This tactic has had varying degrees of success. On the one hand, at least two district courts have held that the agreements shield transfers of work product between financiers and recipients. For example, in *Mondis Technology, Ltd. v. LG Electronics, Inc.*, the U.S. District Court for the Eastern District of Texas recently held that disclosure of documents revealing a plaintiff’s litigation and licensing strategy did not waive work-product protection.¹⁵⁵ Since the documents were subject to non-disclosure agreements, the court concluded that the exchanges “did not substantially increase the likelihood that an adversary would come into possession of the materials.”¹⁵⁶ Later that year, a federal district court in the Eastern District of Pennsylvania came to the same conclusion in *Devon*, discussed above.¹⁵⁷

Nonetheless, the courts have not been uniform in their treatment of non-disclosure agreements. And once again, the primary source of opposition is the Delaware district court’s opinion in *Leader Technologies*. Although secondary sources cite the decision as only pertaining to waiver of attorney-client privilege,¹⁵⁸ the district court also found that the parties waived work-product protection.¹⁵⁹ Indeed, in the hearing before the magistrate judge, the plaintiff-recipient argued that its non-disclosure agreement with the ALF entity prevented waiver of work product.¹⁶⁰ Nonetheless, the magistrate judge held that a non-disclosure agreement is insufficient to protect work product. The

155. No. 2:07-cv-565-TJW-CE, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).

156. *Id.*

157. *Devon IT, Inc. v. IBM Corp.*, No. 10-cv-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (“The documents turned over to Burford were done so under a Confidentiality, Common Interest and Non[-]Disclosure Agreement. . . . Given these controlled conditions, there was no waiver of the attorney-client privilege or the work product doctrine. . . .”).

158. SEBOK & WENDEL, *supra* note 11, § IV.B.3.

159. *See Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 375-76 (D. Del. 2010) (“With respect to the production of privileged documents, Leader contends this portion of the Order is clearly erroneous because it was based on the finding that no common legal interest protecting attorney-client or work product privileged information could exist because a deal was not consummated between Leader and the litigation financing companies.” (emphasis added)); Transcript of Oral Argument, *supra* note 142, at 4-5 (“I do want to point out to the Court that Facebook doesn’t dispute that the documents in question are, in fact, privileged and work product. That’s not an issue for the Court.”).

160. Transcript of Oral Argument, *supra* note 142, at 5 (“[The documents] were sent by email after everything was signed. So the evidence in this case is shown [sic] conclusively that Leader insisted upon a signed NDA before they could make any type of confidential information to these financing companies.”).

parties must also share a common interest.¹⁶¹ The magistrate judge further reasoned that the existence of a confidentiality agreement showed that the parties *lacked* a common interest. The agreement would be unnecessary if the parties had a common stake in the litigation.¹⁶² Since the district court's opinion affirmed the magistrate judge's order in its entirety,¹⁶³ scholars citing only the opinion have not realized the extent of the court's holding.¹⁶⁴

The decision in *Leader Technologies* therefore reflects an expansive view of waiver for work product. Despite the fact that non-disclosure agreements prevent communications from reaching potential adversaries, the court required common interest between parties. Thus, at least in some courts, funders and recipients will have to demonstrate common interest prior to exchanging information covered by either attorney-client privilege or the work-product doctrine.

IV. SOLUTIONS TO THE PRIVILEGE DILEMMA

As this Note argues, the answer to the common interest dilemma may lie in how ALF entities obtain a legal interest in a *qui tam* claim. Although contested by one financier,¹⁶⁵ commentators generally agree that ALF entities purchase an interest in a claim through partial assignment.¹⁶⁶ Unlike a contract, which

161. See *id.* at 10 (“Isn’t she saying that they’re sure if there were a common interest and privilege, she was going to say it was waived because there’s no confidentiality agreement? But it seems in the portion I’m reading from, she’s also saying there is no privilege because there is no common interest.” (citing *NetzPhone, Inc. v. Ebay, Inc.*, No. 06-cv-2469-KSH, 2008 WL 8183817 (D.N.J. June 26, 2008))); see also *Katz v. AT&T Corp.*, 191 F.R.D. 433, 438 n.6 (E.D. Pa. 2000) (“[T]he interests of the parties were clearly adversarial and the negotiations over the terms of the licensing agreement were conducted at arm[']s length[.] Other examples in the record before the Special Master include the confidentiality agreement between the parties which was entered into, according to the terms of the correspondence, so that the content of their discussions could not be used by either participant for any other purpose, including a future lawsuit between them.”).

162. Transcript of Oral Argument, *supra* note 142, at 10.

163. *Leader Techs., Inc.*, 719 F. Supp. 2d at 379.

164. See, e.g., SEBOK & WENDEL, *supra* note 11, § IV.B.3.

165. In its submission to the ABA’s working group on litigation finance, one of the world’s largest litigation financiers, Burford Group LLC, likened its investments to a lien (“[a] car lease is not a bad comparison”) rather than an assignment (“Burford does not buy or take assignments of claims.”). MOLOT, *supra* note 84, at 100.

166. Despite Burford’s submission, the ABA’s informational report on litigation finance ultimately rejected the funder’s characterization of its investments. See SEBOK & WENDEL, *supra* note 11, § II.A (“Consumer ALF suppliers are distinguishable from settlement factoring companies; the former take a partial assignment in a claim that has not yet been

creates a legal right, an assignment is an agreement to transfer a right.¹⁶⁷ Accordingly, a partial assignment is a partial transfer of a right.¹⁶⁸ In the context of litigation finance, if a relator seeks funding, it would transfer a portion of its damages claim to an ALF entity. Likewise, if relator's counsel seeks funding, it would transfer a portion of its contingency fee to the ALF entity.¹⁶⁹ As a result of the partial assignment, the ALF entity and the relator each become "real parties in interest"¹⁷⁰ and both have a cause of action under the Federal Rules of Civil Procedure.¹⁷¹ In practice, the ALF entity will not sue and only the plaintiff will bring the action as a party.¹⁷²

Significantly, qui tam relators obtain an interest in the government's fraud claim using the same legal instrument as ALF entities: partial assignment. As the Supreme Court has held, "[t]he FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim" to the

settled or reduced to judgment, while the latter purchases a claim that has been reduced to judgment"); *see also* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1323 (2012) ("[L]ike an attorney, a financier decides whether to front the litigation costs for a partial assignment of the plaintiff's proceeds on a case-by-case or litigation-by-litigation basis."); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 620 (2007) ("Claim alienation is typically partial but can also be full. The LLA sets forth the terms of the parties' agreement and secures the LFC's interest in the proceeds of the lawsuit through assignment.").

167. 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 73-74 (3d ed. 2004).

168. 6A C.J.S. *Assignments* § 129 (2013).

169. Barksdale, *supra* note 7, at 708.

170. *See* United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 934-35 (2009) ("The phrase, 'real party in interest,' is a term of art utilized in federal law to refer to an actor with a substantive right whose interests may be represented in litigation by another.").

171. *Assignments*, *supra* note 168 ("The general rule . . . is that . . . the assignor and [partial] assignee may unite in a suit for the enforcement of the chose, or the assignor may sue alone. The [partial] assignee may not sue on it alone in his or her own name, since assignment of only a part of an entire claim or debt does not vest in the assignee a right of action in his or her own name. Where both the assignor and [partial] assignee sue, the procedure actually constitutes the prosecution of a single cause of action, with the only difference being that the proceeds of a judgment secured from the defendant are not necessarily given directly or solely to the person who had original title to the cause of action."); *see also* 6A WRIGHT ET AL., *supra* note 154, § 1545 ("[W]hen there has been only a partial assignment the assignor and the assignee each retain an interest in the claim and are both real parties in interest . . . under Rule 17(a) either party may sue to protect those rights.").

172. An entity can be a "real party in interest" without being an actual party to the case. *Eisenstein*, 556 U.S. at 934-35.

relator.¹⁷³ Additionally, much like an ALF entity, the government remains a “real party in interest” even if it is not a party to the suit.¹⁷⁴

As this Part argues, the similar means through which an ALF entity and a qui tam relator obtain standing have three important consequences. First, ALF entities can use case law protecting exchanges between relators and the DOJ to justify protections for relators and financiers. Second, through a quirk of qui tam law, relators can turn ALF entities into fellow whistleblowers by transferring privileged and non-privileged information to them. As co-relators, co-parties in interest, and potential co-plaintiffs in the qui tam suit, the relator and ALF entity would likely share a common interest. Third, relators can make revocable, gratuitous partial assignments to ALF entities during the due diligence phase in order to align the entities’ interests, thereby preventing waiver.

A. *ALF Entities and Relators Can Appeal to Case Law Protecting Communications Between the DOJ and Relators*

Although ALF entities might ordinarily lack a common interest with recipients, it appears that the interests of ALF entities and qui tam relators are uniquely aligned. This is demonstrated by comparing the relationship between ALF entities and relators to that of the DOJ and relators. Given that the courts have almost universally protected exchanges with the DOJ,¹⁷⁵ ALF entities could justify protection by analogizing their relationship to that of the government.

As demonstrated in *Leader Technologies*, ALF entities face a challenge because courts conflate funders’ due diligence phase with arm’s-length negotiation. In practice, however, it is possible to distinguish these two periods. The DOJ’s prosecution of qui tam claims illustrates as much.

173. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000). Additionally, while the Court did not define what it means to “partially assign” a claim, it later clarified the difference between such an assignment and “a contract for legal services.” *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008). “The latter confers a property right (which creditors might attach); the former does not.” *Id.*

174. As a partial assignee, the relator files the qui tam action as a real party in interest and a party to the case. See *Eisenstein*, 556 U.S. at 935. The government, on the other hand, is a real party in interest but a non-party until it elects to intervene in the case. *Id.* Should the government choose to decline intervention, it continues as a non-party. *Id.*

175. See, e.g., *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 561 (C.D. Cal. 2003); *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 26 (D.D.C. 2002); *United States ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 479 (D. Utah 2001); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996).

The courts have acknowledged that the DOJ and the relator go through two phases. The first is the due diligence phase during investigation and litigation of the *qui tam* claim.¹⁷⁶ The second phase follows settlement or judgment, and entails an arm's-length negotiation between the relator and the DOJ over the size of the relator's share.¹⁷⁷ As previously noted, the courts have universally recognized that the DOJ and relator share a common interest during the due diligence phase. The parties are united in a common effort to investigate and prosecute the defendants.¹⁷⁸ Meanwhile, the courts have also recognized that the DOJ and relator lack a common interest during negotiations over the relator's share.¹⁷⁹ At this point, each party is bargaining over a pot that is zero-sum.

ALF entities can appeal to the same analytical distinction. The due diligence phase of an ALF entity and the DOJ is largely similar. Both entities are vetting the suit to determine whether they will pursue the claim. Both entities are requesting privileged information to conduct their investigations. And both entities stand to profit tremendously from the successful prosecution of the defendant.

Once an ALF entity completes its due diligence, the arm's-length negotiation phase begins. At this time, the ALF entity and the relator bargain over contract terms and how the parties will share any proceeds from the suit. Since ALF entities go through similar due diligence/arm's length negotiation phases as the DOJ, ALF entities may be able to persuade the courts to find common interest using the same analytical distinction.

Additionally, ALF entities can appeal to the same statutory and policy rationale as the DOJ for finding common interest. The courts recognize two reasons for protecting communications between the relator and government. First, as a statutory basis, the False Claims Act provides that the relator shall

176. See (*Redacted*), 209 F.R.D. at 479 n.3 ("This is not to say, however, that the Relators and the United States will always share this community of interest. At least one court has noted, in a different context, that the interests of the government and Relators may diverge 'when it comes time to pay the relator's share [of damages].'" (alteration in original) (quoting *United States ex rel. Thornton v. Sci. Applications Int'l Corp.*, 207 F.3d 769, 773 (5th Cir. 2000))); see also *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, No. 99-cv-3298, 2004 WL 2009413, at *6 (D.D.C. May 17, 2004) ("Relator Pogue's and the United States' common interest in the prosecution of the defendants and settlement negotiations that vindicate the interests of both Relator Pogue and the United States remain at this stage. The point at which the Atlanta Physicians' contention might even be viable would be after the settlement agreement was finalized . . .").

177. See *Pogue*, 2004 WL 2009413, at *6.

178. *Id.*

179. *Id.*

bring the action “in the name of the Government” and allows the relator to receive a percentage of the proceeds.¹⁸⁰ Thus, “the legislature left no doubt that the relator is acting on behalf of the government.”¹⁸¹ Second, as a matter of policy, protecting communications “advances the congressional desire that the relator apprise the government of all he or she knows as a condition of bringing a qui tam action.”¹⁸² Thus, finding waiver would “discourage[] the sort of comprehensive disclosure most likely to facilitate the government’s evaluation of the merits and its choice about whether to intervene.”¹⁸³

These two rationales also apply to an ALF entity and a relator. First, a relator acts on the ALF entity’s behalf. As a partial assignee, the ALF entity is the “real party in interest” to the suit, and can only vindicate its rights through successful litigation by the whistleblower. Second, ALF would further comprehensive disclosure between relators and the government.¹⁸⁴ Given the DOJ’s practice of outsourcing pre-intervention investigations to qui tam firms, third-party financing would promote firms’ investigations. These investigations, in turn, apprise the government of all the information related to the claim.

In fact, the legal interests of ALF entities and relators may be even more closely aligned than those of the relator and the government. In a qui tam claim, a relator retains several interests that are adverse to those of the government. For example, the relator has the right to a hearing before the Government dismisses the suit and the right to a judicial determination of fairness, adequacy, and reasonableness before the government settles the

180. *Purcell*, 209 F.R.D. at 26 (quoting 31 U.S.C. § 3730(b) (2000)); see *Miller v. Holzmann*, 240 F.R.D. 20, 21 (D.D.C. 2007) (“[T]he United States and the relator had a common interest in the prosecution of common defendants in an existing civil or criminal case or both.”); (*Redacted*), 209 F.R.D. at 479 (“The Relators and the United States are co-plaintiffs, allied in their interest in this litigation in identifying . . . false claims, proving them, obtaining statutory redress in the form of damages, and distributing the proceeds of this suit.” (internal quotation marks omitted)).

181. *Purcell*, 209 F.R.D. at 26.

182. *Miller*, 240 F.R.D. at 23; see *Purcell*, 209 F.R.D. at 26 (“The court’s interpretation of the FCA’s language must include an examination of the design of the statute as a whole and to [sic] its object and policy.”).

183. *United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 561 (C.D. Cal. 2003).

184. Of course, it could be argued that ALF entities do not meet the policy criteria because they are third parties. However, relator’s counsel is similarly a third party. Additionally, this distinction ignores the way in which enforcement of the FCA has evolved over the years. Given that the government is relying on third parties (e.g., relator’s counsel) to conduct investigations, it makes little sense to arbitrarily draw the line at parties that fund such investigations – ALF entities.

suit.¹⁸⁵ Since ALF contracts generally do not contain similar provisions, ALF entities and relators lack such adverse interests.¹⁸⁶

B. Using Partial Assignment to Align the Interests of Relators and ALF Entities Prior to Filing Complaints

Despite the similar rationale for protecting communications between ALF entities and relators, financiers face an additional hurdle: the parties must share a common interest *at the time* that the privileged materials are exchanged. For the federal government this task is easy: it is the party that suffered the injury and therefore shares a common interest with the relator early on. ALF entities face a more difficult task. As noted previously, while courts are generally willing to recognize that a financier shares a common interest after signing a funding agreement, the parties lack a common interest beforehand. Some ALFs have successfully contracted out of this dilemma by using common interest and confidentiality agreements.¹⁸⁷ Given the uncertainty still surrounding waiver of privilege, there remains a need for additional legal mechanisms to ensure common interest.

A quirk of *qui tam* law, largely ignored in the secondary literature,¹⁸⁸ may provide a unique solution to relators and counsel seeking funding *prior* to filing a complaint with the DOJ. While the Supreme Court has held that relators have standing through the doctrine of partial assignment, it did not state when that assignment actually occurs. One view suggests that the partial assignment

185. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (citing 31 U.S.C. § 3730(c)(2)(B)).

186. Of course, the ALF's relationship also differs from the government's relationship in another significant way—the former is contractual while the latter is statutory. Nonetheless, the courts finding common interest have not done so on purely statutory grounds. Rather, the courts focus on the *language* of the statute and the policy considerations implicated by privilege. See *Miller*, 240 F.R.D. at 21; *Purcell*, 209 F.R.D. at 25 (citing *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 685-86 (S.D. Cal. 1996)); *United States ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 479 (D. Utah 2001). Thus it does not appear significant that the FCA is a statute rather than a contract.

187. See, e.g., *Devon IT, Inc. v. IBM Corp.*, No. 10-cv-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012).

188. While scholars have cited these cases to argue that so-called “pre-filing” releases are enforceable, see, e.g., Todd P. Photopoulos & Graham W. Askew, *Having Your Cake and Eating It Too—The (Un)enforceability of Releases on Future Qui Tam Claims*, 1 J. HEALTH & LIFE SCI. L. 145, 157 (2008), it appears that not a single scholar has discussed how the timing of partial assignments may be relevant for the purposes of discovery.

occurs when the relator files his or her complaint with the government.¹⁸⁹ Another suggests that the partial assignment occurs whenever a person learns of fraud.¹⁹⁰

The former interpretation provides relators little aid. But under the latter view, the relator's disclosure of basic, non-privileged information about the alleged fraud to the ALF entity might simultaneously turn the financier into a partial assignee under the FCA. In other words, the financier would become another whistleblower. As co-relators, the parties—under certain circumstances—would share a common interest prior to exchanging any privileged information. In fact, if the ALF entity becomes a co-relator simultaneously with receiving information about the alleged fraud, then the two-step exchange of factual-then-privileged information might be unnecessary. The exchange of privileged information would simultaneously transform the ALF into a co-relator, and the parties would share a common interest at the time of the transmission.

1. *Based on the Case Law of Several Circuits, It Appears that Persons Become Partial Assignees Whenever They Learn of Fraud*

The strategy of turning ALF entities into co-relators is supported by lower court jurisprudence. At least two circuits have concluded that partial assignment occurs upon learning of fraud.¹⁹¹ These decisions arose from disputes over “pre-filing releases.” In essence, such releases are an agreement by the relator to sell its claim to another entity.¹⁹² These sales are also rarely to

189. See *In re Estate of Duxbury*, 304 P.3d 480, 489 (Wash. Ct. App. 2013) (“[A] relator does not have a property interest in a qui tam action or a portion of its future proceeds until he files his qui tam lawsuit and serves his complaint and supporting evidence on the federal government . . .”). According to the *Duxbury* court, if individuals became partial assignees upon learning of the fraud, then the FCA provision prohibiting these others’ qui tam actions could potentially effect unconstitutional “takings” of these employees’ property by divesting them of the ability to bring their own qui tam actions once one person files. *Id.* This is most likely an incorrect statement of law, however, because assignments are freely revocable by the assignor until the assignee provides some form of “value” in return. See FARNSWORTH, *supra* note 167, at 102 (“An assignee gives value by taking the assignment . . . in exchange for something that would be consideration for a promise . . .”). Given that the relator does not provide “value” until he or she files a complaint with the DOJ, the FCA first-to-file bar would not constitute a “taking.”

190. See *infra* Subsection IV.B.1.

191. See *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 329 (4th Cir. 2010); *United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 912 (8th Cir. 2001).

192. See, e.g., *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 337 (D. Mass. 2011).

disinterested parties. Ordinarily, a relator releases the action to the alleged defendant.¹⁹³ Since the defendant does not bring suit against itself, the sale effectively settles the claim.

Despite the sales, some relators have violated their releases and filed complaints with the DOJ. In the ensuing litigation, the DOJ sought a means to preserve the relators' standing. As part of this strategy, the agency argued that the relator cannot release its claim prior to filing a complaint,¹⁹⁴ since at common law a party cannot assign (or sell) a right that he or she does not yet possess.¹⁹⁵ In other words, since a whistleblower only becomes a partial assignee upon filing, the pre-filing release is invalid.¹⁹⁶

The Eighth and Fourth Circuits rejected the DOJ's argument, although their reasoning is brief. In *United States ex rel. Gebert v. Transportation Administration Services*, the Eighth Circuit held that relators became partial assignees once they "possessed all the necessary information" to proceed with the qui tam complaint.¹⁹⁷ In coming to this conclusion, the court found that the government could point to no authority to support its claim that assignment occurs at the time of filing.¹⁹⁸ The court cited little additional authority of its own. The Eighth Circuit quoted a single Ninth Circuit decision stating that "the FCA effectively assigns the government's claims to qui tam plaintiffs . . . who then may sue."¹⁹⁹ While this sentence seems to support the Eighth Circuit's holding, the Ninth Circuit was not addressing the issue of timing under the FCA; instead, it was addressing whether relators have Article III standing.²⁰⁰ Thus, at best, the sentence is dicta unsupported by any independent statutory analysis.

The Fourth Circuit in *United States v. Purdue Pharma L.P.* offered similar reasoning. The court held that once the relator "became aware of the fraud causing the injury," he or she had the "necessary legal standing as a partial assignee, to file a qui tam lawsuit."²⁰¹ Thus, even if the relator chooses not to

193. See *id.*

194. See *Gebert*, 260 F.3d at 914-15.

195. See FARNSWORTH, *supra* note 167, at 94-97.

196. See *Gebert*, 260 F.3d at 914-15.

197. *Id.*

198. See *id.* at 914.

199. *Id.* (quoting *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993)).

200. *Kelly*, 9 F.3d at 748.

201. *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 329 (4th Cir. 2010).

file suit, she has “an interest in the lawsuit” regardless of whether she chooses to vindicate it.²⁰² The court cited no authority for any of these conclusions.

Despite this flaw, the circuits’ holdings are likely supported by the Supreme Court’s decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,²⁰³ where the Court first held that relators have standing as partial assignees under the FCA. The *Stevens* Court addressed an alternative theory of standing based on the fact that relators have a concrete interest in their portion of the recovery. In rejecting this theory, it held that an “interest that is merely a ‘byproduct’ of the suit itself” will not support Article III standing.²⁰⁴ Since the relator’s share of a suit is a by-product of filing a claim, the Court held that partial assignment was the sole mechanism supporting relators’ standing.

The Supreme Court’s rationale in *Stevens* is likely applicable to the issue of timing under the FCA. It appears that relators do not gain standing by simply filing a claim, as this would be a by-product of the suit itself. Relators must therefore have some type of concrete, pre-existing interest in the suit. The most plausible mechanism would therefore be a partial assignment at the time of discovering the fraud.

This interpretation further avoids the difficulties arising from the FCA’s statute of limitations. The circuits are split on the issue, but at least one court of appeals and district courts in two other circuits have held that the statute of limitations starts to run when relators acquire knowledge of the wrongful activity.²⁰⁵ If a relator only becomes a partial assignee upon filing a complaint, running the statute of limitations when she learns of the fraud would lead to an absurd result. The statute of limitations would potentially bar the putative relator from bringing suit even though she never had a legal claim. In other words, it would be like barring a person who might sign a contract in the future from bringing suit, because she could have signed the contract earlier.

202. *Id.* (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000)).

203. 529 U.S. 765.

204. *Id.* at 773 (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 107 (1998)).

205. *See United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217-18 (9th Cir. 1996) (explaining that a whistleblower’s “duty to act must be triggered by his own knowledge,” and thus a qui tam statute of limitations “start[s] to run when the plaintiff acquires knowledge of the wrongful activity”); *see also United States ex rel. Bidani v. Lewis*, No. 97-cv-6502, 1999 WL 163053, at *9 (N.D. Ill. Mar. 12, 1999) (reiterating the “three-year knowledge rule” and applying it to the plaintiff); *United States ex rel. Sanders v. E. Ala. Healthcare Auth.*, 953 F. Supp. 1404, 1412 (M.D. Ala. 1996) (“The Plaintiffs must also show that they acted within three years of learning of facts material to the false claim or within three years of the time in which the government official responsible for this area knew or should have known that false claims were submitted.”).

Finally, the circuit courts are unlikely to hold that the partial assignment occurs upon filing, as this would overturn nearly twenty years of case law upholding the validity of pre-filing releases. A release, by definition, is an assignment of a right.²⁰⁶ Moreover, at common law, a party cannot assign a right that he or she does not have.²⁰⁷ Thus, if a relator only gains a right under the FCA upon filing, he or she cannot sign an enforceable pre-filing release.

Given that at least four circuits²⁰⁸ and an even greater number of district courts have held that pre-filing releases are enforceable,²⁰⁹ it is unlikely that the other circuits will break rank. As the four circuit courts have recognized, pre-filing releases serve an important public interest in encouraging private settlement of claims. Thus, the four circuits have upheld—and the DOJ as *amicus curiae* has defended—the enforceability of such releases where the government has some prior knowledge of the fraud independent of the relator’s disclosures.²¹⁰

In sum, the Supreme Court’s decision in *Stevens* and potential prudential and public policy concerns indicate that the circuit courts will likely continue holding that a relator becomes a partial assignee upon obtaining knowledge of the fraud. It also does not appear that the Supreme Court is in any rush to hold to the contrary. In 2010, the Court denied certiorari in the Fourth Circuit case, *Purdue*, and therefore declined to address the petitioner’s claims that pre-filing releases are unenforceable and that partial assignment under the FCA occurs only upon filing.²¹¹

2. *ALF Entities and Relators Can Use the Timing of Partial Assignments to Create Common Interest*

Based on the decisions in *Gebert* and *Purdue*, a relator becomes a partial assignee as soon as he or she knows of necessary information to have standing to bring a claim. That threshold is quite low. The relator need only

206. See BLACK’S LAW DICTIONARY 1315 (8th ed. 2004) (defining release as “the act of giving up a right or claim to the person against whom it could have been enforced”).

207. See FARNSWORTH, *supra* note 167, at 94-97.

208. See *United States v. Purdue Pharma L.P.*, 600 F.3d 319, 329 (4th Cir. 2010); *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1169-71 (10th Cir. 2009); *United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 916-17 (8th Cir. 2001); *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233-34 (9th Cir. 1997).

209. See, e.g., *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 338 (D. Mass. 2011) (citing cases).

210. See, e.g., *Purdue Pharma*, 600 F.3d at 331.

211. *United States ex rel. Radcliffe v. Purdue Pharma, L.P.*, 131 S. Ct. 477 (2010) (mem.).

“sufficiently allege[] (1) an injury in fact to the United States that (2) is caused by [the defendant’s] alleged conduct . . . and (3) is likely to be redressed.”²¹² Thus, a relator does not even need to properly allege all of the elements of its claim to establish standing; it just needs to claim an injury of a legally cognizable right.²¹³

This legal situation opens up a unique opportunity for qui tam relators and ALF entities to share privileged information. To begin, a relator would enter into confidentiality, non-disclosure, and common interest agreements with a potential funder. Then, the relator would provide the ALF entity with enough information to file a qui tam claim. The transmission might either be two-step (non-privileged, factual information followed by privileged information), or one-step (all the information at one time, should the ALF entity become a partial assignee simultaneously with receiving privileged information).²¹⁴

As a partial assignee, the ALF entity would become a co-relator, a co-party in interest, and a potential co-plaintiff in the qui tam suit. Since the financier cannot actually file the claim, due to the confidentiality and non-disclosure agreements, there is no risk that the ALF entity would “race to the courthouse.” In fact, since the ALF entity depends on the relator to vindicate its legal interest in the claim—by filing a complaint with the government—the interests of the two parties are aligned and identical. Such common interest is buttressed by the courts’ long history of protecting privileged communications between co-relators,²¹⁵ co-parties in interest,²¹⁶ and potential co-plaintiffs.²¹⁷

212. *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1328 (Fed. Cir. 2010); *see also id.* at 1327-28 (“The standing doctrine is intended to require that the plaintiff is a proper person to bring the suit; it does not require that the plaintiff properly allege all of the elements of his claim. Thus, standing does not depend on the merits of the plaintiff’s contention that particular conduct is illegal; it instead requires a claim to an injury of a legally cognizable right.” (internal quotation marks omitted)).

213. *Id.* at 1327.

214. The FCA expressly permits third parties to become relators based on disclosures by insiders. The FCA only requires that relators be the “original source” of information if the alleged fraud has already been publicly disclosed—for example, through a governmental report or through the news media. 31 U.S.C. § 3730(e)(4)(A) (2012). Since the FCA does not apply the “original source” requirement to all qui tam claims, even though the Act’s framers could have, it appears that Congress intended for third parties to serve as relators.

215. *Sokol v. Wyeth, Inc.*, No. 07-cv-8442-SHS, 2008 WL 3166662, at *9 (S.D.N.Y. Aug. 4, 2008) (finding that the common interest doctrine prevents waiver of attorney-client privilege for “communications that are in furtherance of the common objective[] between . . . joint clients in their common false claims action,” provided that co-relators are identified to the court); *In re Anand*, No. 01-12-01106-CV, 2013 WL 1316436 (Tex. App. Apr. 2, 2013) (holding that communications among relators were privileged); Dan Lawrence & Steve Robison, *Introducing the Kansas False Claims Act: A Primer*, J. KAN. B. ASS’N, Oct. 2010,

This strategy, however, suffers from a potential drawback. It requires whistleblowers to refrain from filing their complaint with the DOJ. Instead, a putative relator and her counsel would have to wait until they compile sufficient evidence to convince a financier to fund at least part of the litigation. Such a delay is risky. The FCA's first-to-file provision bars relators from filing claims if their allegations are substantially similar to those in an earlier complaint.²¹⁸ Thus, waiting may result in another relator filing first and disqualifying the whistleblower seeking financing. The pre-filing funding strategy is therefore most useful to relators who believe other individuals are unlikely to file a claim. Otherwise, relators and their counsel are better off seeking financing after filing a complaint with the DOJ.

C. Using Partial Assignment as a Solution Post-Filing

Relators and their counsel face a greater challenge in proving common interest if they seek funding after filing suit with the DOJ. Nonetheless, the doctrine of partial assignment may still provide a solution. Unlike contracts, which ordinarily require consideration to be enforceable, assignments do not require a quid pro quo in order to be valid.²¹⁹ Additionally, should the assignment be gratuitous, the assignor can freely revoke the assignment up until the point that the assignee provides some form of "value" in return.²²⁰

at 24, 32 ("Communications between a relator and the government or between two relators made in the prosecution of an FCA suit, designed to further that effort, and not subject to a waiver, are privileged.").

216. *Hanson v. U.S. Agency for Int'l Dev.*, 372 F.3d 286, 291-92 (4th Cir. 2004) (finding common interest where both parties were real parties in interest to the suit).
217. *Stanley v. Trinchard*, No. 02-cv-1235, 2005 WL 230938 (E.D. La. Jan. 27, 2005) (holding that while potential co-plaintiffs might have a common interest, parties with only a financial interest in the outcome of litigation do not).
218. *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171, 176 (4th Cir. 2013).
219. See FARNSWORTH, *supra* note 167, at 102 ("An assignee gives value by taking the assignment . . . in exchange for something that would be consideration for a promise."); 29 WILLISTON ON CONTRACTS § 74:3 (4th ed. 1993) ("[T]he Restatement (Second) of Contracts and courts that adopt its principles distinguish between assignments backed by consideration and those which are gratuitous, providing that gratuitous assignments, subject to a number of specific exceptions, are generally revocable by the assignor." (citing RESTATEMENT (SECOND) OF CONTRACTS § 332(2) (1981))); *Assignments*, *supra* note 168, § 70 ("[A]n assignment unsupported by consideration is revocable unless a writing or delivery shows that it is irrevocable.").
220. See FARNSWORTH, *supra* note 167, at 101. There is an exception to the rule if the revocation would be unjust because "the assignee has, to his detriment, reasonably relied on the assignment, and it was for[e]seeable that he would do so." Howard O. Hunter, *Revocability*

This framework provides an opportunity to relators. If a relator wants to ensure that the ALF entity has an interest in the claim *prior* to exchanging privileged information, the relator could make a gratuitous partial assignment to the financier.²²¹ Should the financier decline to fund the case, the relator would revoke the partial assignment. Should the financier fund the suit, the relator could revoke the first assignment and enter into a second irrevocable assignment based on an exchange of “value.”

Additionally, it appears that courts will find common interest even where partial assignments are gratuitous. For example, at least one court has protected pre-filing communications between relators and the government.²²² This is significant because the relator’s partial assignment is still revocable during the pre-filing period. Under the FCA’s “first-to-file” bar, even if a potential relator communicates with the government prior to bringing a claim, that person loses its right to bring suit should another individual file first.²²³ Despite this background, the court held that pre-filing interviews by the DOJ of the relator were protected by common interest.²²⁴ Thus, if a gratuitous partial assignment is sufficient to protect communications between the relator and the government, a gratuitous partial assignment should also protect communications between a relator and an ALF entity.

of Assignments, in MODERN LAW OF CONTRACTS § 21:6 (2013). However, the relator could prevent the ALF entity from taking advantage of him or her by well documenting the circumstances surrounding the assignment and by making it clear that the partial assignment was freely revocable.

221. It appears that courts and the secondary literature generally agree that gratuitous partial assignments are freely revocable. See, e.g., 29 WILLISTON ON CONTRACTS § 74:46 (4th ed. 1993) (citing *Chase Nat. Bank of New York v. Sayles*, 11 F.2d 948 (1st Cir. 1926)); Note, *Revocability of a Gratuitous Assignment of Part of a Pecuniary Legacy*, 39 HARV. L. REV. 368, 373 (1926). But see Edwin D. Dickinson, *Gratuitous Partial Assignments*, 31 YALE L.J. 1, 14 (1921) (“If gratuitous declarations of trust are binding, *a fortiori*, it would seem, gratuitous partial assignments ought to be binding.”).
222. See *United States ex rel. Purcell v. MWI Corp.*, 238 F.R.D. 321, 326 (D.D.C. 2006).
223. 31 U.S.C. § 3730(b)(5) (2012) (“When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”). As this provision demonstrates, merely communicating with the government about the fraud does not provide sufficient “value” to make the assignment irrevocable. Thus, assignments are gratuitous until the relator provides the necessary value: filing a complaint.
224. The decision uses the language of joint-prosecution privilege, which is the same as common interest privilege. See Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 55 (2005) (“Courts identify it by a variety of names, such as the ‘common interest privilege’ . . . [and] the ‘joint prosecution privilege’ . . .”).

If the relator and ALF entity are concerned about the protection offered by a gratuitous partial assignment, the relator could make an irrevocable assignment. Instead of granting the funder a full share in the recovery, the partial assignment would give the ALF entity a marginal percentage of the relator's claim. In return, the funder would provide some form of value to make the assignment irrevocable, such as the results of the funders' due diligence. At that point, the parties would share a common interest in the litigation (albeit a minimal one).

The "minimal assignment" approach could be criticized for privileging form over substance. Nonetheless, the Supreme Court has recognized that the strength of an assignee's legal interest does not depend on how much it stands to recover. For example, in *Sprint Communications Co. v. APCC Services, Inc.*, the Court held that assignees for collection purposes satisfy Article III standing requirements, even though the assignees would receive none of the proceeds of the suit.²²⁵ As the Court reasoned, the assignee had "a contractual obligation to litigate 'in the [assignor's] interest'" and therefore would redress the assignor's injury.²²⁶ Although the respondent in *Sprint* was a full assignee of the claim, the Court nonetheless cited *Stevens* for the proposition that either a full or a partial assignment would confer standing.²²⁷

Although *Sprint* is a decision in a related field of law, its holding is highly relevant to the privilege dilemma. If a partial assignee has standing because it shares a common legal interest with the assignor, as suggested by the holding in *Sprint*, it follows that the partial assignee's interests are also sufficiently common as to allow exchange of privileged information. Put another way, it would be odd to hold that a partial assignee can litigate on behalf of another (because their interests are common), but that the partial assignee may not exchange privileged information (because their interests are divergent).

This analysis of the Supreme Court's decision in *Sprint* is not merely conjectural. The courts in other contexts have held that partial assignments, no matter how small, are sufficient to create common interest.²²⁸ For example, in *Phoenix Insurance Co. v. Woosley*, the Tenth Circuit addressed a situation in which a plaintiff partially assigned his claim against two insurance companies to nine other parties (to whom he owed debts). The court found that while all

^{225.} 554 U.S. 269, 272-73 (2008).

^{226.} *Id.* at 288 (quoting Petition for Writ of Certiorari at 4, *Sprint*, 128 S. Ct 2531 (No. 07-552)).

^{227.} *Id.* at 285.

^{228.} See, e.g., *Phoenix Ins. Co. v. Woosley*, 287 F.2d 531, 533 (10th Cir. 1961).

the assignees did not have “an equal interest,” they nonetheless had a “common and undivided interest” in collection of the insurance.²²⁹

A partial assignment therefore fills the missing piece in common interest agreements. Presently, ALF entities are only using the first tool in *Sprint*—contracting to align the assignee and assignor’s interests. But without the second tool, a partial assignment, the funder and recipient lack an independent legal interest to be jointly shared in the first place.

Critics may respond that these strategies suffer from a Catch-22. Financiers will not fund suits unless they have sufficient evidence of fraud. Relators cannot obtain sufficient evidence of fraud unless they have money to fund the suits. Thus it would appear that relators would never have enough evidence to convince funders to invest in their suits. Nonetheless, *qui tam* firms are not without money. In some cases, counsel may be able to cover the full cost of investigation. Nonetheless, firms may still approach ALF entities for funding because it can take nearly a decade for a payout. *Qui tam* counsel could then use the financier’s investment to pay for investigations in other pending complaints.

In other cases, firms might only be able to pay for part of the litigation. Yet relator’s counsel would still approach a financier with a partially investigated case. And this investigation may be sufficient. Many of the costs in *qui tam* litigation have little to do with developing the underlying facts about the alleged fraud.²³⁰ Rather, they stem from tasks such as drafting government briefs, paying for expert witnesses, supplying clerical work to the government, screening for privilege, and assessing witness testimony. Of course, financiers will not have access to evidence from discovery (since this is likely to be the most significant cost of litigation). Nonetheless, ALF entities regularly fund litigation prior to discovery. Otherwise, transferring privileged materials would not be a problem; discovery would be over and so too would the risk of waiver. Indeed, the DOJ also used to make its intervention decisions before discovery. The recent practice of outsourcing discovery appears to have more to do with the agency’s limited resources and less with the underlying merits of *qui tam* complaints.²³¹

In short, in some instances relator’s counsel will run out of resources before they can convince a financier to invest. However, it appears that in the majority

229. *Id.*

230. See *supra* note 64 and accompanying text.

231. *Supra* text accompanying notes 59–64.

of cases relator's counsel should be able to gather sufficient evidence of fraud in order to procure funding.

V. PUBLIC POLICY IMPLICATIONS

As with contracts, an assignment can be void as against public policy.²³² It is difficult to predict the policy challenges to ALF-funded qui tam claims given the lack of literature on the topic. Nonetheless, defendants will face an uphill battle for a simple reason: courts already permit qui tam plaintiffs to sell their claims to third parties. These pre-filing releases, described previously in Part IV, ordinarily involve a relator selling his or her claim to the defendant alleged of committing fraud.²³³ Since the defendant does not bring suit against itself, the sale settles the claim.

The courts of appeals have regularly sustained such releases using a fairly broad test.²³⁴ Such releases are lawful where the government has already obtained *some* knowledge of the alleged fraud, whether through corporate disclosures or any other form of publicly available information.²³⁵ As the courts have concluded, the standard protects the public interest in settling disputes, while at the same time ensuring that the government can pursue its own investigations.²³⁶

Defendants will therefore face difficulties invalidating a partial assignment of a qui tam claim to a litigation financier. The purpose of such an assignment is to aid a relator in filing a claim with the government, therefore fulfilling the courts' pre-filing release standard. Moreover, complete sales of qui tam claims to defendants appear to have a much greater potential for abuse than a partial sale of a claim to a financier.

This Part therefore addresses four potential public policy challenges that could survive the pre-filing release standard. These challenges stem from the unique relationship between ALF entities and relators. Should an ALF entity invest in a qui tam suit, it would do so through a partial assignment of a partial assignment—a legal development that appears to be unprecedented. This raises public policy questions not addressed by the pre-filing release cases.

²³². See 3 FARNSWORTH, *supra* note 167, at 77-79; *Assignments*, *supra* note 168, § 27 (collecting cases).

²³³. See *supra* notes 192-193 and accompanying text.

²³⁴. See sources cited *supra* notes 208-209.

²³⁵. *Id.*

²³⁶. *Id.*

A. *While Dual Partial Assignments Are an Unprecedented Legal Mechanism, There Are a Number of Practical Limitations Preventing Abuse*

Because the relator's interest in a qui tam action is a partial assignment, a contract with an ALF entity would effectuate a partial assignment of a partial assignment. As previously noted, no court appears to have considered the validity of such an assignment.²³⁷ Since partial assignments also confer standing to sue, opponents might argue that multiple partial assignments allow an unlimited number of unrelated entities to sue a single defendant. The implications of such unlimited partial assignment could be serious.

First, each of the partial assignees could disavow or attempt to avoid the binding effect of any judgment entered on the claims. Thus, defendants might be forced to litigate suits against multiple plaintiffs and engage in costly and duplicative litigation.

Second, partial assignees may complicate discovery. Third parties who do not participate in litigation are likely not subject to discovery rules under the Federal Rules of Civil Procedure.²³⁸ Thus, difficulties arise should a relator partially assign its claim to a third party, choose not to sue, and allow the third party to bring the claim on its own. At that point, the defendant might not be able to conduct discovery of the original relator.

Third, it is unclear whether defendants could raise counterclaims against partial assignees. While a defendant might raise counterclaims against the original relator, the relator does not assign its *own* liabilities to all the partial assignees. Thus, it does not appear that a defendant could raise counterclaims against *those* potential plaintiffs.

These concerns are not merely theoretical. These are the same arguments that split the Supreme Court 5-4 in *Sprint Communications Co. v. APCC Services, Inc.*²³⁹ As previously noted, the majority held that assignees for collection purposes only (that is, they received none of the proceeds from the

²³⁷. The Supreme Court in *Stevens* found that the “long tradition of *qui tam* actions,” “combined with the theoretical justification for relator standing . . . leaves no room for doubt that a qui tam relator under the FCA has Article III standing.” *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774, 778 (2000). While there is a history of partial assignments, see *Assignments*, *supra* note 168, § 129, and of complete assignments of qui tam actions, e.g., pre-filing releases, there is no such history of dual partial assignments or partial assignments of qui tam actions.

²³⁸. *Cf.* FED. R. CIV. P. 26, 33-36 (enumerating the responsibilities of “a party” in discovery).

²³⁹. 554 U.S. 269, 271 (2008).

suit) could satisfy Article III standing requirements.²⁴⁰ Nonetheless, Chief Justice Roberts filed a vehement dissent. As the Chief Justice opined, “By severing the right to recover from the right to prosecute a claim, the Court empower[ed] anyone to bring suit on any claim, whether it be the first assignee, the second, the third, or so on.”²⁴¹ Although a partial assignment does not similarly sever the right to recover from the right to prosecute, multiple partial assignments similarly enable anyone to bring suit. Thus, the Chief Justice’s concerns remain.

Despite these concerns, the Chief Justice’s opinion only commanded four votes. By contrast, the majority argued that there are a number of practical limitations on abusive assignments. First, the Federal Rules of Civil Procedure provide a mechanism to prevent the fragmentation of legal claims.²⁴² Under Rule 19(a), the court may order a required party to join the case as an involuntary plaintiff.²⁴³ Courts regularly use this provision to join partial assignees as parties and could use the same provision to join ALF entities.²⁴⁴ Second, “a district court can, if appropriate, compel a party to collect and to produce whatever discovery-related information is necessary.”²⁴⁵ Third, with regard to counterclaims, the court might allow defendants to file a third-party complaint against the original relator under Rule 14(a).²⁴⁶

Nonetheless, *Sprint* does not close the door completely to future litigation regarding the validity of multiple partial assignments. The majority made an important concession that may persuade courts to reject these assignments. As the Court held, “there has been no allegation that the assignments were made in bad faith. . . . Were this not so, additional prudential questions might perhaps arise.”²⁴⁷ The majority does not define what constitutes bad faith or what prudential questions may arise. Yet district court judges may latch onto this line to find multiple partial assignments unlawful.

240. *Id.* at 273-75.

241. *Id.* at 302 (Roberts, C.J., dissenting) (emphasis omitted).

242. *Id.* at 292 (majority opinion).

243. FED. R. CIV. P. 19(a)(2).

244. 6A WRIGHT ET AL., *supra* note 154, § 1545 (“In practice, a defendant faced with an action by only one of the parties to whom the defendant ultimately may be liable may move to join the absent person in order to avoid the burden of multiple lawsuits.”).

245. *Sprint Commc’ns*, 554 U.S. at 292 (citing FED. R. CIV. P. 26(b)(1), 30-31, 33-36).

246. *Id.* (citing FED. R. CIV. P. 14(a)).

247. *Id.*

B. Relators Have an Incentive Not to Complicate DOJ Prosecutions Through Multiple Partial Assignments

Apart from the potential unfairness to defendants, multiple partial assignments may interfere with DOJ prosecutions of qui tam claims. The federal Anti-Assignment Act contextualizes these concerns.²⁴⁸ The Act prohibits plaintiffs from assigning claims against the government to third parties. A qui tam claim is not one against the government, thus the Act would not bar a relator from partially assigning her claim. Nonetheless, the rationale behind the statute might provide courts a reason to invalidate partial assignments made by relators.

As the courts have long recognized, one purpose for the Anti-Assignment Act is “to enable the Government to deal only with the original claimant.”²⁴⁹ That same rationale could prohibit relators from partially assigning their claims. Once a whistleblower begins to partially assign its suit, the government would be forced to deal with a host of potential parties with competing goals and interests. This could complicate the DOJ’s efforts to litigate the suit. For example, relators retain statutory rights to challenge the DOJ in court should the agency choose to settle or dismiss the action.²⁵⁰ It is unclear whether partial assignees would also retain such rights. At the very least, the presence of multiple partial assignees might increase the probability that the relator would leak confidential information from the DOJ or decrease transparency about the relator’s motives for bringing the suit.

As before, however, there are prudential limits to these concerns. If a relator partially assigned its claims to too many entities, the DOJ might simply decline to intervene or even dismiss the suit. Thus, relators have an incentive not to excessively fragment their claims.

C. ALF Would Neither Prolong Claims nor Complicate Settlements

Another possible ground for a public policy objection is that a qui tam relator takes on a quasi-governmental role in prosecuting the claim.²⁵¹ As a

^{248.} 31 U.S.C. § 3727 (2012).

^{249.} *United States v. Shannon*, 342 U.S. 288, 291 (1952) (quoting *United States v. Aetna Sur. Co.*, 338 U.S. 366, 373 (1949)).

^{250.} 31 U.S.C. § 3730(c)(2)(B).

^{251.} One of the lead proponents of the False Claims Amendments Act of 1986, Representative Howard Berman, characterized the Act’s purpose as to “deputize ready and able people who have knowledge of fraud against the government to play an active and constructive role through their counsel to bring to justice those contractors who overcharge the government.”

general rule, a public officer cannot assign unearned salary or fees of his or her office.²⁵² The rule prevents public officers from being deprived of their means of support, which might impair performance of their services.²⁵³ Thus, a defendant might argue that a relator cannot partially assign its claims due to the risk of impropriety on the relator's part. In particular, defendants would likely claim that financing incentivizes relators to draw out suits in hope of gaining larger settlements.

1. *Gaining Undue Influence over the Relator*

In theory, ALF entities could force relators to hold out for larger settlements based on the terms of the financing contract. ALF entities have publicly stated that they are “passive investors” and have “no control over the litigation whatsoever.”²⁵⁴ This claim is hard to verify, since funding contracts are subject to confidentiality agreements.²⁵⁵ Nonetheless, one such contract in a multi-billion-dollar dispute has recently become public: Burford's funding agreement with Ecuadorian plaintiffs suing Chevron.²⁵⁶ The agreement became public when U.S. District Court Judge Kaplan issued an order for the entire case file of the plaintiffs' lead attorney, Steven Donziger. Moreover, the contract casts doubt on the funders' alleged passivity.²⁵⁷

For the purposes of evaluating undue influence, the most relevant contract terms are those involving settlement.²⁵⁸ There, the contract provides that Burford will receive multiples of \$55 million for every \$1 billion in recovery (\$55 million, \$110 million, and so on). However, if the claimants receive less than \$1 billion but more than about \$69.5 million, Burford still gets the \$55 million payout. In short, the terms of the contract penalize the claimants if they settle for less than \$1 billion.

The Burford contract may be an anomaly. Then again, ALF entities might place similar settlement terms in contracts with relators and their counsel. Should this be the case, the signatories would likely fall under the same

United States *ex rel.* Truong v. Northrop Corp., 728 F. Supp. 615, 618 (C.D. Cal. 1989) (quoting 132 CONG. REC. H9388 (daily ed. Oct. 7, 1986) (statement of Rep. Berman)).

252. 3 FARNSWORTH, *supra* note 167, at 77-79.

253. *Id.*

254. Banzaca, *supra* note 85, at 5.

255. Steinitz, *supra* note 25, at 475-76.

256. *See supra* note 28 and accompanying text.

257. Steinitz, *supra* note 25, at 471-73.

258. *Id.* at 467-68.

pressures to increase the size of settlement. This could unnecessarily prolong cases and complicate the DOJ's efforts to settle the dispute.

2. *Gaining Undue Influence over Counsel*

It is further possible that ALF entities could influence counsel to prolong litigation and pursue larger settlements. As the Burford agreement reveals, ALF entities do far more during their due diligence than simply evaluate the “fit” between attorneys and the claims. The Burford contract requires that the claimants hire “Nominated Lawyers,” chosen jointly by the funder and the claimants.²⁵⁹ In Burford's case, the Nominated Lawyer (James Tyrrell) has close ties to the company's chairman and serves as Burford's counsel in other matters.²⁶⁰ As Nominated Lawyer, Tyrrell has an array of responsibilities, including a duty to

devote sufficient time and attention[,] . . . provide all . . . material Documentation[,] . . . submit to examination by the [lawyers] for the preparation of written statements[,] . . . consult with the [lawyers] as they [prepare to pursue, enforce or settle] the Award[,] . . . appear at any proceedings or hearings[,] . . . [and] cause all persons related to the Claim . . . to submit to examination by the [lawyers].²⁶¹

The Nominated Lawyer therefore not only exerts some degree of control over the litigation, but also decides whether to disclose privileged materials to Burford (by determining whether or not they are “material Documentation”). The Nominated Lawyer must also authorize any payments coming from Burford's contribution.²⁶² Finally, the Nominated Lawyer “can be replaced only with the ‘Funder's approval (which shall not be unreasonably withheld).”²⁶³

The risks that Nominated Lawyers pose to *qui tam* claims are therefore twofold. First, Nominated Lawyers may allow financiers to influence investigations and potentially interfere with settlement negotiations. As a matter of policy, courts may be unlikely to enforce such contractual provisions.

Second, the Nominated Lawyers may raise ethical questions under the Model Rules of Professional Conduct. A Nominated Lawyer's close ties to a

²⁵⁹. *Id.* at 472.

²⁶⁰. *Id.*

²⁶¹. *Id.* at 474-75.

²⁶². *Id.* at 473.

²⁶³. Parloff, *supra* note 21.

funder may impair his or her ability to give impartial advice.²⁶⁴ Additionally, the contract's removal provisions may also violate the Model Rules. The American Bar Association has stated that an agreement permitting an ALF supplier to have veto power over the selection of counsel may inappropriately limit the client's right to terminate counsel, in violation of Model Rule 1.16(a).²⁶⁵ The Model Rules may therefore pose problems should an ALF entity seek to use a similar contract in a qui tam claim.

3. Responses to These Concerns of Impropriety

As previously noted, the Burford contract may be an anomaly. The contract relates to an international dispute involving foreign claims, foreign actors, and foreign courts. Burford therefore did not anticipate that its contract would see the inside of an American courtroom.

Qui tam actions, on the other hand, are always subject to DOJ scrutiny. As a result, it is likely that the DOJ would request funding contracts as part of the agency's due diligence.²⁶⁶ Thus, ALF entities are unlikely to include terms regarding settlement or Nominated Lawyers, lest the DOJ look unkindly on such provisions.

Additionally, even if ALF entities did include such settlement or Nominated Lawyers terms in their contracts, it is unlikely that they would have any substantive impact on the DOJ's litigation. Under the False Claims Act, the DOJ has primary authority to negotiate settlements with the defendant.²⁶⁷ While the relator can challenge any resulting settlement in court, judges generally treat a settlement negotiated by the government with considerable deference.²⁶⁸ Additionally, it is unlikely that litigation financing would result in a greater number of challenges. It is already standard practice for relators to challenge DOJ settlements, since the relator has little to lose from a court hearing.²⁶⁹ Thus, ALF would likely have little effect on the length of litigation.

^{264.} SEBOK & WENDEL, *supra* note 11, § IV.A.1. It is still possible for the Nominated Lawyer to avoid violating the Model Rules by disclosing these conflicts to the client and seeking informed consent. *Id.* This appears to be the case in the Burford contract, given the number of disclosures relating to Tyrrell's relationships and employment.

^{265.} *Id.*

^{266.} See *supra* Part II.

^{267.} See ALICE G. GOSFIELD, MEDICARE AND MEDICAID FRAUD AND ABUSE § 5:18 (2013).

^{268.} *Id.*

^{269.} *Id.*

Finally, it is unlikely that defendants could prove that *qui tam* relators are *per se* barred from assigning claims. Since *qui tam* relators are only partial assignees of the government's damages claim, they do not inherit all of the rights and privileges of governmental office.²⁷⁰ Thus, as quasi-governmental entities, relators can likely assign their claims as they see fit. The litigation involving "pre-filing releases" of *qui tam* claims confirms this outcome.²⁷¹ If a relator can lawfully sell her entire claim, it follows that a relator can also lawfully sell a portion of her claim.

D. ALF Entities Would Not Encourage Frivolous Suits

Opponents may finally argue that ALF would increase the number of frivolous *qui tam* claims. First, third-party financing might lessen the legal constraints and practical disincentives that prevent whistleblowers from filing meritless claims. Second, ALF entities may disproportionately fund those cases declined by the DOJ, which are more likely to be meritless.

1. ALF Entities Are Unlikely to Skew Relators' Incentives to File Suit

The courts have long recognized that the difficult process of bringing a *qui tam* suit deters frivolous claims.²⁷² A false claims plaintiff will usually confront defendants with significant litigation coffers and access to preeminent legal talent. Should the suit proceed to trial, the relator frequently must prove a complex case requiring a substantial investment of time to plead and prove. Then, even if the relator prevails at trial, there is a strong likelihood of an

270. The majority in *Stevens* draws this distinction to address one of the dissent's arguments. The dissent argues that if a relator "act[s] as an assignee of the Federal Government's claim . . . *qui tam* actions may be brought by relators against the same category of 'persons' that may be sued by the Attorney General." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 796-97 (2000) (Stevens, J., dissenting). In response, the majority writes in a footnote that "we are asserting that a *qui tam* relator is, in effect, suing as a *partial* assignee of the United States." *Id.* at 773 n.4. Therefore, the relator does not have the same status to sue as the Attorney General and cannot escape the bounds of the Eleventh Amendment.

271. *See supra* notes 192-193 and accompanying text.

272. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1091-92 (C.D. Cal. 1989); *see United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1154 (2d Cir. 1993) ("Because the *qui tam* relator: (1) funds the prosecution of the FCA suit, (2) will receive a private share in the government's recovery only upon prevailing, and (3) may be liable for costs if the suit is frivolous, the relator's personal stake in the case is sufficiently ensured.").

immediate appeal. “Thus, a plaintiff’s lawyer in a false claims action, invariably working on a contingency fee basis, faces enormous practical disincentives to proceeding with the suit.”²⁷³

Additionally, the “practical disincentives” extend beyond the cost of litigation. Relators often lose well-paying jobs, cannot find alternative employment, and forfeit employment benefits such as health and life insurance.²⁷⁴ While the courts can compensate these losses by increasing the size of the relator’s share, whistleblowers must still endure years of litigation.²⁷⁵ Even then, it is uncertain whether the suit will result in any recovery at all.

ALF participation may therefore skew the incentives for relators and their counsel to bring suit. Instead of having to wait years for a recovery, the parties would receive a portion of the payout upfront. As a result, relators can live in relative comfort prior to the DOJ’s intervention decision, and counsel need not worry about dipping into its own litigation coffers. Thus, ALF participation may lead to an increase in filings of dubious merit with the DOJ.

The potential ramifications are not merely prudential. Opponents might argue that ALF participation undermines the statutory framework of the FCA. Recall that, under the Act, relators receive between fifteen to twenty-five percent of any payout if the government intervenes, and twenty to thirty percent if the DOJ declines.²⁷⁶ These percentages are not an accident; as the courts have long recognized, “[t]he history of the FCA *qui tam* provisions demonstrates repeated congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.”²⁷⁷ Opponents might therefore argue that ALF participation defeats Congress’s intent in passing the FCA by over-incentivizing whistleblowers to bring suit, and therefore should be void on public policy grounds.²⁷⁸

273. *Stillwell*, 714 F. Supp. at 1092.

274. See, e.g., *United States ex rel. Johnson-Pochardt v. Rapid City Reg’l Hosp.*, 252 F. Supp. 2d 892, 902 (D.S.D. 2003); see *United States ex rel. Alderson v. Quorum Health Grp., Inc.*, 171 F. Supp. 2d 1323, 1338 (M.D. Fla. 2001).

275. See *Alderson*, 171 F. Supp. 2d at 1340-41.

276. 31 U.S.C. § 3730(d)(1)–(2) (2012).

277. *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994); accord *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 964 (9th Cir. 1995); *United States ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039, 1046 (S.D.N.Y. 1996).

278. See *Northrop*, 59 F.3d at 958 (opining that courts must first look to Congress’s intent in passing the FCA in order to determine the enforceability of contracts between relators and third parties).

Nonetheless, these concerns appear to be overblown for four reasons. First, relators are already heavily incentivized to bring suits. In recent years, DOJ awards have been steadily increasing, and several relators have received shares in the hundreds of millions of dollars.²⁷⁹ Legal practitioners have acknowledged that these rewards provide “huge incentives” to file suit and are increasing the number of complaints filed with the DOJ.²⁸⁰ And prosecutors have acknowledged that the agency has “received a flood of whistleblower suits” following the recent payouts.²⁸¹ Thus, as one practitioner has written, ALF investment is unlikely to affect the number of people coming forward with cases, as the large payouts probably provide enough incentive to file suit— independent of what funds might offer.²⁸²

Second, ALF entities are aware that paying outsized amounts to potential plaintiffs would lessen claimants’ incentives to properly litigate suits.²⁸³ For this reason, financiers ordinarily contribute a relatively low percentage of the estimated claim value—between five and ten percent.²⁸⁴ Thus, ALF support is less a means for a get-rich-quick scheme, and more a method of tiding whistleblowers over until the DOJ issues a final award. It is therefore unlikely that ALF participation would greatly increase the incentives for whistleblowers to file meritless suits.

Third, even if financiers do incentivize relators to come forward, the financiers already have a mechanism to screen potentially frivolous suits: the due diligence process. Since financiers are unlikely to fund these meritless suits,²⁸⁵ relators have no additional incentive to file a claim with the DOJ. Moreover, the relators that are incentivized to report based on the prospect of ALF funding are also the most likely to seek funding prior to filing a claim with the DOJ. Relators risk significant repercussions to their employment as a result of filing. And if relators are primarily filing for the upfront payment, they will seek funding first, not last.

Finally, ALF participation might result in *fewer* cases being filed with the DOJ. As previously noted, the presence of an ALF entity might serve as a proxy for merit to the DOJ, and the agency might intervene more often in ALF-

279. Bentivoglio et al., *supra* note 61.

280. *Id.*

281. *Id.*

282. Turley, *supra* note 51.

283. Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 106 (2010).

284. Banzaca, *supra* note 85.

285. *See supra* Part II.

backed suits. Should this be the case, all potential relators would have an incentive to seek outside funding. Thus, when a relator does not receive outside funding, he or she would have a lesser incentive to file a claim with the DOJ.

2. *ALF Entities Are Unlikely to Disproportionately Fund Meritless Suits*

Given the high cost of financing, opponents might argue that relators would only seek funding when the government *declines* to intervene in a suit. At that point, the relator is forced to litigate the action on its own – and bear all the costs. Assuming that the government primarily makes its decision to intervene based on the merits, ALF participation in declined actions would disproportionately further meritless cases.²⁸⁶ While ALF entities might still profit because it is cheaper for defendants to settle rather than litigate, the informational value to the government of ALF resources would be marginal.

This argument suffers from several flaws. First, given the DOJ’s policy of outsourcing litigation to qui tam firms, ALF entities are likely to play a substantial role in funding relators’ *pre-intervention* investigations (rather than only declined actions). With the additional resources, relators can present the government with a full, well-documented, and well-investigated picture of the fraud and therefore increase the probability that the DOJ will intervene. Should the agency do so, the relator (and ALF entity) would have minimal influence over settlement negotiations, as that decision is primarily within the hands of the DOJ.²⁸⁷ Therefore, ALF entities would not appreciably extend the litigation process for cases in which the DOJ does intervene.

Second, even if an ALF entity does fund a declined case, this does not mean that the suit lacks merit.²⁸⁸ As previously noted, the DOJ evaluates several secondary criteria in deciding whether to intervene. Thus, assuming ALF entities have an incentive to screen out frivolous cases, they would only take on those suits that were declined for reasons other than merit.

286. See *supra* Part II.

287. See Engstrom, *supra* note 75, at 1271-72 (“[T]he FCA aims to mitigate concern about private overenforcement by granting the Attorney General – and, by further delegation, the DOJ’s Civil Fraud Section – substantial authority to oversee and control qui tam litigation. Thus, the DOJ may dismiss or settle a qui tam case out from under a private relator, subject only to a basic fairness hearing.”).

288. This is particularly true if the ALF entity was not involved with the qui tam firm’s pre-intervention investigations. In this scenario, relator’s counsel might simply have lacked the resources to fully investigate and present the suit to the DOJ, resulting in the decision to decline intervention.

CONCLUSION

This Note has sought to explore the implications when two fields of law collide: alternative litigation finance and qui tam. The growth of ALF in qui tam claims is a recent but expanding trend. To the extent that qui tam represents the privatization of law, the financing of whistleblower claims by third parties will likely have serious implications for our prosecutorial system. As this Note establishes, the participation of ALF entities in qui tam claims can significantly aid the DOJ in its fight against fraud. The test is whether relators and their counsel can use the strategies outlined above to establish common interest with financiers, and ensure that third parties can adequately vet potential claims.

The potential benefits of ALF, although significant, should not deter policymakers and relators from also exploring alternative means of funding qui tam suits. Innovative statutes that mirror the Criminal Justice Act could provide federal funds for attorneys, experts, and services necessary for the adequate representation of relators. Similarly, Congress could provide grants to the many non-profit organizations dedicated to counseling and supporting whistleblowers during their litigation. Relators could even “crowdfund” their claims by forming trusts and allowing investors to buy a stake in the entities. The possibilities are numerous. But ALF can provide a powerful tool in relators’ arsenal along the way.