The False Claims Act (FCA) features an enforcement mechanism that is relatively unique in federal law: individuals with independent knowledge of a contractor’s fraudulent behavior can sue alleged wrongdoers on the government’s behalf. The FCA encourages “relators” to file such qui tam enforcement actions by offering them 10% of the recovery if the government intervenes in the case, and 25% if the government declines participation. This financial incentive, along with statutory increases in per-fraudulent-act penalties and federal courts’ creation of new causes of action under the law, have led to a dramatic rise in FCA lawsuits. That increase has in turn inspired new questions about the value of qui tam claims, especially those in which the government declines intervention.

This WLF WORKING PAPER argues that an increase in the burden of proof qui tam relators must meet in cases they pursue without government intervention could provide an effective check on abusive claims. The proof burden that currently applies to FCA claims is preponderance of the evidence. A clear-and-convincing proof burden for relators’ independent actions could help weed out unsupportable FCA claims in early motions practice and discourage the filing of frivolous suits altogether. This heightened pleading standard could restore a degree of balance with respect to the greatest volume of FCA cases filed, avoid negatively affecting claims brought by the government, and consequently reduce the costs to all parties involved.

Some federal appellate courts applied a clear-and-convincing evidence standard to FCA claims prior to Congress’ 1986 amendments to the law. This same standard historically prevailed over fraud claims at common law. Other appeals courts, based on the purported remedial nature of the FCA, applied a preponderance standard. Congress considered the two standards during debate over the 1986 FCA amendments, and decided upon the preponderance standard for cases brought or joined by the government. The amendments did not explicitly state, however, whether the preponderance standard applied to FCA suits pursued by relators without government participation.

This lack of clarity, and a 2005 US Supreme Court opinion, have created an opening for judicial restoration of the clear-and-convincing burden of proof for independent qui tam actions. Graham County Soil & Water Cons. Dist. v. United States ex rel. Wilson involved a provision of the 1986 amendments that stated FCA claims would be subject to a preponderance of the evidence standard. The Court noted that the provision, as drafted, was limited to actions brought by the United States (as opposed to relators). However, the Graham County decision did not address whether a different burden of proof should govern claims by qui tam relators. Congressional inaction since Graham County suggests Congress intended to ease the burden of proof only with respect to the government, not private qui tam relators.

When given the opportunity, courts reviewing the adequacy of a qui tam relator’s pleadings should utilize a clear-and-convincing evidence standard. Courts can justify such a heightened standard for independently prosecuted FCA suits as necessary to protect defendants’ liberty and property interests. Protection of defendants’ due-process rights will not undermine the government’s pursuit of fraud, as meritorious claims will still proceed under a higher proof standard. Finally, a higher standard is unlikely to increase pressure on the government to intervene in relators’ suits because current statistics reflect the government’s reluctance to wade into cases that lack merit.