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The False Claims Act: Potential Application to Members of Congress

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THE FALSE CLAIMS ACT: POTENTIAL APPLICATION TO MEMBERS OF CONGRESS

I. INTRODUCTION

The False Claims Act[1] is a civil remedy for the restitution to the government of monies fraudulently obtained from the government. The Act provides for a civil suit, by either the federal government or a private plaintiff, for restitution plus a $2,000 statutory penalty where allegedly fraudulent claims have been presented for payment from the United States Treasury.[2] Section 231 is the substantive provision of the Act delineating the circumstances in which a remedy will be available.[3]

1. 31 U.S.C. §§ 231-233, 235 (1976).

2. A consideration worthy of note is that the Act is not an exclusive remedy, although it appears to be the only one providing for specific restitution. There are available to the government various other actions for the vindication of wrongs committed in the obtaining and use of government funds. *See, e.g.*, 15 U.S.C. §§ 1-7, 15 (1976) (Sherman Anti-Trust Act); 10 U.S.C. § 2306(f) (1976) (false certification in military procurement contracts); 18 U.S.C. §§ 287, 1001 (1976) (criminal counterpart to the False Claims Act); 40 U.S.C. § 471 (1976) (Surplus Property Act).

3. 31 U.S.C. § 231 (1976) provides:

> Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the

Section 232 is the major procedural provision, and outlines the parties and the steps necessary to pursue a suit under the Act.[4] Taken together, sections 231 and 232 are both broad and complex.

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doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

4. 31 U.S.C. § 232 (1976) provides:

(A) The several district courts of the United States, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the United States attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) of this section notice of the pendency of such suit shall be given to the United States buy serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, or by certified mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) of this section. The court shall have no jurisdiction to proceed with any suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was 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: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending on December 23, 1943, brought under this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, or by certified mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C) of this section.

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such

The purpose of the Act is, quite simply, to protect the funds of the United States from false claims, and to provide for restitution of those funds obtained by fraudulent means.[5] Recent cases emphasize that the forfeiture and damages provisions are specifically designed to make the government whole.[6]

Although there is a wealth of case law concerning the Act,[7] the greatest proportion of it deals with government contractors. Cases concerning the Act have generally arisen in the context of commercial contracts between the government and private parties, particularly with construction and machinery contractors.[8] Another large category of cases stems from fraudulent claims for benefits made on government agencies like the Veteran's Administration and the Federal Housing Authority.[9]

This comment delineates the potential scope of the Act's application to Members of Congress. The literal scope of the statute certainly includes Members; nowhere has it been posited that this is not the case.[10] In only three cases has the Act been utilized in an attempt to

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suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B) of this section, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefore on the United States.

5. *See, e.g.,* Marcus v. Hess, 317 U.S. 537 (1943).

6. *See, e.g.,* Peterson v. Richardson, 370 F. Supp. 1259 (N.D. Tex. 1973), *aff'd,* 508 F.2d 45 (5th Cir. 1975).

7. *See, e.g.,* Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977); United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973). *See also* Annot., 26 A.L.R. FED. 307 (1976); Annot., 19 L. Ed. 2d 1558 (1968).

8. *See, e.g.,* United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972); United States v. National Wholesalers, 236 F.2d 944 (9th Cir. 1956).

9. *See, e.g.,* United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966); Alperstein v. United States, 291 F.2d 455 (5th Cir. 1961), *aff'g* 183 F. Supp. 548 (S.D. Fla. 1960); United States v. Polly, 255 F. Supp. 610 (W.D.N.C. 1966); United States v. Schmidt, 204 F. Supp. 540 (E.D. Wis. 1962).

10. *See* Hollander v. Clay, 420 F. Supp. 853 (D.D.C. 1976).

force Members of Congress to make restitution for the alleged intentional misuse of official monies.[11] In several of the more recent cases involving the Act, the procedural oddities[12] of the statute have effectively blocked attempts to litigate the questions presented. This reading of the procedural requirements may make the statute, in practical terms, only minimally effective against Members of Congress.

II. HISTORY AND PURPOSE OF THE ACT

The False Claims Act was first enacted in 1863.[13] As originally enacted, the Act encompassed both civil and criminal remedies and was intended as the comprehensive measure with regard to this type of fraud.[14] These provisions were later recodified, creating two distinct remedies, one civil and one criminal.[15] The criminal provision was repealed in 1909.[16] The criminal provision, in spite of its repeal, "has continued vitality . . . insofar as it specifies the acts giving rise to civil liability under § 3490."[17] The civil provision incorporates the language of the repealed criminal provision for the definition of liability.[18] The

11. Joseph v. Cannon, No. 7-0452 (D.D.C. May 25, 1978); Thompson v. Hays, 432 F. Supp. 253 (D.D.C. 1976); Hollander v. Clay, 420 F. Supp. 853 (D.D.C. 1976).

12. 31 U.S.C. § 232 (1970). *See* part III, *infra*, for a discussion of the procedural mechanics of the Act.

13. Act of Mar. 2, 1863, ch. 67, §§ 1-7, 12 Stat. 696-98.

14. [The] Act was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States. It seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims, regardless of the particular form, or function, of the government instrumentality upon which such claims were made.

Rainwater v. United States, 356 U.S. 590, 592 (1957) (citation omitted). *See also* CONG. GLOBE, 37th Cong., 3d Sess. 952-58 (1863). *See also* H.R. REPORT NO. 2, 37th Cong., 2d Sess. Part 2 (1863).

15. Act of Mar. 2, 1877, tit. XXXVI, §§ 3490-3494, 18 Stat. 691-92 (civil and procedural provisions). Act of Mar. 2, 1877, ch. 5, tit. LXX, § 5438, 18 Stat. 1054 (criminal provision and penalty).

16. Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1153.

17. United States v. Bornstein, 423 U.S. 303, 307 n. 1 (1976).

18. Section 3490, the civil provision of the Act, as originally enacted, and as it still stands, reads as follows:

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

Act of Mar. 2, 1877, tit. XXXVI, § 3490, 18 Stat. 691 (codified at 31 U.S.C. § 231 (1976)). The unofficial version of the Act, 31 U.S.C. § 231 (1976), however, incorporates the actual language of the repealed provision, *see* notes 15 & 16 and accompanying text *supra*, rather than merely making reference to it.

present criminal section is an amended and revised version of the original criminal provision.[19] The cases dealing with the test of civil liability generally hold that subsequent amendments of the criminal provision have no effect on the scope of the civil remedy.[20] Accordingly, only those aspects of the criminal title that were part of the statute at the time of the original recodification are relevant to the scope of the civil remedy.[21] Courts generally hold that the intent of Congress to reach a broad spectrum of fraudulent activities is clear,[22] and that the Act must have broad application in order to effectuate its manifest purpose.[23] This broad view of the congressional purpose and the scope of the statute has led to some conflict with the traditional view that the Act, because it incorporates the language of the criminal section, is penal and should be strictly construed.[24] In most applications, courts are now making a broad and liberal reading of the operation of the Act.[25]

III. PROCEDURAL REQUIREMENTS

The False Claims Act is a procedurally complex statutory remedy. Section 232 provides that suits, under section 231, may be brought by the government or by any other person at his own expense.[26] The suit must be brought in the name of the United States, and cannot be withdrawn or discontinued without the consent in writing of both the judge and the United States Attorney, stating the reasons for the discontinuance or withdrawal.[27]

When suit is filed by a private plaintiff, notice of the suit must be given to the United States.[28] A copy of the complaint is served on the

19. 18 U.S.C. §§ 287, 1001, & Reviser's Note at 4187 (1976). This title has been enacted into positive law by the Congress of the United States. The civil provisions found in title 31, however, have not been so enacted, and the official version of the Act is contained in the United States Revised Statutes. *See* note 18 *supra*. The substantive differences between the official and unofficial versions are minimal, and many cases construing the Act refer to the United States Code in their decisions. *See, e.g.,* United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 50 & n. 1 (8th Cir. 1973); United States v. Mead, 426 F.2d 118, 121 (9th Cir. 1970).

20. *See, e.g.,* Kessler v. Mercur Corp., 83 F.2d 178 (2d Cir. 1936).

21. *See, e.g.,* Olson v. Mellon, 4 F. Supp. 947 (W.D. Pa. 1933), *aff'd,* 71 F.2d 1021 (3d Cir. 1934). *See also* Rainwater v. United States, 356 U.S. 590 (1957).

22. *See, e.g.,* United States v. Neifert-White Co., 390 U.S. 228, 232 (1968); Rainwater v. United States, 356 U.S. 590, 592 (1957).

23. *See* note 22 *supra*.

24. *See, e.g.,* Brensilber v. Bausch & Lomb Optical Co., 320 U.S. 711 (1942).

25. *See, e.g.,* United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973); United States v. Griswold, 24 F. 361 (D. Ore. 1885), *aff'd,* 30 F. 762 (9th Cir. 1887).

26. 31 U.S.C. § 232(B) (1976).

27. *Id.*

28. 31 U.S.C. § 232(C) (1976).

United States Attorney together with a written disclosure of all information and evidence in possession of the plaintiff material to the prosecution of the suit.[29] Although the statute requires disclosure of "all information material to the prosecution of the suit,"[30] the Department of Justice feels that it is unclear whether anything more than a memo indicating the basic nature of the allegations and type of evidence is necessary.[31] Once notice has been effected by certified mail or personal service, the United States has sixty days in which to enter an appearance. If the United States does not enter the suit, the private plaintiff may carry on the litigation.[32] If the United States does enter the suit, the litigation will be pursued solely by the United States.[33] Prior actions by the private plaintiff will not be binding on the United States subsequent to its entry into the suit.[34] If the United States enters the suit and then fails to pursue it with "due diligence," the private plaintiff may resume the litigation six months from the date of the initial appearance by the United States or such other date as the court may set.[35]

When the action is brought by a private plaintiff, the court will be deprived of jurisdiction if it is shown—by any party—that the evidence or information on which it is based was in the possession of any agency, officer, or employee of the United States at the time the suit was initiated.[36] It should be noted, however, that this is an affirmative defense, not an affirmative burden of pleading on the complainant.[37] It is clear from the purpose of the Act that the knowledge of officers or employees of the United States who are themselves defendants cannot deprive the court of jurisdiction.

If the United States decides to conduct the suit, the court may award reasonable compensation out of the proceeds collected to the private plaintiff for the disclosure of information or evidence not in the possession of the United States when the action was filed. This award may not exceed one-tenth of the proceeds of the suit or settlement.[38] If the suit is litigated by the private plaintiff, the court may

29. *Id.*
30. *Id.*
31. Conversations with United States Department of Justice, Civil Fraud Division, August 1978 [hereinafter cited as Conversations].
32. 31 U.S.C. § 232(C) (1976).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. The statute reads "whenever it shall *be made* to appear." *Id.* (emphasis added).
38. 31 U.S.C. § 232(E)(1) (1976).

award up to one-fourth of the proceeds of the suit or of the settlement as compensation to the plaintiff for collecting forfeitures and damages for the benefit of the government.[39] The court may also award reasonable costs and expenses.[40] The statute, however, provides that a private plaintiff is solely liable for any costs or expenses incurred; reimbursement is completely within the court's discretion. The statute further bars any right of action by the private plaintiff against the United States for reimbursement or indemnification of such expenses.[41]

IV. CONSTRUCTION AND INTERPRETATION OF THE ACT

The cases dealing with the Act generally state that the statute, in theory, must be strictly and literally construed.[42] This interpretation arises from the notion that statutes which are penal in nature are strictly construed.[43] The statute derives its "penal" aspects primarily from the incorporation of the original criminal provision.[44] The language itself, however, leaves room for speculation and interpretation. More recent cases emphasize the broad, remedial nature of the Act and interpret the Act more liberally.[45] The liberal judicial construction, taken together with arguments for openness in government, favors a less stringent interpretation when the Act is invoked against Members of Congress.

To understand the statute, it is necessary to examine some of its major elements. The following subsections examine the claim and the connection of fraud to the claim, the knowledge and intent required for liability, defenses which can be raised, and finally, cases applying the Act to Members of Congress.

A. The Claim and the Causal Relationship

The first requirement of the statute is that there be a claim.[46] Two issues arise with regard to the delineation of claims covered by the Act: First, what constitutes an actual claim, and second, what degree of causal connection is required between the fraud and the claim.

As the end result of any fraudulent activity, there must be an ac-

39. 31 U.S.C. § 232(E)(2) (1976).
40. *Id.*
41. *Id.*
42. "[E]ven penal provisions must be 'given their fair meaning in accord with the evident intent of Congress.'" Rainwater v. United States, 356 U.S. 590, 593 (1958) (citations omitted). *See also* Brensilber v. Bausch & Lomb Optical Co., 320 U.S. 711 (1942).
43. United States v. McNinch, 356 U.S. 595, 598 (1958).
44. *See* notes 17-21 and accompanying text *supra*.
45. *See* notes 22-25 and accompanying text *supra*.
46. 31 U.S.C. § 231 (1976).

tual claim made against the government in order to trigger the operation of the statute.[47] Although there are recent cases holding to the contrary,[48] the majority view was that a claim is made, within the meaning of the Act, only when payment has been made on the basis of information submitted to the government by the alleged wrongdoers.[49]

In this regard, the conflict previously discussed between the strict, penal and the liberal, remedial readings of the Act is again important. In the past, because many courts held that "claim" was to be strictly construed,[50] they generally required the payment of money to complete a claim.[51] More recently, the Supreme Court has held that "claim" should not be read so narrowly that it includes only demands based on an alleged government liability to the claimant.[52] The Court reasoned that the Act is remedial in nature and reaches beyond the type of claims subject to legal enforcement to any fraudulent attempt to cause the government to pay out money.[53]

The Act, as construed, reaches both direct and indirect claims. The statutory language allows an action against anyone causing a claim to be made.[54] The courts have construed this element of causation liberally.[55] The Supreme Court stated the scope of causation under the statute by holding that "[t]hese provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government."[56]

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47. *See, e.g.*, United States v. Cochran, 235 F.2d 131 (5th Cir.), *cert. denied*, 352 U.S. 941 (1956).

48. *See, e.g.*, United States v. Neifert-White Co., 390 U.S. 228 (1968), which provides a good discussion of the history of this aspect of the Act's operation.

49. The traditional rule strictly construed a claim as a demand for the transfer of money or property based on the government's liability to the respondent; only such a demand would satisfy the statute. *See* United States v. McNinch, 356 U.S. 595 (1958); United States v. Cohn, 270 U.S. 339 (1926). It is as yet unclear whether the holding in *Neifert-White* will completely vitiate this definition of a claim. Although that case did not overrule *Cohn*, which stated the strict rule, the Court did point that the facts in *Cohn* took it outside the ambit of the Act, and therefore it should not be relied on as defining the requirements of the Act.

50. *See, e.g.*, United States v. McNinch, 356 U.S. 595 (1958); United States v. Cohn, 270 U.S. 339 (1926).

51. *See, e.g.*, United States v. Howell, 318 F.2d 162 (9th Cir. 1963); United States v. Cherokee Implement Co., 216 F. Supp. 374 (N.D. Iowa 1963). *See also* note 49 and accompanying text *supra*.

52. United States v. Neifert-White Co., 390 U.S. 228 (1968).

53. *Id.* at 233.

54. 31 U.S.C. § 231 (1976) states "who shall make or cause to be made, or present or cause to be presented."

55. *See, e.g.*, United States v. Neifert-White Co., 390 U.S. 228 (1968); Marcus v. Hess, 317 U.S. 537 (1943).

56. 317 U.S. at 544-45.

In *Marcus v. Hess*,[57] for example, contractors were hired and paid through local government units on Public Works Administration projects.[58] The suit in *Marcus* was brought by a private plaintiff who claimed that the contractors involved had engaged in collusive bidding on the projects and thereby defrauded the government. Some state money was involved, but the bulk of the funding was from the United States Government payable to the contractors through the local government agency. The Court stated that "[g]overnment money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to the States. . . . The fraud here could not have been any more of an effort to cheat the United States if there had been no state intermediary."[59] So long as there is ultimately an actual claim made against the United States Treasury, the courts will permit substantial attenuation between the false claimant and the federal purse.

With regard to the relationship between the fraud and the claim, courts have held that mere fraud or deceit in dealing with the government is not sufficient to trigger the statute.[60] The statute bars fraud "in connection with" the making of a claim.[61] As with the interpretation of the claim itself, a fairly tenuous connection is allowed between the fraudulent act and the actual claim to satisfy the Act.[62] In *United States v. Bornstein*,[63] however, the Supreme Court held that a person may only be held liable under the statute for his or her own acts, not those of another.

B. Intent and Knowledge

The requirements of intent and knowledge, although separate elements of the statute, are closely connected.[64] A few of the cases, viewing the statute as essentially penal, have required the equivalent of criminal mens rea.[65] The Supreme Court, on the other hand, has

57. *Id.*

58. In *Marcus*, the actual transfer of federal funds into respondent's hands went through several intermediary stages.

59. 317 U.S. at 544.

60. *See, e.g.*, United States v. Howell, 318 F.2d 162 (9th Cir. 1963).

61. 31 U.S.C. § 231 (1976) encompasses conspiracy and aiding the making of a claim. *See* United States v. Howell, 318 F.2d 162 (9th Cir. 1963); Cahill v. Curtiss-Wright Corp., 57 F. Supp. 614 (W.D. Ky. 1944).

62. *See, e.g.*, Marcus v. Hess, 317 U.S. 537 (1943).

63. 423 U.S. 303 (1976).

64. Except with regard to military property, where the statute specifies intent to defraud, the statute speaks only of "knowing," which must be presumed to contain the standard of intent.

65. *See, e.g.*, United States v. Priola, 272 F.2d 589, 593-94 (5th Cir. 1959); United States v. Schmidt, 204 F. Supp. 540, 543 (E.D. Wis. 1962).

stressed the civil nature of the statute.[66] Some intent to act, coupled with knowledge of the falsity of the claim, is necessary.[67] Knowledge of falsity is required by the statute.[68] Intent in this context appears to require a volitional and deliberate act, done with knowledge of the misrepresentation and the specific purpose of defrauding the government. But some courts question whether purpose to defraud is actually necessary to establish the requisite intent under the statute.[69]

There is, at the present time, an almost even split among the federal circuit courts of appeal. Perhaps a slightly smaller number of circuit courts require a purpose to defraud the government in addition to the knowledge of the falsity of the claim.[70] The issue arises from the use of the phrase, "false, fictitious, or fraudulent" claims.[71] The courts requiring specific intent hold that the traditional elements of common-law fraud, including a purpose to defraud, must be proven, and that the use of the phrase was only intended to insure the broad coverage of the statute.[72] The courts holding that specific intent is not always necessary argue that some degree of traditional specific intent might be required for "fraudulent" claims, but make a distinction between those and others that are merely "false" or "fictitious."[73] These courts find that the phrase encompasses different standards of intent.[74]

In *United States v. Mead*,[75] the Ninth Circuit reasoned that the use of several terms was merely the result of the "draftsman's desire to encompass the varying ways in which fraud is defined.[76] The court objected to eliminating the specific intent requirement.

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66. *See, e.g.*, Marcus v. Hess, 317 U.S. 537, 550 (1943). *See also* United States v. Hougham, 364 U.S. 310, 313 (1960); Rex Trailer Co. v. United States, 350 U.S. 148, 152-54 (1956).

67. *See, e.g.*, United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973).

68. 31 U.S.C. § 231 (1976) states "knowing such claim to be false, fictitious, or fraudulent."

69. *See* United States v. Kennedy, 431 F. Supp. 877 (C.D. Cal. 1977). *See also* United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973), which held that knowledge, as manifested by "reckless disregard," is sufficient.

70. *See* Annot., 26 A.L.R. FED. 307 (1976). The Third, Fifth, Sixth and Ninth Circuits require specific intent. The Fourth and the Tenth Circuits have rejected this requirement. The Second, Seventh and Eighth Circuits have all rejected, in recent cases, their prior acceptance of the requirement.

71. 31 U.S.C. § 231 (1976).

72. *See, e.g.*, United States v. Mead, 426 F.2d 118, 123 (9th Cir. 1976).

73. *See, e.g.*, United States v. NcNinch, 356 U.S. 595 (1958); United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973).

74. 476 F.2d at 56, 58.

75. 426 F.2d 118 (9th Cir. 1970).

76. *Id.* at 123.

> Judicial definition of fraud indicates that there is not an accepted distinction between a knowingly false claim and a fraudulent claim. . . . Since no reason appears for a partial elimination of the intent requirement, we are unwilling to find a Congressional intent to make such a distinction by subtle means. A further consideration is the familiar principle of construction that no statute is to be construed as altering the common law further than its words import. Intent to defraud has always been an essential element of common law fraud and Congressional intent to partially dispense with that element in the False Claims Act is lacking.[77]

In *United States v. Cooperative Grain & Supply Co.*,[78] the court viewed intent differently.[79] The court found the arguments for requiring specific intent under the Act to be unpersuasive after a review of both the legislative history and the words of the statute.[80] "[T]he most persuasive reason for not requiring a specific intent to defraud the Government is that [the] Act is simply couched in broader terms. The Act is remedial and in plain language covers the submission of a claim known to be false."[81] The court's discussion of intent, of which knowledge is a part, centered on the volitional act in presenting the claim and the "ill will" or specific intent to defraud. The court stated:

> [T]he volitional action of intent is encompassed in words, e.g., "present," "cause to be presented," and "makes, uses or causes to be made." 31 U.S.C. § 321. Of course, the "ill will" part of intent is not encompassed in any part of the Act except the word "fraudulent." Intent, therefore, includes the elements of the volitional action of presenting the claim to the Government, the ill will towards the Government, and the knowledge of the action itself. Although we think that "ill will" may be inferred if the volitional action of presenting the claim and the element of knowledge of falsity . . . are proved by the Government, we do not require that an "ill will" or a specific intent are necessary elements for an actionable liability under the Act.[82]

Thus, where specific intent is not required by the court, knowledge will be the pivotal element.[83] In *Cooperative Grain*, the court carefully analyzed the meaning of "knowledge" under the statute, stating that "[A] necessary question . . . is whether 'knowing' under the False Claims Act, 31 U.S.C. § 231, should be defined according to the crimi-

77. *Id.* (citations omitted).
78. 476 F.2d 47 (8th Cir. 1973).
79. *Id.* at 54-61.
80. *Id.* at 57-58.
81. *Id.* at 58.
82. *Id.* at 58-59 (citations omitted).
83. United States v. Cooperative Grain & Supply Co., 476 F.2d 47 (8th Cir. 1973).

nal sense, which would usually hold negligence not to be the necessary scienter, or its common accepted meaning in everyday usage in civil and business operations."[84]

Based on the fact that the Supreme Court has held the Act to be remedial in nature, the *Cooperative Grain* court found that the guilty knowledge of criminal means rea was not the standard under the Act.[85] The court then proceeded to discuss the type of "knowledge" required in civil misrepresentation. Misrepresentation falls into the three tort classifications of negligence, intent, and strict responsibility.[86] Because the court had found that a "false claim" as well as "fraud" was actionable under the statute, negligent misrepresentation would satisfy the requirement of "knowledge" under the Act.[87] The court felt that the varying phrases contained in the statute represented different degrees of intent, and that the only one requiring specific intent was "fraud." The court felt that for misrepresentation, the intent could include a "reckless disregard for the truth or falsity of a belief."[88] Thus, where the courts find that specific intent is not required under the statute, the scienter associated with common-law misrepresentation will likely be the standard used. Where courts do find a necessity for specific intent, the question of knowledge is subsumed by a finding of such intent.

C. *Defenses under the Statute*

If the Act is considered to incorporate the elements of common-law actions in misrepresentation or fraud, then the defenses available in those types of actions may be available under the Act.[89] The elements of a common-law action in deceit are: (1) a false representation of fact; (2) knowledge or belief by the defendant that the statement is false; (3) an intent to induce the plaintiff to act in reliance on the misrepresentation; (4) justifiable reliance on the misrepresentation by the plaintiff, manifested by action, or refraining from action; and (5) damage to the plaintiff as a result of such reliance.[90] Implicit in these elements are several defenses.[91] For instance, if the statement alleged to

84. *Id.* at 59.
85. *Id.* at 59-60.
86. *Id.* at 60.
87. *Id.*
88. *Id.* (citing Cooper v. Schlesigner, 111 U.S. 148, 155 (1883)).
89. *See, e.g.*, United States v. Mead, 426 F.2d 118 (9th Cir. 1970). The traditional congressional immunities and defenses are discussed in Hollander v. Clay, discussed *infra* at notes 139-160 and accompanying text.
90. W. PROSSER, TORTS 685-86 (4th ed. 1971).
91. *See generally* W. PROSSER, CASES AND MATERIALS ON TORTS 883-952 (6th ed. 1976).

be a misrepresentation is one of opinion or of law, rather than of fact, no action will lie.[92] If the defendant does not know or has no reason to know that the statement is false, the action may be barred.[93] With regard to intent, the result will vary depending upon the jurisdiction in which the suit is brought, and the standard that has been adopted by the court.[94] Some courts have held that simple negligence, as opposed to reckless disregard, is sufficient for an action in misrepresentation.[95] Similarly with regard to the necessary manifestation of reliance, the courts differ as to what is required under the Act.[96] Any instance in which no actual damage has resulted by the loss of money from the treasury will not likely be actionable.[97]

Two recent cases have dealt with the nature of these common law defenses.[98] In *United States v. Ekelman & Associates, Inc.*,[99] the court held that the action, under the Act, was one for intentional fraud and misrepresentation. Accordingly, the burden was on the government to show the requisite intent. *Ekelman* also set a stricter burden of persuasion, requiring proof of all elements by "clear and convincing evidence."

In *United States v. Kates*,[100] the court held that the action under the Act was one for an intentional tort and that, therefore, contributory negligence was no defense. The court stated that the suit could be defended only to the same extent as one for an intentional tort such as fraud. The procedural requirements of the statute may also be used as defenses. If the private plaintiff bases the suit on information already in the possession of the United States, the court is deprived of jurisdiction.[101] In such a case, the plaintiff must either show an evidentiary basis for the suit that is solely in his or her possession, or relinquish pursuit of the action to the government.[102]

The statute also provides time limits within which the government must either prosecute the action or the private plaintiff will be entitled to resume control of the suit.[103] On expiration of this time period the

92. W. PROSSER, *supra* note 90, at 720-25.
93. *Id.* at 699-705.
94. *See* notes 68-82 and accompanying text *supra*.
95. W. PROSSER, *supra* note 90, at 705, summarizing relevant case law.
96. *See* notes 50-56 and accompanying text *supra*.
97. *But see* note 53 and accompanying text *supra*.
98. United States v. Ekelman & Assoc., Inc., 532 F.2d 545 (6th Cir. 1976); United States v. Kates, 419 F. Supp. 846 (E.D. Pa. 1976).
99. 532 F.2d 545 (6th Cir. 1976).
100. 419 F. Supp. 846 (E.D. Pa. 1976).
101. 31 U.S.C. § 232(C) (1976).
102. *Id.*
103. *Id.* The statute provides that the United States has sixty days in which to enter the suit, starting with the day on which they are served with notice. The statute further

defendant may argue to the court that the United States, at least, has been foreclosed from prosecution.

Causation may also operate as a defense.[104] If a defendant's actions can be shown to have an insufficient causal relationship to the claim, or paying of the claim, the court may dismiss the action as to that defendant.[105]

D. Litigation involving Members of Congress

The False Claims Act has been invoked against Members of Congress for the alleged misuse of public funds only three times.[106] These cases are, for the most part, an exercise in the mechanics of the statutory defense discussed above.[107]

In probably the most widely publicized of these cases, Congressman Wayne Hays was sued for having placed Elizabeth Ray on a secretarial salary in his congressional office.[108] The allegations were made that he "caused" a false claim by authorizing requests for payment of Ray's salary to the Clerk of the House of Representatives.[109] The fraud arose, it was alleged, because Ms. Ray was not a secretary, performed no secretarial duties, was in no way qualified for the position or competent to fulfill its responsibilities.[110] Further, it was alleged that payment of the secretarial salary was in fact payment for personal services rendered to the Congressman.[111]

Three separate complaints were filed, on various causes of action, against Congressman Hays, former Congressman Kenneth Gray, Elizabeth Ray, Donald Gosny—a Hays employee—and Dell Publishing Company.[112] The actions were instituted by several private plaintiffs.[113] The United States made a special appearance, moved to con-

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provides that if the United States does enter the suit, but fails to pursue it with due diligence within six months of the initial appearance, the private plaintiff may resume the litigation.

104. *See* notes 60-63 and accompanying text *supra*.

105. *See, e.g.*, United States v. Bornstein, 423 U.S. 303 (1976).

106. Joseph v. Cannon, No. 77-0452 (D.D.C. May 25, 1978); Thompson v. Hays, 432 F. Supp. 253 (D.D.C. 1976); Hollander v. Clay, 420 F. Supp. 853 (D.D.C. 1976).

107. *See* note 101-03 and accompanying text *supra*. Further, section 232 provides for loss of jurisdiction only in those suits brought by private plaintiffs under clause (B) or those pending as of December 23, 1943, the date of the amendment adding these procedural aspects, and does not mandate loss of jurisdiction where the United States has taken over the suit from a private plaintiff.

108. Thompson v. Hays, 432 F. Supp. 253 (D.D.C. 1976).

109. Complaint at 4, Thompson v. Hays, 432 F. Supp. 253.

110. *See generally* Complaint, Thompson v. Hayes, 432 F. Supp. 253.

111. *Id.*

112. Civil Action Nos. 76-1078, 76-1132, 76-1140 (Filed Oct. 26, 1976).

113. Edward Thompson, Anthony D. Cennamo, Anthony R. Martin-Trigona, George R. Douglas, Jr.

solidate the actions and together with all the defendants moved to dismiss for lack of subject-matter jurisdiction, pursuant to the provisions of the statute.[114]

The basis of the motions to dismiss was that the private plaintiffs were in possession of no evidence or information that was not in the possession of the Department of Justice at the time the suit was brought.[115] It was conceded by the plaintiffs in their required disclosure statements[116] that the bulk of their evidence and information was obtained from either newspaper or magazine stories, a report of the Clerk of the House of Representatives, or conversations with undisclosed individuals.[117] The court found that where the information upon which the suit is based has become public information through its dissemination by the media, it is presumed to be information in the possession of officers or agents of the United States and deprives the court of jurisdiction.

It was the contention of the Department of Justice that this case was premature.[118]

> This civil litigation, if allowed to continue, could easily interfere with the presently developing criminal investigation. Moreover, if litigated by the relators themselves on the basis of the information and resources presently professed by them, an adverse decision might collaterally estop the Department of Justice from later filing a suit based upon a complete review of all the information pertinent to the defendants' conduct and liability.[119]

The motions to dismiss were granted. Under the statute, the government may choose whether or not to intervene and, if it intervenes, the pace at which it will pursue the litigation.[120] The Department of Justice confirms that no criminal prosecution was ever instituted against Hays, nor was the civil litigation ever resumed.[121]

In another case,[122] suit was brought against Senator Howard Cannon to recover salaries paid to members of his personal staff. Staff members were allegedly compensated from public funds for the performance of solely personal services. A major issue was the payment

114. 31 U.S.C. § 232(C) (1976). *See* notes 103 & 107 and accompanying text *supra*.
115. *Id.*
116. 31 U.S.C. § 232(C) (1976).
117. 432 F. Supp. at 256.
118. Memorandum of Points and Authorities in Support of Plaintiff's Motion to Dismiss the Action for Lack of Subject-Matter Jurisdiction at 6, Thompson v. Hays, 432 F. Supp. 253.
119. *Id.*
120. *See* note 103 *supra*.
121. Conversations, *supra* note 31.
122. Joseph v. Cannon, No. 77-0452 (D.D.C. May 25, 1978).

of a salary to Chester Sobsey, Cannon's administrative assistant and codefendant. The primary allegation was that Sobsey worked exclusively on fund raising and other campaign related activities while on the payroll of the Senate.[123] The United States declined to enter the suit,[124] and it was carried forward by the private plaintiffs. In a terse two page opinion,[125] the court found that a motion to dismiss, made by defendants, should be granted on two grounds. One basis for the dismissal was that "[d]efendant Cannon . . . did file with the Secretary of the Senate and publicly disclosed that defendant Sobsey was an aide authorized to receive and distribute campaign contributions."[126] The court held that under the statute's provisions,[127] this was sufficient information in the possession of some officer of the government to deprive them of jurisdiction.[128]

This holding was based on Senate Rule XLIX,[129] which permits the designation of two staff assistants as being authorized to receive and distribute campaign funds.[130] The activities of Mr. Sobsey, however, violated federal criminal statutes.[131] The Senate Rule allowing designation and disclosure cannot be an authorization of activities that contravene United States statutes. Although this rule appears to contradict criminal statutes,[132] Senate Rules or simple resolutions must be construed as consonant with, rather than contradictory to, statutory law.[133]

Knowledge of the designation of an aide to receive campaign funds cannot be equated with knowledge of the fact that that aide was employed exclusively to carry on campaign activities. The designation and disclosure provisions of Rule XLIX carry no implication of fraud. Therefore, the court's assumption that the suit was based solely on evidence of the designation of two staff members authorized to handle campaign funds, pursuant to the Rule, is of questionable validity. It was precisely those activities outside the permissible scope of the

123. Complaint at 3, Joseph v. Cannon, No. 77-0452 (D.D.C. May 25, 1978).
124. 31 U.S.C. § 232(C) (1976).
125. No. 77-0452 (D.D.C. May 25, 1978).
126. Memorandum and Order at 2, Joseph v. Cannon, No. 77-0452 (D.D.C. May 25, 1978).
127. 31 U.S.C. § 232(C) (1976).
128. Memorandum and Order at 2, Joseph v. Cannon, No 77-0452 (D.D.C. May 25, 1978).
129. S. Res. 110, 95th Cong., 1st Sess., 123 CONG. REC. 5381 (1977).
130. *Id.*
131. 18 U.S.C. §§ 599-607 (1976) which prohibits solicitation and handling of campaign funds by federal employees.
132. *Id.*
133. Conversation with Staff Counsel, Senate Committee on Rules and Administration, August 1978.

Senate Rules which made the claim fraudulent in this case and it is those activities that would be an unlikely subject of common knowledge.

The other basis for dismissal in the *Cannon* litigation was the court's application of the requirement of the Federal Rules of Civil Procedure[134] that in a case of fraud, the specific allegations must be included in the initial pleading.[135] The court found that specifics had not been pleaded and dismissed the action for failure to state a claim upon which relief could be granted.[136] Leave to amend the complaint[137] was refused by the court. Under the liberal construction given the Federal Rules, such leave generally should be granted.[138]

In the third case brought against a Member of Congress,[139] suit was filed against Representative William Clay by a private plaintiff on the basis of Clay's alleged submission of false travel vouchers to the Clerk of the House of Representatives. The Department of Justice elected to enter the suit[140] and filed an amended complaint that added two non-statutory theories of recovery: unjust enrichment and payment under mistake of fact.[141] The defendant raised four defenses to the action in moving for dismissal, none of them based on the Act itself. The defenses were that (1) the "speech or debate" clause[142] barred the litigation, (2) the "punishment or expulsion" clause[143] granted exclusive power to Congress to discipline its own members, (3) the "political question" doctrine deprived the court of jurisdiction to hear the case, and (4) the statute providing for payments out of the contingent fund[144] made

134. FED.R.CIV.P. 9.
135. *Id.*
136. FED.R.CIV.P. 12(b)(6).
137. FED.R.CIV.P. 15.
138. *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966). In *Surowitz*, the Court found that the rules of procedure should not be construed to deny a litigant his day in court if the complaint appears to state any basis for a valid claim. That case dealt with a plaintiff that had a valid claim, but submitted a less than complete complaint. The majority of cases dealing with the scope and purpose of the Federal Rules holds that they are intended to effectuate justice and to permit a trial on the merits for any complaint that appears to have validity, despite apparent defects in pleading.
139. Hollander v. Clay, 420 F. Supp. 853 (D.D.C. 1976).
140. 31 U.S.C. § 232(C) (1976).
141. 420 F. Supp. 853, 855 (D.D.C. 1976).
142. U.S. CONST. art. I, § 6. "[A]nd for any Speech or Debate in either House, they shall not be questioned in any other place." *Id.*
143. U.S. CONST. art. I, § 5. "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." *Id.*
144. 2 U.S.C. § 95 (1976) provides that:

> No payment shall be made from the contingent fund of the House of Representatives unless sanctioned by the Committee on House Administration of the House of Representatives. Payments made upon vouchers approved by said Com-

conclusive the judgment of the Committee on Accounts of the House of Representatives regarding the payment of vouchers.[145]

The court decided that the traditional defenses of Members of Congress would not bar the operation of the False Claims Act against them. The court stated that the conduct of Members of Congress will not be subject to judicial review, or made the basis of a civil or criminal proceeding, where such conduct is "within the sphere of legitimate legislative activity."[146] In *Gravel v. United States*,[147] the Supreme Court stated that a legislative act was:

> [A]n integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. . . . [C]ourts have extended the privilege to matters beyond pure speech or debate in either House, but "only when necessary to prevent indirect impairment of such deliberations."[148]

In Clay's case, the alleged purpose of the travel, "constituent communication," was a political rather than a legislative activity.[149] The court further found that the issue was the false filing or submission, rather than the potential communication with constituents.[150]

The court also noted that the pursuit of a civil action by the Department of Justice in no way infringes upon the prerogative of Congress to determine the behavior of its members, and to punish or expel them for misconduct.[151] The court said that the congressional option was unaffected by any potential civil liability, and that it was too well settled for dispute that Members of Congress are within the ambit of the Act.[152]

Under the "political question" doctrine, where the Constitution makes a "textually demonstrable commitment" of power to resolve certain issues to another branch of government, the judicial branch is barred from operating in that area.[153] Representative Clay argued that

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mittee shall be deemed, held, and taken, and are declared to be conclusive upon all the departments and officers of the Government: *Provided*, that no payment shall be made from said contingent fund as additional salary or compensation to any officer or employee of the House of Representatives.

145. 420 F. Supp. at 855.
146. *Id.*
147. 408 U.S. 606 (1972).
148. *Id.* at 625.
149. 420 F. Supp. at 856.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 856-57.

the "punishment or expulsion" provision[154] evidenced such a commitment by granting Congress exclusive power to discipline its members.[155] The court found, however, that civil liability for fraud was not demonstrably granted to the legislative branch and that the doctrine, therefore, presented no impediment to the litigation.[156]

Finally, the defendant argued that the statute governing approval of payments from the contingent fund[157] conclusively bars any review of payments made from the contingent fund after approval by the Committee on Accounts of the House of Representatives. Although the statute does on its face[158] bar any further action, the court found that the congressional purpose was to prevent audit and review by the Department of the Treasury which would delay payment of properly approved vouchers.[159] The court reasoned that the payment statute would not prevent the withholding of payment where it would be prohibited by law, that the False Claims Act was drafted specifically to cover fraudulent claims, and that it intended to include Members of Congress.[160] Consequently, the court imposed liability.

V. APPLICATION TO MEMBERS OF CONGRESS—SOME CONCLUSIONS

Several questions concerning the application of the Act to Members of Congress are partially unanswered. The requisite degree of intent required by the statute, for instance, is an important issue. Insofar as Members of Congress are involved, it is difficult to predict what will be the requisite degree of knowledge and intent. If the broad interpretation of knowledge and intent, as espoused in *United States v. Cooperative Grain*,[161] is accepted, the preparation of a "false" claim or voucher by a staff assistant for a Member of Congress may be sufficient to create liability in the Member of Congress. The key issue may well be the willingness of courts to impute to a Member of Congress the knowledge of an aide's misconduct where the Member has good reason to know of the falsification.

Another question is the permissible degree of attenuation between the fraudulent act, or actor, and the actual making of the claim.[162]

154. U.S. CONST. art. I, § 5. *See* note 143 *supra*.
155. 420 F. Supp. at 856.
156. *Id.* at 857.
157. 2 U.S.C. § 95 (1976). *See* note 144 *supra*.
158. *Id.*
159. 420 F. Supp. at 857-58.
160. *Id.* at 858.
161. 476 F.2d 47 (8th Cir. 1973). *See* notes 78-85 and accompanying text *supra*.
162. *See* notes 61 & 62 and accompanying text *supra*.

Although *United States v. Bornstein*[163] limits liability to one's own acts, if negligence or an inference of knowledge can result in liability, the distance at which the inference can arise becomes an important issue. The "fraudulent" activities of a Congressman's staff might cause the imposition of liability on higher level aides or the Members of Congress themselves, regardless of their actual knowledge of misrepresentation.

In suits brought by private plaintiffs, an important question arises as to what evidence the courts will consider sufficient to establish the defense that the information on which the suit is based was in the possession of the government at the time the litigation was instituted. These suits are likely to be brought by a private plaintiff because covert activities are more likely to be known to persons who are intimately involved with the functioning of a Member's office and staff. Both the *Hays* and *Cannon* actions were ultimately instituted by attorneys to whom information had allegedly come through staff assistants. The problem was that the information had become public knowledge through the media by the time of the filing of the actions, and therefore was held to be "in the possession of . . . the United States."[165] In most situations involving a Member of Congress, by the time the fraudulent activities are discovered or an insider chooses to disclose them, they will often have been uncovered by the media as well. Even assuming that a suit is filed prior to the appearance of a news report, the defendant will likely attempt to show that the information was in the possession of some agent of the United States. Thus, it is the more subtle and insidious practices that may, because of the courts' posture, be most easily reached under the Act; blatantly fraudulent activities are more susceptible to the "evidence in possession" defense.

There is an extreme, though understandable, reluctance on the part of the Department of Justice to pursue this type of litigation against Members of Congress. The Department of Justice's informal policy[166] is to enter a memorandum with the court stating its opinions with regard to the suit, even where it chooses not to enter it. Such an action is not required where the Department of Justice declines to enter the suit, but may well influence the decision of the court. The Department of Justice can also move to dismiss, as it did in *Hays*, pending the outcome of a criminal investigation.[167] In *Hays*, the motion was granted

163. 423 U.S. 303 (1976). *See* note 63 and accompanying text *supra*.
164. 31 U.S.C. § 232(C) (1970).
165. *Id.*
166. Conversations, *supra* note 31.
167. *See* notes 118 & 119 and accompanying text *supra*.

on the ground that the evidence on which the suit was based was taken from public sources and must therefore be in the possession of the United States, depriving the court of jurisdiction. There is, however, a clear question whether this type of consideration might move a court to grant a motion to dismiss on a much more narrow showing. When the government has an interest in defeating the litigation, it can effectively do so. Where a Member of Congress is involved, there is a marked tendency to follow just such a course of action. The Department of Justice and the courts appear willing to liberally construe the disclosure and possession elements of the Act. In the litigation that has taken place, the net result has been the dismissal of two of the three cases involving Members of Congress.[168]

None of the foregoing considerations, however, forecloses the possibility of a Member's liability under the Act. Under the decision in *Hollander v. Clay*,[169] the traditional congressional immunities and defenses do not protect a Member's illegal activities within the ambit of the False Claims Act. If a plaintiff is careful in collecting and documenting evidence of covert activities not public or in government possession, the suit cannot be dismissed for lack of jurisdiction. Some activities are so venal that the Department of Justice would probably bring an action even if a private plaintiff was blocked by information in the government's possession. At that point, the issues of inference of knowledge, negligence, and the attenuation of the relationship discussed above become important. It remains to be seen where courts will draw the lines.

Trienah A. Meyers

168. *See* notes 106-160 and accompanying text *supra*.
169. 420 F. Supp. 853 (D.D.C. 1976).