# GOVERNMENT EMPLOYEE-RELATORS: THE DR. JEKYLL AND MR. HYDE SYNDROME

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## I. INTRODUCTION

The "paradigm" *qui tam* case brought under the False Claims Act ("FCA") involves "an insider at a private company [who] brings an action against his own employer."[1] Increasingly, however, FCA suits are brought, not by insiders, but rather by government employees whose job it is to detect and report fraud, or who otherwise have had some involvement in the matter or dispute at issue in the suit. Judge Trott has described the problem this way:

> One day, *Inspector* Fine uses the awesome power of the federal government to investigate you; the next, *Mr.* Fine uses the information he pries loose from you with that power to augment his bank account. Can anyone say when Inspector Fine wields the coercive tools of the government that he is also not working for himself? Dr. Jekyll one day, Mr. Hyde the next. Such an abuse could only cause the public to distrust government officials even more than the public already does.[2]

No court has yet held that the FCA includes a *per se* bar against government employee-relators bringing *qui tam* suits based upon information they learned through their government employment. As a result, the government and defendants have turned to the FCA's public disclosure jurisdictional bar (31 U.S.C. § 3730(e)(4)) as a basis for dismissal of such government employee-relator suits. While the courts have not shied away from addressing the issue in the context of the public disclosure jurisdictional bar, they have steadfastly avoided the broader question of whether government employees' fiduciary duty to their employer, and the myriad conflict-of-interest statutes that govern their conduct, prohibit them from recovering a windfall for merely doing their job.[3] While these duties and statutes may not bar the government employee-relator from filing a *qui tam* suit, they should prohibit them from sharing in any recovery. And the government, while arguing that such government employees are not proper relators, has so far declined to exercise its authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss such suits.

## II. THE FCA AND THE 1986 AMENDMENTS

The FCA was originally enacted in 1863, during the Civil War, to combat Union contractor fraud. The original Act imposed civil and criminal penalties on persons who submitted a false claim for payment to the government. The original Act also provided for federal jurisdiction over civil *qui tam* actions.

Such private enforcement was necessitated by the government's inability to combat contractor fraud while its resources were tied up with the Civil War. Harsh sanctions were provided for in the original Act: double damages and a $2,000 penalty for each false claim by a government contractor. Individuals who brought successful *qui tam* suits were entitled to one half of the forfeitures and damages collected. This provided individuals with a strong incentive to bring *qui tam* suits. However, in order to discourage frivolous lawsuits, the Act required the relator to bear the cost of pursuing the suit and also allowed the Government to intervene and take over the suit at its sole discretion.

Despite the potential for huge windfalls, the end of the Civil War and the requirement that the relator bear the cost of pursuing the suit resulted in few actions under the *qui tam* provision until the 1930's. Several factors led to an increase in the number of *qui tam* suits brought in the 1930's and early 1940's. First, the military build-up prior to World War II and the enactment of the New Deal in the 1930's and early 1940's expanded opportunities for government contractors to increase profits through fraud.

Second, although the Act attempted to discourage frivolous lawsuits by requiring relators to bear the costs of bringing the suit, the Act did not limit recovery to *qui tam* plaintiffs with direct knowledge of previously unknown fraud. As a result, the Act allowed for "parasitic" actions in which individuals used information in criminal fraud indictments to bring civil *qui tam* actions and obtain a fifty percent share in any recovery.

For example, in 1941, an opportunistic relator allegedly instituted a civil action under the FCA which incorporated allegations copied from a criminal indictment under the FCA. Although the relator brought no new information to the government's attention, the Supreme Court held that the relator was entitled to half of any money judgment resulting from the civil action under the FCA.[4]

The Court's opinion in *Hess* led to a significant revision of the Act in 1943 which narrowed a *qui tam* relator's ability to bring suit and reduced the potential bounty the relator could receive. The 1943 amendments included a jurisdictional bar against *qui tam* suits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought."[5] This government knowledge defense effectively prohibited government employees from bringing suit under the FCA.

The courts expansively construed the jurisdictional bar under the 1943 Act. For example, in *Dean*, the Seventh Circuit held that the FCA barred a *qui tam* suit "whenever the government has knowledge of the 'essential information upon which the suit is predicated' before the suit is filed, even when the plaintiff is the source of that knowledge."[6]

In the 1980's, Congress became alarmed at the perceived level of fraud in government contracting and cases such as *Dean* led Congress to believe that the FCA no longer served as an effective enforcement tool or as a sufficient deterrent to fraud. Therefore, Congress, in 1986, made only the second major revision of the Act since 1863 in an effort to reinvigorate the FCA. Congress took the opportunity to expand the availability of *qui tam* actions, increase the financial incentive to bring such suits, and clarify statutory language which had led to conflicting judicial interpretations of the pre-1986 Act.

The history of the FCA demonstrates Congress' struggle "to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior."[7]

## III. THE GOVERNMENT'S POLICY CONCERNS

The legislative history of the 1986 amendments provides some support for the argument that Congress "envisioned only [the] paradigm suit," and not suits by government employee-relators, when enacting the current version of the FCA.[8] The Senate Report, for example, states that "[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more **private** enforcement suits."[9] The House Report similarly provided that "[t]he purpose of the *qui tam* provisions of the False Claims Act is to encourage **private** individuals who are aware of fraud being perpetrated against the Government to bring such information forward."[10]

Indeed, the United States has advanced the "more general proposition that the comprehensive bar against *qui tam* suits by government employees in the 1943 version of the False Claims Act was never repealed in the 1986 amendments to the Act", but no court has yet agreed with the government on this point.[11] Undeterred, the United States has sought to dismiss, on jurisdiction grounds, government employee-relator suits that are based upon information acquired in the course of their government employment. The government has sought such dismissals whether the employee's principal job responsibility was the detection of fraud (*e.g.,* Office of Inspector General agents),[12] or not (*e.g.*, government attorneys with responsibility for contract formation and compliance).[13]

In addition to its legal arguments under the FCA's public disclosure jurisdictional bar, the government has identified numerous policy arguments against "allow[ing] a personal reward to government employees for the 'parasitical' use of information obtained and developed in the course of government employment."[14] For example, the government has argued that allowing such suits would provide government employees with "perverse incentives": [15]

- "to spend work time looking for personally remunerative cases . . . rather than doing their assigned work";[16]
- "to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain";[17]
- "to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and diverting unnecessarily up to 30% of the government's recovery to the government employee";[18] and

- "to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests."[19]

The government also argues that allowing government employees to act as relators would:

- deter contractors from cooperating in governmental investigations and audits for fear that their confidential work papers will be used for a government employee's personal use in filing a *qui tam* "rather than for legitimate governmental functions";[20]

- compromise criminal prosecutions because the government employee's personal interest in the outcome of the matter will call into question their credibility should they have to testify in the criminal trial;[21] and

- "necessarily decrease" the public's confidence in the integrity and impartiality of government audits and investigations;[22]

Simply stated, the government believes that its "employees should not receive compensation via the False Claims Act for reporting fraud against the government when it is part of their duties as government employees to report such fraud notwithstanding the Act."[23]

## IV. THE PUBLIC DISCLOSURE ARGUMENT

Proper application of the public disclosure jurisdictional bar should result in the dismissal of *qui tam* suits brought by government employees who base their claims on information learned through their government employment, at least where the requisite threshold finding of "public disclosure" has been made.

### A. HAS THERE BEEN THE REQUISITE PUBLIC DISCLOSURE?

Federal law provides that a federal employee "shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest."[24] Federal regulations further provide:

> (a) **Prohibition**. An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.
>
> (b) **Definition of nonpublic information.** For purposes of this section, **nonpublic information** is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public.[25]

All federal employees are "considered to be on notice of the requirements" of the law.[26]

Consequently, by relying on information obtained during the course of a relator's government employment – "government information" – to pursue private financial gain, a government employee-relator must acknowledge that information as public information. If the information was non-public, of course, the government employee-relator would have violated federal law.

In order to trigger the FCA's public disclosure jurisdictional bar, however, it is not enough that the information was "public." The public disclosure must have been made in a "criminal, civil, or administrative hearing, in a congressional, administrative or [General] Accounting Office report, hearing, audit, or investigation, or from the news media."[27] As a result of this requirement, several Courts of Appeal have permitted *qui tam* suits initiated by government employees to proceed, finding that the public disclosure bar was not triggered – not because the information was not "public," but rather because it was not made public in one of the enumerated ways.[28]

### B. IS THE GOVERNMENT EMPLOYEE-RELATOR AN "ORIGINAL SOURCE"?

Assuming that there has been a triggering "public disclosure," the court lacks jurisdiction over the action unless the government employee-relator can establish that he is an "original source" of the information upon which his complaint is based. To qualify as an original source, a relator must, at a minimum,[29] have (1) direct and independent knowledge of the information on which the allegations are based; and (2) voluntarily provided such information to the government prior to filing suit.[30]

In *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, the First Circuit held that a government employee whose responsibility includes the detection of fraud did not have "independent knowledge of the information," and did not therefore qualify as an "original source."[31] However, most of the other Circuit Courts to address the issue have focused on the second prong of the "original source" test – whether the relator made the requisite "voluntary" disclosure. Many would argue, rightly, that it is simply impossible for a government employee to make a "voluntary" disclosure because federal employees are bound by federal regulations that provide that all such "[e]mployees **shall** disclose waste, fraud, abuse, and corruption to appropriate authorities."[32]

Generally, however, the courts have not adopted such a broad standard, and have instead focused on the nature of the government employee-relator's job responsibilities. In particular, they have focused on whether their primary responsibilities included the detection of fraud, rather than focusing on the simpler question of whether the relator's suit was based on information "gain[ed] by reason of Federal employment."[33]

In *Fine*, the Ninth Circuit, sitting *en banc*, held that a former employee of the Office of the Inspector General at the Department of Energy was required, in his position, to oversee audits, and therefore could not be a FCA relator because his disclosure of fraud was not voluntary. The court stated:

> The district court is surely correct in its conclusion that Fine was no volunteer. He was a salaried government employee, compelled to disclose fraud by the very

> terms of his employment. He no more voluntarily provided information to the government than we, as federal judges, voluntarily hear arguments and draft dispositions.[34]

The court concluded:

> The government employed Fine to assist in its efforts to root out, disclose, and prevent fraud, and rewarded him with a salary and benefits. The government has no further need to rouse him from slumber and embolden him to perform his job responsibilities through the possibility of enormous monetary recovery from a *qui tam* action. His performance of his job responsibilities, including the provision to his superiors of the information that later formed the basis of these two suits, was not voluntary within the meaning of the False Claims Act. He therefore is not an original source.[35]

Shortly after deciding *Fine*, though, the Ninth Circuit in *United States ex rel. Hagood v. Sonoma County Water Agency* held that a *qui tam* suit filed by an Assistant District Counsel to the Army Corp of Engineers was not jurisdictionally barred.[36] The court held that the case was not controlled by its recent decision in *Fine* because Hagood's job was not to expose fraud, "but to draft contracts and perform other legal services for the Corps."[37] As such, Hagood was able to satisfy the "voluntary disclosure" prong of the original source test. The court did not, however, address any of the federal laws that required Hagood to disclose fraud. Nor did the court address the argument raised by Judge Kleinfeld, in his concurring opinion, that the rules of professional conduct that govern lawyers, including Hagood, "made disclosure to his agency of fraud mandatory, not voluntary."[38]

### C. THE NEED FOR A RATIONAL STANDARD

Fundamentally, whether or not government employees should be permitted to initiate *qui tam* suits based on information gathered in the course of their employment should not turn on whether the information was disclosed in one of § 3730(e)(4)(A)'s enumerated ways, nor should it turn on their job title. The policy concerns advanced by the government do not differ, or disappear, depending on the category of government employee – the same perverse incentives remain regardless of whether the relator is an OIG auditor, or a government attorney responsible for administering contracts. As Deputy Assistant Attorney General Stuart Shiffer told Congress, "Suffice it to say that *qui tam* suits filed by government employees cause us substantial concern for the obvious reason that relator status generally strikes us as in conflict with the fiduciary duties owed by government employees to their employer, the United States."[39]

Furthermore, a job responsibility-based standard creates a line-drawing problem, as demonstrated in *United States ex rel. Biddle*, which was the Ninth Circuit's third opportunity to address a disagreement between parties as to whether a government employee-relator had "voluntarily" disclosed the fraud to the government prior to filing suit. In *Biddle*, the relator was an Administrative Contracting Officer and Resident Representative for the Office of Naval Research, which was responsible for setting indirect cost rates and staff benefits at the defendant entity, Stanford University. The relator argued that *Fine* should not bar his claim because his job duties did not entail detection of fraud. The court disagreed, finding that "Biddle had a duty as an [Administrative Contracting Officer] to disclose fraud."[40]

Judge Kleinfeld, who had argued in a concurring opinion in *Hagood* that the relator in that case could not have "voluntarily" disclosed the fraud, dissented in *Biddle.* In his dissent, Judge Kleinfeld recognized the difficulty in differentiating between the facts in *Fine, Biddle and Hagood*:

> Does *Biddle* mean that no government employee can recover in a *qui tam* case? We noted in *Fine* that an executive order obligates all government employees to "disclose waste, fraud, abuse, and corruption to appropriate authorities." [cites omitted] That executive order is considerably clearer in obligating employees to report fraud than the regulation we rely on in the case at bar, so if the regulation in the case at bar eliminates voluntariness, it would seem to follow *a fortiori* that the executive order cited in *Fine* eliminates voluntariness for all government employees.[41]

## V. In the Absence of a Jurisdictional Bar, Relators Should be Precluded From Any Share of the Recovery

Whether a government employee-relator's suit is jurisdictionally barred under § 3730(e)(4) or not, federal law prohibits such relators from using government information for their private gain. As such, while they may not be precluded from filing a *qui tam* suit, their demand for relief can not include any demand for a bounty. As noted above, federal regulations provide that "[e]mployees shall not use public office for private gain."[42] The knowledge gained by employees in the course of their employment belongs to the employer, the federal government,[43] and federal employees "shall not use [government] property, or allow its use, for other than authorized purposes."[44] Government employees who participate "personally and substantially" in any particular matter in which they have a financial interest are also subject to criminal penalties.[45]

The Ninth Circuit has noted that the purposes of the FCA *qui tam* provision do not support permitting government auditors to recover financial benefits in an FCA action.

> The relator is entitled to share in as much as 30% of the settlement or judgment depending on whether the United States intervenes in the action. Thus, potential recoveries for *qui tam* relators are staggeringly large, as well they should be for insiders in private companies who risk their jobs and reputations when they blow the whistle on their own employers. We question whether government auditors, who already receive a salary and benefits for reporting allegations of fraud, deserve or need this same incentive.[46]

The concurring opinion of Judges Trott and Kozinski goes even further:

> Why would Congress silently permit auditors like Inspector Fine to use their salaried jobs to set up private lawsuits when such auditors are also subject to a myriad of legal duties and responsibilities, all of which command independence and freedom from personal involvement in their work? Such provisions covering Inspector General employees prohibit the use of public office for private gain, 5 C.F.R. §§ 2635.101(b)(7), 2635.702;

the use of government property or government time for personal purposes, 5 C.F.R. §§ 2635.704, 2635.705; the trafficking in "inside information" for personal advantage, 5 C.F.R. §§ 2635.101(b)(3), 2635.703(a); the participation in any government matter in which the employee has a financial interest, 5 C.F.R. §§ 2635.402, 2635.501, 2635.502; and last but not least, the holding of financial interests that may conflict with the impartial performance of government duties, 5 C.F.R. § 2635.403.[47]

Courts routinely dismiss or strike demands for relief when they are not among the remedies available to plaintiffs in given cases.[48] While this issue commonly arises in the context of inappropriate demands for punitive damages, for example, demands for relief that conflict with federal conflict-of-interest laws should be treated no differently. Eliminating the monetary reward to government employee-relators not only eliminates the incentive for filing such suits, it also eliminates the "perverse incentives" that would otherwise arise in these suits (in the unlikely event that a government employee-relator would file suit without any financial incentive).

## VI. THE GOVERNMENT SHOULD DISMISS SUCH SUITS UNDER § 3730(C)(2)(A)

A second solution to the government employee-relator problem lies within the exclusive power of the government. Section 3730(c)(2)(A) of the FCA gives the government the **right** to dismiss the action: "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."

While the government has rarely exercised this right, it has been successful each time it has done so. In *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, the Ninth Circuit held that while the government's right to dismiss *qui tam* actions is broad, it remains subject to judicial review.[49] The court then held that the standard of review to be applied to a government's motion to dismiss under § 3730(c)(2)(A) is the "rational relation" standard under which the court will consider (1) whether a valid government purpose for the dismissal has been identified; and (2) whether there is "a rational relation between dismissal and accomplishment of the purpose."[50] In applying this standard, though, the court makes clear that the government's right to dismiss is so broad that it has the authority under the FCA to dismiss even meritorious cases.[51]

In *Swift v. United States*, however, the D.C. Circuit rejected the *Sequoia* standard, holding that "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States."[52] Under *Swift*, the U.S. Constitution gives the government absolute (or at least near absolute) discretion not to prosecute cases.[53] According to *Swift*, § 3730(c)(2)(A) merely provides the relator with "a formal opportunity to convince the government not to end the case."[54]

Under either standard, the government has ample authority to dismiss parasitic *qui tam* cases filed by government employee-relators.

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1 *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 742 (9th Cir. 1995).

2 *United States ex rel. Fine*, 72 F.3d at 748 (Trott, J., concurring) (emphasis in original).

3 *See, e.g., United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1214 n.11 (10th Cir. 2003) (expressly declining to reach the issue).

4 *United States ex rel. Marcus v. Hess*, 317 U.S. 537, *reh. denied*, 318 U.S. 799 (1943).

5 31 U.S.C. § 232(C) (Supp. III 1943), 57 Stat. 608 (1943).

6 *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984) (citing *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980)).

7 *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

8 *United States ex rel. Fine*, 72 F.3d at 742.

9 S. Rep. No. 345, at 23-24 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-5289 (emphasis added).

10 H.R. Rep. No. 660, at 23 (1986) (emphasis added).

11 *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991) (noting, but rejecting the government's argument).

12 *See, e.g.*, *United States ex rel. Fine*, 72 F.3d 742 (relator worked in the Office of Inspector General).

13 *See, e.g.*, *United States ex rel. Williams*, 931 F.2d 1493 (relator was an attorney for the U.S. Air Force).

14 *Id.* at 1503.

15 *United States ex rel. Fine*, 72 F.3d at 745.

16 *Id.* (quoting Amicus Brief of the United States).

17 *Id.* (quoting Amicus Brief of the United States).

18 *Id.* (quoting Amicus Brief of the United States)*; also United States ex rel. Williams*, 931 F.2d at 1503.

19 *United States ex rel. Fine*, 72 F.3d at 745 (quoting Amicus Brief of the United States).

20 *Id.* (quoting Amicus Brief of the United States).

21 *Id.*

22 *Id.* (quoting Amicus Brief of the United States).

23 *United States ex rel. Williams*, 931 F.2d at 1503.

24 5 C.F.R. § 2635.101(b)(3) (2004).

25 5 C.F.R. § 2635.703 (2004) (emphasis in original).

26 5 C.F.R. § 2635.101(c) (2004).

27 31 U.S.C. § 3730(e)(4)(A).

28 *See United States ex rel. Williams*, 931 F.2d at 1499-1500; *also United States ex rel. Holmes*, 318 F.3d at 1205-1207.

29 Some courts have imposed additional obligations. The Second Circuit, for example, requires that an original source have "directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based." *United States ex rel. Dhawan v. New York Med. Coll.,* 252 F.3d 188, 120 (2d Cir. 2001).

30 *See, e.g., id.*; 31 U.S.C. § 3730(e)(4)(B).

31 913 F.2d 17, 20 (1st Cir. 1990).

32 5 C.F.R. § 2635.101(b)(11) (2004) (emphasis added).

33 5 C.F.R. § 2635.703 (2004).

34 72 F.3d at 743-44.

35 72 F.3d at 745.

36 81 F.3d 1465 (9th Cir. 1996).

37 *Id.* at 1476 n.19.

38 *Id.* at 1479.

[39] May 18, 2000 Statement of Stuart E. Schiffer before the Subcommittee on Energy and Mineral Resources, Committee on Resources, U.S. House of Representatives, Concerning Oil Royalty Underpayment False Claims Act Litigation.

[40] *United States ex rel. Biddle v. Bd. Of Trustees for the Leland Stanford, Jr. Univ.*, 161 F.3d 533, 542 (9th Cir. 1998).

[41] *Id.* at 544.

[42] 5 C.F.R. § 2635.101(b)(7) (2004).

[43] *See, e.g., United States v. First Trust Co. of St. Paul*, 251 F.2d 686, 688 (8th Cir. 1958) (holding that "written records of a government officer executed in the discharge of his official duties . . . are public documents and ownership is in the United States."); *Pfeiffer v. CIA*, 60 F.3d 861, 864 (D.C. Cir. 1995) ("[T]he report at issue in this case . . . is indisputably the property of the Government. It was obtained at government expense, *i.e.*, with government materials and on government time.").

[44] 5 C.F.R. § 2635.704(a) (2004).

[45] 18 U.S.C. § 208.

[46] *United States ex rel. Fine*, 72 F.3d at 743 n.3.

[47] *Id.* at 747.

[48] *See, e.g., Addie Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) (affirming "dismissal" by district courts of demands for compensatory damages); *Cohen v. Goodfriend*, 665 F. Supp. 152, 160 (E.D.N.Y. 1987) (applying Rule 12(b)(6), granting motion to "strike" demands for relief seeking attachment and imposition of constructive trust upon a determination that they were not "appropriate remedies").

[49] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1144 (9th Cir. 1998).

[50] *Id.* at 1145; *also United States ex rel. Ridenour v. Kaiser-Hill Co.,* 397 F.3d 925, 936 (10th Cir. 2005) (adopting the *Sequoia* standard for dismissal).

[51] *United States ex rel. Sequoia Orange Co.*, 151 F.3d at 1144.

[52] *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003).

[53] The court declined to decide whether there might be an exception for "fraud on the court." *Id.*

[54] *Id.*