Does Private Enforcement Attract Excessive Litigation? Evidence from the False Claims Act

David Y Kwok
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Abstract

Private litigation can help correct wrongs, but the right to litigate can also be abused. The structure of the U.S. judicial system can make it difficult to determine how frequently private parties misuse litigation. Utilizing a new data set of False Claims Act litigation, I conduct a systematic evaluation of private litigation in the fraud context. I find law firms generally pursue a cooperative strategy with the Department of Justice rather than adopting abusive litigation practices. This suggests that private litigation may effectively complement public enforcement and that such litigation may be helpful in other areas of law.

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I. Introduction

The United States has a reputation as one of the most litigious countries, but the normative importance of this claim depends on a basic question: do people bring forward “good” cases for litigation? This is a difficult empirical problem for numerous reasons, beginning with the definition a “good” case. Even with a definition, we need some method of systematically evaluating actual cases. We typically rely upon judges and juries to determine the legitimacy of a specific case, but case outcomes may vary greatly depending on the performance of the attorneys and the particular judge and jury members. Worse yet, many cases end up being settled and therefore never exposed to independent judgment. Even if the settlement amounts are reported, the amounts may conflate the defendants’ beliefs about the claims with their concerns about litigation circumstances.

While these are serious empirical challenges, measuring the quality of private litigation has broad implications for the design of our governance systems. Private litigation is but one potential tool in addressing problems and conflicts in society; alternative dispute resolution, social and market pressures, and even physical force can come into play. Perhaps the most relevant alternative, though, is public enforcement, in which a public official is responsible for initiating and litigating against offenders. Public enforcement is standard for criminal actions, but both private and public enforcement are important in a variety of important areas including civil rights, the environment, healthcare, and antitrust. If private litigants are prone to improper litigation, though, perhaps we should consider greater restrictions on private litigants and increase reliance upon public enforcement or other tools.

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4 See, e.g., Chesney v. Marek, 720 F.2d 474 (7th Cir. 1983) (describing the importance of attorneys’ fees in the private enforcement of civil rights).
In this article, I utilize a new empirical data set constructed from Department of Justice (DOJ) records to help address this question of private litigation quality. Due to the unique procedural nature of cases under the False Claims Act (FCA), the DOJ receives a copy of every piece of litigation filed. This presents an unusual opportunity to review systematically an entire set of cases before they reach the courts or the settlement process. I apply the DOJ’s judgment on the cases as a proxy for litigation quality, and I find that the private litigants do not appear to be abusing the judicial system.

Of course, the individuals and law firms that participate in litigation under the False Claims Act may not be representative of private litigants in the U.S. as whole, which may limit some of the external validity of this article. Nonetheless, there are reasons to believe that the FCA could be particularly inviting to abusive litigation. For one, the FCA does not have any traditional requirement of standing, effectively allowing anyone to file a case. Additionally, the DOJ may end up handling litigation of any case, which could reduce the amount of investment and efforts needed from the private parties. Third, the FCA provides trebled damages, creating large potential payoffs.

This article evaluates whether private parties are attempting to take advantage of this litigation system. In particular, I consider whether law firms slack. Rather than carefully determining the merits of each case before filing, a law firm could simply become a "filing mill," churning out a high volume of unfiltered cases for the DOJ to investigate. The law firms are repeat players in FCA litigation, which allows us to compare their performance. This new data set clarifies whether law firms pursue such a filing mill strategy. In the next part, I briefly review the False Claims Act's *qui tam* provisions and procedure. Then in Part III I review some of the literature concerning the private enforcement in the modern context. I next outline my identification strategy based on Freedom of Information Act data in Part IV. In Part V I test for the presence of the filing mill strategy, followed in Part VI with some tests for government deterrence of filing mill behavior. Part VII concludes with suggestions for future work.

II. Background on the False Claims Act

The False Claims Act (FCA) proscribes fraud on the federal government through the imposition of both civil and criminal penalties. Besides traditional public enforcement, the Act also contains *qui tam* provisions, which allow private litigants known as relators to pursue civil actions and prosecute cases of fraud separately from the Department of Justice (DOJ). Dating back to the Abraham Lincoln presidency, the *qui tam* provisions received renewed attention in 1986 when Congress enhanced the reward structure. Today, relators can receive as much as 30% of the civil recovery, which can

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13 See Beck, 78 N.C.L. REV. 539, 554-65 for a brief history.
be substantial given the treble damages provisions in the statute. They do not have to satisfy the traditional requirements of standing \(^{14}\); as such, they have a remarkable amount of flexibility in pursuing cases of their choice. From a private enforcement perspective, relators are nearly on par with public enforcement agents in their ability to select cases. The relators, often whistleblowers within an organization, typically obtain representation by counsel on a contingency fee basis; they are not responsible for attorneys’ fees if the case is unsuccessful. \(^{15}\)

Since the statute's revision in 1986, there has been tremendous growth in qui tam litigation, as whistleblowers and other private parties helped recovery billions of dollars in fraud. \(^{16}\) These successful whistleblower cases have inspired new legislation such as the Dodd-Frank Wall Street Reform and Consumer Protection Act to increase whistleblower rewards. \(^{17}\) At the same time, there continue to be allegations of private citizens selecting unmerited cases. \(^{18}\)

For purposes of this article, the unusual procedure of qui tam is of particular importance. The DOJ effectively has a right of first refusal on every FCA qui tam case. \(^{19}\) Upon the initial filing by a relator, the court will immediately seal and stay the case for 60 days. During this time, the DOJ investigates the allegations. The government typically requests time extensions for investigation, which are routinely granted. After an average of 13 months, the DOJ announces whether or not it is 'intervening' in the action, also known as its 'election' regarding intervention. If it chooses to intervene, it either takes over litigation of the case or dismisses the case outright and may do so over the objections of the relator. \(^{20}\) If it does not intervene, the relator is then free to litigate the case. Should the relator attempt to settle or dismiss the action, however, she must obtain DOJ consent. \(^{21}\)

If the DOJ intervenes in the qui tam action, the relator is entitled to receive between 15 and 25 percent of the amount recovered. \(^{22}\) If the DOJ declines to intervene in the action and the relator prevails in litigation against the defendant, her share is between 25 to 30

\(^{15}\) See Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1, 58 (2002).
\(^{19}\) See § 3730(b).
\(^{20}\) § 3730(c)(2)(A).
\(^{21}\)§ 3730(b).
\(^{22}\) § 3730(d).
percent. Regardless of intervention, a successful relator is also entitled to legal fees from the defendant.

The DOJ Civil Division’s Commercial Litigation Branch (Fraud Section) has centrally collected data on qui tam cases since 1986. Its officially published statistics show the startlingly poor success rate of non-intervened cases. According to the published figures as of September 20, 2009, only 239 out of 3,920 non-intervened cases resulted in a settlement or judgment in favor of the United States, a 6% success rate. In comparison, of the 1,134 cases in which the DOJ intervened, 1,076 resulted in a settlement or judgment in favor of the United States, a 95% success rate. A disheartening inference some have drawn from this discrepancy is that the private litigants are pursuing weak cases. There are, however, a variety of other possible explanations. The DOJ might simply intervene in all of the best or easiest cases. It may be that judges, juries, or the defendants draw negative implications about the validity of the litigant’s case due to the DOJ’s non-intervention and thus treat the relator more harshly than otherwise deserved. Alternatively, it may be procedurally difficult to work a fraud case without the actual defrauded party, the United States, in litigation. Resolving the difference in final success rates would require substantial investigation into each case and the parties involved. I do not undertake such an effort at this time.

III. The Private Right of Action

While the FCA’s qui tam provisions are unusual in modern legislation, this form of litigation has a long history in the common law. Originally, the common law relied heavily upon private individuals to initiate litigation. The concept of qui tam was recognition of the need for public interests to be vindicated in the common law’s private dispute framework, allowing individuals to sue on behalf of a king. As the power of centralized government in the United Kingdom grew, public enforcement would eventually overshadow the role of private litigation in serving such public interests.

Today, tort and contract actions continue with the private dispute resolution model, but many areas of law now follow a public enforcement model. This is not to say that private individuals are no longer involved in, for example, the enforcement of criminal law. Rather, private individuals do not take the lead in the formal judicial process. In a criminal case, they may alert police to the commission of a crime, act as witnesses in a trial, and serve as members of a jury. The official decision and power to prosecute a

23 Id.
24 Id.
25 Department of Justice, False Claims Act Statistics, supra note 16.
defendant criminally, though, remains with a public official. These forms of private enforcement are outside the scope of this article.

There may be a variety of historical and normative reasons for the shift towards public enforcement, including the importance of the public interest, the government's capacity for litigation, and the severity of potential sanctions. This article is not meant to be a comparative evaluation of public versus private enforcement as exclusive regimes, though. Instead, I accept public enforcement as a given and consider the possibility of private litigation as a supplemental enforcement tool. Thus, I look towards the modern exceptions of providing a private right of action. Here, the government has the power of public enforcement, but private enforcement is also available. Stephenson provides a review of the instrumental arguments surrounding a private right of action, which I summarize briefly here.\(^\text{29}\) In conjunction with public enforcement, private enforcement may provide greater resources and efficiency in prosecuting offenses.

**Magnitude of enforcement**

Private enforcement can provide enforcement resources beyond a public enforcement agency’s efforts.\(^\text{30}\) A move towards private enforcement effectively shifts the costs of detection and litigation towards private parties, both enforcers and defendants. Private enforcement may also lead toward a level of enforcement that better reflects societal preferences. To the extent there are differing beliefs as to the proper level of enforcement, individuals who place greater value on a higher level of enforcement can directly do so, without their preferences being diffused through the legislative system.\(^\text{31}\) Political pressures may result in distorted levels of enforcement by an agency.\(^\text{32}\)

At the same time, however, those political decisions about enforcement level may be the result of democratically legitimate tradeoffs. Private enforcement may disrupt such agreements, leading to the need for more detailed legislation. As to legitimacy, there is no direct method for other private citizens to hold a particular private enforcer liable for poor selection of cases.\(^\text{33}\)

Private enforcement may also result in excessive enforcement. Except for advocates who believe there is no normative upper limit to enforcement,\(^\text{34}\) private parties may not fully consider all of the costs and tradeoffs in choosing litigation. Landes and Posner’s theory of private enforcement results in excessive levels of private enforcement.\(^\text{35}\) There may be

\(^\text{30}\) Id. at 107.  
\(^\text{31}\) Id. at 109.  
\(^\text{32}\) Id. at 110.  
\(^\text{33}\) Id. at 119.  
diffuse beneficiaries of the proscribed activity that may not be represented in the action.\textsuperscript{36} Alignment of private and public incentives is a constant concern in allowing private rights of action.

\textit{Efficiency of enforcement}

Private parties may be better situated to monitor compliance and detect legal violations, thus having a structural efficiency advantage.\textsuperscript{37} Whistleblowers and other private enforcers may not have to invest heavily in detecting offenses if they learn of these offenses in the course of their regular work. In contrast, public enforcers must invest heavily for the purpose of detection, and we may be concerned about the invasiveness of public surveillance and investigation. A cost advantage in detection is not determinative, of course, as we would consider the costs of litigation and the aftermath for private enforcers.

A “competitive” market of private enforcers may also stimulate innovation: new techniques for detection, dispute settlement, or legal advocacy that may improve on current methods.\textsuperscript{38} Furthermore, private enforcement of public laws may theoretically improve the efficiency of the legal system and public enforcement infrastructure in transitioning countries.\textsuperscript{39}

Private enforcement, however, may also disrupt the efficiency of public enforcement actions. It may be that a long-term, cooperative relationship between regulators and the regulated entities is the most efficient method of achieving compliance.\textsuperscript{40} It is also unclear if a government body or a private organization would be best at coordinating strategic suits that would improve overall compliance in an industry.\textsuperscript{41} Private suits may target firms for which compliance might be extremely costly or not satisfy a cost-benefit analysis.\textsuperscript{42}

Enforcement efficiency may be changed via the differing incentives for settlements. Coffee notes that private rights of action have substantial problems, particularly with regards to settlements.\textsuperscript{43} Private enforcers can negotiate with the potential defendants. While the private enforcer’s lack of a long term relationship with the potential defendant might prevent capture, they might enter into settlements that are not in the public’s long term interest. Particularly, risk aversion may lead to inadequate settlements, as the private enforcer may simply want to come out ahead.

\textsuperscript{36} Stephenson, \textit{supra} note 15, at 115.
\textsuperscript{37} \textit{Id.} at 108 note 42.
\textsuperscript{38} \textit{Id.} at 112.
\textsuperscript{40} Stephenson, \textit{supra} note 15, at 117.
\textsuperscript{41} \textit{Id.} at 119.
Furthermore, private enforcement may necessitate the statutory development of more specific language. Statutes and administrative regulations are often drafted to be rather broad and overinclusive, as there is a cost to specific drafting, and prosecutorial discretion can handle the difference. The involvement of private enforcement removes this discretion, however, thus necessitating precise regulations to avoid over-inclusive or predatory litigation. Agencies may have superior expertise in making strategic decisions as to proper enforcement.

*Fairness*

Beyond the economic arguments regarding private rights of action, there may also be fairness and democracy concerns. Allowing a private right of action might encourage individual participation in governance, thus strengthening the ideal of democracy, regardless of the specific outcomes of the litigation. Private enforcement may also be a “fairer” legal situation. Courts may be more deferential to a public prosecutor or agency. In comparison, courts might be more even handed in a dispute between private parties. Furthermore, litigation losses between private parties do not have the same stigma as that of incarceration or criminal conviction.

*Measuring Private Enforcement Effectiveness*

After considering the theoretical tradeoffs in allowing private litigation, I now turn to the challenge of empirical support. I start by considering the types of cases selected by the private enforcers. A basic question is of true defendant liability. Ideally, private enforcers would not commit any false positive errors in selection. In other words, each defendant selected by private enforcers actually had committed the offense. False positives could stem from both carelessness and malice.

Minimizing false positives alone is not enough. Private enforcers might select marginal cases in which the offense may be de minimis or trivial. A more economically precise formulation is that the social costs of prosecuting the defendant could outweigh the total benefits from prosecution. A private prosecutor might pursue such a case because her private benefits, including attorneys’ fees, for example, might be sufficient to offset the cost of litigation. Her private benefits, however, may simply be inter-party transfers that do not generate much societal value. Private enforcers might also choose to litigate instead of applying less confrontational methods that could be equally successful.

Similarly, private litigation might interfere with non-litigious public enforcement efforts. A defendant might normally choose to cooperate with government regulators, but the private initiation of litigation could trigger defensiveness. If defendant corporate executives react in such a hostile manner, the corporate bureaucracy might turn away from facilitating future compliance and instead emphasize obscuring past liability.

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46 *Id.* at 227 note 25.
The challenge in measuring these factors is that cases tend to be distributed across a variety of courts, judges, and juries. These groups may have very different conceptions of social values and appropriate litigation. The result may be judicial decisions that do not systematically reflect the quality of the original case brought by the private enforcer.

Furthermore, measuring the efficiency or fairness of any one case requires detailed analysis with often difficult hypothetical questions. For example, would a public enforcer have found it difficult to discover the case brought by the private enforcer? How would they have compared in terms of cost of litigation? Measuring aggregate efficiency or fairness is even more challenging.

As a result, many of the published empirical studies are limited to descriptive case studies. Glicksman’s study of private environmental suits is a typical example, describing how those suits created new environmental regulatory programs, reprioritized enforcement efforts, and accelerated regulatory implementation. Nonetheless, despite Glicksman’s admiration for the success of the private efforts, he does not attempt any cost-benefit comparison for the private role, thus crippling any comparative effort, nor is there guidance as to the volume of non-meritorious environmental litigation.

While not a direct evaluation of efficacy, some research in environmental rights suggests that public and private enforcement may be roughly comparable. Naysnerski and Tietenberg find private enforcement to be a substitute for EPA enforcement. They observe a decline in EPA cases from 1978 to 1984, paralleled by a concurrent rise in citizen enforcement actions. The citizen suits appear to be validated as “appropriate” by courts, and they appear to be motivated more by statutes that grant financial penalties than by statutes granting injunctive remedies.

In defending such private actions, Thompson argues that nonprofit environmental organizations that conduct the majority of litigation tend to be larger and thus more representative of generalized public interests (as opposed to narrow environmental interests). His first claim, however, as to the majority of litigation being conducted by these groups, may be misleading, as it does not consider the types of litigation and only the case volume. The next logical inference, as to the representative nature of the larger organizations, it rather lacking—it could just as easily be argued that larger groups

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48 *Id.* at 362.
49 *Id.* at 373.
50 *Id.* at 392.
51 *See id.* at 390.
52 Naysnerski & Tietenberg, *supra* note 39.
53 *Id.* at 35-36.
54 *Id.* at 38.
55 *Id.* at 45.
became larger by advocating clear, strong principles as opposed to compromise among interests.

Selmi supports the private inefficiency claim with some basic data, comparing the effectiveness of private rights of action in housing and employment discrimination. He looks primarily at rates of litigation and success. As with any study of litigation, it is extremely difficult to establish the comparative validity of these numbers. Instead of relying solely on those values, Selmi also considers the types of litigation pursued, thus arguing that the government is underperforming in pursuing the public interest in comparison with the private litigation. Nonetheless, we cannot detect the general legitimacy of the claims outside of the judicial finding, nor do we have clear insight as to what portion of unperceived injurious events actually became claims.

Donahue & Siegelman note that the detection ability difference between private parties and the government is relevant to the regulated firms’ response. They argue that it is difficult for private plaintiffs to detect discrimination in hiring, but easier for private parties to identify (or at least claim) discrimination in firing. Thus, they infer the private party’s detection advantage in the latter case led to a decrease in hiring of protected groups due to the threat of private litigation. They observe a change in discrimination patterns that fit in line with such this explanation: that the grant of private litigation has changed incentives for employers.

Coffee combines anecdotal evidence with other studies to argue that private attorneys general do not substitute for public detection and enforcement. Coffee surrounds a case study of “Fine Paper,” an antitrust case, with other anecdotal observations of private attorney general litigation. Coffee finds that private attorneys do not have lower search costs—rather than conducting independent investigations, they tend to rely on the government’s investigations (or those of other attorneys) to pursue actionable harms. As a result, they generally do not broaden the scope of enforcement, but rather intensify the penalty upon offenders. Worse yet, the incentives surrounding their compensation result in collusion and delay, particularly in cases of non-pecuniary damage (such as environmental harms). The value of the attorneys’ services is linked to time spent in litigation. Thus, private attorneys do not contribute to detection, and they create inefficiency in litigation.

IV. Research Method

59Coffee, supra note 29, at 234.
60Id. at 223.
61Id. at 239.
62Id. at 246.
Outside of the FCA *qui tam* process, a stereotypical filing mill law firm would take on a high volume of plaintiff clients without careful analysis of each case. By litigating numerous cases, the firm shifts some of the cost burden onto the judicial system and defendants. Many of the cases may end up settling to reduce defendants' litigation costs. The identification problem for researchers is the difficulty in distinguishing meritorious from non-meritorious cases; a filing mill law firm's aggregate results might look remarkably similar to that of a law firm pursuing more meritorious cases. The lack of commonality in defendants and courts makes between-firm comparisons difficult.

The FCA's *qui tam* provisions provide an opportunity to identify this filing mill strategy. Since each case must pass through DOJ review, we have a common reference point to evaluate the legitimacy of each case. While law firms could pursue a variety of strategies with regards to *qui tam* case filing, the design of the FCA regime allows a law firm to pursue a filing mill strategy. As the DOJ is obligated to investigate each filing, the law firm could avoid expending efforts until after the DOJ decision. Thus, we could observe such a firm by identifying repeat player firms that have an unusually low intervention rate combined with a high filing rate. In contrast, firms pursuing cooperation with the DOJ will end up with higher intervention rates, as they will expend effort in filtering out less-meritorious cases.

This identification approach relies upon the legitimacy of the DOJ's review and selection process. There are doubtless numerous factors that may impact the agency's willingness to take on a particular case, including, but not limited to, the harm of the offense, the precedential value of the case, the defendant's liability under other statutes, agency resources, and perhaps political sensitivities. The fact that the DOJ did not intervene in a case should not be a strong condemnation of the actual merits of the case. Rather, I approach the function of the law firms in light of the statutory purposes: either to provide useful information to the DOJ or to litigate cases of fraud themselves. As noted earlier and in the following Table 3, the relators and their law firms do not have a good track record in successfully litigating non-intervened cases. In aggregate, then, it is unreasonable for the DOJ to expect successful litigation if it declines intervention. The remaining function of the law firms is the provision of useful information to the DOJ. The fact that the DOJ intervenes in a case is a proxy for the usefulness of the information. My analytical approach assumes that higher rates of usefulness suggest that law firms are expending more effort in finding cases that match DOJ interests. As a result of using the DOJ review process as a benchmark, though, I cannot simultaneously evaluate the government's performance in case selection. Thus, the possibility of government capture or other improper government action in case selection remains unmeasured.

Furthermore, this article emphasizes the role of repeat players in private enforcement. Repeat player law firms can play a crucial role in private enforcement, as they may both support and undermine the broader enforcement system. The ability of the government to cope with varying quality of private enforcement depends on the extent and intensity of private prosecutors. If the grant of a private right of action attracts a high volume of distinct plaintiffs and attorneys, it will be difficult for a public enforcement agency to
maintain oversight into the wide variety of cases. On the other hand, if the private right of action instead attracts a high volume of cases from a limited number of attorneys, managing the caseload may become more achievable due to reputation effects. Once the government identifies attorneys who properly work for the public interest, it can spend more time scrutinizing the new filings of attorneys with more questionable judgment.

This identification approach also does not cover all the possibilities for malfeasance by private enforcers. I cannot detect, for example, whether potential whistleblowers are blackmailing potential defendants and then settling cases without DOJ knowledge. Similarly, the central reliance upon DOJ evaluation could be suspect if there is significant variation within the Civil Division in its consideration of cases.

In response to a Freedom of Information Act (FOIA) request, the DOJ's Civil Division provided two raw tables. The first raw table contained 6,581 entries describing qui tam cases. The second raw table, with 1,476 entries, described impositions: the dollar judgments or settlements against defendants. Many cases did not result in defendant liability, thus the smaller size of the second raw table. As the DOJ has a vested interest in properly tracking impositions, it has greater confidence in the accuracy of the second raw table. A qui tam case could span multiple entries in either table. I collapsed and joined the tables together using case captions as a unique identifier, resulting in 3,577 entries.

The cases provided are unsealed, resolved qui tam actions under the FCA starting from 1986. The latest settlement is from July 16, 2009, and the latest election date is July 20, 2009. The DOJ did not provide information as to the number of sealed cases during the corresponding timeframe, nor is there information regarding unsealed but unresolved cases.

The FOIA data do not have as many cases as the official published total, but this may be due to the presence of sealed cases in the official publication or due to different classification of what counts as a distinct case. As a verification step, the FOIA data nonetheless roughly match the officially published figures: 95% of the data's intervened qui tam cases resulted in a settlement or judgment for the U.S., and only 9% of the non-intervened cases generated such a result. The FOIA data contain more detail regarding the litigation status of cases, so the categories do not match exactly. Also note that Tables 2 and 3 do not cover all possible cases; for example, some cases are dismissed before the DOJ made a decision on intervention.

Table 1: Summary Statistics

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total FCA qui tam cases*</td>
<td>3515</td>
</tr>
<tr>
<td>Cases resulting in defendant liability (settlements and judgments)</td>
<td>1,116 (32%)</td>
</tr>
<tr>
<td>Cases resulting in government intervention</td>
<td>953 (27%)</td>
</tr>
</tbody>
</table>

63 Relators may not always be prompt or accurate in reporting case status, and the DOJ often relies on PACER records to keep up to date.
Primary Agency Defrauded (by case volume)
- HHS 1,807 (51%)
- DOD 697 (20%)
- All others < 3% each

Judicial Circuit (by case volume)
- 9th Circuit 767 (22%)
- 11th Circuit 489 (14%)
- 5th Circuit 380 (11%)
- All others < 10% each

Impositions (Settlements or Judgments for U.S.)
- Total value $11,700,000,000.00
- Maximum $568,000,000.00
- Minimum $0.00
- Median $931,112.00
- Total HHS value $8,360,000,000 (71%)
- Total DOD value $1,750,000,000 (15%)

Relator share of imposition
- Maximum $96,600,000.00
- Minimum $0.00
- Median $144,020.00

Relator Filing Frequency (by case volume)
- Total Relators 3209
- Relators responsible for only one case 3,087 (96%)
- Relators filing two cases 85 (2.6%)
- Relators filing over 10 cases 3 (< 0.1%)
- Cases with pro se relator 294
- Intervened pro se cases 12 (4%)

* Total cases with sufficient data for summary statistics. There is actually a total of 3,577 cases, but some are lacking basic information.
Table 2: Outcome of Intervened Cases

<table>
<thead>
<tr>
<th>Litigation Status</th>
<th>FOIA Data</th>
<th>Official DOJ Publication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed No FCA Recovery</td>
<td>29 (3%)</td>
<td>58 (5%)</td>
</tr>
<tr>
<td>Dismissed by U.S.</td>
<td>9 (1%)</td>
<td>not reported</td>
</tr>
<tr>
<td>Final Judgment for Defendant</td>
<td>9 (1%)</td>
<td>not reported</td>
</tr>
<tr>
<td>Final Settlement/Judgment for U.S.</td>
<td>906 (95%)</td>
<td>1076 (95%)</td>
</tr>
<tr>
<td>Total</td>
<td>953</td>
<td>1134</td>
</tr>
</tbody>
</table>

Table 3: Outcome of Declined Intervention Cases

<table>
<thead>
<tr>
<th>Litigation Status</th>
<th>FOIA Data</th>
<th>Official DOJ Publication</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismissed</td>
<td>1148 (49%)</td>
<td>3681 (94%)</td>
</tr>
<tr>
<td>Dismissed by relator</td>
<td>585 (25%)</td>
<td>not reported</td>
</tr>
<tr>
<td>Dismissed by U.S.</td>
<td>82 (4%)</td>
<td>not reported</td>
</tr>
<tr>
<td>Final Judgment for Defendant</td>
<td>291 (12%)</td>
<td>not reported</td>
</tr>
<tr>
<td>Final Settlement or Judgment for U.S.</td>
<td>208 (9%)</td>
<td>239 (6%)</td>
</tr>
<tr>
<td>Unknown</td>
<td>15</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>2329</td>
<td>3920</td>
</tr>
</tbody>
</table>

While this piece focuses on the potential of "filing mill" law firms in *qui tam* litigation, the legal entity in question may not actually be a law firm in the strict sense of the phrase. Of the 3,577 entries, there are approximately 2,505 "law firms" listed, but a firm might simply be a single practitioner. For purposes of the basic filing mill hypothesis, it does not matter if there is a single attorney responsible for the filings or if it is an entire firm. 1,072 cases do not have any law firm listed, although all but 69 of those cases do list an attorney.\(^64\) If the law firm field listed "Attorney", "Esq," or "Lawyer," I replaced the law firm field with the name of the attorney. Therefore, the use of the term "law firm" in this piece should be interpreted rather broadly. There are understandably substantial differences between an individual attorney and a firm, but since this analysis focuses upon the presence of strategic legal representation, the combination of the entities should only increase our opportunities for detecting such representation.

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\(^{64}\) There are 294 cases identified as pro se relators, but I do not have information regarding the bar membership of those relators. Overall, pro se litigants do not fare well in intervention, with only 12 interventions (including one partial intervention) equaling a 4% successful intervention rate. I also considered statistics on individual relators, but there are few significant repeat relators in the data. Only three relators have ten or more filings.
V. Identifying "filing mills"

Utilizing the detailed information from the FOIA request, I apply two tests regarding filing mill strategy. The first is to compare law firms’ intervention rates; law firms pursuing a high volume of cases paired with a low intervention rate would suggest a filing mill strategy. Since such a firm would not carefully evaluating the merits of each case, the DOJ would not intervene as often, and the firm would not be obligated to follow up on a declined intervention case. The second method is to look at the aggregate intervention rate by firm experience. If the intervention rate is improving with experience over time, it could imply that in the aggregate, firms are learning to cooperate with the DOJ. As a reference point, the overall intervention rate is 27% if we consider all cases in the data.65

A. Law firms with low intervention rates and high volume

The proposed filing mill strategy emphasizes a high volume of cases with a resulting low intervention rate. I measure the DOJ’s case intervention rate by dividing the number of intervened cases by the total number of cases filed by the firm. I have two proposals in measuring case volume. The first possible method of case volume is in absolute number of cases filed. Figure 1 is a scatter plot of firm intervention rate by the total number of cases filed; only firms with a minimum of 10 total cases are included to insure a meaningful intervention rate. If we consider 10 cases to be the cutoff for significant repeat players, only 496 cases out of the 3,515 total come from these repeat players, approximately 14%.66 Appendix A contains more specific information regarding these firms.

Figure 1: Firm intervention rate vs. total cases filed

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65 The DOJ intervened in 953 out of 3,515 cases. This includes 166 partial interventions, which I treat as intervention for purposes of this article.
66 1,475 of the cases come from single-shot players, firms that filed only one case.
Firms pursuing a filing mill strategy would be found in the lower right corner of the graph, combining a high volume of cases with a lower intervention rate. Only two firms stand out with higher case volume, Philips & Cohen with 65 cases, and the Warren Benson Law Group with 43 cases. Neither has a remarkably low intervention rate.

There are a few firms that obtain intervention at rates substantially below 27%. Walker, Knopf & Billingsley (8%), Grayson, Kubli & Hoffman, P.C. (0%), and Frank, Haron, Weiner & Navarro (7.1%) stand out as firms with single digit intervention rates. All of Walker, Knopf & Billingsley's cases have the same relator, an individual named Jeff Cox. Seven of Grayson, Kubli & Hoffman, P.C’s cases list a Goldstein as the relator, while Frank, Haron, Weiner & Navarro's cases do not have any immediate relator commonalities. More detailed investigation into their case files might clarify their filing strategy.
An alternative method of measuring case volume would be dollar volume. Unfortunately, I do not have access to uniform pre-filing case valuation, as it is attorney work product. The case values in the data are only for settlements or judgments against the defendants, known as imposition values. The defendants might not have actually paid these amounts due to insolvency or other factors. Measuring case volume by the imposition data is skewed in favor of successful law firms: relatively unsuccessful law firms will appear to be handling fewer cases because I cannot value unsuccessful cases. Figure 2 is a scatter plot of firm intervention rate by log total imposition dollars with a minimum of $50 million in total impositions. Similar to the previous figure, Figure 2 is dominated by high intervention rate firms, which adds additional evidence to the prevalence of DOJ intervention in large dollar cases. Philips & Cohen is again the right-most firm with over $1.5 billion in impositions. There is no law firm generating large recoveries with a strategy of single-digit intervention rate. The lowest firm here is Ashcraft & Gerel with a 14% intervention rate. Appendix B is a table listing the firm identities. From the additional information in Appendix B, we can see that the 100% intervention rate firms tend to be single-shot law firms.

B. Aggregate intervention rates with experience

An alternate method of identifying a firm's strategy would be to evaluate their performance as they gain experience in filing *qui tam* actions. If the intervention rate is improving with experience over time, it could imply that the firm is learning to cooperate with the DOJ. Given the limited number of cases by each firm, it is difficult to compare
individual intervention probabilities over time. To help capture some of the low-frequency firm actions, though, we can look *qui tam* filings in aggregate. Figure 3 shows the firms’ average intervention rates by chronological case sequence.

![Figure 3:Aggregate intervention rate by chronological case sequence](image)

Since our concern is with law firm performance given previous experience, Figure 3 excludes firms having participated in only one case total. Thus, Column 1 is the intervention rate for the first case filed by firms that have filed at least two cases. Column 3 shows the intervention rate for the third case filed by firms that have filed at least three cases. The intervention rate rises steadily over time, which can be an indication that firms are improving their case selection process with experience. The DOJ or defrauded agency might prefer to intervene in cases with particular characteristics, and the firms may be learning how to choose and present the most desirable cases. There may also be a strong selection effect; the only firms continuing with additional cases are the successful ones. Thus rather than learning to improve, the firms that are less successful simply drop out and stop submitting cases. Either way, the aggregate performance over time tends to suggest that repeat player law firms are pursuing cooperation with the DOJ through intervention.

**VI. Does the DOJ deter "filing mills"?**

Our inability to observe filing mill law firms may be evidence that the DOJ is deterring such behavior. Given the special procedures in *qui tam* litigation, it is possible that the
DOJ would penalize weak relator filings. If the threat of sanction is sufficiently strong, we might not expect to see any filing mill law firms. Some deterrence methods might not be visible in these data. For example, the DOJ might restrict relator access to government witnesses, making it more difficult for the relator to survive dismissal at the pleading stage or to litigate further. Also, DOJ approval is required for all settlements, so a threat to withhold approvals might be intimidating and undocumented. Finally, although I draw an artificially stark contrast between meritorious and non-meritorious cases, the reality is that there is a continuum of case quality. My data do not provide clear insight as to the weakness of any case, so the group of non-intervened cases in aggregate likely contains much merit diversity. Nonetheless, there are a couple of deterrence strategies that could be visible through these data.

A. Dismissal

The first method of stopping disfavored cases is the most direct. By statute, the DOJ can shut down any relator's case upon initial filing.\(^67\) If the DOJ intervenes and dismisses, the relator procedurally cannot stop the dismissal. This is technically an "intervened" case, but it is unlikely that any relator would desire this type of intervention. This would be the strongest method of immediately halting disfavored litigation.

While the ability to dismiss any case immediately is powerful, it would only effectively deter non-meritorious cases to the extent that the case would not otherwise have been promptly dismissed. If a judge would also have promptly dismissed the case, the DOJ's decision to do so would not generate any additional deterrence, unless relators and their firms are specifically concerned about their reputations with the DOJ. Alternatively, it may be sufficient that the defendant's belief about the judge's actions would generate positive expected value for relators. A defendant who believes a judge would not immediately dismiss a case might be more likely to settle, thereby encouraging relators to file. Under this scenario, the DOJ's decision to dismiss would be costly to relators and generate some deterrence.

Looking at the 953 intervened cases as described in Table 2, we see that the DOJ explicitly dismissed only nine intervened cases, or less than one percent. Seen in context of the total volume of some 3,515 cases, these nine cases represent an extremely limited exercise of the DOJ's prerogative to terminate a case. Note, however, that there are 29 cases listed as "Dismissed No FCA Recovery," which does not indicate the party responsible for dismissal. Even including the additional 29 cases, however, it is difficult to argue that the DOJ is aggressively dismissing disfavored *qui tam* cases.

Less officially, the DOJ also has some ability to control litigation after declining intervention. While the statute requires government approval of any settlement agreement and provides for later intervention with "good cause," it does not specify other government rights during private litigation. Looking at the statistics in Table 3, the government has dismissed 82 declined intervention cases, which is approximately 4% of

\(^67\) § 3730(c)(2)(A).
the total declined intervention cases. This level is relatively low in magnitude, although for many cases, the dismissing party is not identified, leading to some uncertainty regarding the level of government involvement. Without better data on each case, it is difficult to argue that the DOJ is aggressively dismissing non-meritorious cases after declining intervention.

Despite the minimal application of the DOJ's prerogative to immediately dismiss cases, it is still possible that the mere threat of dismissal exerts a deterrent effect on relators. Under such a scenario, the DOJ and potential relators may be in an equilibrium in which the DOJ does not need to dismiss cases and law firms only select meritorious cases. A stronger version of this threat equilibrium might be that both law firms and the DOJ value a law firm's reputation as a cooperative player; a law firm that attempted to pursue a filing mill strategy might be punished later by being denied government support. I currently do not have a method to verify these potential equilibria.

B. Delay

An alternative method the DOJ might use to discourage weak litigation would be to delay. Although the statute grants the government 60 days during which the case is stayed, courts routinely grant time extensions. Since 1986, there have only been 18 Notices of No Election, cases in which the judge denied an extension request. The DOJ thus seems to have a significant amount of latitude in determining when relators can actually resume private litigation. Following the information from Figure 1, cases have a mean decision time of nearly 600 days and a median of 437 days after initial filing.

Figure 4: Histogram of time to election
Delay in deciding on intervention is not necessarily a strategic choice by the DOJ. The time to decide could be based in part on internal priorities. Both the DOJ and the allegedly defrauded agency have numerous cases to handle. Weaker cases might simply be low priority and thus require more time before full investigation. Nonetheless, it is also possible that the DOJ could deliberately use this power to discourage non-meritorious private litigation. Keeping a case under seal for additional time might frustrate the law firm or relator, and it certainly would prolong the time before the law firm can proceed with litigation and recovery.

Assuming the DOJ’s analysis time for meritorious and non-meritorious cases to be similar, we might expect to see the time under seal for declined intervention cases to be high in comparison to intervened cases. An alternative assumption is that meritorious cases take more analysis time than non-meritorious cases. This could be reasonable if, for example, dodgy law firms and relators cannot readily obfuscate non-meritorious cases. Under this assumption, we would expect a non-penalizing DOJ to take less time for declined intervention cases. A DOJ intent on discouraging non-meritorious cases would keep declined intervention cases under seal for equal or more time in comparison to intervened cases.

Figure 5: Comparison of median days to election
From Figure 5, we can see above that the government takes fewer days to decline intervention than it does to intervene in a case. This suggests that the DOJ is not aggressively delaying decisions on cases in which it plans to decline intervention. Nonetheless, without specifics on case details or the DOJ’s activities during the decision time, these data cannot rule out the possibility that the DOJ deliberately delays its intervention choice for disfavored cases.
VII. Conclusion

The False Claims Act provides a channel for the private enforcement of law with systematic government oversight. Despite the opportunity for firms to proceed with a low-effort, high volume case strategy, most firms do not seem to be following such an approach. Instead, the repeat player firms typically maintain good track records as to intervention percentages. These firms seem to understand government enforcement interests. Furthermore, a surprising number of one-shot law firms are prominently successful in their efforts. The Department of Justice similarly has the opportunity to dismiss weak cases promptly, yet it rarely uses this power. Although the data cannot rule out less visible forms of influence upon the case filing process, the evidence suggests an equilibrium in which law firms and the DOJ attempt to cooperate.

Of the major parties involved in the *qui tam* process, this article has focused primarily on the role of the relator's law firm. While I do not strongly identify any "filing mill" law firms, further research is important in understanding the reason for the observation. I considered some straightforward forms of DOJ influence over the process, but other parties could also contribute to the finding. It may be that the background rate of potential relators is relatively honest, easing the law firms' selection process. Under that scenario, distinguishing legitimate potential relators from frivolous relators could be a straightforward task. Thus, selecting legitimate clients could be the dominant strategy for law firms. Given the limited frequency of cases for many firms, a more detailed case study approach may help understand the law firms involved. Of particular interest are the successful one-shot law firms. Not only is it remarkable that the law firm did not choose to pursue other cases, but also that a relator chose to trust the law firm with a valuable case.

A case study approach may also help clarify the role of the federal government. This article effectively relies upon the DOJ's decision as a reference for identifying legitimate fraud cases. The common reference point facilitates the comparison of different law firms, but there remains a broader normative question of the nature of the government review. The government's decision is not an easy one, as legal enforcement efforts are spread across a variety of offenses. Additional information regarding the non-intervened cases would help understand both government interests and law firm decisions. Even within the FCA statute alone, there are numerous separate government agencies that may serve as plaintiffs; treating the government as a unified actor is a simplification. Further attention should also be paid to the interaction among various offenses and sanctions. As a broader policy question, an evaluation of government performance could help answer the social planner’s question of resource allocation between public and private enforcement efforts.

Allowing private enforcement of laws entails significant risk, as it can be difficult to predict how private parties will utilize the legal system. Congress's amendments of the FCA in 1986 have enlisted private law firms and relators in recovering billions of
government fraud. Ongoing research into the reasons for its performance may help better utilize the strengths of private enforcement within a public regime.
Appendix A: Law Firms Ranked by Number of Cases, minimum 10

<table>
<thead>
<tr>
<th>Firm</th>
<th>Total Imposition $</th>
<th>Cases</th>
<th>Intervention rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phillips &amp; Cohen</td>
<td>$1,550,000,000</td>
<td>65</td>
<td>58.5%</td>
</tr>
<tr>
<td>Warren Benson Law Group</td>
<td>$47,100,000</td>
<td>43</td>
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</tr>
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<td>Law Offices of Herbert Hafif</td>
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<td>23.1%</td>
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<td>$305,050</td>
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<td>$223,000,000</td>
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<td>William R. Ramsey, A Professiona</td>
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<tr>
<td>Law Offices Of Robin P. West</td>
<td>$12,200,000</td>
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<td>30.0%</td>
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</table>
Appendix B: Law Firms Ranked by Total Imposition Dollars, minimum $50 million

<table>
<thead>
<tr>
<th>Firm</th>
<th>Total Imposition $</th>
<th>Cases</th>
<th>Intervention Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phillips &amp; Cohen</td>
<td>$1,550,000,000</td>
<td>65</td>
<td>58.5%</td>
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<td>Sheller, Ludwig &amp; Badey</td>
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<td>Kohn, Shands, Elbert, Gianoulaki</td>
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<td>27.3%</td>
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<td>83.3%</td>
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<td>$50,700,000</td>
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<td>23.1%</td>
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