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Getting Schooled: The United States Court of Appeals for the Eleventh Circuit Holds that the Federal Government Need Not Show "Good Cause" Before Settling and Dismissing a Pending Qui Tam Action Against College

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Casenote

Getting Schooled: The United States Court of Appeals for the Eleventh Circuit Holds that the Federal Government Need Not Show "Good Cause" Before Settling and Dismissing a Pending Qui Tam Action Against College*

I. INTRODUCTION

In *United States v. Everglades College, Inc.*,[1] a case of first impression in the United States Court of Appeals for the Eleventh Circuit, the court interpreted the good cause intervention requirement of § 3730(c)(3) of Title 31 of the United States Code (U.S.C.).[2] The court was asked to

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1. 855 F.3d 1279 (11th Cir. 2017).

2. 31 U.S.C. § 3730(c)(3) (2017). The statute reads,

> If the [g]overnment elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the [g]overnement so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the [g]overnment's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the [g]overnment to intervene at a later date upon a showing of good cause.

31 U.S.C. § 3730(c)(3).

determine whether the United States needed to show "good cause" for intervening in a *qui tam* action brought by two private individuals under the False Claims Act (FCA).[3] The government, after originally declining to proceed with the FCA action itself, eventually decided to "intervene" while the action was pending on the appellate docket simply for the purposes of settling with the defendant college and having the case dismissed.[4] Relying on 31 U.S.C. § 3730(c)(3)'s plain language and similar decisions from sibling circuits, the Eleventh Circuit held that the United States did not need to show "good cause" for intervening when its only purposes were to settle with the defendant college and terminate the litigation. [5] The court also approved the proposed settlement terms.[6] In doing so, the court recognized the differing statutory requirements and standards guiding government actions in *qui tam* cases depending on whether the United States intervenes to proceed with the action itself, dismiss the action overall, or settle with the defendant.[7] Noting these differences, the Eleventh Circuit declined to import the good cause intervention requirement from § 3730(c)(3) to the other sections of the statute.[8] The Eleventh Circuit's decision increases the government's discretion in settling *qui tam* cases and, as a result, decreases incentives for individuals to bring *qui tam* cases alleging fraudulent behavior.

II. FACTUAL BACKGROUND

In *United States v. Everglades College, Inc.*, two former private university employees accused the university of knowingly submitting false claims to the United States Department of Education. Under the Higher Education Act of 1965,[9] specifically Title IV[10] of the act, undergraduate and graduate students attending eligible institutions are

3. 31 U.S.C. § 3729 (2017).

4. *Everglades College*, 855 F.3d at 1285.

5. *Id.* at 1286.

6. *Id.* at 1289.

7. *Id.* at 1286. The statutory requirements distinguished by the court are found in 31 U.S.C. § 3730. When the federal government chooses to proceed with a civil action for a false claim itself, § 3730(c)(1) is the controlling section. 31 U.S.C. § 3730(c)(1) (2017). If the federal government decides to dismiss the action altogether, § 3730(c)(2)(A) states the requirements for doing so properly. *Id.* § 3730(c)(2)(A) (2017). Lastly, § 3730(c)(2)(B) governs the steps the federal government must take to settle the action with the defendant, including a fairness hearing concerning any proposed settlement agreements struck between the involved parties. *Id.* § 3730(c)(2)(B) (2017).

8. *Everglades College*, 855 F.3d at 1286.

9. Higher Education Act of 1965, 20 U.S.C. §§ 1001–1161aa (2017).

10. 20 U.S.C. §§ 1070–1099d (2017).

able to receive federally sponsored financial aid.[11] To receive Title IV funds, institutions of higher education must enter into "program participation agreements"[12] with the United States Department of Education. These agreements condition eligibility for financial aid funds based on compliance with various requirements.[13] One requirement, known as the Incentive Compensation Ban (ICB),[14] prohibits institutions from paying incentives to recruiters and admissions personnel based on the number of students they enroll.[15]

Manuel Christiansen and Brian Ashton (Relators), two former admissions department employees for Keiser University, brought a *qui tam* action pursuant to 31 U.S.C. § 3729[16] against Everglades College, Inc.,[17] d.b.a. Keiser University (Everglades).[18] The Relators alleged that Everglades, a participant in federal student financial aid programs, falsely certified compliance with the required program participation agreements. Specifically, the Relators claimed Everglades knowingly violated the ICB because admissions personnel received incentive payments based on their successes in securing student enrollments.

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11. *Id.*; *Everglades College*, 855 F.3d at 1283.

12. 20 U.S.C. § 1094 (2017).

13. *Everglades College*, 855 F.3d at 1283.

14. 20 U.S.C. § 1094(a)(20) (2017).

15. *Everglades College*, 855 F.3d at 1283.

16. 31 U.S.C. § 3729. The statute is more commonly known as the False Claims Act.

17. In September 1990, American Flyers College was founded in Fort Lauderdale, Florida. Arthur and Belinda Keiser purchased American Flyers College in August 1998. The following year, the school was renamed Everglades College. In 2000, Everglades College became incorporated as a not-for-profit corporation in the State of Florida. Two years later, the United States Department of the Internal Revenue Service recognized Everglades College as a not-for-profit 501(c)(3) corporation. Everglades College, Inc. became independently operated by a board of trustees. In December 2003, Everglades College officially changed its name to Everglades University. In 2010, the Southern Association of Colleges and Schools Commission on Colleges accredited Everglades University for bachelor's and master's degrees.

Everglades University is currently a regionally accredited, not-for-profit private institution of higher education. Classes are offered both online and on-campus. The main campus is located in Boca Raton, Florida, with additional campuses in Orlando, Sarasota, and Tampa. Undergraduate students can earn a degree in various topics: alternative medicine, alternative and renewable energy management, construction management, surveying management, aviation/aerospace, crisis and disaster management, international business, business administration, environmental policy and management, land and energy management, and hospitality management. Graduate students can earn a degree in business administration, aviation science, entrepreneurship, and public health administration. ABOUT EVERGLADES, http://www.evergladesuniversity.edu/about/ (last visited Dec. 26, 2017).

18. *Everglades College*, 855 F.3d at 1282.

Because Everglades did not properly comply with its program participation agreements, the Relators maintained that more than 230,000 claims, amounting to an estimated total of $1.2 billion in federally funded financial aid, were illegally submitted to the Department of Education. Consequently, the Relators contended the university's behavior caused its students to unknowingly submit claims for federal financial aid, also violating the ICB. Therefore, according to the Relators, Everglades was liable for both its own express false certifications of compliance and the enormous volume of student-submitted claims.[19]

When the Relators initiated their action against Everglades pursuant to 31 U.S.C. § 3730,[20] the United States initially declined to intervene and take over the case.[21] Thus, exercising their statutory rights under § 3730(b)(1)[22] and (b)(4)(B),[23] the Relators pursued the case on behalf of the United States. At the conclusion of a bench trial, the United States District Court for the Southern District of Florida found that Everglades violated the ICB.[24] However, the district court severely limited the monetary benefits of this finding to the Relators in three ways. First, the district court rejected the Relators' theory that each student-submitted financial aid claim was an actionable FCA claim because Everglades could not control the content, number, or submission of student-submitted financial aid claims. Second, the district court found that Everglades' top policymakers did not become aware of the ICB violation scheme until November 20, 2009. After this date, Everglades knowingly submitted two falsified certifications of compliance to the Department of Education. Therefore, Everglades was liable only for those two false claims, compared to the alleged amount of approximately 230,000 claims, and the district court awarded the Relators the minimum statutory penalty of $5,500 per violation. Lastly, the district court rejected the Relators' argument that the federal government's damages were equal to the value of all educational assistance paid to Everglades during the period covered by the false certifications. The district court reasoned the Department of Education would not have demanded reimbursement for the already-paid Title IV funds even if Everglades had disclosed its ICB

19. *Id.* at 1282–83.

20. 31 U.S.C. § 3730 (2017). The statute regulates civil actions for false claims in violation of 31 U.S.C. § 3729. *Id.*

21. *Everglades College*, 855 F.3d at 1282.

22. 31 U.S.C. § 3730(b)(1) (2017).

23. 31 U.S.C. § 3730(b)(4)(B) (2017).

24. *Everglades College*, 855 F.3d at 1283.

violations.[25] Thus, the Relators were entitled to only $11,000 in penalties against Everglades and no damages.[26]

Disappointed in the district court's limited award,[27] the Relators appealed the decision to the Eleventh Circuit. While the appeal was pending on the Eleventh Circuit's docket, and after the Relators' opening brief was filed, the United States commenced settlement negotiations with Everglades.[28] Then, before the United States moved to formally intervene in the Relators' *qui tam* action, the United States reached a tentative settlement with Everglades. It provided that the university would pay the United States $335,000 in exchange for being released from any further administrative or civil claims concerning the Relators' *qui tam* action. Additionally, the agreement provided that the United States would refrain from suspending or terminating Everglades' eligibility for any future Title IV funds based on the Relators' action.[29]

Although the Relators' appeal was pending when the tentative settlement was struck, the United States moved the district court for an indicative ruling. In doing so, the United States asked the district court to permit its intervention and approve the tentative settlement once the district court reacquired jurisdiction on remand from the Eleventh Circuit. The district court issued the requested indicative order, reasoning the United States could intervene and the $335,000 settlement

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25. *Id.* at 1283–84.

26. *Id.* at 1282.

27. After the bench trial in the district court, but before the settlement, the Relators asked for over $1 million in attorney's fees and approximately $76,000 in litigation costs. However, in light of their limited success at trial, the district court reduced both the attorney's fees award to $60,000 and the litigation costs award to $27,000. *Everglades*, 855 F.3d at 1285. The Eleventh Circuit affirmed the district court's reduced amounts. *Id.* at 1294. Thus, at the time of the appeal, the Relators were set to receive only $87,000 ($98,000 total after including the $11,000 in awarded penalties). In looking at the amount, it is important to remember that at the district court's bench trial, the Relators argued that the defendants had caused more than $1 billion in federal student financial aid claims to be filed while the university filed false certifications of compliance with the Department of Education. *Id.* at 1283.

28. *Everglades College*, 855 F.3d at 1284. The Relators and their legal counsel were excluded from the settlement negotiations. The United States explained that it excluded the Relators from its direct negotiations with Everglades College because "[the] Relators' confidence of appellate reversal and adamant demand for billions of dollars would have impeded productive settlement negotiations." The United States did however invite the Relators' counsel to meet and discuss the proposed settlement, but only after striking a tentative deal with Everglades College. The Relators' counsel accepted the invitation and explained his objection to the notion of settling while the case was pending appeal. Notwithstanding this objection, the United States decided to go forward with its settlement agreement and intervened in order to dismiss the action. *Id.* at 1291.

29. *Id.* at 1291.

was fair and reasonable since it far exceeded the $11,000 won by the Relators. Because of the indicative ruling, the Eleventh Circuit remanded the case back to the district court. The district court then formally granted the United States' motion to intervene, which was made for the purposes of obtaining court approval of the tentative settlement and dismissing the *qui tam* action.[30] As statutorily required under § 3730(c)(2)(B),[31] the district court scheduled a hearing to confirm whether the United States' proposed settlement with the defendant university was fair, reasonable, and adequate. After the fairness hearing, the district court approved the settlement and dismissed the Relators' *qui tam* action with prejudice.[32]

III. LEGAL BACKGROUND

A. The Higher Education Act of 1965

President Lyndon B. Johnson signed the Higher Education Act of 1965 (HEA) into law on November 8, 1965 in the gymnasium at Southwest Texas State College, his alma mater. Symbolically, President Johnson signed the bill sitting at the same desk he used while a student working as a secretary to the university's president. During his time in college, President Johnson also worked as a janitor on campus to supplement the loan he obtained to finance his tuition. With his penurious collegiate background in mind, President Johnson hoped the HEA would remove any financial barriers for academically qualified students.[33]

The HEA was one of the most important pieces of President Johnson's Great Society legislation. It aimed to broaden educational opportunities for all Americans, leading to higher incomes for families, decreased poverty rates, and a prosperous country with a steady supply of educated individuals. One of the most significant components of the HEA was the creation of federal student aid programs under Title IV.[34] The purpose of Title IV, as originally stated in § 401(a),[35] was to provide "educational opportunity grants to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families

30. *Id.*

31. 31 U.S.C. § 3730(c)(2)(B).

32. *Everglades College*, 855 F.3d at 1284–85.

33. TG RESEARCH AND ANALYTICAL SERVICES, OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER 1 (2005).

34. *Id.* at 17.

35. Higher Education Act of 1965, Pub. L. No. 89-329, § 401(a), 79 Stat. 1219, 1232 (1965).

would be unable to obtain such benefits without such aid."[36] The HEA established a federal role in providing post-secondary students with need-based grants, work-study opportunities, and loans to students willing to invest in themselves.[37]

To be considered an eligible institution for the purposes of its students receiving federal financial aid under the HEA and its Title IV, universities and colleges must comply with various requirements. Initial and continuing eligibility for participating in federal student financial assistance programs mandates that institutions of higher education enter into and comply with program participation agreements.[38] Of particular importance, § 1094(a)(20), known as the ICB, prohibits institutions from providing its admissions staff with any commission, bonus, or other incentive payment based on success, or lack thereof, in securing student enrollments.[39] This ban was enacted based on evidence of serious program abuses. Implementation of the ICB is designed to curb the risk that recruiters, in an effort to win trips, gift cards, or paid vacation days, will enroll under-qualified students who will gain little benefit from a post-secondary institution and may be unable or unwilling to repay the federal loans borrowed to attend.[40]

B. A Brief History of Qui Tam and its Survival in the United States

Qui tam is shortened from the Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who pursues this action on our Lord the King's behalf as well as his own."[41] According to this common law civil action, private persons (denominated "relators" in American law) may bring a *qui tam* civil action for themselves and for the United States against an alleged fraudulent defendant on behalf of the government.[42] In doing so, both the relator and the government, the party that is actually harmed, may share in the rewards of any penalty, damages, or settlement recovered from the fraudulent defendant.[43]

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36. *Id.*

37. TG RESEARCH AND ANALYTICAL SERVICES, *supra* note 33, at 1.

38. 20 U.S.C. § 1094(a).

39. 20 U.S.C. § 1094(a)(20).

40. United States v. Univ. of Phoenix, 461 F.3d 1166, 1168–69 (9th Cir. 2006).

41. Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 768 n.1 (2000).

42. *Id.* at 769.

43. Jonathan T. Brollier, *Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought under the False Claims Act*, 67 OHIO ST. L.J. 693, 698 (2006).

Qui tam actions originated in England at common law around the end of the thirteenth century allowing private individuals who had suffered an injury to bring actions in the royal courts on both their own and the Crown's behalf.[44] Originally, *qui tam* actions were sometimes the only way a private individual could get his claims heard in the royal courts, which generally were limited to matters exclusively involving the Crown's interest. Eventually, however, beginning in the fourteenth century, the royal courts started to extend jurisdiction to suits involving wholly private wrongs causing *qui tam* actions to gradually fall into disuse but technically remain available.[45] At the same time, despite the decline in use, Parliament began enacting statutes that expressly provided for *qui tam* litigation. One type of statute, appropriately named informer statutes, allowed informers to obtain a portion of the penalty dealt as a reward for their information, even if they themselves suffered no injury.[46] In essence, this form of *qui tam* action was a mode of privatized law enforcement.[47] Highly subject to abuse due to predatory and professional informers, informer statutes created great opposition to the use of *qui tam* actions.[48] Therefore, many of the old enactments were repealed or made limited in the following centuries.[49] In 1951, Parliament repealed all remaining laws allowing *qui tam* suits.[50]

The *qui tam* tradition, like much of the English common law, was passed on to the United States.[51] Although *qui tam* enforcement has never been as widespread in the United States as it once was in England, *qui tam* survives in America despite having been completely abolished in England—perhaps because of a greater distrust of government and its

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44. *Vt. Agency of Nat. Res.*, 529 U.S. at 774.

45. *Id.* at 774–75.

46. *Id.* at 775.

47. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 222 (Wolters Kluwer Law & Business, 2d ed. 2009). By providing incentives for informers to investigate and prosecute violators, a skeletal government could enforce economic and other regulations without an expensive police force or prosecutorial corps. *Id.*

48. *Vt. Agency of Nat. Res.*, 529 U.S. at 775; Brollier, *supra* note 43, at 698.

49. *Vt. Agency of Nat. Res.*, 529 U.S. at 775–76.

50. Brollier, *supra* note 43, at 698–99. Interestingly, this was done following the concern that an enterprising informer may resurrect an eighteenth-century prohibition on serving alcohol on Sundays in order to challenge His Majesty's 100th Anniversary of the Great Exhibition of 1851. *Id.*

51. *Vt. Agency of Nat. Res.*, 529 U.S. at 776.

leaders.[52] Immediately after the framing of the United States Constitution, the First Congress enacted a considerable number of informer statutes.[53] Despite the availability of *qui tam* actions under surviving statutory provisions, only the False Claims Act has produced a large amount of federal *qui tam* cases.[54]

C. The False Claims Act and Civil Actions for its Violation

The purpose of the False Claims Act (FCA) is to enhance the government's ability to recover losses resulting from fraudulent behavior taken against the government.[55] In turn, the FCA imposes civil liability on any defendant who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" to the federal government.[56]

In 1863, Congress enacted the FCA, 31 U.S.C. § 3729, midway through the Civil War in response to widespread fraud and deception on the part of military contractors. The original FCA was specifically designed, through its inclusion of *qui tam* provisions, to combat fraud and false claims by commissioning private citizens to bring wrongdoings to light. In return for their diligence, relators were allowed to collect up to one-half of the total amount recovered from the fraudulent defendant.[57]

The FCA's *qui tam* provisions remained in force until abuses by relators during World War II led to their restriction and near-abolition.[58] The Supreme Court's holding in *United States ex rel. Marcus v. Hess*[59] triggered the statute's phasedown.[60] There, the defendants were electrical contractors hired to work on Public Works Administration projects in Pittsburgh, Pennsylvania and were subsequently indicted by the government on a bid-rigging conspiracy.[61] Upon discovering the government had already made a case for him, a sly relator copied the allegations stemming from the government's indictment into his own

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52. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 553 (2000); HISTORY OF THE COMMON LAW, *supra* note 47, at 223.

53. *Vt. Agency of Nat. Res.*, 529 U.S. at 776.

54. Beck, *supra* note 52, at 555.

55. Ridenour v. Kaiser-Hill Co., LLC, 397 F.3d 925, 930 (10th Cir. 2005).

56. 31 U.S.C. § 3729(a)(1)(B) (2017).

57. Beck, *supra* note 52, at 555–56; Brollier, *supra* note 43, at 699.

58. Beck, *supra* note 52, at 556.

59. 317 U.S. 537 (1943).

60. Beck, *supra* note 52, at 556.

61. *Id.*; *Marcus*, 317 U.S. at 539.

FCA *qui tam* suit and obtained a judgment in his favor for $315,000.[62] The Court upheld the judgment finding the relator was within his rights to bring suit even though the government had explicit knowledge concerning the fraud.[63] Thus, in 1943, along with several other restrictions, Congress amended 31 U.S.C. § 3729 to deprive courts of jurisdiction over any *qui tam* suit built upon information or evidence already possessed by the government.[64]

In 1986, Congress once again found itself amending the FCA in response to a series of scandals involving excessive prices paid by the government for items procured from defense contractors.[65] This time, however, the amendments strengthened the reach of the FCA, producing a *qui tam* revival.[66] The 1986 amendments created increased monetary incentives for relators to bring *qui tam* suits and granted the government greater control over these privately brought actions.[67]

Today, under 31 U.S.C. § 3730, a FCA action may be commenced in one of two ways.[68] First, the government, through the Attorney General, may bring a civil action against a person who has violated, or is violating, § 3729.[69] Second, a relator may bring a civil action for a violation of § 3729 for the relator and the government, in the name of the government.[70]

When a relator initiates an FCA *qui tam* action, the guidelines set forth in 31 U.S.C. § 3730 must be strictly followed. First, the relator must serve a copy of the complaint and any material evidence and information on the government. Then, within sixty days after receiving the complaint, the government may choose to intervene and proceed with the action itself.[71] If the government elects to intervene and proceed within the stated time frame, it will have primary responsibility for prosecuting the action and will not be bound by any act of the relator.[72]

Alternatively, the government may decide to either dismiss or settle the action. The government may dismiss the action notwithstanding

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62. Beck, *supra* note 52, at 556.

63. *Marcus*, 317 U.S. at 548.

64. Beck, *supra* note 52, at 560.

65. *Id.* at 561. In some instances, for example, the Department of Defense was charged $435 per hammer, $640 for a toilet seat cover, and $7,622 for a coffee maker. The national media became aware of these prices and helped to generate pressure on Congress through high-profile exposés. *Id.*

66. *Id.* at 561–63.

67. *Id.*; *Ridenour*, 397 F.3d at 931.

68. *Vt. Agency of Nat. Res.*, 529 U.S. at 769.

69. *Id.*

70. *Id.*

71. 31 U.S.C. § 3730(b)(2) (2017).

72. 31 U.S.C. § 3730(c)(1).

objections from the relator if the government notifies the relator that it filed a dismissal motion. After doing so, the court must provide the relator with an opportunity for a hearing on the motion.[73] Subsection (c)(2)(A) is silent as to the standard behind granting a government motion to dismiss a *qui tam* action.[74] Nevertheless, the United States Court of Appeals for the District of Columbia Circuit held that § 3730(c)(2)(A) confers on the government "an unfettered right to dismiss" *qui tam* claims. The D.C. Circuit also stated the only function of a dismissal hearing is to provide the relator a formal opportunity to convince the government not to end the case.[75] As another option, the government may choose to settle the action notwithstanding the relator's objections only if the court determines, after a statutorily mandated hearing, that the government's proposed settlement is "fair, adequate, and reasonable under all the circumstances."[76] Judicial review and approval of a proposed settlement is necessary for it to become effective. Otherwise, the settlement will remain a proposal.[77]

Finally, the government may elect not to prosecute, dismiss, or settle the action after the relator files a *qui tam* complaint. Instead, the government may notify the court that it declines to take over the action before the end of the sixty-day period. In this scenario, the relator acquires the right to conduct the litigation.[78] However, once the relator proceeds with the action, the court, without limiting the status and rights held by the relator, may still permit the government to "intervene at a later date upon a showing of good cause."[79]

If found guilty, a fraudulent defendant is liable for damages and civil penalties of no less than $5,000, but no more than $10,000, per falsified claim.[80] In keeping with the monetary incentives created by the 1986 FCA amendments, a relator bringing a *qui tam* action stands to recover no matter what path the government chooses to take. If the government proceeds with the action, the relator will receive at least 15% but no more than 25% of the proceeds of the litigation or settlement of the claim.[81] If

73. 31 U.S.C. § 3730(c)(2)(A).

74. *Ridenour*, 397 F.3d at 935.

75. United States ex rel. Schweizer v. Océ N.V., 677 F.3d 1228, 1233 (D.C. Cir. 2012) (quoting Swift v. United States, 318 F.3d 250, 252–54 (D.C. Cir. 2003)).

76. 31 U.S.C. § 3730(c)(2)(B).

77. *Schweizer*, 677 F.3d at 1234.

78. 31 U.S.C. §§ 3730(b)(4)(B), (c)(3).

79. 31 U.S.C. § 3730(c)(3).

80. 31 U.S.C. § 3729(a)(1)(G) (2017).

81. 31 U.S.C. § 3730(d)(1) (2017). The percentage range is dependent upon the extent to which the relator substantially contributed to the prosecution of the action. *Id.*

the government opts not to proceed with the action, the relator who litigates or settles the claim will receive at least 25% but no more than 30% of the proceeds.[82]

IV. COURT'S RATIONALE

In *United States v. Everglades College, Inc.*, the Eleventh Circuit analyzed each relevant subsection of 31 U.S.C. § 3730 in determining the proper requirements for government intervention in FCA *qui tam* actions. The Eleventh Circuit determined a straightforward reading of § 3730 supported its finding that the United States did not need to satisfy the good cause intervention requirement found in § 3730(c)(3) because here, the United States settled and sought to dismiss the case instead of "intervening" for the purpose of continuing the litigation. [83]

First, the court interpreted subsection (b)(2) to expressly link the concept of intervention to the government's decision to literally "proceed with the action." [84] Next, the court read neither subsections (c)(2)(A) nor (c)(2)(B) as being conditioned upon what the court defined as formal intervention by the government. That is, intervention intended to proceed with the litigation and not merely to end it. Rather, these subsections, respectively, allow the government to dismiss or settle *qui tam* actions notwithstanding the relator's objections.[85] If the government dismisses the action, the relator is only provided with an opportunity for a hearing on the motion to dismiss.[86] If the government settles with the defendant, the court is required only to have a fairness hearing on the proposed settlement.[87] Therefore, the court declined to import the good-cause requirement for government intervention from subsection (c)(3) into the subsections governing government dismissals and settlements.[88] The court relied on decisions from the United States Court of Appeals for the District of Columbia Circuit, Fifth Circuit, and Tenth Circuit to further support its conclusion.[89]

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82. 31 U.S.C. § 3730(d)(2) (2017). The percentage range is dependent upon what the court decides is a reasonable amount for collecting the civil penalty and damages. *Id.*

83. *Everglades College*, 855 F.3d at 1285–87.

84. *Id.* Section 3730(b)(2) reads, "The Government may elect to intervene and proceed with the action within [sixty] days after it receives both the complaint and the material evidence and information." 31 U.S.C. § 3730(b)(2).

85. *Everglades College*, 855 F.3d at 1286.

86. 31 U.S.C. § 3730(c)(2)(A).

87. 31 U.S.C. § 3730(c)(2)(B).

88. *Everglades College*, 855 F.3d at 1286.

89. *Id.*; United States ex rel. Schweizer v. Océ N.V., 677 F.3d 1228 (D.C. Cir. 2012); Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003); Riley v. St. Luke's Episcopal Hosp.,

In deciding *Everglades College*, the Eleventh Circuit cited two decisions hailing from the D.C. Circuit: *United States ex rel. Schweizer v. Océ N.V.*[90] and *Swift v. United States*.[91] In *Schweizer*, the D.C. Circuit closely analyzed subsections (c)(2)(A) and (c)(2)(B) in response to the relator's appeal from the lower court's decision to decline review of a proposed settlement between the United States and the defendant corporation.[92] There, the lower court reasoned that subsection (c)(2)(A) gave the government "an unfettered right to dismiss" *qui tam* actions and declared (c)(2)(B) a "dead letter."[93] On appeal, as a preliminary matter, the relator claimed the government had no right to invoke subsection (c)(2)(A) because the government never properly intervened in the case and therefore, was never a true party to the suit. The relator argued the government never became a true party to the suit because the government (1) declined to intervene during the initial sixty-day period as allowed under subsection (b)(4) and (2) did not invoke subsection (c)(3) by showing good cause for filing at a later date.[94] The D.C. Circuit held the relator's interpretation of 31 U.S.C. § 3730's intervention provisions as inaccurate, declaring intervention was necessary only if the government wished to proceed with the *qui tam* litigation. There, the government intervened to settle with the defendant corporation and end litigation.[95] However, the D.C. Circuit agreed with the relator that the lower court erred in denying her a fairness hearing on the proposed settlement.[96] Similarly, in *Swift*, the D.C. Circuit analyzed subsection (c)(2)(A) in response to the relator's appeal on the ground that the government could not move to dismiss her *qui tam* action without first properly intervening.[97] Once again, the court held that the language in subsection (c)(2)(A) does not require the government to intervene in order to seek dismissal and end the action because subsection (b)(2) makes formal intervention necessary only if the government wishes to proceed with the action itself.[98]

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252 F.3d 749 (5th Cir. 2001); Ridenour v. Kaiser-Hill Co., LLC, 397 F.3d 925 (10th Cir. 2005).

90. 677 F.3d 1228 (D.C. Cir. 2012).

91. 318 F.3d 250 (D.C. Cir. 2003).

92. *Shweizer*, 677 F.3d at 1232.

93. *Id.*

94. *Id.* at 1233.

95. *Id.*

96. *Id.* at 1233–35.

97. *Swift*, 318 F.3d at 251.

98. *Id.*

The Eleventh Circuit also relied on *Riley v. St. Luke's Episcopal Hospital*[99] and *Ridenour v. Kaiser-Hill Co., LLC*.[100] In *Riley*, the Fifth Circuit analyzed the many mechanisms available in § 3730 allowing the government to retain control over a *qui tam* action throughout the entire litigation process.[101] In particular, the court highlighted that even if the government never intervenes, it is still allowed to settle the action over the relator's objections as long as the relator is provided with both notice and a hearing.[102] In *Ridenour*, the Tenth Circuit, relying on *Swift*, affirmed that the government did not need to formally intervene before moving to dismiss a *qui tam* action.[103]

In *Everglades College*, because the Eleventh Circuit determined the United States' actions were for the narrow purpose of settling the *qui tam* action, the court then turned to the text of subsection (c)(2)(B) and described the proper standard for approving or rejecting proposed settlements between the government and a defendant in a FCA case.[104] Here, the Relators asked the court to review the proposed settlement under the same standard used for class action suits under Federal Rule of Civil Procedure 23.[105] Specifically, Rule 23(e)(2)[106] states, "[i]f the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."[107] In deciding the fairness of Rule 23 settlements, the Eleventh Circuit considers (1) the likelihood of success at trial, (2) the range of possible recovery, as well as (3) the complexity and expense of the litigation, and (4) the stage of the proceedings at which the settlement is reached without giving deference to the settling parties.[108]

In response, the Eleventh Circuit rejected the Relators' request and stated that a *qui tam* FCA suit substantially differs from class action suits in two ways. First, a relator has suffered no invasion of his own personal rights. Instead, the relator is bringing the *qui tam* action on behalf of the government, which it believed to have been injured and is the real party of interest to the action. Thus, when the government settles a *qui tam* case, it is agreeing to compromise with respect to its

99. 252 F.3d 749 (5th Cir. 2001).
100. 397 F.3d (10th Cir. 2005).
101. *Riley*, 252 F.3d at 753–55.
102. *Id.* at 754.
103. *Ridenour*, 397 F.3d at 933.
104. *Everglades College*, 855 F.3d at 1287.
105. *Id.*
106. FED. R. CIV. P. 23(e)(2) (2017).
107. *Id.*
108. *Everglades College*, 855 F.3d at 1287.

own injuries and not those of the relator or any other absent party.[109] Second, in a *qui tam* suit, the government is not mainly concerned with maximizing recovery against the defendant. On the contrary, the government considers whether the maximum recovery is proportional to the seriousness of the misconduct, potential public policy consequences, political ramifications, and if continued monitoring of the case is worth spending limited prosecutorial resources.[110] Additionally, it is important to differentiate and note that in reviewing a settlement agreement in a *qui tam* FCA suit, considerable deference must be given to the government's rationale underlying the settlement.[111] While courts must give respect to the government's settlement rationale, courts "cannot just rubber stamp the government's justifications."[112] Therefore, unlike Rule 23 standards, under subsection (c)(2)(B), courts must merely find the settlement is "fair, adequate, and reasonable."[113]

In applying the *qui tam* standard to the *Everglades* settlement, the Eleventh Circuit concluded the proposed agreement was fair, adequate, and reasonable.[114] According to the court, the United States provided sensible rationales for settling the Relators' action. Most importantly, since the district court found that Everglades was only liable for two false claims, the United States believed an appeal was risky due to the chance the Eleventh Circuit would affirm the district court's narrow interpretation of FCA liability. If the Eleventh Circuit affirmed on appeal, the government's FCA enforcement efforts would be impaired in the circuit. The United States considered the precedential impact a potentially adverse appellate decision concerning the enforcement efforts would have on monetary recoveries for future FCA violations. If the Eleventh Circuit affirmed the district court's decision, the government and future relators would receive substantially lower recovery amounts.[115] Also, the United States preferred the certainty of a settlement compared to the uncertainty of an appeal in light of the fact that the Relators' case partially hinged on a proposition not yet settled in the Eleventh Circuit. The question of whether an educational institution that is violating 20 U.S.C. § 1094 can be held liable under the FCA for

109. *Id.* at 1287–88.

110. *Id.* at 1288.

111. *Id.*

112. *Id.* at 1288–89.

113. *Id.* at 1288 (quoting 31 U.S.C. § 3730(c)(2)(B)). Implicit in this rule is a broad recognition of the government's power and authority to enforce federal law.

114. *Id.* at 1289.

115. *Id.*

student-submitted financial aid requests remains undecided in the Eleventh Circuit.[116]

Lastly, the court looked to the Relators' potential monetary recovery in accord with § 3730(d)(1). Here, the proposed settlement agreement the United States struck with Everglades yielded a recovery amount more than thirty times the amount recovered by Relators at trial in the district court. Therefore, both the United States and the Relators secured a higher recovery, making the settlement fair and reasonable.[117]

V. IMPLICATIONS

Since its amendment in 1986, actions filed pursuant to the FCA have steadily increased, enabling the government to recover billions from deceptive defendants.[118] Interestingly, the amount of *qui tam* actions filed under the FCA is also ever growing. In 1988, a total of 253 fraud claims were brought overall and 43 of these were *qui tam* actions. Altogether, the fraud claims allowed the government to recover approximately $175 million, with roughly $2.3 million won from the *qui tam* cases.[119] In comparison, in 2016,[120] a total of 845 FCA claims were brought and 702 of these were *qui tam* claims. These fraud claims allowed the government to recover approximately $4.76 billion that year. Approximately $2.9 billion of the total amount was won in the sizeable number of *qui tam* actions.[121] In recent decades, a large quantity of fraud lawsuits, non-*qui tam* and *qui tam*, have been directed specifically at the health and human services industry and the Department of Defense.[122] However, fraudulent behavior accusations have been pointed towards other industries and departments too,[123] including the housing and mortgage industry, United States Customs, the Department of the Interior, and—of particular importance to this Note—for-profit schools.[124]

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116. *Id.*

117. *Id.*

118. Beck, *supra* note 52, at 541–43, 638.

119. Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016) (on file with Author); FRAUDS STATISTICS, http://www.justice.gov/opa/press-release/file/918361/download (last visited Dec. 30, 2017).

120. The information listed for 2016 is calculated through September 30, 2016. Therefore, the amounts may differ slightly for the year's entirety.

121. Press Release, *supra* note 119; FRAUDS STATISTICS, *supra* note 119.

122. *Id.*

123. FRAUDS STATISTICS, *supra* note 119.

124. *Id.*

In 2015, for example, the second largest for-profit education company in the United States, Education Management Corporation (EDMC), paid the government $95.5 million[125] to settle four separate FCA lawsuits filed under the act's *qui tam* provision. In their *qui tam* cases, the relators alleged that EDMC violated FCA provisions by certifying compliance with Title IV of the HEA despite blatant abuse of its ICB provision. [126] The government intervened in one of these cases, *United States ex rel. Washington v. Education Management Corp.*,[127] and found EDMC was running a high-pressure sales business where its recruiters were paid based solely on the number of students they enrolled for more than ten years.[128] EDMC pursued an enrollment-maximization strategy and accepted all potential students who completed an application regardless of their high school grades or the quality of their written essay.[129] In response to the settlement, United States Department of Education Secretary Arne Duncan stated, "This settlement should be a warning to other career colleges out there: We will not stand by while you profit illegally off of students and taxpayers. The federal government will continue to work tirelessly with state attorneys general to ensure that all colleges follow the law."[130]

However, the Eleventh Circuit's decision in *Everglades College*, does not seem to support the same policy articulated in Secretary Duncan's quote. Despite the nationwide increase of *qui tam* actions during the past thirty years and the huge monetary amounts recovered by the relators,

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125. The United States is to receive $52.62 million from the settlement and the remaining $11.3 million will be divided between the co-plaintiff states (California, Florida, Illinois, and Indiana), the relators, and their counsel in the four *qui tam* cases. Press Release, U.S. Dep't of Justice, For-Profit College Company to Pay $95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations (Nov. 16, 2015) (on file with Author).

126. Press Release, U.S. Dep't of Justice, For-Profit College Company to Pay $95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations (Nov. 16, 2015) (on file with Author). EDMC, headquartered in Pittsburgh, Pennsylvania, operates hundreds of higher education institutions throughout the United States and enrolls over 100,000 students. These institutions are more commonly known as the Art Institutes, South University, Argosy University, and Brown-Mackie College. *Id.*

127. 871 F. Supp. 2d 433 (W.D. Pa. 2012).

128. *See* Press Release, U.S. Dep't of Justice, *supra* note 125.

129. 871 F. Supp. 2d at 439–40. The annual student aid funds received by EDMC increased from $656 million in 2003–2004 to $2.578 billion in 2010–2011. *Id.* Institutions of higher education pursue this strategy because the students and taxpayers, not the educational institutions, absorb the risk of defaults on student loans. Therefore, there is little economic incentive to limit student enrollment and institutions set some students up for failure. *Id.*

130. *See* Press Release, U.S. Dep't of Justice, *supra* note 125.

qui tam actions involving fraudulent behavior by institutions of higher education no longer seem as appealing in the Eleventh Circuit.[131]

Laura Leigh Fox

131. Attorneys for relators now have reduced incentives to pursue FCA claims against universities that defraud the government. In *Everglades*, the Relators' attorneys filed the original complaint in February 2012. Brief for Plaintiffs-Appellants at 22, United States v. Everglades College, Inc., 855 F.3d 1279 (11th Cir. 2017) (No. 16-10849) (filed Aug. 22, 2016). After five years of extensive research, drafting legal documents, performing depositions, filing motions, attending court hearings, and winning a judgment in the trial court, the government belatedly stepped in and settled the case while it was pending on the appellate court's docket. *Id.* at 28. In its response brief, the government indicated its fear that if the Relators' theory of liability gained traction in the appellate court, it could have devastating financial implications to Everglades' ability to run its institution. Response Brief of Appellee at 29, United States v. Everglades College, Inc., 855 F.3d 1279 (11th Cir. 2017) (No. 16-10849) (filed Oct. 11, 2016). The government is basing its argument off 34 C.F.R. § 668.86(a), which provides that an institution's participation in Title IV or HEA programs may be limited if the institution violates an applicable regulatory provision. *Id.* The government was mainly concerned because the district court found Everglades had violated the ICB and therefore Everglades risked its eligibility to receive future Title IV funding, to participate in HEA programs going forth, and to continue operating efficiently. *Id.* Therefore, the government wanted the district's court decision finding the government's settlement was "fair, reasonable, and adequate" to be confirmed by the Eleventh Circuit. *Id.* at 28. The government's settlement was substantially more than the Relators recovered while adjudicating the case in the district court. Yet it seems to approve a very low standard for government settlements. The Relators strongly believed Everglades fraudulently received millions from the government and actually proved to the district judge's satisfaction violations of federal law. Yet, not only did the government settle for less than half a million, but also it did so partly in order to make sure Everglades could continue to operate.