Blowing the Whistle on Avoiding Use Taxes in Online Purchases

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Leslie J. Carter

I. INTRODUCTION

John wanted to buy a new winter coat. He had seen one he liked at a store downtown, but the store did not have his size. He could have had the store order it for him, but he instead decided to order it off of the store’s website and have it sent right to his house. After John placed the order, he realized he had saved a few dollars because the website had not charged him tax on his purchase. John thought maybe this lack of taxation was illegal, but he was unsure of the law. Furthermore, he had benefited from it by getting a cheaper jacket, and no one else besides the store knew about this transaction. So why should John worry or complain?

As this type of transaction becomes more common, states have a growing interest in ensuring that tax is collected when the law requires it. However the buyer and seller have no incentive to report any tax avoidance, and it is difficult for any other parties to identify such misbehavior.

Thus some states, with the help of clever plaintiffs, have found a new way to try to handle these problems of lost revenues and skewed incentives. Many states have passed false claims acts based on the federal False Claims Act (“FCA”), which allows citizens to bring suits on behalf of the government against parties who have knowingly defrauded the government. Such citi-

1 For the sake of the example, assume that he also got free shipping, so he really got a better bargain.
2 The seller benefits by attracting purchasers with tax-free sales, and the buyer benefits by paying tax-free prices.
zens then share in any damages the government collects. These false claims acts provide incentives for people like John, or employees of the company where John bought his coat, to report frauds such as uncollected taxes.

Several hurdles, however, stand between such plaintiffs and a collection. The history behind the false claims acts makes it unclear whether plaintiffs should be allowed to bring tax fraud issues on behalf of the government. Beyond that, the statutory language of the false claims acts sets up requirements that may be difficult for plaintiffs to satisfy when trying to bring a tax fraud claim. And finally, the tax law surrounding internet transactions is quite complex, which only adds to the plaintiffs’ burden.

The steady increase in internet purchases makes it quite important to understand the situations, if there are any, in which plaintiffs can satisfy the requirements and bring a successful claim for tax fraud related to an internet purchase. As such, this Comment analyzes the circumstances under which purchasers of goods over the internet may use state false claims acts to bring successful claims alleging tax violations against online retailers.

Part II of this Comment provides a brief overview of the history and development of the Federal False Claims Act (“FCA”), outlining some of the purposes of the act, as well as some of the problems associated with it. Part III discusses the emergence of the state false claims act, looking specifically to how these acts are similar and different from the Federal FCA, and how those similarities and differences inform the understanding of the state false claims acts. Part IV discusses the overlap of the tax issues involved in internet transactions and the state false claims acts, describing the mechanics of taxing internet purchases. Part V looks at the challenges that face false claims acts plaintiffs, and argues for circumstances in which such plaintiffs should be successful when bringing tax claims under the state false claims acts. Part VI concludes by summarizing instances in which a purchaser of goods over the internet can serve as a whistleblower and bring a successful use tax claim through state false claims statutes.

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4 31 USC § 3730(d) (discussing awards to private plaintiffs).
II. HISTORY AND DEVELOPMENT OF THE FALSE CLAIMS ACT

State false claims acts are to a large extent modeled after the Federal FCA. As a result, state false claims acts cannot be understood without a good understanding of the development of the Federal FCA.

A. Original Enactment, Original Problems

In 1863, at the urging of President Abraham Lincoln, Congress enacted the first version of what is today known as the Federal False Claims Act. Lincoln wanted to provide a mechanism for fighting the growing number of individuals selling defective goods to the Union Army. During this time, "for sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors or the refuse of shops and foreign armories." More often than not, these frauds went unpunished because of the absence of federal agencies to prosecute them. Lincoln sought to combat these fraudulent transactions by allowing citizens to bring suits on behalf of the government.

Suits under the FCA took the name qui tam actions. Qui tam is an abbreviation of the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means "who as well for the king as for himself sues in this matter." To give citizens incentive to bring a qui tam action, the original version of the FCA rewarded the private party who initiated the suit, known as the relator, with up to half of the government's monetary recovery.

5 Act of March 2, 1863, ch 67, 12 Stat 696 (1863).
6 HR 4827, 99th Cong, 2d Sess in 132 Cong Rec H 6474 (Sept 9, 1986) (statement of Representative Berman).
7 Robert Tomes, Fortunes of War, 29 Harper's New Monthly Magazine 227, 228 (July 1864). Further, according to Webster's New World Dictionary, spavined means "affected with spavin," where spavin is "a disease of horses in which a deposit of bone ... or an infusion of lymph ... develops in the hock joint, usually causing lameness." See David B. Guralnik, ed, Webster's New World Dictionary of the American Language 1366 (Prentice Hall 2d ed 1985).
9 Id.
After the Civil War, the number of such fraudulent actions greatly decreased, and the FCA lay dormant, most likely because of a large decrease in government spending.\textsuperscript{12} However, beginning in the 1930s and continuing into the 1940s and the era of the New Deal, as government spending increased, petitioners began exploiting the FCA by bringing so-called "parasitic" actions.\textsuperscript{13} These actions began when petitioners learned of fraud through public channels, perhaps from previous allegations or court proceedings against a party, or from a newspaper article reporting or alleging a party's wrongdoing.\textsuperscript{14} The relators then used that public information to bring a suit on the government's behalf, hoping to collect part of the damages, all the while contributing nothing new to the action.\textsuperscript{15}

\textit{Marcus v Hess}\textsuperscript{16} provides a paradigmatic example. The petitioner in that case relied on information from a previous indictment of the defendants to bring a claim under the FCA.\textsuperscript{17} The government argued that the FCA should not allow a petitioner who did not contribute any new information to bring such a suit.\textsuperscript{18} The Court, however, using a strict reading of the FCA, found no specific textual requirement that the relator must contribute some new or unique information to the suit, and hence allowed the petitioner to bring the suit.\textsuperscript{19} The petitioner eventually collected $75,000,\textsuperscript{20} roughly $898,000 in today's money.\textsuperscript{21}


\textsuperscript{13} Doe v John Doe Corp, 960 F2d 318, 321 (2d Cir 1992).

\textsuperscript{14} Id at 319.

\textsuperscript{15} Id.

\textsuperscript{16} 317 US 537 (1943).

\textsuperscript{17} Id at 539 n 1. The fraud involved a system of rigged bids by electrical contractors for government projects. The respondents had already faced indictment and fines for defrauding the government through these same bids for which they were currently being sued. "The appellants, the officers and members of the Electrical Contractors Association of Pittsburgh, conspired to rig the bidding on [government] projects. The pattern of the collusion was the informal and private averaging of the prospective bid which might have been submitted by each appellant. An appellant chosen by the others would then submit a bid for the averaged amount and the others all submitted higher estimates. The government was thereby defrauded in that it was compelled to contribute more for the electric work on the projects than it would have been required to pay had there been free competition in the open market."

\textsuperscript{18} Id at 545.

\textsuperscript{19} Id at 546.

\textsuperscript{20} Hess, 317 US at 546.

\textsuperscript{21} This figure was calculated using the Bureau of Labor Statistics' inflation adjustor, which is based on the average Consumer Price Index for a given year. See
B. 1943 Amendments

Following Marcus, an increasing number of relators brought suits based on newspaper reports of indictments. This growth in qui tam actions helped lead Congress to amend the original FCA in 1943. Then-Attorney General Francis Biddle asked Congress to abolish the qui tam provisions altogether. Although Congress did not adopt this polar proposal, it did substantially amend the FCA.

The amendments altered the relators' rights in three main ways. First, the 1943 amendments denied recovery to relators who brought claims "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Second, the amendments allowed the Justice Department to take control of such proceedings, reducing the control the relator had over the case, and allowing the government to dismiss or settle the case. Furthermore, when the government took over the case, the relator's share of the proceeds was capped at one-tenth of the recovered amount. Third, even if a relator overcame these previous restrictions and brought a successful suit, the amendments decreased the relator's share of the recovery from 50 percent to a maximum of 25 percent. Together, these amendments "thwarted the effectiveness of the False Claims Act," as they made it both more difficult and less economically attractive for a petitioner to bring a claim.


22 Note, The Federal False Claims Act: The Informer As Plaintiff, 69 Harv L Rev 1081, 1108 n 17 (1955) (citing a letter from Attorney General Francis Biddle noting that eighteen of the nineteen pending cases were based on "information obtained from indictments").


24 Id.

25 See, for example, Act of Dec 23, 1943, ch 377, at § 3491(c) (denying recovery to relators who raised claims "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought").

26 Id.

27 Id.

28 Id.


30 Id.
C. 1986 Amendments

By the 1980s, Congress realized that these amendments had created a situation similar to the pre-Civil-War passage of the original act, where fraud against the government went seemingly unchecked.\(^{31}\) In 1986, Congress once again "reinvigorated the False Claims Act with the express intention of recruiting qui tam relators and their counsel in the fight against fraud."\(^{32}\) The 1986 amendments expanded the relator's rights by, among other things, increasing the financial reward available to the relator and allowing the relator to remain a party even after the government had intervened and decided to take on the case itself.\(^{33}\) Furthermore, Congress narrowed and better specified the informational restrictions on relators, saying that no relator could base an action "upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless ... the person bringing the action is an original source of the information."\(^{34}\)

Another feature of the 1986 amendments was to allow so-called "reverse false claims."\(^{35}\) Reverse false claims involve situations where a party attempts to avoid paying the government, or under-represents a debt owed the government, rather than over-charging the government, as in a traditional false claim.\(^{36}\) This language in the amended FCA allowing reverse false claims opened the door for tax fraud claims, as people committing tax fraud under-represent a payment owed to the government, rather than over-representing a payment owed by the government. Congress quickly closed that door with the explicit exclusion of tax issues, as the 1986 amendments also made it so the FCA did "not apply to claims, records, or statements made under the Internal Revenue Code of 1986."\(^{37}\)

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\(^{32}\) Raspanti, 71 Temp L Rev 23, 26 (cited in note 8).

\(^{33}\) 31 USC § 3730(d)(1).

\(^{34}\) 31 USC § 3730(e)(4)(A).


Congress likely included this exemption of tax issues to refrain from interfering with the pre-existing framework the IRS had in place to deal with such tax fraud issues. The FCA filled a gap where federal agencies did not exist. However, no such gap exists for tax issues, as the IRS serves this function. And not only did the IRS have expertise regarding these tax issues, but this exemption would allow the IRS commissioner to control all actions for the collection of internal revenue, leading to a desired consistency that would likely not arise from letting the various federal district and circuit courts handle the issues. Furthermore, this exclusion is consistent with the Federal Tax Code itself, which provides that “[n]o civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced.”

Most people regard the 1986 amendments as a success, as the FCA now allows relators to bring suits to cut into the fraud against the government without giving them opportunities to bring parasitic suits. On their website, the Taxpayers Against Fraud show that as of October 1, 2007, qui tam suits have led to more than twenty billion dollars in awards. Over thirty different relators have collected claims totaling over $100 million, with one claim reaching $900 million.

38 See Fallon v Accudyne Corp, 880 F Supp 636, 639 (W D Wis 1995).
39 See Raspanti, 71 Temp L Rev 23, 24 (noting Lincoln's purpose for encouraging the passage of the FCA) (cited in note 8).
40 Furthermore, the IRS has its own "rewards for information" program. Although it is not a qui tam provision, this program "compensates informants for information they provide identifying tax fraud," and "rewards are paid according to a discretionary reward schedule based on the value of the information provided." Isaac B. Rosenberg, Raising the Hue . . . And Crying: Do False Claims Act Qui Tam Relators Act under Color of Federal Law?, 37 Pub Con L J 271, 294 (2008).
41 Fallon, 880 F Supp at 639 ("Since such fraud is directly addressed and remedied by the Internal Revenue Code it follows that Congress would not intend to duplicate those remedies with an FCA claim arising from the identical conduct.").
43 Springfield Terminal Railway v Quinn, 14 F3d 645, 651 (DC Cir 1994) (discussing repeated Congressional efforts to balance the encouraging of whistleblowing while discouraging opportunistic behavior).
45 These numbers are the total amount of money paid back to the government, not just the relators' shares. See The False Claims Act Legal Center, List of Top 20 Cases, available at <http://www.taf.org/top20.htm> (last visited Apr 8, 2008) (The Taxpayers Against Fraud website describes the settlement between Tenet Healthcare and the Federal Government in which Tenet Healthcare "agreed to pay the Federal Government $900
D. The Post-1986 FCA: Procedures and Problems

1. Procedures.

Qui tam actions begin when a private person brings "a civil action for a violation of [the FCA]" on behalf of "the person and for the United States Government." The relator must give the government "a copy of the complaint and written disclosure of substantially all material evidence and information" related to the case. The Government then has sixty days in which to take one of three actions. First, it may "proceed with the action, in which case the action shall be conducted by the Government." Second, it may "notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." Third, the Government may dismiss the action with the written consent of the court and the Attorney General.

Although the private party formally remains a party to the suits in which the Government takes control, the private party's power in such cases is very limited. The Government may dismiss the action over any objections from the private party, as long as it gives the person notice and an opportunity for a hearing. The Government has the power to settle the action over any objections from the private party, as long as it determines through a hearing that "the proposed settlement is fair, adequate, and reasonable under all the circumstances." Also, in

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million for billing violations that include manipulation of outlier payments to Medicare, as well as kickbacks, upcoding, and bill padding.

46 31 USC § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.").

47 31 USC § 3730(b)(2).

48 Id.

49 31 USC § 3730(b)(4).

50 Id.

51 Id. ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."). For an explanation of the general standard a court uses when deciding whether to dismiss a qui tam action at the Government's request, see Timothy Stoltzfus Jost and Sharon L. Davies, Symposium: Health Care Fraud: Past, Present and Future; The Empire Strikes Back: A Critique of the Backlash against Fraud and Abuse Enforcement, 51 Ala L Rev 239, 317 (1999) (noting that "the standard is whether the government's dismissal is 'reasonable,' i.e., [whether] it bear[s] a rational relationship to a legitimate government purpose").

52 31 USC § 3730(c)(1).

53 31 USC § 3730(c)(2)(A).

54 31 USC § 3730(c)(2)(B).
some circumstances, the Government may "impose limitations on the person's participation" by limiting things such as "the number of witnesses the person may call" and "the length of the testimony of such witnesses." Similarly, if the defendant shows that participation by the private person "would be for the purposes of harassment or would cause the defendant undue burden or unnecessary expense," the Government may limit the person's participation.

If the Government neither proceeds with the action nor dismisses the action, the person may proceed on his or her own, though the court may allow government intervention in the case at a later date. Regardless of the Government's decision whether or not to intervene, if discovery in the action interferes with "the investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery" for up to sixty days. Furthermore, the Government may "pursue its claim through any alternate remedy available." The individual's rights remain the same in any alternate proceeding as they would have been had the action continued as instituted.

The amount an individual stands to receive through a successful action depends upon both the individual's and the Government's level of involvement. If the Government remains involved, the individual receives "at least 15 percent but not more than 25 percent of the proceeds of the action . . . depending upon the extent to which the persona substantially contributed." If the court finds that the action is "based primarily on disclosures of specific information" not provided by the individual, the individual may receive at most 10 percent of the proceeds. If the Government was not involved in the action, and assuming the person bringing the action did not plan or initiate the violation at hand, the individual will receive between 25 and 30 percent of any proceeds.

55 31 USC § 3730(c)(2)(C)(i)-(ii).
56 31 USC § 3730(c)(2)(D).
57 31 USC § 3730(c)(3).
58 31 USC § 3730(c)(4).
59 31 USC § 3730(c)(5).
60 Id.
61 31 USC § 3730(d)(1).
62 31 USC § 3730(d)(1) (This section provides a list of the types of specific information to which it refers: information "relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media.").
63 31 USC § 3730(d)(3)-(4).
2. Statutory ambiguities.

The statute provides that relators cannot bring a qui tam action "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information."64 Understanding what types of actions relators can bring requires, however, understanding how courts have interpreted those restrictive words. The case law reveals that three fundamental questions arise when considering a possible qui tam action in light of the above statutory language. First, what constitutes a public disclosure? Second, when is a qui tam action "based upon the public disclosure"? And third, who can serve as an original source?

a) Interpretations of "public disclosures." The text of the statute itself sheds light on interpreting "public disclosures." The text states that "public disclosures" include "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."65 Courts have consistently found that anything beyond those items on the above list are not public disclosures.66

However, despite this "exhaustive rendition of the possible sources," courts still face difficult inquiries over what constitutes a publicly disclosed fact.67 This problem arises in part because "Congress gave [ ] little specific guidance to determine the scope of the [listed] public disclosure sources."68 For instance, the court in Dunleavy v County of Delaware grappled with the scope of "administrative . . . reports."69 How broad did Congress intend

64 31 USC § 3730(e)(4)(A).
65 Id.
66 See, for example, Dunleavy v Delaware, 123 F3d 734, 746 (3d Cir 1997) (stating that the statutory definition of public disclosure does not include reports created by a local government agency); Doe, 960 F2d at 323 ("Section 3730(e)(4)(A) furnishes an exclusive list of the ways in which a public disclosure must occur for the jurisdictional bar to apply."); LeBlanc v Raytheon Co, Inc, 913 F2d 17, 20 (1st Cir 1990) (section 3730(e)(4)(A) "does not deny jurisdiction over actions based on disclosures other than those specified"). But see Fine v Advanced Sciences, Inc, 99 F3d 1000, 1004 (10th Cir 1996) (holding that Section 3730(e)(4)(A) "defines the sources of allegations and transactions which trigger the bar but . . . does not define the only means by which public disclosure can occur").
67 Dunleavy, 123 F3d at 744.
68 Id at 745.
69 Id.
this language to stretch?\textsuperscript{70} Was this language meant to include non-federal government administrative reports?\textsuperscript{71} Even with the exhaustive list of sources, the court noted the unlikelihood that "Congress intended the public disclosures bar to be invoked without limitation."\textsuperscript{72} So the important question becomes: what are the limitations?

To answer this question, courts have set up a two-step inquiry to help determine whether the information is publicly disclosed.\textsuperscript{73} First, courts ask "whether the source is one recognized by the Act."\textsuperscript{74} Answering this question often involves using standard canons of construction to ask whether the information at hands fits into one of the listed categories.\textsuperscript{75} Second, courts ask "whether the extent of disclosure is sufficient to support the conclusion that the information contained therein is now public within the meaning of the Act."\textsuperscript{76} This inquiry depends upon the type of information at issue, and a survey of the totality of the circumstances surrounding any disclosure often answers this inquiry.\textsuperscript{77}

\textit{b) Interpretations of "based upon."} Further ambiguities arise when courts consider whether a qui tam action is "based upon the public disclosure."\textsuperscript{78} Some courts allow suits by relators with personal knowledge of fraudulent behavior, irrespective of the fact that the fraud has been publicly disclosed.\textsuperscript{79} For them, the critical question is whether the relator's knowledge came from the public disclosure or some other source.\textsuperscript{80}

\textsuperscript{70} Id.
\textsuperscript{71} Dunleavy, 123 F3d at 744.
\textsuperscript{72} Id at 745.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} See, for example, Dunleavy, 123 F3d at 744 (noting that "Congress gave [the court] little specific guidance to determine the scope of public disclosure sources" before using the doctrine of noscitur a sociis, which uses the surrounding words to inform a word's meaning)
\textsuperscript{76} Id at 744.
\textsuperscript{77} See, for example, Stinson, Lyons, Gerlin & Bustamante, PA v Prudential Ins Co, 944 F2d 1149, 1158-60 (3d Cir 1991) (considering things like the potential accessibility of certain types of information).
\textsuperscript{78} 31 USC § 3730(e)(4)(A).
\textsuperscript{79} See, for example, Siller v Becton Dickinson & Co, 21 F3d 1339, 1348 (4th Cir 1994) ("Rather plainly, therefore, a relator's action is 'based upon' a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his \textit{qui tam} action is based.").
\textsuperscript{80} Id (noting that 'based upon' means 'derived from').
For example, in *Siller v Becton Dickinson*, the relator was an employee of SSI. SSI was a distributor of products manufactured by Becton Dickinson ("BD"). Through this distributorship, the relator learned that BD overcharged the government for certain goods. This information, however, was also included in publicly available documents related to a previous suit between SSI and BD. BD attempted to dismiss the relator's action, claiming that it was "based upon publicly disclosed allegations."

The Fourth Circuit decided that "based upon" means "derived from." Thus, even though the settlement between SSI and BD included the very same information contained in the relator's suit, the fact that the relator did not get his information from those settlement documents meant that his action was not based upon the public disclosure. The Fourth Circuit noted that a "straightforward textual exegesis" of the phrase "based upon" means "to use as a basis for." And since the relator's employment relationship, and not the settlement, was the basis for his claim, his claim was not based upon, or derived from, public information.

Other courts throw out claims whenever a public disclosure contained the relator's information, even if the relator did not rely on that disclosure to bring the suit. In *Doe v John Doe Corp*, the Second Circuit held that a relator's action is "based upon" a public disclosure whenever the allegations are "the same as those that ha[ve] been publicly disclosed ... regardless of where the relator obtained his information."

A third line of analysis used by courts relates to situations where a relator brings multiple claims at once, some of which are based upon public information, while other claims are based upon information uncovered by the relator's own work and inves-

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81 *Siller*, 21 F3d at 1340–41.
82 Id.
83 Id at 1341.
84 Id at 1341. SSI had sued BD for wrongful termination of the distributorship. SSI claimed that BD had terminated the distributorship because BD feared SSI would disclose that BD overcharged the government.
85 *Siller*, 21 F3d at 1340.
86 Id at 1347–48.
87 Id at 1348.
88 Id.
89 *Siller*, 21 F3d at 1348.
90 See, for example, *Doe*, 960 F2d 318 (2d Cir 1992).
91 Id at 324.
tigation. In *Federal Recovery Services, Inc v United States*, the relator alleged that an emergency medical services company submitted fraudulent claims for reimbursement for ambulance services received by individuals who were not eligible for them. The relator alleged multiple instances of fraud, one of which was the same instance alleged in a prior complaint available to the public. In dismissing the claim, the Fifth Circuit followed the Tenth Circuit's prior holding that "an FCA *qui tam* action *even partly* based upon public disclosed allegations or transactions is nonetheless 'based upon' such allegations or transaction." Thus, even though the relator provided some original work leading to some of the claims, the relator could not recover.

c) The meaning of "original source." The questions of whether the claim is based upon a public disclosure are irrelevant if the relator is an original source. The text of the FCA itself lends a hand in interpreting "original source" in 31 USC § 3730(e)(4)(B). The statute defines the term as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Despite the guidance offered by this definition, ambiguity still exists, as different circuit courts differ in their interpretation of the meaning of "original source." *Cooper v Blue Cross and Blue Shield of Florida* provides a good example of the disagreement across circuits. The Eleventh Circuit notes that it disagrees with the Second Circuit's interpretation of who constitutes an original source. The Second Circuit requires that relators be able to prove they were the original source "to the entity that disclosed the allegations." The Eleventh Circuit makes no

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92 See, for example, *Federal Recovery Services, Inc v United States*, 72 F3d 447, 451 (5th Cir 1995) (barring a suit based in part on a public disclosure, even though the relator added other "substantively identical" claims to the suit).
93 Id.
94 Id, citing *Precision Co v Koch Industries, Inc*, 971 F2d 548, 552 (10th Cir 1993) (second emphasis added).
95 *Doe*, 960 F2d 318, 322 n 3 (noting that "[e]ven if a relator’s claim is based upon allegations or transactions that were publicly disclosed . . . the action is not jurisdictionally barred if the relator is an ‘original source’").
96 31 USC § 3730(e)(4)(B).
97 19 F3d 562 (11th Cir 1994).
98 Id at 568 n 13 (noting that "[w]e are unable to agree with the Second Circuit’s opinion that the relator must also prove he was the original source of the information").
such requirement, and further does not even require that an original source possess all the relevant information independently.\textsuperscript{100}

Quite recently, the Supreme Court acknowledged difficulties with this original source question in \textit{Rockwell International Corp v United States}.\textsuperscript{101} The Court noted that the original source "question is hardly free from doubt," and is one that provides "textual ambiguity."\textsuperscript{102} However, the Court did not in that decision resolve all questions regarding original source questions.\textsuperscript{103}

\section*{III. STATE FALSE CLAIMS ACTS}

The 1986 amendments to the FCA made it a much more powerful tool in fighting fraud against the government.\textsuperscript{104} Perhaps due to the success this more powerful FCA had in combating fraud against the federal government, many states began enacting their own versions to encourage similar policing of frauds perpetrated against state governmental agencies.\textsuperscript{105} California became the first state to pass a false claims act. It passed the California False Claims Act in 1987,\textsuperscript{106} just after the 1986 FCA amendments passed.\textsuperscript{107} The federal government encouraged more states to pass false claims acts in its Deficit Reduction Act of 2005. This Act gave states a 10 percent increase in Medicaid-fraud recoveries if they passed false claims acts that met certain enumerated qualifications.\textsuperscript{108} As of 2007, California, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indi-

\begin{itemize}
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} 127 S Ct 1397 (2007).
  \item \textsuperscript{102} Id at 1407–08.
  \item \textsuperscript{103} See, for example, Carolyn V. Metnick, \textit{The Jurisdictional Bar Provision: Who Is an Appropriate Relator?} 17 Annals Health L 101, 104 (2008) (noting that although the decision provides clarity to some conditions, "a number of other conditions of . . . the original source exception . . . remain unclear").
  \item \textsuperscript{104} Tipton F. McCubbins and Tara I. Fitzgerald, \textit{As False Claims Penalties Mount, Defendants Scramble for Answers; Qui Tam Liability, 31 U.S.C. § 3729 et seq.,} 62 BusLaw 103, 106 (2006).
  \item \textsuperscript{105} R. Harrison Smith, \textit{A Key Time for Qui Tam: The False Claims Act and Alabama,} 58 Ala L Rev 1199, 1207 (2006–07).
  \item \textsuperscript{106} Cal Gov Code § 12652 (West 2000).
  \item \textsuperscript{108} 42 USCA § 1396h(a) (West 2007) ("Notwithstanding section 1369d(b) of this title, if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.").
\end{itemize}
ana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, Nevada, Oklahoma, Tennessee, Texas, and Virginia all had their own false claims statutes.\textsuperscript{109} Most states have passed their false claims acts since 2000.\textsuperscript{110}

A. Similarities with the FCA

Because states modeled their false claims acts after the FCA, the state false claims acts closely resemble the Federal FCA.\textsuperscript{111} Not only do the acts forbid essentially the same things, but they use nearly identical language in doing so.\textsuperscript{112} Moreover, the state statutes set up nearly identical procedural frameworks for qui tam actions.\textsuperscript{113} For instance, all state statutes allow the government to intervene in the case and serve as a co-plaintiff with the relator.\textsuperscript{114} Similarly, all statutes allow states to monitor the suit, even if the state refrains from adding itself as a plaintiff.\textsuperscript{115} Most importantly for the current analysis, all state statutes allow reverse false claims, doing so with language identical or nearly identical with that used in the FCA.\textsuperscript{116} Further, all of


\textsuperscript{110} Smith, 58 Ala L Rev at 1207 (cited in note 105).

\textsuperscript{111} Barger et al, 80 Tul L Rev 465 (cited in note 107) (citing a survey of state attorneys general who responded to a phone survey consisting of several specific questions about their states' false claims acts); Smith, 58 Ala L Rev at 1207 (cited in note 105) (listing similarities between state and federal false claims acts).

\textsuperscript{112} Compare 31 USC § 3729(a) (making liable "[a]ny person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval"), with 740 ILCS 175/3(a) (West 2007) (making liable "[a]ny person who . . . knowingly presents, or causes to be presented, to an officer or employee of the State or a member of the Guard a false or fraudulent claim for payment or approval"). Other state statutes bear similar resemblances. See, for example, Cal Gov Code § 12651(a)(1) (West 2007) (making liable "[a]ny person who . . . [k]nowingly presents or causes to be presented to an officer or employee of the State or of any political subdivision thereof, a false claim for payment or approval").

\textsuperscript{113} Smith, 58 Ala L Rev at 1207 (cited in note 105).

\textsuperscript{114} Id.

\textsuperscript{115} Id.

\textsuperscript{116} Compare 31 USC § 3729(a) (making liable "[a]ny person who . . . knowingly makes, uses or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government") with 740 ILCS 175/3(a) (making liable "[a]ny person who . . . knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the State"). Other state statutes bear similar resemblances. See, for example, Cal Gov Code § 12651(a)(7) (West 2007) (making liable "[a]ny person who . . . [k]nowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision".
the state statutes include language barring suits brought with public information, unless the relator was the original source, just as the FCA does.\footnote{117 See, for example, 740 ILCS 175/4(e)(4)(A) (West 2007) (barring actions “unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.”).}

Since many of these state false claims acts are “virtually identical” in language to the Federal FCA, they have encountered the same interpretive problems that arise under the FCA.\footnote{118 Beeler, Schad and Diamond, PC v Target Corp, 856 NE2d 1096, 1102 (Ill App 2006). See Part II D 2 for a discussion of these problems.} Furthermore, as states have passed their false claims acts much more recently than Congress passed the Federal FCA, the state courts often face these questions with little if any state case law that speaks to them.\footnote{119 Id (noting that “[b]ecause the language in the [Federal] FCA is virtually identical to the language in the [State] Act, in order to understand the [State] Act, we review federal cases which have examined and analyzed the [Federal] FCA”).} And while some state courts have inserted their own lines of analysis into these qui tam actions, most state courts have relied heavily on the well-established body of federal law when analyzing these questions.\footnote{120 Id (noting that “[b]ecause the language in the [Federal] FCA is virtually identical to the language in the [State] Act, in order to understand the [State] Act, we review federal cases which have examined and analyzed the [Federal] FCA”).}

Not surprisingly, California, as the first state to pass a false claims act, doing so in 1987 after the 1986 amendments to the FCA, has the most case law on the subject.\footnote{121 Barger et al, 80 Tul L Rev at 479 (cited in note 107).} This body of case law bears great resemblance to the federal law on the subject. For instance, California cases express the same general underlying theory of when to allow or disallow a qui tam action, noting that “the California [false claims] statute was intended to limit the availability of qui tam actions so as to protect against ‘opportunistic’ or ‘parasitic’ actions.”\footnote{122 Mete v CCC Information Services, Inc, 149 Cal App 4th 402, 420 (2007), citing Allstate Insurance Co v Weitzman, 107 Cal App 4th 534, 564 (2003).} This language fits very well with some of that used in federal cases after Congress passed the 1986 amendments to the Federal FCA.\footnote{123 See, for example, Doe, 960 F2d at 321 (discussing the transition to the 1986 amendments in light of a paradigmatic “parasitic action”).}

Other cases note the parallel in language and purpose between state and the Federal FCA, and they rely on these similarities to perform lengthier analyses very similar to those performed in federal courts when analyzing the meaning of “public...
disclosure,” “based upon a public disclosure,” and “original source.”124 For instance, *Grayson v Pacific Bell Telephone Co* looks closely at the meaning of “original source” and “public disclosure,” and in doing so relies heavily on federal precedents.125 Even in what seems like a new interpretation of some statutory language in *Grayson*—when the court holds that “news media” include scholarly or scientific periodicals—the court reaches that decision by relying on a federal precedent that included government reports in “news media.”126

Overall, the little bit of case law that addresses some of the issues common to those in Federal FCA cases indicates that when state courts face the same or similar questions that federal courts have already answered regarding the Federal FCA, states will look to those federal decisions for guidance, and they often keep their rulings in line with federal precedent. Also, even when state courts must answer new or unique questions, they usually do so with federal precedent as a starting point.127 The states first passed false claims actions heavily relying on the federal model, and now are slowly building a body of case law based on those cases stemming from their original federal model. Any departure from federal precedent would be inconsistent with the development of the statutes and case law thus far.

B. Differences with the FCA

The main difference between the Federal FCA and some state false claims act is that some state false claims acts do not expressly exempt tax issues.128 Such omissions of tax exemptions, especially when the rest of the act bears a close resemblance to the Federal FCA, which expressly exempts such tax claims, strongly suggest that state legislatures that did not expressly exempt tax claims desired to permit them through their

124 See, for example, *Grayson v Pacific Bell Telephone Co*, 142 Cal App 4th 741, 748 (2006) (citing both federal and state cases when discussing when a qui tam action is barred).

125 Id at 755.

126 Id at 751, citing *Findley*, 105 F3d at 686.

127 Courts tend to use federal guidance from the federal courts that encompass their jurisdiction. See, for example, *Beeler*, 367 Ill App 3d at 865 (citing the Seventh Circuit when reasoning that, “[b]ecause the language in the FCA is virtually identical to the language in the Act, in order to understand the Illinois Act, we review federal cases which have examined and analyzed the FCA”).

false claims act. The Supreme Court of Nevada made this observation, noting that:

Nevada’s FCA, in stark contrast to the federal legislation after which it was modeled, includes language allowing reverse false claims but omits any provision barring persons from bringing false claims actions based on tax liabilities. Thus, facially and otherwise, the inclusion of "obligations" within the FCA's scope, coupled with the omission of an express tax bar, conclusively demonstrates the Legislature's intent to include tax liability matters within the realm of possible false claims.

Although in *International Game Technology, Inc v Second Jud D Court*, the Nevada Supreme Court did go on to hold that the state tax department should deal with the issues at hand, the conclusion of the decision notes that a "false claims action involving allegations that by reference incorporate the revenue statutes is not necessarily excluded from the realm of permissible claims under the Nevada FCA."'

IV. INTERNET SALES AND QUI TAM ACTIONS

This recent growth in the number of state false claims acts indicates that states are getting more serious about addressing issues of being overcharged and underpaid. A huge area of lost revenue for states is taxes never collected and remitted on remote sales, especially internet sales. Thus, if these false claims acts are to be most useful in reducing tax fraud in this area of internet sales, the key question is whether qui tam actions can

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129 *International Game*, 127 P3d at 1104 (noting that "the inclusion of 'obligations' within the FCA's scope, coupled with the omission of an express tax bar, conclusively demonstrates the Legislature's intent to include tax liability matters within the realm of possible false claims").

130 Id.

131 Id at 1108.

132 Smith, 58 Ala L Rev at 1207 (cited in note 105) ("[T]he greatest concentration of state false claims acts have been passed since the year 2000.").

133 See, for example, Jennifer Ballantonio, *E-commerce firms shrug off new plans to tax internet sales*, available at <http://findarticles.com/p/articles/mi_m5072/is_50_25/ai_111617677> (last visited Apr 12, 2008) ("California loses $1.2 billion annually in uncollected use tax, the bulk of which is via e-commerce."). California does require consumers to pay use tax, and admits that it loses money to uncollected use taxes because of enforcement issues. See Legislative Analysts Office, *California's Tax System: A Primer*, available at <http://www.lao.ca.gov/2001/tax_primer/0101_taxprimer_chapter3.html> (last visited Apr 12, 2008).
be a successful tool in reducing this level of unpaid taxes. In setting up an answer to this question, this Part explains the basic mechanics of taxing remote sales, shows the importance of internet sales to state revenues, and describes the distinct role internet purchases play.

A. The Mechanics of Taxing Remote Sales

Understanding how a basic internet purchase can lead to a qui tam action requires a basic understanding of how a remote purchase can lead to state taxation in the first place. Most states levy a sales tax. Such taxes are imposed on almost all purchases of tangible personal property purchased in a state, as well as on many purchases of services within a state.\(^{134}\) For instance, when a purchaser goes into a store in Illinois and buys a soft drink, the seller adds a 6.25 percent state sales tax onto the purchase.\(^{135}\)

However, states may not apply sales tax to interstate transactions. Such a tax amounts to taxing interstate commerce, which conflicts with the Commerce Clause of the United States Constitution.\(^{136}\) If no such comparable tax were added to goods ordered over the internet or through the mail, such a taxation system would tend to favor out-of-state purchases.\(^ {137}\) In response to this inequality and in an effort to protect their in-state sellers, many states enacted what is called a use tax. Use taxes, as their name suggests, tax the use of the goods in the state rather than the purchase of the goods outside the state.\(^ {138}\) The use tax serves to complement the sales tax; typically transactions are subject to a sales or use tax, but not to both.\(^ {139}\) Use taxation both raises revenue and protects local retailers who are subject to the usual sales tax.\(^ {140}\)


\(^{135}\) See <http://tax.illinois.gov/Businesses/TaxInformation/Sales/rot.htm> (last visited Apr 12, 2008).

\(^{136}\) See McLeod v JE Dilworth Co, 322 US 327, 330–31 (1944) (affirming that “the Commerce Clause precludes liability for the sales tax of that State”).

\(^{137}\) Certainly other costs of out-of-state purchases might be higher, such as shipping and handling charges, but the purchases would at least be favored from a tax perspective.


\(^{139}\) United Air Lines, Inc v Mahin, 410 US 623, 638 (1973) (“The use tax came into being to complement the sales tax, i.e., to fill in gaps where the States could not constitutionally tax interstate arrivals or departures.”).

\(^{140}\) William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations, 18A Fletcher Cyc Corp § 8817.30 (2007) (“[T]he purpose of such a tax, in addition to raising revenue, is to protect local retailers who must collect a sales tax from unfavorable compe-
As a technical matter, the purchaser bears the burden of paying both sales and use tax. However, collecting such taxes from purchasers is impractical. Thus, the burden of collecting sales taxes has traditionally been placed on sellers, who collect and remit the tax to the state. However, the Supreme Court has held in the sales tax context that imposing this collection duty on out-of-state sellers violates the Commerce Clause. There is little doubt that they would hold similarly when it comes to use taxes. Stated simply, if a seller lacks physical presence in a state, it cannot be made to collect either a sales or use tax on behalf of the state.

However, this Quill standard leaves open what constitutes physical presence, and requirements differ from state to state. Illinois, for example, says that a retailer satisfies this physical presence if a purchaser can return the item purchased to a store somewhere in the state. Other factors, such as a retailer's direct physical presence in a jurisdiction, the physical presence of an affiliate, or the presence of an agent or representative of the retailer, come into play for some states when determining whether there is an obligation to collect and remit a tax.

These issues of nexus are complicated and differ across states, but the basic idea is simple: if a remote seller has sufficient physical presence within a state, that state can require the remote retailer to collect sales or use taxes due from customers within that state. In this way, if an internet seller has the appropriate nexus with a state, the sale of goods to people within...

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143 Annette Nellen, Nexus Confusion: Sales and Use Tax, available at <http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2007/CorpTax/UseTax.jsp> (last visited May 10, 2008) ("rules differ from state to state, are not always clear and interpretations continue to evolve").
144 Robert Guy Matthews, Online Retailer Skips Sales Tax? You Might Sue, available at <http://online.wsj.com/public/article/SB112924792244868264-tMx7xjZSaV89CMWg9qkxX0d3s_20061014.html> (last visited May 10, 2008) ("In Illinois, a retailer is considered to have a physical presence if a customer can return an item purchased online to a retailer's physical location.").
145 For examples of cases discussing some fundamental issues behind levying use taxes, see Associated Industries of Missouri v Lohman, 511 US 641, 647–48 (1994) (discussing the Commerce Clause's impact on levying a use tax); Railcar, Ltd v Southern Illinois Railcar Co, 42 F Supp 2d 1369, 1379–80 (N D Ga 1999) (discussing the minimum contacts required for a state to be able to levy a use tax).
that state requires the internet seller to collect use taxes in relation to those purchases.146

B. The Distinct Role of Internet Sales

Internet purchases provide a distinct and critically important example of remote sales where use taxes may apply. This issue of use taxes on internet purchases is of critical importance for several reasons. It is incontrovertible that internet sales have grown and continue to grow at impressive rates.147 Not only has the pure dollar amount of sales grown, but the number of people making purchases online has grown.148 This growth has impacted the retail sales landscape in two main ways. First, internet sales have grown to the point where they outnumber all other sources of remote sales, including mail- and telephone-order sales.149 Second, internet sales continue to make up an increasing portion of retail sales overall.150 This trend has persisted even in the face of a slowing economy, where many sectors of the retail market experience falling sales, but online purchases continue to increase.151

Further, this growth of internet sales has coincided with the emergence of state false claims acts; "the greatest concentration of state false claims acts have been passed since the year 2000."152 By that time internet sales were well into their trend of healthy and consistent growth.153 This timing is important not only because a growth in internet sales may very well coincide

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146 Whether the sellers are collecting use taxes is another issue.
148 See, for example, Online Buying Grows, But How Much?, available at <http://www.emarketer.com/Article.aspx?id=1005942&src=article1_home> (last visited, May 10, 2008) ("The number of US consumers who have purchased online more than doubled from 22% in June 2000 to 49% in September 2007.")
149 Precise data on this issue are hard to find. Many sources, however, indicate this to be the case. See, for example, US Census Bureau E-Stats, (May 25, 2007) available at <http://www.census.gov/eos/www/2005/2005reportfinal.pdf> (last visited May 10, 2008).
150 See, for example, Peters, Doing the Math (cited in note 147) (demonstrating the growth of internet sales as a portion of both remote sales and retail sales in general).
151 See, for example, Cheryl Lu-Lien Tan, Retail Sales Fall in Some Categories But Surge Online, MasterCard Says, available at <http://online.wsj.com/article/SB119989825758778245.html> (last visited May 10, 2008).
152 Smith, 58 Ala L Rev at 1207 (cited in note 105).
153 See, for example, Peters, Doing the Math (cited in note 147) (demonstrating the growth of internet sales as a portion of both remote sales and retail sales in general).
with a growth in avoided use tax collection, but also because the growth in sales increases the incentives for a relator to bring a qui tam action. So as internet sales grew, tools for purchasers to use against tax avoiding retailers were developing.

There are two reasons why the amount of sales in a certain area is directly proportional to the probability that a relator will bring a qui tam action in that area, and also directly proportional to the amount a qui tam relator stands to recover if successful. First, and more importantly, the higher the amount of sales, the more money there is at stake. This is a huge piece, since the amount of money at stake is directly proportional to the award a qui tam plaintiff stands to receive, which directly affects the plaintiff's decision of whether or not it is worthwhile to initiate a suit. Second, the more sales there are, the more likely there will be some wrongdoing. If the probability of tax evasion occurring in a transaction is given by P, and the number of transactions is given by T, then the number of occurrences of wrongdoing is the product of P and T. As T rises, which is the case here, then the number of transactions involving wrongdoing increases. Thus, as internet sales continue to grow, the more important issues surrounding use tax collection and qui tam suits involving internet retailers become.

The importance of the issue of internet taxation is further evidenced by the amount of attention the legal and business worlds give to the subject. State legislators are concerned with the amount of money their states are losing to uncollected use taxes, local businesses are concerned with losing business to untaxed internet retailers, and internet retailers are concerned with how having to pay use taxes in the future will affect their profitability.

\[154\] See, for example, Bellantonio, E-commerce firms shrug off new plans (cited in note 133) ("California loses $1.2 billion annually in uncollected use tax, the bulk of which is via e-commerce."). California does require consumers to pay use tax, and admits that it loses money to uncollected use taxes because of enforcement issues. See California's Tax System: A Primer (cited in note 133).

\[155\] See, for example, Pamela Swidler, The Beginning of the End to a Tax-Free Internet: Developing an E-Commerce Clause, 28 Cardozo L Rev 541, 543 (2006) ("The difficulties involved in taxing remote sales... are far from novel. [And] the increasing use of the web for transactions previously conducted in real space is cause for even greater confusion. The Internet adds to these complexities by blurring both the geographic boundaries between states and the definitional boundaries between goods and services.") (footnotes and internal quotations omitted).

Thus, for all of these reasons, as internet sales grow, which in turn enhances the financial significance of internet sales, understanding how courts will handle issues of use tax evasion and their relation to qui tam actions become increasingly important.

C. The Distinct Role of Internet Purchases

As indicated in Part IV A, above, not all internet purchases give rise to taxes, and as such, only certain internet purchases can lead to a whistleblower case for a use tax violation. A recent New York Times article notes this well: "Buy the latest John Grisham book at Barnes & Noble in Union Square in New York, and you'll pay 8.375 percent sales tax. Buy it from Amazon and you won't pay any tax. But order the same book from Barnes & Noble's Web site, and you do pay the tax because any company with operations in the state must collect [use] tax."\(^{157}\)

So what does an internet transaction leading to a qui tam action look like? A typical qui tam action arises when an online customer in one state begins an online purchase transaction with an online retailer. Often, at or near the end of such a transaction, the website displays the amount of tax the company applies to the purchase. If the company satisfies State X's requirements for taxable nexus, then Company Y should be collecting tax from the customer for the purchase. If the website shows that the retailer is not collecting any taxes, the customer could collect this evidence, and then use it to institute a suit on behalf of the state, beginning the qui tam action. The question is whether such actions should succeed.

V. WHETHER AND WHEN AN INTERNET PURCHASER CAN WIN A QUI TAM ACTION

Such actions have been brought, but to date, no internet purchaser qui tam plaintiff has recovered on a tax-related claim.\(^{158}\) This Part examines why plaintiffs have lost, and argues for specific circumstances in which a plaintiff should win.

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\(^{158}\) See, for example, *Beeler, Schad & Diamond, PC v Ritz Camera Centers, Inc*, 878 NE2d 1152, 1170 (Ill 2007).
A. The "Knowingly" Hurdle

One hurdle that internet purchases face is showing that the retailer knowingly made a false record or statement sufficient to create liability under the relevant state false claims act. This hurdle has two parts. First, the relator must show that the retailer was required to collect and remit use tax. That is, to show that the record or statement is false, the plaintiff must know a little bit about what is true—that is, whether, objectively speaking, the retailer should have collected and remitted taxes. Second, assuming a few things—that some tax requirement existed, that the retailer failed to collect and remit the tax, and that the relator can show this—the relator must show that the retailer knowingly failed to collect and remit the tax. It is not enough that the retailer made a mistake with the amount of tax collected. The retailer must have knowingly submitted a false record or made a false statement.

Beeler, Schad & Diamond, PC v Ritz Camera Centers, Inc provides a nice example of these two requirements. In Ritz, the qui tam plaintiff had records from the online retailer that showed that the retailer had collected no use tax. The qui tam plaintiff claimed this was fraudulent, and wanted to recover these taxes on the state's behalf, and take a portion of the claim. The court dismissed the action, noting that a "remote retailer cannot make a 'knowingly' false record or statement to create liability under the" Illinois Whistleblower Reward and Protection Act if it "disclosed that no use tax [was] due or collected based on the taxpayer's reasonable interpretation of the law." The court concluded that if reasonable parties may disagree about the underlying tax issue, a record regarding the taxes as-

159 This idea of knowingly making a false claim or record is one embodied in the Federal FCA, and was adopted by the states when they passed their state false claims acts. Compare 31 USC § 3729(a)(7) (making someone liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government") with 740 ILCS 175/3(a)(7) (West 2007) (making someone liable who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the State"). The only difference is between the word "Government" and "State." Note even the section numbers are the same, which results because of the similarity of the general structure of these false claims acts.

160 878 NE2d 1152 (Ill 2007).

161 Id at 1156.

162 Id.

163 Id at 1170.
BLOWING THE WHISTLE ON AVOIDING USE TAXES

associated or not associated with the disputed transactions cannot be knowingly false. The court held that the Act, under the specific facts in Ritz, "require[d] the existence of an actual record or statement," and "documents memorializing a purchase that discloses that no use tax is being collected cannot be considered false sufficient to create liability under the Act." Furthermore, "[s]ince falsity is synonymous with an untruth, 'expressions of opinion, scientific judgments, or statements as to conclusions about which reasonable minds may differ cannot be false.' That is, if there is a confusing or complicated tax issue at the heart of the relator's claim over which reasonable minds could disagree, the retailer's failure to collect and remit tax could not be a knowing violation of a tax law. Instead, the court noted that the relator could have had a perfectly reasonable belief that no tax should be collected, and hence the retailer did not knowingly reduce an obligation owed to the state.

Similar to the holding in International Game, the court in Ritz did find that "the Act [does] appl[y] to alleged tax liabilities under the Use Tax Act when fraudulent records and statements exists [sic]." The court does not provide a specific example of where this may be the case, but presumably such an example would involve a clearer tax issue which would make it possible for sellers to falsify their records.

The hurdle becomes higher as courts, including those in International Game and Ritz, have demonstrated concern in involving themselves at all with complicated tax issues. Perhaps relators could be bailed out in cases like Ritz if courts sorted through the tax issues, but courts generally express that the complex nature of tax claims makes these issues better-suited for resolution through the state-created bodies that have experience in dealing with them. Not only can these state tax departments answer these questions with greater expertise, but in do-

164 Ritz, 878 NE2d at 1170.
165 Id.
167 See Part II for a discussion of some of the difficulties in establishing that use taxes must be collected on a remote sale.
168 Ritz, 878 NE2d at 1170.
169 Id.
170 Id.
171 International Game, 127 P3d at 1108. ("As asserted by the Attorney General, these are exactly the types of determinations better left to the tax department in order to promote consistency and uniformity.").
ing so, they will likely hand down more consistent decisions and make the body of tax law easier for subsequent parties to navigate.172 This expertise becomes even more important when the case presents the initial question of whether any tax is due in the first place, as was the case in Ritz.173 The Illinois court said that "a remote retailer cannot make a 'knowingly' false record or statement sufficient to create liability under the Act when the pertinent area of the law is unclear and specific factual analysis must be completed."174

These statements from the Ritz court address both parts of the "knowingly" hurdle. To the first part, whether there is any tax due, the court basically took a hands-off approach, saying that that question was best left for others to decide. The court then induced an answer to the second question from its answer to the first. Given that the issue of whether taxes should have been collected and remitted is difficult and ambiguous, and since the retailer could have failed to collect and remit taxes based on a reasonable understanding that the tax law did not require this collection and remitting, the knowingly requirement is not met.175 Thus the hurdle becomes even higher for the relator, since a complex issue implies an unfavorable answer for the relator.

Given this tall initial task that faces any relator, an important question is whether a relator can ever meet it. Assuming these online retailers are rational actors, it is logical to think that, the clearer the tax issues, the less likely it will be for them to neglect to collect and remit taxes. Put another way, the cases that make it to court because a retailer did not collect use tax are likely to involve the more complicated tax issues.176 Thus, the cases that make it to court might very well resemble Ritz and International Game, and as such, might be dismissed because of

172 Id.
173 Ritz, 878 NE2d 1152.
174 Id at 1158.
175 Note that the court in Ritz did not consider whether the retailer knew or did not know that taxes were due, but only said that it was reasonable for the retailer not to know. Ritz, 878 NE2d at 1170. This is how the two issues—whether tax was due and whether the retailer knew that—are intertwined. The complexity of the issues leads to a reasonableness of confusion, and hence a lack of a knowing avoidance.
176 This works on two levels. First, if the retailer is purposefully trying to avoid taxes, the retailer is wise to omit those taxes in complicated cases, since it is likely harder to detect the wrongdoing, and the case law is on their side. Second, if the retailer is a good faith actor, tautologically, it is more likely the retailer will make more mistakes in collecting and remitting taxes when the tax issues are more complicated, for that is what it means for the tax issues to be complicated.
the complexity of the tax issues involved. So perhaps the right conclusion is to say this hurdle is one that relators cannot overcome, because the only times they will face it is when it is far too high to clear.

Yet to conclude that because of possible difficulties, courts cannot find that remote retailers can knowingly make, use, or cause to be made or used, false records or statements that conceal, avoid, or decrease an obligation to the government, flies in the face of what the courts have themselves said. For instance, in *International Game*, while the Supreme Court of Nevada did not give a specific example of a tax case that could properly be brought under the state false claims act, the court clearly stated that “private plaintiffs may properly bring false claims actions based on tax deficiencies under some circumstances.” The court in *Ritz* cited this point when discussing the interpretation of the state false claims acts that do not specifically exempt tax claims.

Given this language from the courts, there is another possibility. Certainly situations exist where the tax issues involved will not be ones where reasonable parties can disagree about the interpretation of the tax code. For example, in *Ritz*, the court indicated that, had the retailer had scienter when generating documents that showed that no use tax was due or collected, the claim may very well have succeeded. Perhaps, despite the incentives for the retailers to comply with the simpler tax issues, some of those cases may very well make it to court. Further, this body of issues where reasonable parties will not disagree will likely grow as state courts address the issues at the center of these tax claims. At some point, courts might then require parties—especially retailers, who may often be sophisticated repeat players—to understand some of the frequently litigated issues of other states’ tax codes. And once courts begin to allow such cases to go forward, clearer precedents will follow, putting future parties on notice of their obligations.

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177 *International Game*, 127 P3d at 1093.
178 *Ritz*, 878 NE2d at 1166.
179 Id at 1162.
180 One may argue that the ever-changing tax codes of states may slow this process. However, it is not clear that is the necessary effect of evolving tax codes. In fact, the changes in tax codes might very well be passed in order to address and clarify the very issues at hand here. In that way, such changes in state tax codes may actually help lead to a growing body of tax issues that may properly be brought under state false claims acts.
181 This brings up concerns about unsophisticated parties. However, the realization
One might object to this possibility, however, and say that state courts will not want to get their hands dirty with tax questions no matter what, and hence will use statutory loopholes like this “knowingly” language to avoid letting such cases come before them. The same justifications just mentioned apply here as well: a state tax body with expertise exists and can handle such issues, and in doing so will likely hand down better and more consistent rulings. However, this implicates a key question: Why would the states, who so closely modeled their false claims acts on the Federal FCA, omit the tax exemption when passing their own false claims acts? An objector may respond by noting that the state legislature and judiciary are different bodies, and just because the legislature made a decision not to exempt tax questions expressly does not mean that the judiciary will accept such issues with open arms.

These objections, however, hold little water. A legislature will likely do little to deter potential use tax avoiders by omitting certain clauses from a statute. This very idea that parties such as retailers will notice omissions from state statutes when compared to federal legislation not only is unlikely, but it cuts against the idea that the complexity of these issues lies beyond the ken of the parties and state courts. Also, the legislature could do much more in terms of both deterrence and clarity by including a clause that specifically allows relators to bring tax issues, though it might be marginally more difficult for a legislature to pass such a statute. Furthermore, the retailers with sales and use taxes of high enough value to give relators enough incentive to institute a claim are likely to be those who are sophisticated parties and repeat players, as was the case in *Ritz*.\(^{182}\) These parties will likely gain, either through continued participation or through the advice of legal council, an understanding of how such use tax claims will play out in court regardless of whether these claims arise from an express grant or the lack of a denial in state legislation.

The small number of cases on point makes it hard to deduce a pattern or underlying theory. Perhaps the safest and most ac-

\(^{182}\) *Ritz*, 878 NE2d 1152 (including as defendants popular retailers Ritz Camera, Wolf Camera, Petsmart, Armani Exchange, Amazon, Toys R Us, 1-800-Flowers, Universal Studios, etc.)
curate conclusion regarding the role the “knowingly” requirement will play in future internet purchaser qui tam actions is to recognize that, while courts are hesitant to explore preliminary tax issues, they have left the door open to that possibility. Two factors will influence the likelihood that internet purchasers will recover in use tax qui tam actions. The first factor is whether relators can find cases involving clear tax issues with clear scienter. Based on the language in *Ritz*, this would certainly help the relator’s cause. The second factor is whether the body of law surrounding internet taxation issues becomes better settled. If the number of issues about which reasonable parties may disagree shrinks, relators will have a better chance winning their case.

Beyond this lies the question of what courts should be doing when faced with these difficult tax questions in qui tam cases. This question implicates the tension between administrative control of tax issues and private control of qui tam actions. If indeed there should be administrative deference to the state tax bodies on these questions of whether there is tax liability in a certain situation, the courts are correct to step back until state tax bodies provide clarifying rulings on the law. On the other hand, the whole purpose of qui tam actions is to make up for some sort of administrative failing, so perhaps this is exactly where courts should be going forward with such actions. Things are slipping through the administrative cracks, and so courts should be willing to let qui tam actions fill in those cracks.

For two reasons, courts ought to resolve this tension in favor of the qui tam plaintiffs and should proceed with these tax issues if at all possible. First, the state false claims acts, whose language clearly permits such tax claim qui tam actions, should be read liberally in favor of qui tam plaintiffs. States, who so closely modeled their false claims after the Federal FCA, yet explicitly omitted the language exempting tax claims, did so to permit such actions. Courts have said as much.

Second, court decisions would in no way have to preempt administrative action. Not only can court decisions on these matters be crafted narrowly, as these cases are highly fact-specific by nature, but subsequent changes in the tax law would give them no precedential weight going forward. That is, if courts somehow

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183 *Ritz*, 878 NE2d at 1162.
184 *International Game*, 127 P3d at 1093 (“[P]rivate plaintiffs may properly bring false claims actions based on tax deficiencies under some circumstances.”).
misapplied the tax law, further administrative clarifications or modifications of the tax law would reduce or eliminate the impact of such a decision. In fact, such court decisions can even serve to identify what pieces of the tax law need administrative clarification and incentivize and direct future modifications of the tax law.

B. Websites As Sources of Public Information

All state statutes prohibit certain claims from being brought based upon public disclosures.\(^{185}\) Most of these states discuss this exception using language closely similar, if not identical to the language in the Federal FCA, which itself indicates that "public disclosures" include "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media."\(^{186}\) For instance, the Nevada statute says:

No action may be maintained pursuant to this chapter that is based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of a house of the legislature, an auditor or the governing body of a political subdivision, or from the news media, unless the action is brought by the attorney general or an original source of the information.\(^{187}\)

Federal courts have consistently excluded those sources not listed as constituting original sources.\(^{188}\) Internet sources may pose a new problem—one that courts have not yet addressed. For instance, would a financial report compiled voluntarily and posted on a publicly traded corporation's website fall into any of


\(^{186}\) 31 USC § 3730(e)(4)(A).


\(^{188}\) See, for example, Dunleavy, 123 F3d at 746 (holding that exclusion occurs "only when information has been publicly disclosed through an enumerated method").
the categories? After a quick glance, it does not seem to fit into any of the categories. However, in some sense, the information seems quite public. The publicly traded corporation is posting information on its website for anyone with internet access to view. The only requirement for being able to view the material is having internet access. However, that is a requirement a growing number of people meet today. Furthermore, a minor requirement in order to access the information has not prevented courts from finding information to be publicly disclosed. As the amount of content available online grows, and as the number of people who have internet access grows, courts will face the question of how to treat online information more often.

Two scenarios seem possible if a court indeed addresses the issue of information on a public website. A first option is for the court to treat online information no differently than it treats any other information. The court can look at the information and decide if it falls into one of the categories enumerated in the pertinent statute. This scenario, though it keeps with precedent, may not at first provide much certainty, for it still leaves unanswered what type of information from a website a court will include in the enumerated categories. This may not be a problem, for perhaps the online information will just be an electronic version of the same types of information courts typically encounter. Yet this might not be the case. The costs of publishing information online are lower than producing print or other media versions of the information, in which case online retailers and other companies may start providing more information online. This general question will likely remain unanswered until courts answer it themselves.


190 The easiest example to see this is with the news media category. A person cannot know of information in a newspaper without getting a copy of a newspaper. A person cannot learn of something on the television news if that person does not have access to a television set.

191 For example, online retailers often provide fairly standard information, such as annual reports, stock price information, and SEC filings. See, for example, J.Crew's SEC Filings, available at <http://www.jcrew.com/content/investorrelations/filings.jhtml> (last visited May 10, 2008).

192 Companies might, for instance, find it beneficial to make available to potential investors all sorts of information it would not choose to make available were the only other option printing the material in a hard copy report. This, however, is in and of itself not a reason that courts cannot look to the current categories in the statutes and inquire whether the information fits in any of those categories.
The second option is for the court to come up with new tests for determining whether information on a website is publicly disclosed. Courts may consider things such as how easy it is for a user to navigate to the information on the page and how many people have access to the website. Is the website an active link that users can access from the company's main page? Is it a link whose URL must be typed directly into a browser to access it? Does this website require a subscription or membership agreement to access certain information?

This type of new test, however, may prove unhelpful. Precedent, albeit not from cases involving websites, suggests that both the low probability of finding information and the reduced accessibility to the information has no effect on whether the court will find the material as publicly disclosed. For instance, in *John Doe v John Doe Corp*, the court made the sweeping statement that any information placed in the "public domain" constituted a public disclosure. Of course this may do little to clarify things, as it leaves unanswered the question of what constitutes the public domain. Answering this question may very well entail asking some of the same questions just mentioned.

Admittedly, *Doe* dealt with accusations of fraud leaking into the public domain, which may factually differentiate it from information willingly disclosed on a website. However, the court does not put much weight on the type of fact that leaked into the public domain. It instead looks to issues such as the level of accessibility of the information, and notes that information need not be accessible to all members of the public for it to be considered publicly disclosed. This strengthens a claim that information available on a public website, even if located on a page to which few if any users navigate, constitutes information in the public domain.

However, disqualifying this information under the public disclosure ban creates the problem of bad incentives and possible loopholes for online retailers. Such retailers may then place information of illegal tax activities, such as admissions of use taxes not collected, in an obscure corner of their website with the purpose of protecting themselves against qui tam actions that may later arise. Including the information on a website may auto-

193 960 F2d at 320.
194 Id at 322.
195 Id.
196 Id.
matically classify the information as publicly disclosed, hence barring any relator from using that information to bring a qui tam action against the retailer. There is an admitted danger of a perverse exclusion.\textsuperscript{197} However, it would not be difficult for legislatures to legislate around this, or for courts to make an exception.\textsuperscript{198} Furthermore, this public disclosure exception does not apply when the attorney general commences the suit, so retailers would not completely avoid chances of liability through such schemes.

Another argument that such information should or will be considered as a public disclosure is that it fits into the news media category. Courts have traditionally interpreted news media to mean television, magazines, and newspapers.\textsuperscript{199} However, as an increasing number of people use the internet for their news, courts may indeed lump internet information into the news media category. This broadening of the news media category is further supported by the \textit{Grayson} court's finding in a California case that news media includes scholarly journals and periodicals.\textsuperscript{200}

Yet if courts do expand the news media category further to include a large portion of website content, they run the danger of excluding too much information as publicly accessible. For if any information on websites fits into the news media category, again retailers and other such possible defendants have bad incentives, as mentioned above, to disclose wrongdoings on their websites. Though again, courts may be able to weed out those cases, legislatures may be able to legislate around them, and attorneys general may be able to institute the suit on behalf of the government.

The better of these two possible solutions seems to be to treat online information no differently from other forms of infor-

\textsuperscript{197} See, for example, \textit{Findley}, 105 F3d at 682--84 (throwing out claims alleging that government employees' clubs that earn revenue from vending services on federal property violate the FCA by retaining money owed the government, even though the relator did not rely on the public disclosure to bring the suit, because the relator was not an original source and merely echoed information that was publicly available).

\textsuperscript{198} For instance, a legislature could exempt as public disclosures any website postings that are deemed to be hidden, or can exempt as public disclosures information posted by a company for the sole purpose of avoiding qui tam actions. This wording might, however, lead to difficult judicial inquiries, such as what constitutes hidden postings, or when a company has deliberately tried to avoid a qui tam action.

\textsuperscript{199} See, for example, \textit{McKenzie v Bellsouth Telecommunications, Inc}, 123 F3d 935 (6th Cir 1997).

\textsuperscript{200} \textit{Grayson}, 142 Cal App 4th at 754--55 (noting that nothing in either the statutory language or public policy considerations indicates that news media should include only newspapers).
mation. This method enjoys two benefits. First, as mentioned, it is consistent with methods used to this point, and as such, will not disrupt the current judicial standards. And while online information may present some new problems, there is no reason to think that information disclosed on the internet will differ in any way substantial enough to justify a completely new test. Second, this method helps preserve the goals of the false claims acts. Recall that Lincoln originally urged for the passing of the Federal FCA to provide a tool to help fight fraud against the government.\textsuperscript{201} Subsequent amendments preserved this purpose while helping prevent parasitic suits.\textsuperscript{202} The basic idea was to create an FCA and related judicial standard that rewarded relators who contributed work to the case.\textsuperscript{203} Allowing relators to use information from a website that does not otherwise fit into one of the categories in the false claims acts preserves incentives for relators to do research and help the government combat fraud, without allowing relators to exploit truly public information that fits into the list of categories.\textsuperscript{204}

C. Documents Resulting from Internet Purchases

Given the analyses in Parts A and B above, information contained in a document resulting from an internet purchase—such as a receipt—should not constitute public information for the purposes of false claims statutes. First of all, assuming courts will stick with the statutory enumeration of public sources, a sales receipt does not naturally fit into any of the categories.\textsuperscript{205} Beyond that, this purchase agreement looks quite similar to a classic set of false claims cases, those arising in hospital settings

\textsuperscript{201} 2d Sess in 132 Cong Rec H 6474 (Sept 9, 1986) (statement of Representative Berman).
\textsuperscript{202} See Doe, 960 F2d at 319.
\textsuperscript{203} See, for example, Federal Recovery Services, 72 F3d at 451.
\textsuperscript{204} For example, there is a distinct difference between using information disclosed due to a criminal hearing, and using information in a financial document posted on a company's website. The relator is not trying to exploit something that has been involved in public proceedings, but has uncovered a piece of information through his or her own work.
\textsuperscript{205} Note that the courts in Ritz and International Game did not specifically discuss the issue of whether the documents memorializing the sales were public disclosures. Thus there is no definitive answer from the case law, yet it seems likely that had the courts considered the records invalid forms of information, they would have noted as such. Further, their language about possible future suits by online purchasers would be contradicted, at least in part, by an exclusion of such material.
where doctors or patients bring false claims suits against manufacturers, sellers, or distributors. 206

Beyond this, one might argue that anyone can make purchases from an online company and discover that the company is fraudulently withholding taxes from the government. This argument, however, both proves too much and misses the purpose of false claims statutes. It proves too much, for in most false claims acts, one could imagine any number of situations where a citizen might stumble across the discovery of fraud. Yet just because several, or even most, people could have found themselves in the relator's shoes does not mean the actual relator should not be able to bring suit. And in that way, the objection misunderstands a purpose of the false claims acts. After all, one of the main, if not the main, purpose of the false claims acts, was to incentivize private parties to bring actions on behalf of the government and provide channels for such actions. 207 Such stringent restrictions would go against the very nature of the acts.

A caveat to this allowed category of qui tam actions is that other information outside of that contained on the receipt may bar the action. For instance, if a purchaser notices information on a receipt that indicates tax fraud by a retailer, yet other publicly disclosed information may already point to this same fraud, in which case the purchaser may be barred from bringing the action. 208

VI. CONCLUSION

Both federal and state false claims acts seek to provide citizens with the necessary means to assist the state and federal governments in fighting fraud against the government. One such area where fraud can take place is in avoidance of taxes. While the Federal False Claims Act expressly exempts such actions from being brought by citizens, many state statutes make no

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206 See, for example, Schmidt v Zimmer, Inc, 386 F3d 235, 245 (3d Cir 2004) (ruling for relators in an FCA claim against seller of orthopedic implants when seller knowingly assisted in causing government to pay claims grounded in fraud).

207 Rapsanti, 71 Temp L Rev at 27 (cited in note 8).

208 See, for example, Doe, 960 F2d at 320.
such exemptions. State courts have indicated that relators may, in some instances, be able to bring tax claims through state false claims acts. In fact, several online purchasers have brought claims alleging use tax violations. However, in part because the tax issues involved were messy, state tax courts have as of yet not allowed these online purchasers to win their qui tam claims.

This leads to the questions of whether an online purchaser should be able to bring a successful qui tam action alleging a use tax violation, and if so, under what circumstances. This Comment shows that a purchaser of goods over the internet can indeed serve as a whistleblower and bring a successful use tax claim through state false claims statutes that do not strictly forbid such claims. Relators must first be able to meet the "knowingly" standard set out in state false claims statutes. To do this, they must show that the online retailers knowingly reduced a debt owed to the government. This is a difficult standard to meet, however if the right cases comes before the court—a case involving simple tax issues—or as the tax law involving internet taxation issues becomes more settled, relators may find more success in meeting this standard. In situations where online purchasers can meet this standard, they can use certain information—information unique to them and not available to the public at large, such as a receipt from a sales transaction—to win their suit. Whether courts will allow relators to use other types of information available on websites, information that does not fit into any of the categories listed in state false claims acts, remains an unanswered question. When faced with this question, courts should leave in place the existing inquiries to serve judicial consistency and the function of false claims acts in general.