

## DEATH CANCELS EVERYTHING BUT TRUTH:<sup>1</sup> Survivability of False Claims Act *Qui Tam* Claims

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### DEDICATION

This article is dedicated to our friend and client, George Couto. George died on November 18, 2002, at the age of 39, approximately one month before his Medicaid fraud case against the pharmaceutical giant Bayer Corp., brought on behalf of the United States under the federal False Claims Act, was settled in principle for a record sum of nearly a quarter of a billion dollars. He fought his case to the very end.

When the settlement of the case was formalized, here is what the *Boston Globe* reported on April 17, 2003, under the headline, "Dying Executive Drove Landmark Medicaid Case":

The record Medicaid fraud settlement against two major drug companies, announced yesterday by federal officials, was set in motion by a whistle-blowing executive from Boston who helped nail down the case as he was dying of cancer last fall.

George Couto, a former mid-level executive at Bayer Corp., in charge of marketing its antibiotic Cipro, had alleged for several years that the company overcharged the government insurance program for the poor by more than a \$100 million for Cipro and for Bayer's high-blood pressure drug Adalat. As the government closed in on Bayer, Couto was diagnosed with terminal pancreatic cancer.

'He had to brace himself to undergo a grueling cross-examination with weeks ticking down on his life,' said his attorney, Neil Getnick of New York City. 'His doctor had told him that any stress could significantly shorten his life. Despite that fact, he made the decision that he was going to see this case through to the end.'

...Bayer pleaded guilty to violating the Prescription Drug Marketing Act and paid a \$5.6 million criminal fine. In addition, the company agreed to pay \$251 million to settle civil allegations it violated federal law that requires drug companies to give the Medicaid program the lowest price charged to any customer....

People like George Couto have become the new heroes of corporate America. He was unable to get his concerns addressed internally at his company. More and more whistleblowers are corporate executives just like George—people with a huge investment in remaining loyal to the company. People like that are driven to go outside the company not primarily by outside forces, but by an inability or unwillingness on the company's part to address illegal or unethical conduct internally.

The message for corporate executives who find themselves in George's position is that they are now empowered with a powerful federal statute enabling them to do the right thing and see justice done.

The message for corporate America is that by championing integrity and transparency, corporations can improve their bottom line, maintain a positive image, and avoid legal problems.

This article is based on the memorandum of law in support of the motion we brought to substitute George's estate as the relator in his case after his death. Because both the Government and the defendant, by then both committed to the agreed upon settlement in principle, assented to that motion, it was granted without the need for the court's opinion on the underlying argument in favor of the survivability of *qui tam* actions. Here is that argument updated to include the key cases decided since then, most notably the Supreme Court's ruling in the *Chandler* case. It is our hope that our analysis will prove to be of help to relators' families and their counsel should this issue arise in the future.

When a whistleblower files a False Claims Act *qui tam* claim, he or she almost never asks: “What happens to my claim if I die before it is resolved?”

Perhaps this is because few of us tend to dwell on the subject of death—particularly our own—or perhaps because the assumption is that the claim survives. While the interests of justice (in our view) dictate that it should, the survivability of *qui tam* claims has become mired in a jurisprudential debate rooted in a 19<sup>th</sup> century common law rule originally applying to the demise of defendants. As a district court in Oklahoma observed in 1997, applying this analysis to the tripartite circumstances of a *qui tam* case is like “asking whether a chicken is a mammal or a fish.”<sup>2</sup>

While only four reported cases have ruled on the issue of survivability in the *qui tam* context (three in favor, one against), two Supreme Court cases decided in the last five years have materially affected the issue without having directly (or even indirectly) addressed it. Added to this complexity are policy considerations and the extent to which a rule on survivability serves the purpose and intent of the *qui tam* law.

As *qui tam* relator’s counsel, we have twice come face to face with this question. In one case, our client was an elderly Medicare beneficiary who died before the case was resolved.<sup>3</sup> In the second, our client was a 39-year-old corporate executive who was diagnosed with pancreatic cancer two years into the case and passed away three weeks before settlement-in-principle (but not before he bravely faced cross examination by his former employer, the pharmaceutical company Bayer, in a deposition held to preserve his testimony).<sup>4</sup> In both cases we were able to substitute another party as the *qui tam* plaintiff: in the first, the relator’s widow, who received a 21 percent share of the recovery, and in the second, his estate, which received a 24 percent share of the federal portion of the recovery.

This article reviews the cases and argues that not only the judicial precedents, but the interests of justice and the Congressional purpose behind the *qui tam* right of action, dictate that *qui tam* claims should survive the death of the relator.

## REMEDIAL OR PENAL? THAT IS THE QUESTION.

Substitution Upon the Death of a Party is governed by Rule 25 of the Federal Rules of Civil Procedure. This provides that a court may order the substitution of a deceased party, upon motion made within ninety days of the suggestion of death on the record, “if a party dies and the claim is not extinguished thereby.”<sup>5</sup>

The False Claims Act, 31 U.S.C. § 3729–3733 (“FCA”), does not speak directly to the survivability of a *qui tam* action. Therefore, the federal common law applies. Under federal common law, as decided in Schreiber v. Sharpless, 110 U.S. 76, S. Ct. 423, 28 L. Ed. 65 (1884), the general rule is that an action survives the death of a party if it is remedial and not penal in nature.

1. William Hazlitt (1778–1830), British essayist, *The Spirit of the Age* (1825), on the death of Lord Byron.

2. United States ex rel. Semtner v. Medical Consultants, Inc., 170 F.R.D. 490, 495 (W.D. Okla. 1997).

3. U.S. ex rel. Hertz v. Delray Community Hospital and Tenet Healthcare Corp., No. 13-194-023890-1 (S.D. Fla.) The substitution order was granted in March 2000 and the settlement reached in April 2001.

4. U.S. ex rel. Estate of George Couto v. Bayer Corporation, No. 00-10339-PBS (D. Mass.) The relator’s estate was substituted in January 2003. In April 2003 Bayer settled the action for \$251 million and paid a \$5 million criminal fine.

5. Fed. R. Civ. P. 25(a)(1).

It is this debate that has governed how the courts have addressed the question of the survivability of *qui tam* claims. The rationale behind the remedial/penal rule is less obscure when one appreciates that it was crafted for circumstances in which the defendant was the decedent. What purpose can there be in punishing a dead person? On the other hand, if the cause of action is remedial, it would be unfair to a plaintiff to extinguish a right to recover damages from the heirs of a defendant at whose hands the plaintiff had suffered injury.

The aptness of this rule for plaintiffs nonetheless has been largely unchallenged by counsel who have briefed the issue and (for the most part) courts that have decided it. As the Oklahoma district court referred to earlier observed:

It is questionable whether the common law as adopted and crafted in the federal courts is defensible. Without comment the courts apply the penal/remedial test to all questions of survival regardless of the decedent's status as plaintiff or defendant. The Court notes that the jurisprudential bases for applying a penal/remedial test to survivorship following the death of a defendant, as in Schreiber, may not carry over to instances in which the plaintiff is the decedent. Clearly, once the defendant has died it is no longer possible to fully accomplish a statute's retributive goals. Yet, a plaintiff continues to be deserving of remedial compensation from a defendant or her estate regardless of the defendant's continued viability, while the survival of the plaintiff is irrelevant to whether the defendant continues to be worthy of punishment. Therefore, a rule of abatement that accounts for the position of the decedent in the litigation is far more defensible than the present party-neutral rule. Nonetheless, as the parties have not briefed this core issue, and the Court finds that any change in such a long-standing common-law rule is better decided in the circuits' chambers, the Court will not attempt to remedy the rule's deficiencies in the present order.<sup>6</sup>

The fate of *qui tam* cases when the relator has died, therefore, have turned upon the remedial/penal rule.

## IS THE FCA REMEDIAL OR PENAL?

The Supreme Court in 1943 described the FCA, saying: "The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly." United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n. 5, 87 L. Ed. 443, 63 S. Ct. 379 (1943) (quoting United States v. Griswold, 24 F. 361, 366 (D. Or. 1885)).<sup>7</sup>

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6. Semtner, 170 F.R.D. at 493 n.2.

7. See also, United States v. Bornstein, 423 U.S. 303, 315, 46 L. Ed. 2d 514, 96 S. Ct. 523 (1976).

In enacting the 1986 amendments to the FCA, Congress likewise stated that: “False Claims Act proceedings are civil and remedial in nature and are brought to recover compensatory damages.”<sup>8</sup>

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000), however, which concerned whether states are “persons” capable of being sued under the FCA, the Supreme Court, in finding that they were not, stated that the FCA treble damages and penalty provisions in the statute as amended are essentially punitive in nature.<sup>9</sup>

Just three years later, in *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003), which concerned whether counties and municipalities are “persons” capable of being sued under the FCA, the Supreme Court, in finding that they were, stated that the FCA’s treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.<sup>10</sup>

How is the *qui tam* action survivability issue to cope with this apparently shifting target? The following paragraphs discuss the cases pre-*Stevens*, post-*Stevens* and post-*Chandler*, and finally present an analysis of where the question should lie today.

## PRE-STEVENSON: A QUI TAM ACTION IS REMEDIAL, OR IS IT A FISH?

*United States ex rel. Neher v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1994) is the only circuit court case to directly address *qui tam* survivability. While adopting the penal/remedial rule, the Court of Appeals for the Eleventh Circuit recognized that “a statute can be remedial as to one party, yet penal as to another.”<sup>11</sup>

The issue for the court was thus whether “the FCA is remedial or penal with respect to the recovery of the *qui tam* relator.”<sup>12</sup>

The court held that a *qui tam* action is remedial because a relator suffers substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm. *Qui tam* relators typically suffer emotional strain, lost employment opportunities and financial burdens as a result of the time and expense of bringing the suit.

The court relied on a three-part test articulated in *Murphy v. Household Fin. Corp.*, 560 F.2d 206, 209 (6th Cir. 1977) in deciding that the FCA was remedial as to the relator: “(1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public; (2) whether recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by statute is wholly disproportionate to the harm suffered.”<sup>13</sup>

First, the court opined that “a relator suffers substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm,” including emotional strain,

8. See, S. Rep. No. 99-345 at 30–31 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5295–96.

9. 529 U.S. at 784.

10. 538 U.S. at 130–31.

11. 11 F.3d at 137, n.1.

12. 11 F.3d at 137, emphasis added.

13. 560 F.2d 206, 209 (internal citation and quotation omitted). *Murphy* did not involve the death of a party. Instead, the question in *Murphy* was whether a bankrupt’s cause of action against a lending company pursuant to the Truth in Lending Act, 15 U.S.C. § 1302(a)(A), would pass to the bankruptcy trustee.

harm to employment and financial burdens as result of the time and expense involved in bringing the case.<sup>14</sup>

Second, the court rejected the argument that the recovery runs only to the general public, instead finding that the recovery runs to the United States government *and* the relator, as compensation for the harm to his employment and for his time and expenses.<sup>15</sup>

Third, the court found that the recovery sought by the relator was not disproportionate to the harm “typically suffered” as a result of the defendant’s fraudulent conduct. The court stated: “Because the harm suffered by a *qui tam* relator is often the type that is difficult or incapable of measurement, Congress chose to compensate these individuals by rewarding them a percentage of the government’s recovery.”<sup>16</sup> Then, relying on 31 U.S.C. § 3730, providing that the relator’s recovery varies “depending upon the extent to which the person substantially contributed to the prosecution of the action,” the court stated, “the fact that the relator’s award is proportionate to the harm he suffered as a consequence of the action further demonstrates the statute’s remedial purpose.”<sup>17</sup>

Finally the court stated that it believed “the underlying purpose of the FCA will best be served by allowing *qui tam* actions to survive the death of the relator.”<sup>18</sup> The court identified as one of the FCA’s primary purposes encouraging individuals with knowledge to come forward to the government with information about fraud.<sup>19</sup>

In the next case to be decided, United States ex rel. Semtner v. Medical Consultants, Inc., 170 F.R.D. 490 (W.D. Okla. 1997), an Oklahoma district court declined to follow the reasoning in NEC, *supra*, but reached the same final conclusion of survivability. The court decided that a *qui tam* action cannot be characterized as either remedial or penal, but still survives the death of the relator because a *qui tam* action is derivative of the claims of the government. Since the parties in the case had agreed that the government’s claims were remedial, the claim survived. The court also relied heavily on the statutory structure and legislative history of the FCA encouraging relators to come forward and pursue FCA actions.

In a sharply-reasoned judgment, the court questioned whether the penal/remedial test should apply at all when the decedent is the plaintiff, noting that in Schreiber, *supra*—the Supreme Court decision regarded as seminal on the subject—the decedent was the defendant. The court held that the claims of the *qui tam* plaintiff survive although they are neither penal nor remedial.

After reviewing the status of the *qui tam* relator under the traditional survivorship tests, the Court concludes the relator and her claims do not fit within the definition of either penal or remedial, and therefore, the only rational characterization of the relator’s claim must be de-

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14. 11 F.3d at 138.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* (citing S. Rep. No. 99-345, 99th Cong., 2d Sess. 2 (1986), U.S. Cong. & Admin. News 1986, p. 5266).

rived from the underlying claim of the government. As the parties do not contest the remedial nature of the government's claim, the action does survive and the personal representative should be substituted in the stead of the decedent relator.<sup>20</sup>

The court took issue with the NEC court analysis of harm suffered by the relator, concluding that the FCA is not intended to remedy such harm.<sup>21</sup> The court went on to explain its view of the improper fit of the penal/remedial test to the *qui tam* FCA action.

The defendants as well as the court of appeals in NEC appear to assume that there is a universe of actions that is filled entirely and exclusively with two subsets of claims—remedial and penal. The defendants implicitly argue that so long as they can prove it is not remedial, the claim must be penal by process of elimination. The Court refuses to accept this assumption for the role of the *qui tam* relator. The Murphy analysis presented by the parties and their efforts to categorize the relator result in an artificial attempt to place a square peg in a round hole. Both parties clearly identify in their arguments what is so evident in the legislative history and structure of the *qui tam* provisions of the FCA: the relator is a mechanism of enforcement. The relator's recovery is not compensation for damages nor is it a penalty to be imposed upon the defendants; it is a lure. Her ultimate claim is not even against the defendants, but against the government for a share of the award. *Qui tam* is not a cause of action, it is a means of pursuing the government's cause of action. The parties have fallen into an understandable myopia trying merely to apply the majority rule to the facts of the case. However, the results are asking whether a chicken is a mammal or a fish.<sup>22</sup>

Finally, the court cited the statutory structure and the history of the *qui tam* provisions of the FCA in support of its ruling: (i) Congress sought to provide an incentive for individuals to come forward with information and prosecute claims which might not be initially efficient for the government to pursue;<sup>23</sup> (ii) the government sought to remedy the lack of resources in the federal enforcement scheme by giving individuals incentive to pursue claims, regardless of the government's involvement, so that individuals would litigate claims that the government would not;<sup>24</sup> and (iii) Congress sought to have individuals act as overseers of actions in which the government has joined because it believed that the participation of private plaintiffs at all phases of the litigation would lead to a greater number of recoveries for the government.<sup>25</sup>

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20. *Id.*

21. 170 F.R.D. at 494–95.

22. 170 F.R.D. at 495.

23. *Id.* (citing S. Rep. No. 99-345 at 1-2, 1986 U.S.C.C.A.N. at 5266).

24. *Id.* (citing S. Rep. 99-345 at 7 1986 U.S.C.C.A.N. at 5272).

25. *Id.* (citing S. Rep. 99-345 at 25–26, 1986 U.S.C.C.A.N. at 5290–91).

Thus prior to the muddying of the waters in Stevens, the survivability of a *qui tam* action could be approached from two sides, both of which were likely to come out well for the relator: the *qui tam* action would survive either because it was remedial as to the relator, whose investment of time, effort and risk was a compensable commodity, or it survived—notwithstanding that the *qui tam* action could not be characterized as remedial, or punitive or anything else along those lines—because the claims of the government in an FCA action were remedial, and the *qui tam* action was derivative of the claims of the government.

## POST-STEVENSON: A QUI TAM ACTION MIGHT BE REMEDIAL, BUT NOT IN THIS CASE.

As stated earlier, In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000), which concerned whether states are “persons” capable of being sued under the FCA, the Supreme Court, in finding that they were not, stated that the FCA treble damages and penalty provisions in the statute as amended are essentially punitive in nature.

In United States ex rel. Harrington v. Sisters of Providence in Or., 209 F. Supp. 2d 1085 (D. Or. 2002), the Oregon District Court, in a three page decision, dismissed the non-intervened *qui tam* FCA case of a deceased relator pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction on the grounds that (i) following the decision of the Supreme Court in Stevens in 2000, the FCA is penal as to the defendant, (ii) this finding does not conclude the analysis since an action may be penal as to one party and remedial as to the other, and (iii) the FCA was not remedial to the relator in the present action because the complaint contained no allegations of personal or substantial harm to the relator. The Harrington court relied in part on the decision of the Eleventh Circuit Court of Appeals in NEC, *supra*.

The relator, an attorney who was appointed by the court to serve as the conservator of a patient at the defendant hospital, filed his action in 1998. The government declined to intervene. In April 2002, the relator died during the pendency of a Fed R. Civ. P. 9(b) motion to dismiss and defendants moved to dismiss for lack of subject matter jurisdiction. Relying on the federal common law principle that remedial actions survive the death of a party while penal actions do not, the court stated that, “the court’s task is to determine whether the FCA is remedial or penal in nature.”<sup>26</sup>

In reaching its decision, the court first relied on Stevens, and post-Stevens cases from the Third, Seventh, and Fifth Circuits, as well as a case from the Northern District of California, in concluding that “courts consider the FCA damages and penalty provisions to be punitive in nature, at least with respect to the *qui tam* defendant or for purposes of state *qui tam* liability.”<sup>27</sup>

The court then went on to hold that characterizing the FCA as punitive with respect to the defendant does not fully resolve the issue. Citing NEC, the court observed

26. 209 F. Supp. 2d at 1087.

27. *Id.* at 1087–88, emphasis added.

that “a statute can be remedial as to one party, yet penal as to another.”<sup>28</sup> The court observed that the NEC court based its decision, at least in part, on the belief that the *qui tam* relator suffers substantial personal harm that the *qui tam* provisions are intended to redress. The court then acknowledged that the *qui tam* action might be remedial, but it was not remedial in the present case because the relator had not included any allegations to support such finding in his complaint.

Assuming that the NEC Corp. analysis survives Vermont Agency and that in certain special cases, the Ninth Circuit might agree with the Eleventh Circuit that the *qui tam* provisions of the FCA may properly be characterized as remedial, the claim in the present case contains no allegations of personal or substantial harm to the relator, only harm to the public interest.<sup>29</sup> (emphasis added)

The Oregon court, therefore, was only prepared to recognize that *qui tam* actions were survivable in “certain special cases”—of which the case before it was not one because the remedial aspects of the relator’s claim had not been specifically pled. The court’s insistence that this fact-specific analysis be spelled out in the complaint is not supported by the decision of the Circuit Court in NEC which (properly in our view) recognized that the remedial aspects of the FCA as to the relator are built into the statute in the sliding relator share compensation scale of 15 to 30 percent.<sup>30</sup>

Post-Stevens, therefore, a case brought by a deceased relator who could not show personal or substantial harm, on the Harrington analysis, was in peril. While the Harrington court was prepared to recognize that survivability might be determined by focusing on whether the *qui tam* claim was remedial in a particular case, the court did not have to reach that issue because any such remedial factors in the case before it had not been specifically pled. The decision is a narrow one, and in our view, has limited precedential authority.

## **POST-CHANDLER: A QUI TAM ACTION IS REMEDIAL. PERIOD.**

As stated earlier, in Cook County v. United States ex rel. Chandler, 538 U.S. 119, 123 S. Ct. 1239, 155 L. Ed. 2d 247 (2003), which concerned whether counties and municipalities are “persons” capable of being sued under the FCA, the Supreme Court, in finding that they were, stated that the FCA’s treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives.

One reported case has tackled the *qui tam* survivability issue since the Supreme Court’s decision in Chandler in 2003. In United States ex rel. Botnick v. Cathedral Health Systems, 352 F. Supp. 2d 530 (D.N.J. 2005), the New Jersey District Court, in a three page decision, held that a deceased relator’s claim survives his death. The court relied on the Chandler ruling that the FCA is both remedial and punitive, in particu-

28. *Id.* at 1088.

29. *Id.*

30. 31 U.S.C. § 3730(d)(1) and (2).

lar on the court's observation that the *qui tam* action was the "most obvious" indication that the FCA has a remedial component. The court also relied on the legislative history indicating an intent by Congress to encourage relators to come forward.

In Botnick the relator filed suit in 1997, the government intervened in 2001, the relator died in 2002, and the case was settled in 2003. The relator's estate, which had been substituted (presumably in *ex parte* proceedings) in 2003, sought a share of the proceeds. The defendant objected.

The court made no distinction between the plaintiff, the government or the defendant in its discussion of whether the FCA was remedial or punitive. The relator having conceded that, since Stevens, "a punitive action would not survive Botnick's death,"<sup>31</sup> the court moved on to consider the impact of Chandler on the Stevens ruling. Holding that Chandler governed the case before it, the court said:

The Chandler Court backed away from the blanket ruling in Stevens that the FCA was solely penal in nature and instead held that, "while the tipping point between pay-back and punishment defies general formulation. . . the facts about the FCA show that the damages multiplier has compensatory traits along with the punitive," 538 U.S. at 130. The Court went on to note that "the most obvious indication that the treble damages ceiling has a remedial place under [the FCA] is its *qui tam* feature with its possibility of diverting as much as 30 percent of the Government's recovery to a private relator who began the action." *Id.* at 131. As the Supreme Court specifically cited the provision for a relator's recovery of a percentage of any FCA award as an indication of the remedial aspects of the statute, this Court agrees with Botnick's estate that it would follow that a relator's recovery constitutes a remedial action rather than a penal one.<sup>32</sup>

The court also took into account the FCA's legislative history "indicating a strong intent on the part of Congress to create incentives for relators such as Botnick to come forward, see Chandler, 538 U.S. at 133 ('because Congress was concerned about pervasive fraud . . . [it] enhanced the incentives for relators to bring suit')"<sup>33</sup> in deciding that the action is remedial and survived the relator's death.

Perhaps in view of the relator's concession that, under Stevens, the claim would not survive (notwithstanding that Stevens only dealt with the punitive/remedial dichotomy as to the defendant), the court did not engage in the analysis of whether a claim could be remedial as to one party and punitive as to another. The court's ruling can be read as endorsing the position that the FCA is always remedial as to the relator. Since the court decided that Botnick's claim survived his death on the basis of the Chandler Court's specific reference to the *qui tam* recovery as the most obvious remedial component in the government's recovery, it follows that the *qui tam* action is

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31. 352 F. Supp. 2d at 532.

32. *Id.*

33. *Id.*

remedial independently of any factors relating to an individual relator. On the Botnick analysis, it would never be necessary to determine whether a particular relator had suffered a compensable harm (as in NEC and Harrington) because the *qui tam* action, following the Supreme Court in Chandler, is by definition remedial.

This view has much merit. However, in light of the checkered history of the *qui tam* survivability question, it may not be the final word on the subject.

### Arguments in Support of the Survivability of *Qui Tam* Claims.

Both judicial precedent and policy considerations support various arguments in favor of the survivability of the *qui tam* claim beyond the death of the relator.

First, it is well recognized that the FCA is not punitive as to the relator. Thus Stevens, *supra*, does not bear upon the issue of the survivability of a *qui tam* action, even apart from Chandler which recognized both a remedial and punitive element in the FCA. Second, since Chandler specifically referenced the *qui tam* action as “the most obvious indication” that the FCA has remedial aspects, the *qui tam* action is remedial. While earlier courts (specifically, NEC and Harrington), analyzed specific compensable aspects of the relator’s claim, e.g., harm to employment, time and expense involved in bringing the suit), Chandler recognizes that the *qui tam* action is remedial per se. Third, following NEC and Harrington, the *qui tam* claims of individual relators who have suffered specific compensable harm are remedial. Fourth, the history and purpose of the FCA support the survivability of relator’s claim. Fifth, the government is the real party in interest in a *qui tam* action and thus the relator’s death should not extinguish his or her claim.

#### Arguments One Through Three: The FCA is Remedial as to the Relator.

It is well recognized that a cause of action can be remedial as to one party and penal as to another.<sup>34</sup> While the Court in Stevens held that the FCA was punitive as to the defendant,<sup>35</sup> it did not explore the role of the relator or even touch upon it. Therefore, Stevens has no bearing on the issue of whether a *qui tam* action survives the relator’s death.

No court had held that a *qui tam* action is punitive as to the relator. The Eleventh Circuit Court of Appeals in NEC recognized that the relator’s claim in an FCA case is remedial. The court in Semtner argued that the *qui tam* action may well be neither penal nor remedial. In Harrington, the court cited NEC approvingly and held that the *qui tam* provisions of the FCA may be remedial (but not, however, in the case before it). In Botnick, the court held that, following Chandler, the relator’s claim is remedial per se.

A rational analysis of the *qui tam* action also leads to the view that it is not punitive. As the court in NEC observed, the relator’s presence can in no way “punish” the

34. NEC 11 F.3d at 137, n. 1; Harrington, 209 F. Supp. 2d at 1088.

35. In Stevens, the question whether the FCA is punitive was raised by the majority as further support for the conclusion that the majority had already reached, i.e., that States are not subject to *qui tam* liability. The issue is dealt with in a single short paragraph. Stevens, 529 U.S. at 784–85.

defendant because the recovery from the defendant is the same whether the relator is there or not: “The FCA’s *qui tam* provisions do not act as a penalty; rather, they provide incentive to government ‘whistle blowers’ and compensate such individuals for their time and trouble.”<sup>36</sup> Further, while the FCA does mandate the payment of attorneys fees directly to the relator, attorneys fees are not punitive but are merely intended to reimburse the relator for fees and costs “necessarily incurred.”<sup>37</sup>

If a *qui tam* action is not punitive, then it is either wholly or partially remedial, or neither penal nor remedial. While the latter position was taken in Semtner, the Oklahoma district court’s attempt to contrive a new phenomenon that is not a cause of action at all but a “lure,” or a “mechanism of enforcement,” while intriguing, is out on its own in the caselaw.<sup>38</sup> That the *qui tam* action is remedial is supportable both on the Botnick analysis (holding that the action was remedial because “the Supreme Court [in Chandler] specifically cited the provision for a relator’s recovery of a percentage of any FCA award as an indication of the remedial aspects of the statute”<sup>39</sup>) and on the NEC analysis, to the extent that the relator suffers substantial harm which the *qui tam* provisions are intended to remedy. This includes emotional strain, impact on employment, and financial burdens arising from the time and expense of bringing the lawsuit.<sup>40</sup>

As the NEC court recognized, the remedial nature of the *qui tam* action is demonstrated by the fact that *qui tam* recovery is governed by a statutorily-mandated percentage range of between 15 percent and 25 percent, which is designed to compensate the relator for his or her “substantial contribution” to the underlying FCA action.<sup>41</sup> Indeed, the DOJ’s own relator share guidelines identify the very factors that the court in NEC saw as relevant in determining the appropriate reward that the relator should receive within the 15 to 25 percent range. Item 8, for example, provides for an increase in relator share if the relator “provided substantial assistance during the investigation and/or pre-trial phases of the case,” and Item 14 provides for an increase if “the filing of the complaint had a substantial adverse impact on the relator.” The relator share is also subject to increase if “the relator was an excellent, credible witness” at his deposition or trial (Item 9), and if “the case went to trial” (Item 12)—the last two items describing a level of commitment by relators that necessarily involves additional time, risk and expense on their part.

In U.S. ex rel. Alderson v. Quorum Health Group, 171 F. Supp. 2d 1323, in which the court awarded the relator a 24 percent share of the recovery, the criteria upon which the court focused most heavily were the relator’s “extraordinary commitment” of time and energy, the “unusual length and complexity” of the legal proceedings, and “the hardship endured by Alderson and his family” during the currency of the case.<sup>42</sup>

36. NEC, 11 F.3d at 139.

37. 31 U.S.C. § 3730(d)(1).

38. 170 F.R.D. at 495. Semtner, in declining to ascribe any remedial component to the *qui tam* action, arguably fails to acknowledge what is inherent in the statute: a percentage range of recovery for the relator that is designed to compensate the relator according to the extent to which he or she has invested time, trouble, hardship and risk.

39. Botnick, 352 F. Supp. 2d at 532.

40. See NEC, 11 F.3d at 138.

41. *Id.* See 31 U.S.C. § 3730(d)(1).

42. 171 F. Supp. at 1338.

Congress, the court noted “has chosen a mechanism calculated to encourage potential relators to undertake the risk and enervating hardship often attendant to FCA litigation.”<sup>43</sup> Alderson’s *qui tam* action, amongst other things, had “a disruptive and divisive effect” on Alderson and his family, “including dispiriting financial hardship and the burden of the confidentiality obligations governing the case.”<sup>44</sup> The court observed that Alderson’s experience “illustrates vividly Judge Learned Hands’s cautionary observation that ‘as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.’ ‘The Deficiencies of Trials to Reach the Heart of the Matter,’ 1921, in Lectures on Legal Topics, 3:89, 105 (1926).”<sup>45</sup>

The court in Harrington, it should be noted, erred in finding that such factors must be specifically pled in the complaint, since the FCA, the legislative history, the DOJ’s guidelines, and the caselaw set forth the criteria for determining the level of compensation the relator will receive.

Where does this leave the relator who has not suffered significant emotional strain, damage to employment, financial burdens, or investment of time? Such a relator will be rare, but is conceivable: not all relators are corporate insiders, not all relators are actively involved in the government’s investigation, not all relators are deposed or give evidence to the grand jury, and not all FCA cases go to trial. If the analysis of whether a *qui tam* claim is remedial stops with NEC, then it is possible to conceive of a court declining to uphold the survivability of the claim of a deceased relator who did not, in fact, suffer “substantial harm.” In that case, the Botnick analysis, relying on Supreme Court authority in finding that the *qui tam* claim is remedial independently of the circumstances of the individual relator, supports the survivability of the claim.<sup>46</sup>

Additional compelling policy-based arguments also support of the survivability of a *qui tam* action.

#### Arguments Four and Five: FCA Policy Supports Survivability.

As the courts in NEC,<sup>47</sup> Semtner<sup>48</sup> and Botnick<sup>49</sup> observed, the history and purpose of the FCA support the survivability of the relator’s claim.

The legislative history of the 1986 amendments to the FCA provide two major policy hooks supporting survivability. The first is that the statute was intended to encourage private citizen suits. The second is that private citizen suits were intended to supplement the government’s resources, permitting them to go forward in the absence of government intervention.

The FCA is designed to provide a framework for fighting fraud against the federal government through a combination of private and public enforcement. The Senate Re-

43. *Id.* at 1341.

44. *Id.* at 1328.

45. *Id.* at 1338 n. 43.

46. Semtner also found that the *qui tam* claim is remedial independently of the circumstances of the individual relator, although via a different route.

47. NEC, 11 F.3d at 139.

48. Semtner, 170 F.R.D. at 495.

49. Botnick, 352 F. Supp. 2d at 532.

port accompanying the 1986 amendments to the FCA described the Act's purpose as not only providing the "Government's law enforcers with more effective tools," but also encouraging "any individual knowing of Government fraud to bring that information forward."<sup>50</sup> The Senate stated that "only a coordinated effort of both the Government and the citizenry will decrease the wave of defrauding public funds."<sup>51</sup> The committee's overall intent in amending the *qui tam* provisions of the FCA was to "encourage more private enforcement suits."<sup>52</sup>

Private citizens will be discouraged from bringing information to the government if the effort and risk involved in bringing a *qui tam* action will go unrewarded in the event of their demise. A rule against survivability would not serve the underlying purpose of the FCA to encourage more private enforcement suits.

Potential relators who are elderly or ill, in particular, would be less likely to bring information forward if their claims were extinguished upon their deaths. Indeed, since 1999 the Department of Health and Human Services has actively sought to encourage elderly citizens to examine their Medicare statements of benefits and to report any fraudulent billing to the Government.<sup>53</sup> Such persons should not be treated differently from potential relators who are lucky enough to be younger and/or enjoy good health, nor should a rule against survivability discourage them from coming forward.

By enacting the amended FCA in 1986, Congress sought both to provide incentives to individuals to come forward with information and to supplement federal enforcement resources by encouraging them to pursue and litigate claims on behalf of the government.<sup>54</sup> It was envisioned that a relator would be able to bring, and prosecute on behalf of the government, actions that for some reason the government could not effectively bring on its own.<sup>55</sup> The FCA provides that if the government declines to intervene, the relator has the right to conduct the action alone.<sup>56</sup>

If defendants were able to obtain dismissal of meritorious non-intervened actions upon the death of the relator, these intended goals of the FCA would not be served. The government declines to intervene in *qui tam* actions for a variety of reasons, many of which have nothing to do with the merits of the case. Sometimes, for example, the government declines to intervene because it simply lacks the resources to pursue the case, and/or chooses to rely on the resources of the relator to do so. If such actions were extinguished upon the relator's death, not only would the FCA's goals not be served, but the government would lose the benefit of those meritorious claims. As the

50. S. Rep. No. 345, reprinted in 1986 U.S.C.C.A.N. at 5266–67.

51. *Id.*

52. *Id.* at 5288–89.

53. See <http://www.cms.hhs.gov/providers/fraud/hmfraud1.asp>. "The Medicare program needs its 39 million beneficiaries to act as 'eyes and ears' in spotting mispayments," said the then HHS Secretary in launching the "Who Pays? You Pay!" campaign. This law firm brought what is believed to be the first successful *qui tam* suit brought by a Medicare beneficiary who learned of the alleged fraud by scrutinizing his own bills and statements. In that case, which was filed in 1995, the relator did, in fact, die before the settlement, which was reached in 2001. In 2000, his wife was successfully substituted as the *qui tam* plaintiff and received a relator share payment from the DOJ. *U.S. ex rel. Hertz v. Delray Community Hospital and Tenet Healthcare Corp.*, No. 13-194-023890-1 (S.D. Fla.) The substitution order was granted on March 15, 2000, and the settlement reached in April 2001.

54. See, S. Rep. No. 345, reprinted in 1986 U.S.C.C.A.N. at 5272.

55. *Id.* at 5266.

56. 31 U.S.C. § 3730(b)(4)(B) and (c)(3).

court in Semtner stated: “The legislative history clearly reveals that Congress believed the participation of private plaintiffs at all phases of the litigation would lead to a greater number of recoveries for the government and possibly in higher amounts—the ultimate goals of the 1986 amendments.”<sup>57</sup>

Furthermore, from a practical point of view, a rule that would promise defendants an automatic reprieve in the event of the relator’s death would encourage defendants to use delaying tactics to prolong proceedings in the hope that a relator who is elderly or terminally ill will die before the action can be settled or tried.

Related to these compelling policy considerations is the nature and quality of the *qui tam* action itself. A *qui tam* action is brought in the name of the government. It can only be dismissed with the written consent of the Attorney General.<sup>58</sup> The courts have consistently found that the United States Government is the real party in interest in *qui tam* FCA actions. This is true whether the Government has intervened in the action or not. Recognition by the courts that the Government is the real party in interest has been used as the basis for rulings that, among others, support standing for relators against constitutional challenges, reject state claims of sovereign immunity from suit by private citizens, and permit the government to challenge a relator/defendant settlement without intervening in the action.<sup>59</sup>

As the real party in interest, the government’s claim against the defendant in an FCA action should continue despite the death of the relator. For example, if the relator dies during the government’s investigation and prior to intervention, should the cause of action be automatically extinguished and the government thereby lose the benefit of the relator’s timely filing within the relevant statute of limitations? FCA cases typically are highly complex and the government must dedicate substantial time and resources to “diligently . . . investigate” the allegations as required under the FCA.<sup>60</sup> It is not unusual for an FCA action to be under investigation for several years pending an intervention decision, during which time the relator may die. In that event, should the government have to re-file the action, potentially losing many years of damages or even the action in its entirety if the statute of limitations has run? In effect, the government would be investigating the relator’s case under threat that it may be extinguished at any time.

## CONCLUSION

Three of the four reported cases on the survivability of *qui tam* claims—NEC, Semtner and Botnick—have upheld the viability of the claim. In the fourth case, Harrington, the court found against the relator, but only because the relator had failed to plead certain facts in his complaint, and thus the case must be regarded as limited to the facts—as well as being now subject to the Supreme Court’s ruling in Chandler. The fact that the courts in each case reached their decisions via different analytic routes

57. 170 F.R.D. at 496.

58. 31 U.S.C. § 3730(a).

59. See, John T. Boese, Civil False Claims and Qui Tam Actions § 4.01[C].

60. 31 U.S.C. § 3730 (a).

offers greater flexibility to the survivors of relators faced with the unfortunate task of securing the future viability of the *qui tam* claim after the relator's death.

The jurisprudential history of this issue is perhaps more complex than is justified by the issue itself, since the policy considerations are really rather straightforward. As the court summed it up in NEC:

One of the FCA's primary purposes is to encourage individuals knowing of government-related fraud to come forward with that information. By minimizing the obstacles faced by *qui tam* plaintiffs, we believe that this type of government "whistleblowing" will be further encouraged.<sup>61</sup>

A rule on survivability that would extinguish the relator's claim on his or her death would indeed present such an obstacle. Though the death of the relator is rare, the impact of such a rule on the willingness of individuals to go the *qui tam* route in the first place would be far-reaching.

Permitting a relator's claim to survive the death of the relator is consistent with, and supportive of, the underlying purpose and goals of the FCA.

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61. NEC, 11 F.3d at 139.