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False Claims Act and *Qui Tam* Quarterly Review

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The *False Claims Act and Qui Tam Quarterly Review* is published by Taxpayers Against Fraud, The False Claims Act Legal Center (TAF). This publication provides an overview of major False Claims Act and *qui tam* developments including case decisions, DOJ interventions, and settlements.

TAF is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). TAF's mission is both activist and educational. Established in 1986, TAF serves to: (1) collect and evaluate evidence of fraud against the Federal Government and facilitate the filing of meritorious FCA *qui tam* suits; (2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to effectively prosecute *qui tam* suits; (3) inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions; and (4) advance public, legislative, and government support for *qui tam*.

TAF is based in Washington, D.C., where it maintains a comprehensive FCA library for public use and a staff of lawyers and other professionals who are available to assist anyone interested in the False Claims Act and *qui tam*.

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FALSE CLAIMS ACT AND *QUI TAM* DECISIONS

Survivability of *Qui Tam* Actions

__U.S. ex rel. Harrington v. Sisters of Providence__, 209 F. Supp. 2d 1085 (D. Or. July 22, 2002)

An Oregon district court ruled that an FCA *qui tam* action did not survive the death of the relator. The court noted that a number of courts have ruled that FCA damages and penalties are punitive, at least with respect to the *qui tam* defendant. While recognizing the possibility that the FCA could be penal with respect to the defendant but remedial with respect to the relator, the court declined to address such an argument in this case absent "allegations of personal or substantial harm to the relator."

Francis Harrington filed this *qui tam* action against the Sisters of Providence in Oregon in 1998. In 2002, Harrington died. The defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the relator's death extinguished his claim. The personal representative of the relator's estate moved to substitute herself as relator and proceed with the *qui tam* action.

Qui Tam Action Was "Penal" and Abated on Relator's Death

The court granted the defendants' motion and dismissed the action. The court noted that under federal common law, a remedial action survives the death of the plaintiff, while a penal action does not. In general, according to the court, an action is remedial if the recovery compensates an individual for harm suffered, and penal if the recovery imposes damages on the defendant for a general harm to the public.

Before the 1986 amendments, the court noted, the FCA imposed double damages and civil penalties, which the Supreme Court considered to be remedial in nature. Accordingly, in *United States ex rel. Neher v. NEC Corp.*, 11 F.3d 136 (11th Cir. 1994), the Eleventh Circuit held that an FCA *qui tam* action survives the death of the relator. However, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 785 (2000), 19 TAF QR 1 (July 2000), the Supreme Court stated that the post-1986 version of the FCA "imposes damages that are essentially punitive in nature." In the wake of *Stevens*, a number of courts, including the Third, Fifth, and Seventh Circuits, have stated that FCA damages are essentially punitive in nature, and the Ninth Circuit has held that the FCA's purpose is at least in part punitive.

However, the court noted, as the Eleventh Circuit acknowledged in *NEC Corp.*, a statute can be remedial as to one party, yet penal as to another. The Eleventh Circuit reasoned that the FCA is not penal with respect to the relator's claim, because the *qui tam* provisions serve to compensate relators for their time and trouble. The Eleventh Circuit observed that relators often suffer substantial harm and that the *qui tam* provisions are intended to remedy that harm.

Nevertheless, the district court noted, Harrington's claim contained "no allegations of personal or substantial harm to the relator, only harm to the public interest." Therefore, the court concluded that the relator's claim did not survive his death, and dismissed the action.

__U.S. ex rel. Klaczak v. Consolidated Medical Transport, Inc.__, 2002 WL 31010850 (N.D. Ill. Sept. 9, 2002)

An Illinois district court denied a number of motions to dismiss a *qui tam* suit based on allegations that the defendants billed for medically unnecessary ambulance services and

participated in a kickback scheme. Among other rulings, the court held that a *qui tam* action does not abate on the death of a defendant, but survives and is enforceable against the defendant's estate.

In September 2002, an Illinois district court denied motions to dismiss a *qui tam* suit alleging that the defendants billed Medicare for medically unnecessary ambulance services and provided kickbacks to providers in exchange for referrals of Medicare patients. John Klaczak and Jeff Sharp, former employees of Consolidated Medical Transport, Inc. (CoMed), filed suit against CoMed, its officers, and a number of hospitals and other medical providers. The relators alleged that CoMed filed tens of thousands of false claims for medically unnecessary ambulance transportation, and entered into exclusive contracts with hospitals to transport inpatients at rates below its costs in exchange for a monopoly on outpatient transportation. The Government intervened in part of the case and filed its own amended complaint. Various defendants filed motions to dismiss the relators' second amended complaint and the Government's amended complaint in whole or in part.

Motion to Dismiss Kickback Allegations Denied

The court denied each of these motions. Defendants Holy Cross Hospital and Loretto Hospital had moved to dismiss kickback allegations in the relators' second amended complaint (allegations in which the Government had declined to intervene). Loretto argued that its contract with CoMed did not contain the discount that the relators alleged as the basis for their kickback allegations. The relators replied that although the contract did not set forth a specific discount, the rates set forth in the contract were in fact discounted from the then current retail rates. Viewing these allegations in the light most favorable to the relators, the court declined to dismiss these allegations.

Holy Cross and Loretto further argued that the discount arrangement in their contracts with CoMed was permissible, because it fit within the discount "safe harbor" established by HHS. The court rejected this assertion, noting that the discount arrangement was available only to the hospitals, not Medicare or Medicaid. The court also rejected the hospitals' arguments that the alleged false certifications were not material, and that the relators had failed to allege a violation of the Anti-Kickback Act.

Pleading in the Alternative Upheld

A number of defendants attacked the Government's assertion of equitable claims based on payment by mistake of fact and unjust enrichment on the grounds that the Government's FCA and common-law fraud counts provided it with an adequate remedy at law. However, the court observed that Fed. R. Civ. P. 8(e)(2) expressly permits a plaintiff to set forth inconsistent legal theories, whether based on legal or equitable grounds, and does not require the selection of a single theory for recovery.

FCA Claims Survive Death of Defendant

The estate of John Daley, Jr. also moved to dismiss. Daley was a named defendant in the original complaints filed by the relators and the Government, and upon Daley's death the court granted the Government's motion to substitute his estate for the deceased. The estate moved to dismiss on the grounds that (1) the substitution was untimely; and (2) even if the substitution were timely, an FCA claim is punitive in nature and therefore cannot survive the death of the defendant.

The estate's argument that the substitution was untimely rested on Rule 25(a)(1), which provides that a motion for substitution must be made no later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death. However, the court noted, no statement of the fact of the death was ever filed as required by the Rule. Instead, the estate argued, the death was suggested on the record in a footnote in a response brief filed on behalf of CoMed and all the individual defendants. The court found this argument to be without merit. Even assuming that Daley's death was made of record in the footnote in question, the court found that it was excusable neglect for the relators and the Government not to notice the fact of a death mentioned only in a footnote. Moreover, after Daley died, his attorneys continued to file papers on his behalf, creating a reasonable belief that the estate would be substituted without objection, and the estate failed to point to any prejudice for failure to meet the time period set forth under Rule 25(a).

The court also rejected the estate's argument that the FCA action abated on Daley's death because the action sought damages that are punitive in nature. The court noted that 28 U.S.C. § 2404 provides that "[a] civil action for damages commenced by or on behalf of the United States . . . shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants." Because the FCA action commenced by the relators and the Government was "a civil action for damages," the court denied the estate's motion to dismiss.

Joint Prosecutorial Privilege

U.S. ex rel. Purcell v. MWI Corp., 209 F.R.D. 21 (D.D.C. Aug. 26, 2002)

A District of Columbia district court ruled that in *qui tam* cases in which the Government elects to intervene, the Government and relator's counsel may share attorney work product without waiving work-product privilege. Such shared materials, the court ruled, are protected by joint prosecutorial privilege.

Robert Purcell filed this *qui tam* action in 1998 against MWI Corp., a Florida water pump manufacturer, and its president J. David Eller, alleging that the defendants violated the FCA by improperly using $28 million of a $74.3 million government loan to pay a "commission" to a Nigerian agent who in turn made payments to Nigerian officials. In January 2002, the Government intervened and the case was unsealed. *See* 27 TAF QR 46 (July 2002). The parties agreed to take the deposition of a key witness, who was very ill, in February 2002. However, a discovery dispute arose over documents related to this witness. The Government claimed that a joint prosecutorial privilege protects attorney work product shared between the Government and the relator, while the defendants countered that no federal appellate court has ever recognized such a privilege. The defendants also sought a protective order restricting discovery of MWI's financial information and trade secrets.

Joint Privilege Protects Shared Work Product in Cases Where the Government Intervenes

On this matter of first impression, the court held that a joint prosecutorial privilege does exist between the Government and the relator in *qui tam* cases. The court noted that in addition to the well-known work-product and attorney-client privileges, courts recognize both a joint-defense privilege and a common-interest privilege. These privileges serve to protect the confidentiality of attorney-client correspondence and attorneys' preparations for trial and to preserve the vitality of the adversary system by encouraging the fullest preparation without fear of access by adversaries. Furthermore, a number of courts have recognized a joint prosecutorial privilege as a parallel to the joint-defense privilege. To allow work-product privilege to protect a joint defense without extending similar protection to a joint prosecution, the court ruled, would not be fair.

Furthermore, the court noted, in the False Claims Act, Congress made clear its intention to align the interests of the relator with those of the Government. In the court's view, this manifest intention strongly supports the existence of a joint prosecutorial privilege. The unique relationship between the Government and the relator in *qui tam* cases requires the sharing of the work product generated between the relator and his attorney with the Government in order for the case to proceed. Therefore, the court ruled, in cases where the Government elects to intervene, a joint prosecutorial privilege exists between the Government and the relator.

"Attorney's Eyes Only" Protective Order Issued

The court next addressed the defendants' request for a protective order. Because the relator Robert Purcell is currently employed as director of marketing with a competitor of the MWI, the defendants sought an order restricting his access to their financial information and trade secrets. The Government countered that the defendants' motion was conclusory and was actually aimed at limiting the ability of the Government and the relator to make their case. In order to protect the competing interests at stake, the court adopted a compromise proposed by the defendants. The court permitted the Government and the relator's counsel, but not the relator himself, to have full access to the information in question. In this way, the court ruled, the Government would be able to litigate its case fully, and the defendant's proprietary interests would not be compromised.

FCA Liability of Government Entities

U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District, 2002 U.S. Dist. LEXIS 17987 (W.D.N.C. Sept. 19, 2002)

See "Rule 9(b)" below at page 38.

FCA Liability/False Certification

U.S. ex rel. Coppock v. Northrop Grumman Corp., 2002 WL 1796979 (N.D. Tex. Aug. 1, 2002)

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" below at page 15.

U.S. ex rel. Schuhardt v. Washington University, No. 4:99-CV-1202 (E.D. Mo. Aug. 20, 2002)

A Missouri district court held that a provider may only bill Medicare for a teaching physician's services if the teaching physician was physically present for surgical services and, under certain circumstances, for pre- and post-operative care. The court thus held that claims for such a teaching physician's services may be false for FCA purposes where the physician was not physically present.

Cynthia Schuhardt and Nancy Becker worked as medical billing coders in the Department of Surgery at Washington University. They brought a *qui tam* action against the university, alleging that it improperly billed the Government for attending physicians' services that were actually performed by residents or other non-physicians. In addition, Schuhardt alleges that she was harassed, demoted, and eventually discharged because of her complaints about the fraudulent billing practices. The Government declined to intervene, and the defendant moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) on the grounds that the plaintiffs had failed to state a claim under the FCA and failed to plead fraud with particularity.

The gravamen of the relators' complaint was that the defendant falsely billed for surgical procedures as if they were performed by attending physicians when in fact the procedures were performed by residents, fellows, or nurses. The relators alleged that the attending physicians were not physically present for any critical portion of the surgical procedures or medical services, and did not supervise the staff who actually provided the services. The defendant argued that applicable Medicare regulations do not require the physical presence of attending physicians during pre- and post-operative care when the provider bills globally for a package of surgically related services.

Teaching Physician Must Be Present to Bill for Surgical Procedures

In its unpublished memorandum decision and order, the court rejected the defendant's argument, and held that until June of 1996, Medicare required a teaching physician to be physically present for both surgical services and pre- and post-operative care in order to receive reimbursement under Part B. To receive reimbursement, Medicare regulations in effect from 1967 to 1996 required a teaching physician to furnish "personal and identifiable direction" to interns and residents providing the actual service to the patient, and in the case of "major surgical procedures and other complex and dangerous procedures and situations" the teaching physician must provide direction "in person." 20 C.F.R. § 405.521(b) (1968).

Shortly after these regulations were issued, it became apparent that some Medicare carriers were paying charges for physician services in some teaching hospitals even though interns and residents were primarily providing the care for patients in those hospitals. Therefore, in April 1969, the Bureau of Health Insurance (predecessor of HCFA and CMS) issued specific guidance establishing conditions for Part B payments to supervising physicians in a teaching setting. *See* Bureau of Health Insurance, Intermediary Letter No. 372. Because this letter is the agency's interpretation of its own regulations, it is controlling unless it is plainly erroneous or inconsistent with those regulations. Intermediary Letter 372 required that to receive reimbursement under Medicare Part B, a teaching physician must have rendered sufficient personal and identifiable medical services to the Medicare beneficiary to exercise full, personal control over the management of the portion of the case for which a charge [could] be recognized." The letter also stated: "If the [teaching] physician acted as the attending surgeon but did not render the pre- or post-surgical services generally performed by a private surgeon to a private patient, the difference in service should be reflected in the amount of reimbursement." Congress repeatedly endorsed this view, as is evident from the legislative history of Medicaid amendments adopted in 1980 and 1982. Agency guidance distributed in 1992 again confirmed that teaching physicians must be physically present during all procedures in order to receive Part B reimbursement.

In July 1996, new regulations governing payment for services performed in teaching settings went into effect. *See* 42 C.F.R. § 415. These regulations require the teaching physician to be present during all critical portions of a procedure and immediately available to furnish services during the entire procedure. However, if the teaching physician decided that neither pre- or post-operative services were "key" portions of the billable service, then those services could still be eligible for reimbursement even if they were performed by a resident without the teaching physician physically present.

Global Billing Policy Did Not Alter Physician Presence Requirement

In January 1992, a global billing policy for Medicare was adopted, permitting reimbursement of surgical procedures under codes covering not just the surgery itself, but also certain related services rendered before, during, and after the surgery. Medicare guidelines do not specifically address the issue of global surgical billing for services performed by residents not in the presence of attending physicians. However, agency comments on the proposed regulations governing global billing indicate that the new global fees would change "the amount Medicare pays but not the services for which it pays." The court concluded that the global billing policy did not alter the physical presence requirements in effect from 1967-96 and from 1996 to the present.

Complaint Satisfied Rule 9(b)

The court rejected the defendant's argument that the complaint failed to plead fraud with particularity. In response to a previous Rule 9(b) motion, the court had ordered the plaintiffs to amend their complaint to conform with the Rule, but stated that "[b]ecause of the breadth of the allegations—possibly hundreds of doctors and thousands of claims over several years—the complaint need not cite specifics for every transaction." Rather, the court required the plaintiffs to provide some representative samples of the fraud with specific details. The court found that the plaintiffs' amended complaint filed in response to that order adequately complied with Rule 9(b).

In their amended complaint, the plaintiffs named specific doctors and identified specific dates and amounts billed for specific patients. The court did not require the plaintiffs to provide a specific allegation to substantiate every general allegation in the complaint, but noted that the amended complaint probably did just that. The court rejected the defendants' attempted reliance on *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002), 27 TAF QR 14 (July 2002). Unlike the plaintiffs in *Clausen*, the plaintiffs in this case did identify specific false claims submitted to the Government.

Relator Stated Claim for Retaliation

The court also rejected the defendant's argument that Schuhardt failed to state a claim for retaliation because she failed to allege that she specifically reported fraud or illegality, as opposed to mere wrongdoing, in the defendant's billing practices. In the amended complaint, Schuhardt alleged that she complained to her supervisor that the policy of billing for work done by residents when no attending physician was present was "wrong." She further alleged that "she engaged in protected activity under the False Claims Act—specifically, she questioned and complained about Defendant's billing practices not conforming to statutory and regulatory requirements" and that her employer retaliated against her "because of lawful acts done by her in furtherance of an action under the False Claims Act, including the report of the false claims to her supervisor."

The court noted that the issue was whether Schuhardt had sufficiently pleaded that she put her employer on notice of the distinct possibility of FCA litigation. Although the amended complaint contained no specific allegation that Schuhardt was investigating fraud in contemplation of bringing an FCA action, it did state that she was acting "in furtherance of an action under the False Claims Act." Based on these allegations, the court could not say that there was no set of facts that would entitle Schuhardt to relief. The court noted that the majority of cases cited by the defendant were decisions rendered after a motion for summary judgment, and thus inapposite to the present context involving a motion to dismiss. Accordingly, the court denied the defendant's motion to dismiss Schuhardt's retaliation claim.

U.S. ex rel. King v. F.E. Moran, Inc., 2002 WL 2003219 (N.D. Ill. Aug. 29, 2002)

An Illinois district court granted in part and denied in part the defendants' motion for summary judgment in a *qui tam* suit alleging that the defendants improperly identified certain companies as minority-owned business enterprises for the purpose of obtaining federal funding on construction projects. The court rejected the defendants' argument that it lacked jurisdiction based on the public disclosure bar, as well as their argument that they were entitled to summary judgment on the issue of whether they made false statements. However, the court dismissed the relator's implied certification claims, finding no genuine issue of fact as to whether the defendants certified compliance with relevant statutes and regulations as a condition of receiving payment.

Reava King worked for F.E. Moran, Inc. from 1998 to 2000. In 2000 she filed a *qui tam* suit against Moran and its corporate parent, as well as Jadco, a minority-owned business enterprise (MBE), alleging that the defendants used Jadco as a "pass through" for federal contract work actually performed by non-MBEs. During discovery, King apparently found that she did not have a viable claim against Moran based on its relationship with Jadco, abandoned her original theory, and dismissed her claims against Jadco. At that time, King revised her position (but not her complaint) to allege FCA violations relating to Moran's subcontracting work with four different MBEs: Air Lopez, Air Lopez Spiral, Ortiz Mechanical, and JN Construction and Engineering. According to King's revised theory, Moran improperly identified these four companies as MBE participants on two federally funded projects in Chicago.

The Government declined to intervene, and the parties filed cross-motions for summary judgment. King argued that she was entitled to summary judgment on the issue of falsity. Moran argued that the court lacked jurisdiction based on the public disclosure bar; that it was entitled to summary judgment on the issue of falsity; and that its contracts were not governed by any federal statutes or regulations that would support the relator's implied false certification claims.

Suit Was Not Based on Public Disclosures

The court rejected the defendant's argument that the public disclosure bar applied. Moran asserted that the information giving rise to King's fraud allegations was disclosed in documents submitted to Moran's affirmative action consultant, but the court found that the consultant received only the allegedly false information supplied by Moran, and not the information regarding Moran's arrangement with non-MBE contractors, without which the alleged pass-through scheme would not be readily discernible.

Moran also argued that public disclosure occurred in a FOIA response that Moran obtained in 2002. Although the Seventh Circuit has not directly addressed whether the disclosure of documents under FOIA constitutes a public disclosure for the purpose of 3730(e)(4), the court expressed the view that it does. However, the court noted, the FOIA disclosure occurred in the course of discovery after King had filed suit, and disclosures during discovery do not normally trigger the public disclosure bar.

Moran asserted that the FOIA response was nonetheless a public disclosure because it occurred after King had abandoned her original theory of the case and adopted the new theory relating to Air Lopez, Air Lopez Spiral and

Ortiz Mechanical. The court stated that if King's only knowledge of the alleged fraud came from the FOIA response, then arguably it would be improper to allow her to avoid the jurisdictional bar simply by virtue of having filed an earlier—and apparently unfounded—FCA claim. At the same time, however, the court observed that a defendant should not be allowed to assert the jurisdictional bar by making a FOIA request after a *qui tam* action has been filed and claiming that a public disclosure has occurred. In this case, the court noted that King submitted a settlement letter in August 2001 that clearly notified Moran of her new claim, and also asserted the new claim in interrogatory responses in March 2002. Because Moran's attorney did not forward the FOIA documents to King's attorney until April 2002, King clearly developed the new theory from other sources. Therefore, the court ruled, King's suit was not based upon publicly disclosed allegations.

Genuine Issues of Fact Existed Regarding Falsity

The court next turned to the merits of King's claim under § 3729(a)(2). It was undisputed that Moran worked with certified minority contractors, namely, Air Lopez, Ortiz Mechanical, and JN Construction, and it appeared to have believed in good faith that Air Lopez Spiral was also a certified MBE. The issue in dispute was the significance of Moran's contractual maneuvering to obtain MBE participation credit. Moran issued subcontracts to non-minority firms, then cancelled those subcontracts and reissued them to MBE firms that, in turn, subcontracted the work back to the original non-minority companies on essentially the same terms. The court stated that it is not clear whether such an arrangement is valid for the purpose of meeting MBE participation goals.

Moran argued that its representations that it had awarded contract work to MBEs were not false because it did not know that they were false. But King had submitted evidence that Moran might have intentionally misled the Government regarding the value of work performed by the MBEs because it knew that the actual amounts paid to the MBEs were different from what it stated on the forms. Therefore, the court ruled, there was a genuine issue of fact as to whether Moran knowingly made false statements.

Moran argued that its statements to the Government were immaterial because the company was paid for all of its work even though it never attained its MBE goals. However, the court ruled, the real question was whether Moran would have been paid if the general contractors had known that Moran's effort to award minority subcontracts was arguably a sham. Nor did the mere fact that the Government declined to intervene demonstrate that it did not consider Moran's statements to be false, or that it was not harmed by Moran's allegedly false statements.

Implied False Certification Claims Dismissed

The court next turned to King's claims under § 3729(a)(1), which rested on an implied false certification theory. Moran claimed that its contracts were not governed by any federal statutes or regulations as required for such a theory. The court observed that Moran certified on various forms that its MBE subcontracting information was accurate, but the forms did not reference any particular statute or regulation. Contractual clauses cited by King did not include specific requirements regarding minority contracting. Furthermore, Moran's certification of the accuracy of its statements merely resulted in credit for MBE participation; it was not a claim for payment. Therefore, finding no genuine issues of fact as to the implied certification theory, the court granted summary judgment to the defendants on this issue.

Court Directs Relator to Amend Complaint

Moran also argued that King failed to comply with the written disclosure requirement of § 3730(b)(2). Although King made a disclosure to the Government before filing her complaint in 2000, this disclosure related only to her original theory of liability, which she later abandoned. King never amended her complaint to include the allegations on which her case currently rests. Nevertheless, the court ruled, the defendants had adequate notice of her new theory, and because the requirements of § 3730(b)(2) are procedural rather than jurisdictional, dismissal was not warranted. However, King was required to amend her complaint in order to make clear the current basis of her claim, comply with Rule 9(b), and give the Government an adequate opportunity to intervene.

Moran argued that the statute of limitations barred King from amending her complaint to raise these new claims. The court disagreed, holding that because the Government had declined to intervene, the FCA's three-year tolling provision was measured by the relator's knowledge of the new claims, and King did not become aware of these claims until after she filed her complaint in 2000. Therefore, the statute of limitations did not bar King's amended complaint provided it is filed before 2003. However, in order to keep the case on track, the court directed King to file an amended complaint immediately.

FCA Liability/Materiality

***U.S. ex rel. Coppock v. Northrop Grumman Corp.*, 2002 WL 1796979 (N.D. Tex. Aug. 1, 2002)**

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" below at page 15.

Section 3729(a)(3) Conspiracy Claims

***U.S. ex rel. Campbell v. Lockheed Martin Corp.*, No. 6:95-cv-549-Orl-28DAB (M.D. Fla. Aug. 21, 2002)**

See "Rule 9(b)" below at page 35.

***U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 2002 WL 2014135 (E.D. Pa. Aug. 30, 2002)**

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" below at page 18.

Section 3729(b) Knowledge Requirement

***U.S. ex rel. Campbell v. Lockheed Martin Corp.*, No. 6:95-cv-549-Orl-28DAB (M.D. Fla. Aug. 21, 2002)**

See "Rule 9(b)" below at page 35.

***U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 2002 WL 31133257 (4th Cir. Sept. 27, 2002)**

The Fourth Circuit held that the Government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter requirement for an FCA violation. The court of appeals also ruled that the district court did not abuse its discretion in denying various procedural motions by the relator.

Martin Becker brought this *qui tam* action against Westinghouse Savannah River Company, which operates the Savannah River

Plant, a federally-owned nuclear installation in South Carolina. Westinghouse operates and maintains the plant on a cost-plus basis: It may receive payment charged to an appropriations account only for authorized work and only in amounts equal to its actual costs plus an additional fee. In fiscal years 1992 through 1995, Congress appropriated $55 million for the construction of three buildings at the plant, and established appropriations accounts for the construction managed by the Department of Energy's Office of Defense Programs. In 1995, the Department of Energy underwent a management and budget reorganization, and transferred responsibility for the Westinghouse accounts from the Office of Defense Programs to the Office of Environmental Management. Because the two offices are funded through separate congressional appropriations, however, Defense Programs accounts could not be transferred to Environmental Management without congressional approval. The Department of Energy requested such approval, but it is unclear whether it received it.

Nevertheless, the Department of Energy transferred approximately $12 million from Defense Programs to Environmental Management, and directed Westinghouse to change the budgeting and reporting codes to correspond to this transfer. Although Westinghouse was aware of the uncertainty regarding congressional authorization, it acceded to the Department's direction and changed the codes.

Becker sued, alleging that Westinghouse had wrongfully retained and used government funds and had created false records to conceal this conduct in violation of §§ 3729(a)(4) and (a)(7). The Government declined to intervene. Near the close of discovery, Westinghouse moved for summary judgment. Becker moved to compel discovery of certain accounting documents. The district court granted Westinghouse's motion, and denied Becker's motion as untimely. Becker moved for reconsideration, which the district court denied. Becker appealed the grant of summary judgment, as well as the denial of his motions to compel discovery and for reconsideration.

Government Knowledge May Negate FCA Scienter Requirement

The Fourth Circuit affirmed. The court found Becker's the theory underlying Becker's suit problematic. It was possible to infer that, in changing the budgeting and reporting codes, Westinghouse may have disregarded whether Congress had approved the appropriations transfer. Yet the Department of Energy had at least as much knowledge as Westinghouse regarding Congressional authorization for the transfer, and nonetheless instructed Westinghouse to change the codes.

The court noted that this case was factually similar to *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542 (7th Cir. 1999). In that case, in order to facilitate the rapid dredging of a sedimentation pond, a government official instructed a contractor to submit invoices for unperformed excavation work. The contractor complied, dredged the pond, and was paid. Durcholtz brought a *qui tam* action, and the district court awarded summary judgment for the contractor. The Seventh Circuit affirmed, stating that if the Government knows and approves of the particulars of a claim before it is presented, the presenter cannot be said have knowingly presented a false claim. Accordingly, the *Durcholtz* court declined to hold the contractor liable for defrauding the Government by following the Government's explicit directions. The Second, Fifth, and Ninth Circuits have reached similar conclusions.

The Fourth Circuit joined with its sister circuits to hold that the Government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation. In following the Department of Energy's instructions, Westinghouse properly relied on the Department's knowledge of congressional authorization for the appropriations transfer gleaned from the Department's communications with Congress. The Department's full knowledge of the material facts underlying any representations implicit in Westinghouse's conduct negated any knowledge that Westinghouse had regarding the truth or falsity of its claims. Accordingly, the Fourth Circuit ruled, the district court properly granted Westinghouse's motion for summary judgment.

Procedural Rulings Were Not Abuse of Discretion

The Fourth Circuit rejected Becker's challenges to the district court's procedural rulings. Becker's first motion to compel discovery of evidence relating to Westinghouse's knowledge of the truth or falsity of its claims was properly denied because any such evidence was immaterial. His second motion to compel was untimely. Furthermore, the district court did not err in denying Becker's motion for reconsideration. The district court's grant of summary judgment was legally correct, and there was no newly discovered evidence or intervening change in the law that would justify altering or amending the judgment. Therefore, the Fourth Circuit affirmed the judgment of the district court.

Section 3730(c)(5) Alternate Remedy

U.S. ex rel. Duquette v. Centennial Health Care Corp., No. 96-75710 (E.D. Mich. July 18, 2002)

A Michigan district court denied the relator's motion for a share of monies that the Government recovered in administrative audits of the defendants' cost reports. The court ruled that the monies in question were obtained as the result of annual audits performed in the ongoing administration of the Medicare program and not as an alternate remedy under the FCA. However, the court ordered the Government to produce to the relator all documentation pertaining to the resolution of the cost report audits.

Carole Duquette, a former Administrator of the Hilltop Nursing Home in Roscommon, Michigan, filed this *qui tam* suit in 1996 against Centennial Health Care Corp. and related entities. Duquette alleges that at facilities throughout the United States, the defendants systematically overcharged the Government by billing for nursing and staff services that were never performed. In 2000 the Government declined to intervene, and in 2001 Duquette was informed that the Government had "settled" Medicare overpayment claims with Centennial for the 1996, 1997, and 1998 cost report years for $5.34 million, $5.02 million, and $8.83 million, respectively.

In February 2002, Duquette filed a motion asking the court to determine her share of the $19 million out-of-court settlement, to compel the Government to produce materials related to the settlement, to stay the underlying action pending resolution of her claim for a share, and to lift any seals remaining on pleadings in the case.

Administrative Reimbursement Was Not Alternate Remedy

In an unpublished opinion, the court denied Duquette's motion for a share of the monies recovered. Duquette sought to rely on *United States ex rel. Barajas v. United States*, 258 F.3d 1004 (9th Cir. 2001), which held that a government proceeding for suspension or disbarment of a military contractor may under certain circumstances constitute an "alternate remedy" for FCA purposes. However, the court ruled that

Barajas was inapposite to the case at bar. As the Government argued, while the *Barajas* court emphasized that res judicata prevented the relator in that case from proceeding with his *qui tam* action, Duquette remained free to pursue her claims against Centennial. Furthermore, the court ruled, the Government's administrative audit of Centennial's cost reports from 1996 through 1998 was part of the annual administrative process required under Medicare regulations, and was thus not an alternate remedy under the FCA.

Because the payments received by CMS were the result of annual audits performed in the course of its ongoing administration of the Medicare program, the court ruled, there was no factual or legal basis for Duquette's claim to a share of those payments. Accordingly, the court denied Duquette's request for a percentage of those monies.

Motion to Compel Granted

However, the court granted Duquette's motion to compel the Government to produce all material pertaining to its resolution of Centennial's cost reports for fiscal years 1996 through 1998. The Government had argued that the material sought was irrelevant and that, because Duquette originally sought the material pursuant to a Freedom of Information Act (FOIA) request, she should pursue any problems arising from her requests through the FOIA administrative provisions.

Noting that the scope of discovery under Fed. R. Civ. P. 26 is quite broad, the court rejected the Government's arguments. FOIA serves only as a "floor" for the discovery of government documents in civil litigation, and information that is unavailable under FOIA may nevertheless be discoverable. Furthermore, the Government had not set forth with specificity the hardships that it would incur in the absence of a protective order. Although the court had ruled that the Government's administrative action with regard to the 1996-98 cost reports was not a settlement for purposes of the FCA's alternate remedies provision, it nonetheless held that the information relating to resolution of the cost reports was arguably relevant to Duquette's pursuit of her *qui tam* action. Therefore, the court ordered the Government to produce all materials responsive to Duquette's request.

Seal Lifted

The court also granted Duquette's motion to lift the seal on any documents remaining under seal in this case. Although the complaint was unsealed in February 2001, extension applications and other documents remained under seal. The Government contended that public disclosure of these documents was inconsistent with congressional intent and that Duquette could not demonstrate need or prejudice with respect to the documents. The court rejected these arguments, noting that the legislative history of the 1986 amendments clearly indicates that the Government should not be allowed to delay unnecessarily the lifting of the seal, and that the courts have long favored an open judicial system in order to protect the public's interest in civic proceedings. In the absence of a specific showing of good cause to the contrary, the court ordered the seal lifted on all remaining documents in the case file.

Section 3730(d)(1) Attorneys' Fees

***U.S. ex rel. Averback v. Pastor Medical Associates, P.C.*, 2002 WL 31163850 (D. Mass. Sept. 27, 2002)**

A Massachusetts district court ruled that awards of attorneys' fees under § 3730(d)(1) should be calculated by the lodestar method without separating "core" from "non-core" work, and without adjustments based on the plaintiff's degree

of success. However, because the plaintiff's attorneys failed to establish that they possessed the skills and experience of senior litigators, as they claimed, the court calculated the award based on a reduced hourly rate.

Dr. Randy Averback worked as a physician at Pastor Medical Associates (PMA) in the 1990s. In 1996, Dr. Bruce Pastor decided to sell PMA to the Beth Israel Physicians' Association. Averback was not invited to participate in the new practice, and she resigned. She subsequently brought several claims in state court, which were partially successful. John White and other attorneys in his firm represented her in these actions; in 1998 they were joined by Max Borten. Borten advised Averback that she had a potential FCA matter, but White refused to bring any federal claims until the state claims were resolved. Averback therefore dismissed White and Borten took over the representation of her claims.

In 1999, as he was preparing to file a *qui tam* action on behalf of Averback, Borten asked Sidney Gorovitz to join him as co-counsel. Averback's *qui tam* complaint was filed under seal in May of that year. Averback alleged that PMA violated the anti-kickback and Stark physician self-referral statutes, billed for medically unnecessary tests, and upcoded claims. The Government intervened, and in August 2001, the parties reached a settlement. PMA agreed to pay the Government $230,000, including a relator's share of $41,400 or 18%.

Averback then applied for an award of attorneys' fees pursuant to § 3730(d)(1). Averback claimed a lodestar total of $116,756 for the work of Borten and Gorovitz, based on 348.3 hours of "core" work at $325 an hour and 16.4 hours of "non-core" work at $217 an hour. Averback further argued that this figure should be enhanced by a factor of 1.5 to reflect her degree of success in this action, bringing her total claim for attorneys' fees to $175,143. The defendants responded that this figure was far too high, because Borten and Gorovitz were not sufficiently experienced to charge the rates they proposed, much of their work was duplicative and derived from the prior state court actions, and many of the hours designated by Averback as core work should have been charged as non-core work. The defendants also strenuously objected to Averback's proposed enhancement factor. Arguing that 80% of Averback's claims were unsuccessful, the defendants contended that the lodestar total should be adjusted downward proportionately, so that the final award should be only 20% of the lodestar total.

Court Adopts Pure Lodestar Approach

The court noted that the Supreme Court has taken two approaches since the 1970s in defining "reasonable" attorneys' fees. The "lodestar approach" calculates the fees by multiplying an hourly rate for attorneys in the relevant market by the number of hours reasonably expended; the "Model Code approach" combines the lodestar calculation with various other factors such as "degree of success obtained," "novelty," and "complexity." However, in *Blum v. Stenson*, 465 U.S. 886 (1984) and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986), the Court held that factors such as novelty, complexity, and degree of success are normally already fully reflected in the initial lodestar amount, and thus cannot serve as independent bases for increasing the basic fee upward. Moreover, the Court held, there is a strong presumption that the lodestar product is reasonable.

Mindful of these teachings of the Supreme Court, and noting that the FCA's statutory authorization for attorneys' fees is mandatory and does not ask the court to exercise its discretion, the district court ruled that the Model Code factors, while relevant, were already included in the lodestar calculation, and that there was therefore no need to separate core from non-core work, or to adjust the lodestar fee based on such factors as the degree of success. The court's task was simply to make sure that Averback had provided reasonable figures for hours worked and hourly rates.

In reviewing a claim for hours expended, the court should discount hours that were duplicative, unproductive, excessive, or otherwise unnecessary, as well as hours spent on unsuccessful claims where they can be easily severed. The court noted that the 16.4 hours that Averback claimed as "non-core" work consisted entirely of travel time. The court found this claim excessive and unreasonable, and subtracted it from the total hours claimed. However, the court rejected the defendants' contention that work done prior to the filing of the FCA claim related to Averback's state-law actions and should therefore be excluded. The court found that it was reasonable to assume that Borten and Gorovitz were reviewing depositions in the prior action with a federal health-care fraud claim in mind. The court also rejected the defendants' argument that Borten should not be permitted to bill 60 hours in which he was engaged in a "primer on basic health care statutes." In the court's view, although this claim was relevant to Borten's level of experience and the rate he should expect to charge, it did not follow that the 60 hours were completely deductible. In fact, the court deducted only 6.3 hours of the 60: 3 hours that Borten spent attending a seminar on Stark II, and 3.5 hours spent reviewing a state statute. After these subtractions, Averback was left with a total of 342 hours.

Relator's Counsel Failed to Support Hourly Rates Claimed

The court next reviewed the hourly rates claimed. The court noted that the plaintiff bears the burden of providing affidavits and other evidence establishing the requesting lawyers' skills and experience and the prevailing rates in the community for similarly qualified attorneys. Averback fell short in meeting this burden. Although Borten did furnish a curriculum vitae and a short affidavit describing his involvement in Averback's case, neither Borten nor Gorovitz had provided an affidavit describing their skills, experience, or customary billing rates. The only information justifying the hourly rate claimed was the summary assertion in the application for fees that "[b]ecause of his extensive medical-legal background Attorney Borten brings a strong, if not imposing presence" which "is virtually unparalleled in the greater Boston legal market" and would warrant the hourly rate charged by "a Senior Litigator at a major, large scale Boston law firm"—an amount which "would be in the magnitude of $350.00-$400.00 per hour in today's economy." The court was unable to ascertain Borten's and Gorovitz's experience as litigators on such a poor showing.

The court rejected the relator's requested hourly rate of $325 an hour. After looking at Borten's and Gorovitz's time records, which included over sixty hours of time spent reviewing basic statutes, the court found that "any claim that they possess extensive experience in *qui tam* actions involving health care fraud is far-fetched, to say the least." Borten's and Gorovitz's failure to provide proper affidavits in support of their application for attorneys' fees was, in the court's view, further evidence of their inexperience.

In addition, the court noted that the defendants had submitted an affidavit that Borten had filed in one of Averback's prior actions in which Borten testified that his "normal hourly rate when dealing with health care matters is $225.00." The court found almost impossible to believe that in the short interim between the two cases Borten could have gained enough experience to justify an increase of $100 in his hourly rate. Based on this affidavit, the court determined that Borten's hourly rate should not exceed $225. Because Gorovitz supplied no evidence regarding his own experience, he was entitled to no higher a rate than Borten.

However, the amount of $225 was only a ceiling. The court found that a lower rate was called for to reflect not only counsel's inexperience, but also as a sanction for the lack of evidentiary support underlying the claimed hourly rate, and Borten's failure to disclose or explain his earlier testimony that his hourly rate was $100 less than the rate he claimed in this action. The defendants suggested that Borten's real level of legal experience was that of a junior associate, and suggested a rate of compensation of $120 an hour. Nonetheless, the court noted that Borten's prior experience as a physician, and his familiarity with hospital billing practices justified a higher rate than his level of legal experience would permit. Accordingly, splitting the difference between $225 and $120, the court obtained an hourly rate of $175. Multiplying this rate by the 342 hours reasonably expended, the court reached a lodestar figure of $59,850. The court ordered the defendants to pay Averback that amount, plus $1,909 in costs.

Section 3730(e) Public Disclosure Bar and Original Source Exception

***U.S. ex rel. King v. F.E. Moran, Inc.*, 2002 WL 2003219 (N.D. Ill. Aug. 29, 2002)**

See "FCA Liability/False Certification" above at page 7.

***U.S. ex rel. Coppock v. Northrop Grumman Corp.*, 2002 WL 1796979 (N.D. Tex. Aug. 1, 2002)**

A Texas district court dismissed all FCA claims in a *qui tam* case based on allegations that the defendant military contractor falsely certified compliance with contractual and legal duties while contaminating a government-owned production site as well as the local water supply. The court ruled that public disclosures barred the relator's claims except for his claims based on a toxic waste spill in July 1997. The court also dismissed the latter claims for failure to plead fraud with particularity, failure to plead that the alleged false certifications were a prerequisite of government payment or forbearance, and failure to plead materiality.

Stephen Coppock worked as an engineer at Northrop Grumman Corporation's Naval Weapons Industrial Reserve Plant in Dallas, a government-owned industrial production and waste treatment facility. Northrop leases the facility from the Navy in order to produce military aircraft, and is also authorized to use it on a limited basis to fulfill commercial contracts, provided such use does not exceed 25% without approval and does not interfere with military production.

Coppock brought a *qui tam* suit against Northrop alleging that its excessive use of the facility for commercial aircraft contracts resulted in the production of approximately 110,000 gallons of industrial waste concentrate daily in a facility designed to handle no more than 5,000. As a result, the site was contaminated and significant quantities of hexavalent chromium, a highly toxic carcinogen, were discharged into the Trinity River, which is a source of drinking water for the residents of Dallas.

Coppock alleged that each periodic rent payment that Northrop made to the Government constituted a false implied certification that the company was complying with its lease obligations to perform normal maintenance, disclose damage to the Government, comply with environmental laws, and indemnify the Government for liability arising from its use of the property and in particular its contamination of neighboring properties and the Dallas public water supply. Coppock also claimed that Northrop made reverse false claims in the form of rent payments that knowingly miscalculated the amount owed to the Government, because the company took credits that were precluded by its unauthorized use of the facility. He also alleged that the company made reverse false claims by failing to disclose matters that it was contractually obligated to disclose, including a catastrophic spill in July 1997. In addition, Coppock brought state-law claims for common-law fraud and breach of contract.

Northrop moved to dismiss the FCA claims under Fed. R. Civ. P. 12(b)(1) based on the public disclosure bar, under R. 9(b) for failure to plead fraud with specificity, and under R. 12(b)(6) for failure to plead that certification was a prerequisite to payment or that the alleged false statements were material. Northrop also moved to dismiss the state-law claims on various grounds.

Public Disclosure Barred All Claims Except Those Based on July 1997 Spill

The court first inquired whether Northrop's Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction was a facial or a factual challenge. Northrop maintained that it was challenging subject-matter jurisdiction both facially and factually, but the court noted that Northrop had presented no evidence to support a factual challenge. Therefore, the court ruled that Northrop's challenge was facial only.

Northrop contended that it had publicly disclosed all the information upon which Coppock's *qui tam* action was based. The court noted that Coppock alleged that he had direct and independent knowledge of the alleged violations, but voluntarily provided only information regarding the July 1997 spill to the Government before filing suit. Therefore, the court dismissed all of Coppock's FCA claims except those predicated on the July 1997 spill.

Relator Failed to Plead Time and Other Particulars of Fraudulent Conduct

The court next examined whether Coppock's surviving FCA claims satisfied Rule 9(b). Under Fifth Circuit precedent, in order to plead fraud with particularity, a plaintiff must provide the time, place, and contents of the false representations, as well as the identity of the person making the representations and what was obtained thereby. The court noted that although Coppock appeared to state claims under §§ 3729(a)(1), (a)(2), and (a)(7), it was doubtful that he could rely on the July 1997 spill to state a claim under (a)(1), which applied to "actual demands for money or property." However, Coppock had adequately pleaded how the spill formed the basis of his (a)(2) claims that Northrop falsely certified compliance with its rent payments, and his (a)(7) claim that it falsified required records and reports regarding the spill to reduce its liability.

Nevertheless, the court ruled, Coppock did not adequately plead when Northrop falsified the records. Because Coppock alleged that Northrop prevented him from recording the spill in the plant environmental logs, the court ruled that Coppock must specify the time when that occurred. Likewise, regarding Coppock's allegation that Northrop falsely reported the nature of the spill and the scope of the required remediation, the court ruled that Coppock had failed to identify the document or oral disclosure that was falsified, the time of the false disclosure, and the party making the false representation. In light of these conclusions, the court directed Coppock to replead in order to comply with Rule 9(b).

Relator Failed to Allege That Certification Was a Prerequisite of Payment

The court next turned to Northrop's Rule 12(b)(6) motion. Northrop argued that in order to state an FCA claim based on false certification, the plaintiff must allege that the certification was a prerequisite to the Government's decision to pay or forfeit monies due. The court agreed, concluding that the Fifth Circuit would likely follow the approach of *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002). Therefore, the court ruled that Coppock failed to state a proper false certification claim, because he did not plead that the Government required Northrop's certifications of compliance as a condition of its acceptance of rent payments or its decision not to seek to hold Northrop liable for contractual, statutory, or regulatory violations.

Relator Failed to Plead Materiality

The court also ruled that Coppock failed to allege how Northrop's claims or conduct was materially false. Although Coppock argued that compliance with the Clean Water Act (CWA) was a material term of Northrop's contracts with the Government, his amended complaint did not mention the materiality of the CWA, but merely indicated that Northrop was contractually obligated to abide by the CWA. Because Coppock failed to plead materiality, the court ruled, his § 3729(a)(2) claim failed. Moreover, his § 3729(a)(7) claim failed both for failure to plead materiality and for failure to plead that the alleged false certifications were a condition of the Government's decision not to hold Northrop liable for the alleged violations. However, the court granted Coppock thirty days' leave to amend his complaint to cure the deficiencies identified.

The court also dismissed one of Coppock's state-law fraud claims. However, the court sustained Coppock's claim that Northrop managers committed common-law fraud by falsely stating that there was no toxic discharge from the plant in order to induce Coppock to wash hexavalent chromium foam into an adjacent lagoon, and that Northrop breached its promises of confidentiality when he first reported the July 1997 spill.

U.S. ex rel. Woods v. Empire Blue Cross & Blue Shield, 2002 WL 1905899 (S.D.N.Y. Aug. 19, 2002)

A New York district court granted the defendant's motion for summary judgment in a *qui tam* action. The court ruled that the action was based on publicly disclosed allegations, and the relator was not an original source of the information upon which his allegations were based.

Jack Woods operated Taylor Ambulance in New York City until 1982. During that time he was investigated for submitting false claims to the Government, and he was ultimately tried and convicted for that offense. In 1996 Woods saw a television program on ambulance fraud that reported that an audit of eighteen New York ambulance companies had tentatively concluded that Medicare had made overpayments totaling approximately $109 million. Woods also obtained a copy of a 1995 newspaper article describing the audit, which was conducted by Empire Blue Cross & Blue Shield, a Medicare carrier for the Greater New York Area under contract to HCFA. The article quoted James Cantrell, a Medicare compliance officer at Empire, as stating that "some patients transported to renal dialysis were able to walk out to the ambulance on their own, evidence that they didn't need the service." Through FOIA requests in 1997 and 1998, Woods obtained letters that Empire had sent to various ambulance companies between 1996 and 1999 seeking to recover millions of dollars in alleged overpayments. Woods also obtained documents from two criminal prosecutions for ambulance fraud in the Eastern District of New York.

In 1999, Woods filed a *qui tam* action against Empire. Woods alleged that Empire paid ambulance providers for claims that were false either because they involved renal centers that were not approved destinations or because they misrepresented dialysis patients as requiring assisted transportation when in fact the patients could walk. Furthermore, Woods alleged that Empire submitted claims that were false because Empire failed to use certifying officers and contracting officers as required by the Medicare contract.

In 2000, the Government declined to intervene and the complaint was unsealed. After discovery, Empire moved for summary judgment based on the public disclosure bar, immunity under the Medicare Act, and official immunity. Woods cross-moved for summary judgment on liability.

Allegations Were Publicly Disclosed and Relator Was Not Original Source

The court granted Empire's motion to dismiss for lack of subject matter jurisdiction based on the public disclosure bar. The court thus did not reach the other arguments raised by the parties. The court noted that under Second Circuit precedent, the public disclosure jurisdictional bar applies to a *qui tam* action "based in *any* part on publicly disclosed allegations or transactions." The court found that Woods' action was based upon information that was publicly disclosed in the television program, the newspaper article, and the two criminal prosecutions for ambulance fraud.

Furthermore, the court ruled, Woods was not an original source. Woods had no direct and independent knowledge of Empire's method of reporting claims, and he did not claim that he learned any specific information about Empire's alleged fraud while he was working in the health care industry. The fact that Woods conducted some independent investigation did not salvage his claims, the court ruled.

The court also rejected Woods' argument that the public disclosure rule did not bar his claim that Empire failed to designate certifying and disbursing officers, which was not explicitly discussed in the public disclosures. The court ruled that the essential elements of the alleged fraud, namely that Empire paid out large sums of money to ambulance companies for trips to non-approved facilities, had been publicly disclosed. The fact that the disclosures did not reveal every detail of the fraud, such as Empire's alleged failure to name specific certifying and disbursing officers, was, in the court's view, irrelevant.

U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co., *2002 WL 2014135 (E.D. Pa. Aug. 30, 2002)*

A Pennsylvania district court granted in part the defendants' motion to dismiss a *qui tam* complaint on public disclosure grounds. However, the court did not dismiss the relator's conspiracy claim, ruling that the relator was an original source of those allegations. For the purposes of the original source exception, the court held that where two co-relators conduct a joint investigation, they function as a "single disquisitive agent," so that each relator may be considered to have direct and independent knowledge of information obtained directly and independently by the other relator. The court also held that in order to qualify as an original source, a relator must have direct and independent knowledge of each essential element of his claim. The court dismissed allegations that the defendants conspired to make reverse false claims, ruling that reverse false claims are not actionable under § 3729(a)(3). Finally, the court dismissed certain allegations in the relator's remaining count based on the statute of limitations.

Paul Atkinson brought this *qui tam* action against the Pennsylvania Shipping Company (Penn Ship) and First Fidelity Bank, N.A., alleging that the defendants defrauded the Navy in connection with a contract for the construction of several oil tanker ships.

Atkinson alleges that Penn Ship undertook a ten-year program of misrepresentations and asset transfers in order to deceive the Navy into concluding that its financial condition was better than it actually was. If the Navy had known of Penn Ship's financial weakness, according to Atkinson, it would not have granted Penn Ship the contract.

Atkinson alleges that the pattern of deception began in 1984, when Penn Ship omitted from its financial statements loss contingencies related to the use of its assets to prop up another company, the Levingston Shipbuilding Company. Penn Ship and Levingston were among several companies under the control of Edward Paden, and Atkinson asserts that assets were transferred and debts assumed among these Paden companies as a means of deceiving the Navy.

Penn Ship submitted the lowest bid on the oil tanker contract in 1984, but Atkinson alleges that its bid was artificially lowered by the company's knowing omission of the cost of architectural drawings. However, before awarding the contract, the Navy requested that Penn Ship secure it against reprocurement costs in the event of default. Penn Ship accordingly offered the Navy a trust indenture involving security agreements and mortgages on the Chester shipyard, where Penn Ship's operations were centered, and on some of Penn Ship's equipment. First Fidelity Bank served as trustee for this indenture, which the Navy accepted in 1985. According to Atkinson, however, Fidelity and Penn Ship conspired to defeat the trust indenture by failing to perfect the security interests specified in the indenture. Atkinson alleges that the defendants thus concealed from the Navy their failure to secure it against reprocurement costs, and that this deception, together the false impression Penn Ship gave of its financial well-being, induced the Navy to award the original contract for the construction of two tankers in 1985, and then to exercise its option for the construction of a third and a fourth tanker in 1986 and 1987.

The first tanker was due for delivery in 1989. However, in late 1987, Penn Ship informed the Government that it was experiencing financial difficulty, and requested permission to transfer the contract on the third and fourth tankers to another shipbuilder. In 1988 the Navy agreed, and signed a modification (Modification 5) to the contract that eliminated these two tankers, and restructured the compensation arrangement on the first two tankers, changing it from a \$222 million cost reimbursement incentive contract to a \$331 million fixed price contract. In 1989, as Penn Ship's financial status worsened, it obtained a second modification (Modification 11), under which it obtained a \$10 million advance payment secured by a \$17 million interest in a floating drydock in the Chester shipyard. Later that year, Penn Ship obtained a default modification (Modification 17), that terminated the trust indenture and transferred the two original tankers to another shipyard. However, Penn Ship remained obligated to compensate the Navy for reprocurement costs and other expenses occasioned by this default. Penn Ship undertook to sell part of the Chester shipyard and other property to meet these obligations, but Atkinson contends that it never intended and never used its best efforts to do so. Nevertheless, Penn Ship did eventually sell some of its assets, and in 1992 obtained a final modification (Modification 20), releasing it from all further liability under the contract.

Atkinson filed two *qui tam* actions arising out of these allegations, of which the present one, filed in 1994, was the second. The Government declined to intervene in 1997, and the complaint was served in 1998. In 1999, the defendants moved to dismiss, and in 2000 the court dismissed much of the second amended complaint without prejudice for failure to comply with Rule 9(b). *See United States ex rel. Atkinson*, 2000 WL 1207162 (E.D. Pa. Aug. 24, 2000). Following this ruling, Atkinson filed a third amended complaint. The defendants moved under Rule 12(b)(1) to dismiss pursuant to the public disclosure bar, and also moved under 12(b)(6) to dismiss certain allegations for failure to state a claim based on the statue of limitations and other grounds.

Court Lacked Jurisdiction Over Most Claims Under Public Disclosure Bar

The defendants argued that the court lacked jurisdiction under the pre-1986 "government knowledge" bar over allegations based on claims submitted prior to the effective date of the 1986 amendments to the FCA, and that the public disclosure bar enacted in 1986 applied to block claims submitted after that date. The court found that the pre-1986 government knowledge bar applied only to Atkinson's allegations based on the submission of biweekly invoices before October 27, 1986, and dismissed those allegations. Most of the relator's allegations, however, pertained to claims submitted after that date.

The court next turned to Atkinson's allegations concerning the latter claims, which are governed by the FCA's current public disclosure provision, § 3730(e)(4). The court proceeded through each count of the complaint to determine whether it was based on publicly disclosed allegations or transactions, and if so, whether the relator was an original source of the information upon which his allegations were based.

Conspiracy Allegations Were Publicly Disclosed

The first count alleged that Penn Ship and Fidelity conspired to cause false claims to be paid by failing to perfect the Navy's security interests that were identified in the trust indenture. The defendants argued that the underlying allegations were disclosed in a Senate investigation and in documents that Atkinson's former co-relator, Eugene Schorsch, obtained through a FOIA request. Atkinson agreed that the misrepresented version of the facts put forward by the defendants had been publicly disclosed. However, Atkinson contended that the true state of facts, namely Penn Ship's failure to record the security instruments, was not disclosed, that Schorsch discovered this failure only by inspecting county real estate records, and that those records do not qualify as a form of public disclosure under § 3730(e)(4)(A). Therefore, under the approach of *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 654-55 (D.C. Cir. 1994), Atkinson argued, the public disclosure bar did not apply.

The defendants replied, and the court agreed, that the *Springfield Terminal* approach was inapposite to the conspiracy count. While a fraud claim under § 3729(a)(1), as the *Springfield Terminal* court recognized, involves a false and a true version of the facts, a conspiracy claim under § 3729(a)(3) consists of a showing that the defendant conspired with one or more persons to get a false claim paid, and that one or more conspirators performed an act in furtherance of this conspiracy.

The court found, moreover, that Penn Ship's failure to record the security interests was disclosed in a 1993 response to Schorsch's FOIA request and in a 1994 audit report issued by the Inspector General of the Department of Defense. Because both these public disclosures preceded the filing of the complaint in Atkinson's current *qui tam* action, the court ruled that Atkinson's conspiracy claim was based upon public disclosures.

Relator Had Direct and Independent Knowledge of Information Gained by Former Co-Relator

The court then examined whether Atkinson was an original source of the allegations. Atkinson argued that although he learned of Penn Ship's failure to record from Schorsch, who was no longer his co-relator, he should nonetheless be considered an original source of information learned by Schorsch when they were co-relators. Furthermore, because Schorsch voluntarily informed the Government that its security interest had not been perfected, Atkinson argued that he fulfilled the second requirement for original source status.

The defendants pointed to a stipulation signed on behalf of Atkinson and Schorsch and entered as an order by the court in 1999, which provided that Schorsch "shall not be deemed a relator in this action for any purpose." The defendants argued that this stipulation removed Schorsch from the status of a relator without any temporal limitation, so that Atkinson could not be considered an original source of information learned by Schorsch even when they were co-relators. Furthermore, the defendants argued, under the plain language of § 3730(e)(4), to qualify as an original source, the relator must have direct and independent knowledge of the underlying information. Because Atkinson learned of the failure to record through Schorsch, they argued, he could not have direct and independent knowledge.

The court found the defendants' arguments on this point uniformly unpersuasive. A person's status as an original source, the court ruled, is not something that can be altered by subsequent events. If Atkinson gained direct and independent knowledge of the failure to record through Schorsch's inspection of the county records, then Schorsch's subsequent withdrawal from the action could not deprive Atkinson of his original source status. Accordingly, the 1999 stipulation was irrelevant, and the pivotal question was whether Schorsch's discovery provided Atkinson with direct and independent knowledge.

To answer this question, the court needed to explore the contours of the original source exception in cases involving co-relators. The court concluded that the answer depends on the nature of the relationship between the co-relators. For example, if relator A discovers X (the misrepresented state of facts) and relator B discovers Y (the true state of facts), and they subsequently share their findings and institute a *qui tam* action as co-relators, then A cannot be considered an original source of Y. However, unlike A and B in that example, Atkinson and Schorsch undertook a joint investigation and functioned as a single disquisitive agent. To require both co-relators in such a situation to conduct each aspect of the investigation would effectively eliminate the possibility of a genuine joint investigation and remove any practical benefit of bringing a *qui tam* claim with a co-relator. Moreover, the court ruled, such a requirement would impose a formal procedural hurdle in cases involving co-relators that is inconsistent with the language and spirit of the original source provision. Therefore, the court concluded that knowledge gained directly and independently by one relator in the course of a joint investigation may be said to have been learned directly and independently by his co-relator.

The court concluded that Atkinson was (through Schorsch's inspection of county records) an original source both of Penn Ship's failure to record the Navy's security interests and of Fidelity's failure to insure such recordation. Atkinson inferred the existence of a conspiratorial agreement from these omissions, each of which qualified as an act by a conspirator in furtherance of the conspiracy. Therefore, the court ruled, it had jurisdiction over Atkinson's conspiracy allegation insofar as it was based on the defendants' failure to record the security interests.

Remaining Allegations Barred by Public Disclosure

The court dismissed each of the remaining counts in Atkinson's third amended complaint pursuant to the public disclosure bar.

Atkinson conceded that his second and third counts, based on Penn Ship's failure to disclose loss contingencies in its 1984 financial statements, were based upon public disclosures of which Atkinson was not the original source. Accordingly, the court dismissed those counts.

Atkinson's fourth count, as formulated in Atkinson's second amended complaint, alleged that Penn Ship intentionally understated its costs in bidding for the tanker contract. In his third amended complaint, Atkinson added allegations that Penn Ship concealed the fact that it was likely to default on the contract. Because the court did not give Atkinson leave to amend this count in its 2000 order, the court concluded that the amendment was improper, and evaluated the fourth count for purposes of jurisdictional analysis as it appeared in the second amended complaint. However, the allegation in the second amended complaint that Penn Ship understated its costs had been publicly disclosed, and Atkinson was not an original source. Therefore, the court dismissed the fourth count.

The fifth count was based on alleged misrepresentations in a letter that Penn Ship's chairman Thomas Weller sent in 1985 to a Navy financial analyst. In particular, Atkinson alleged that Weller stated (1) that significant cost overruns were "highly unlikely" (when in fact Penn Ship's bid had knowingly understated costs); (2) that the trust created by the indenture would be "irrevocable" (when in fact the agreement permitted Penn Ship to strip the trust of its assets); and (3) that the trust res consisted of a security interest or mortgage in the entire Penn Ship facility (when in fact seven critical acres, including the administrative buildings, were deliberately excluded).

The defendants argued that both the "true" and "misrepresented" facts that formed the basis for each of these three alleged misrepresentations had been publicly disclosed, and that Atkinson was not an original source. In his opposition, Atkinson failed to rebut the defendants' arguments regarding the first two alleged misrepresentations. As for the third, Atkinson did not dispute that both the Weller letter (the alleged misrepresented state of facts) and the mortgage accompanying the trust indenture (which contained a metes and bounds property description of the excluded acreage) had been publicly disclosed. However, Atkinson contended that only a person with his specialized knowledge or personal familiarity with the shipyard would be able to discern that the excluded acreage was shipyard property.

The court rejected Atkinson's argument. The fact that the mortgage never employed the term "shipyard" or specified the nature of the area excluded did not mean that the nature of the area as shipyard property was not revealed. The court concluded that Atkinson added no new information to the public sphere, but merely interpreted information already revealed. In *Springfield Terminal*, the D.C. Circuit discussed the analogous example of engineering blueprints on file with a public agency that might not be readily comprehensible to nonexperts. The D.C. Circuit commented that "[e]xpertise in the field of engineering would not in itself give a *qui tam* plaintiff the basis for suit when all the material elements of the fraud are publicly available." 14 F.3d at 655. Similarly, the court ruled, Atkinson's contribution was limited to the interpretation of information contained in a publicly disclosed document, and the court accordingly ruled that his allegations were based upon public disclosures.

For the same reasons, Atkinson's special knowledge of the shipyard was not enough to qualify him as an original source. As the court of appeals stated in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991), if mere "background information that enables a putative relator to understand the significance of a publicly disclosed transaction or allegation" were enough to qualify the relator as an original source, "then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase." Accordingly, the court ruled that Atkinson was not an original source, and dismissed the fifth count.

To Qualify As Original Source of Publicly Disclosed Allegations, Relator Must Have Direct and Independent Knowledge of Each Element of His Claim

Atkinson's sixth count, like his first, focused on the failure to perfect the security interests identified in the trust indenture. However, whereas the first count alleged a conspiracy between Penn Ship and Fidelity in violation of § 3729(a)(3), the sixth count alleged that Penn Ship made knowingly false statements that it would record the security interests in violation of § 3729(a)(2). Unlike the conspiracy claim, which involved different elements, count six fell squarely within the *Springfield Terminal* analysis under which disclosure of both the misrepresented (X) and true (Y) state of facts amounts to disclosure of the fraud (Z).

Atkinson conceded that the X element in count six, namely, Penn Ship's representation in the trust indenture that it would record the Navy's security interests, was publicly disclosed in response to a FOIA request made by Schorsch. Moreover, Atkinson was not an original source of that information, because he learned of it through that public disclosure. The Y element, the allegation that Penn Ship had no intention to record the security instruments, was based in part on Fidelity's failure to ensure that the security instruments were recorded. This element too was publicly disclosed, but Atkinson was an original source.

The court noted a lack of consensus among the courts of appeals as to the proper application of the original source provision where the relator is an original source of some, but not all, of the essential elements of his *qui tam* claim. In *Springfield Terminal*, 14 F.3d at 657, the D.C. Circuit held that the original source exception applies whenever the relator has "direct and independent knowledge of *any* element of the underlying fraud transaction (*e.g.*, Y)." However, the court noted, this reading has turned out to be the exception rather than the rule. Other courts have held that to qualify for the original source exception, a *qui tam* relator must have direct and independent knowledge of *each* essential element of his claim. The court found that the Third Circuit had "indicated its inclination to abide by the majority view," and therefore dismissed the sixth count because Atkinson did not have direct and independent knowledge of all its essential elements.

Atkinson's eighth and ninth counts centered on allegations that Penn Ship fraudulently induced the Navy to exercise its options on the third and fourth tankers. (Atkinson had abandoned his seventh count.) In his third amended complaint, Atkinson sought to link these allegations to his claims concerning the trust indenture. However, in its 2000 ruling, the court did not dismiss these counts, nor did it grant Atkinson leave to amend them. Therefore, it rejected these amended counts and considered them instead as they appeared in the second amended complaint.

Just as in the sixth count, the X and Y elements in these counts had been publicly disclosed, and the relator was an original source only of the Y element. Therefore, the court dismissed counts eight and nine. Similarly, Atkinson's tenth and eleventh counts, which involved allegations of false claims and reverse false claims in connection with Modifications 5 and 11, were based upon public disclosures and Atkinson was an original source only of the Y elements. Therefore, the court dismissed these counts as well.

Atkinson's twelfth count alleged violations of § 3729(a)(2) and (7) in connection with the default modification. Here the X element was Penn Ship's assertion that it would use its best efforts to liquidate its interests in the shipyard within a thirteen-month period, before the Navy lost its right to the proceeds of the sale. The Y element was the allegation that Penn Ship had no intention to sell these assets, as evidenced by the fact that immediately after the expiration of the thirteen months, it sold the derrick to a company it had just created, which in turn sold it to a third party.

Atkinson argued that these allegations were advanced in his first *qui tam* action, and therefore any subsequent public disclosures were irrelevant to their justiciability. The court disagreed, holding that the public disclosure bar applied to any claim whose essential elements were disclosed prior to the assertion of the claim in the present action, and it was irrelevant whether the same claim was asserted in a prior action. Atkinson also argued that the twelfth count had as an alternative basis the trust indenture fraud, which was not publicly disclosed. However, like the fourth, eighth and ninth counts, the twelfth count was not one that the relator was granted leave to amend, and the court declined to address this new theory (although, in a footnote, the court suggested that it would fail in any case, for the same reason that the sixth count failed). Because both the X and Y elements of the twelfth count had been publicly disclosed, and Atkinson was the original source only of the Y element, the court dismissed this count.

Finally, the court also dismissed Atkinson's so-called "additional count," which alleged that in biweekly invoices Penn Ship sought compensation for certain expenditures that it did not actually make. The court ruled that these allegations were derived from a Defense Department audit report. As such, they were based on public disclosures and Atkinson was not an original source. Accordingly, the court dismissed the additional count.

Rule 12(b)(6) Motion

Having ruled on the defendants' 12(b)(1) motion, the court next evaluated their 12(b)(6) motion as it applied to the one remaining claim, the conspiracy allegations of count one insofar as they were based on allegations of failure to record the Navy's security instruments. Fidelity argued that this claim failed because under Pennsylvania law, it had no obligation to ensure the recording of these instruments, since its duties under the trust indenture were essentially custodial in nature. The court rejected Fidelity's argument. Fidelity was correct that under Pennsylvania law, a trustee's duties are determined pursuant to the trust instrument rather than general fiduciary principles. Nevertheless, the trustee is subject to numerous underlying common-law duties, including the duty to protect the trust assets from destruction. Although the trust indenture assigned to Penn Ship the obligation to record the security instruments, it did not thereby modify Fidelity's fiduciary obligation to use reasonable care to protect the trust res. Moreover, even if the indenture purported to empower Fidelity to undermine the Navy's security interests, the courts would not give effect to such a provision.

Fidelity also argued that its alleged wrongdoing consisted solely of failing to ensure that the Navy's security interests were perfected, and that mere nonfeasance cannot form the basis of an FCA claim. The court disagreed, ruling that were a party incurs a duty to prevent a fraud on the Government, its failure to fulfill that duty can give rise to FCA liability. Such a duty, the court noted, unquestionably inheres in a fiduciary relationship.

The defendants also renewed their argument that Atkinson had failed to allege fraud with particularity as required by Rule 9(b). They argued that his allegations in the third amended complaint remained impermissibly conclusory, and that his conspiracy claims were overly speculative. The court did not agree that the conspiracy claim was conclusory, noting that the first count in Atkinson's third amended complaint was "exponentially more voluminous and precise" than its predecessor in the second amended complaint, and that "it would be difficult to allege with a great deal more particularity the contours of a conspiracy."

However, the court ruled, the defendants' argument that Atkinson's conspiracy claims were overly speculative presented more difficult question. The court noted that Rule 9(b) applies not to the allegations regarding the conspiracy itself, but only the assertions as to the fraudulent substance of that agreement, and even there, matters concerning the defendants' intentions and knowledge could be averred generally. To the extent that Atkinson was required to substantiate his assertion that the defendants did not intend to fulfill their promises to record the security instruments, the court recognized that the mere nonperformance of a promise does not give rise to an inference of an intent not to perform at the time the promise was made absent the existence of other factors such as the passage of a short period of time between the promise to perform and the failure to perform. However, the trust indenture required Penn Ship to record the Navy's security instruments "promptly" after the indenture went into effect, and only six weeks elapsed between this promise and its breach. There was no evidence of a material change in circumstances in those six weeks, and therefore, in this case Atkinson was entitled to infer from the defendants' nonperformance that they never intended to perform. Accordingly, the court ruled, Atkinson's surviving conspiracy allegations satisfied Rule 9(b).

Conspiracy to Submit Reverse False Claims Not Actionable Under FCA

The defendants also argued that the court should dismiss Atkinson's allegations that the defendants conspired to submit reverse false claims, on the grounds that reverse false claims are not actionable under § 3729(a)(3). This argument was drawn from the language of the FCA's conspiracy provision, which prohibits only conspiring to defraud the Government "by getting a false or fraudulent claim allowed or paid." Atkinson responded by pointing to two cases that he claimed held that reverse false claims are actionable under § 3729(a)(3). However, the court found that one of these cases did not so hold, while the other undertook virtually no analysis of the issue. Moreover, the court ruled, the statute is unambiguous on its face, and plainly excludes from liability a person who conspires to defraud the Government by concealing his own financial obligation to the Government. Therefore, the court dismissed Atkinson's conspiracy allegations based on reverse false claims.

Statute of Limitations Barred Recovery for Claims Submitted Before 1988

Finally, Penn Ship argued the statute of limitations barred Atkinson from seeking recovery for claims submitted prior to 1988, six years before the date when Atkinson filed the present *qui tam* action. Atkinson sought to argue that because the conspiracy continued until the Navy released Penn Ship from its contractual obligations, the limitations period began to run only upon termination of the contract. The court disagreed, noting that in the Third Circuit, the limitations period for a civil conspiracy runs from each overt act causing damage. Therefore, the court barred recovery for claims submitted more than six years before the complaint was filed. Although a statute of limitations defense ordinarily may not be raised in the context of a 12(b)(6) motion to dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period. Therefore, the court granted Penn Ship's motion for partial dismissal with respect to claims submitted outside the limitations period.

Section 3730(h) Retaliation Claims

U.S. ex rel. Schuhardt v. Washington University, No. 4:99-CV-1202 (E.D. Mo. Aug. 20, 2002)

See "FCA Liability/False Certification" above at page 4.

U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District, 2002 U.S. Dist. LEXIS 17987 (W.D.N.C. Sept. 19, 2002)

See "Rule 9(b)" below at page 38.

Shekoyan v. Sibley International Corp., 38 217 F. Supp. 2d 59 (D.D.C. Aug. 16, 2002)

A District of Columbia district court denied a motion to dismiss a claim for retaliation under § 3730(h). Although the plaintiff was a noncitizen employed overseas, his employer was located in the United States, and both the report of the alleged fraud and the alleged acts of retaliation occurred within the United States. Moreover, although the plaintiff's pro se complaint failed to satisfy the requirements of Rule 9(b), in his opposition to the defendant's motion to dismiss he supplemented his complaint, putting the defendant on notice of the particulars of his claim.

Vladimir Shekoyan, an Armenian-born resident of the United States, was hired in 1998 by Sibley International Corporation as a training adviser for a project in the Republic of Georgia funded by the United States Agency for International Development (USAID). Shekoyan alleges that his supervisor in Georgia created a hostile work environment by discriminating against him because of his national origin. Shekoyan also alleges that he reported the supervisor's discriminatory conduct and misappropriation of USAID funds to Sibley management officials in the United States, and that they advised him not to "make too much noise" about the misuse of funds. Although USAID offered to extend Shekoyan's contract, Shekoyan asserts he did not have the skills required for the extension, and declined to extend his employment beyond the original termination date. At this time Shekoyan's supervisor sent an e-mail to project employees stating that Shekoyan had been fired for insubordination.

Shekoyan sued Sibley for discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964 and retaliatory termination of employment in violation of § 3730(h) of the FCA, as well as a variety of common-law claims. Sibley moved to dismiss.

Alleged Disclosure and Retaliation Occurred Within the United States

The court granted the defendant's motion as to the Title VII claim, ruling that Title VII does not apply extraterritorially to noncitizens of the United States. However, the court denied Sibley's motion to dismiss Shekoyan's FCA retaliation claim. In contrast to the Title VII allegations, the FCA claim was based on allegations of disclosure of misappropriation to company officials and subsequent retaliation by those officials in the United States. Therefore, the issue of the extraterritorial application of the FCA was not raised. (In a footnote, the court observed that the Second Circuit applied the FCA extraterritorially in *United States ex rel. Thistlewaite v. Dowty Woodville Polymer, Ltd.*, 110 F.3d 861 (2d. Cir. 1997). However, in dicta, the court cast doubt on this approach, stating that "it appears . . . that the whistleblower provision may not apply to aliens and fraudulent conduct that occurs abroad.")

Complaint as Supplemented by Pleadings Satisfied Rule 9(b)

The court next addressed the defendant's argument that the complaint failed to satisfy Fed. R. Civ. P. 9(b). The court noted that Shekoyan's pro se complaint, even when held to a less stringent standard than one drafted by an attorney, still failed to satisfy the particularity requirements of Rule 9(b), in that it failed to allege the time, place and nature of the alleged misappriation. However, Shekoyan subsequently retained counsel, and in his opposition to the defendant's motion to dismiss did satisfy the requirements of Rule 9(b). The court noted that while a complaint may not generally be amended in an opposition to a motion to dismiss, courts have allowed a party to supplement its complaint through such a pleading for Rule 9(b) purposes for the sake of judicial economy. The court also noted that leave to amend is almost always allowed to cure deficiencies in pleading fraud.

Because Shekoyan provided the details required by Rule 9(b) in his opposition to the motion to dismiss, the court ruled that the defendant was on notice of the particulars of the FCA claim, and dismissal would be inappropriate. Therefore, the court denied the defendant's motion to dismiss, and permitted Shekoyan's counsel to file an amended complaint to cure the deficiencies in pleading.

Section 3731(b) Statute of Limitations

***U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 2002 WL 2014135 (E.D. Pa. Aug. 30, 2002)**

See "Section 3730(3) Public Disclosure Bar and Original Source Exception" above at page 18.

***U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District*, 2002 WL 31104581 (W.D.N.C. Sept. 19, 2002)**

See "Rule 9(b)" below at page 38.

***U.S. v. Intrados/International Management Group*, No. 01-0769 (D.D.C. Aug. 2, 2002)**

A District of Columbia district court ruled that the common-law doctrine of equitable tolling cannot apply to the statute of limitations unless the plaintiff exercised due diligence in uncovering the fraud. Without deciding in general whether equitable tolling does apply in FCA cases, the court ruled that it could not apply in this case because the Government failed to exercise due diligence in investigating and asserting its claim.

This case arose out of U.S.-sponsored privatization programs in several of the independent states of the former Soviet Union. The Government entered into a series of contracts with the defendants, the Intrados Management Group, and a number of individuals, to train mid-level government officials in former Soviet republics on the privatization of markets and assist with the transition to a capitalist economic system. The contract awarded the defendants $8.1 million dollars and authorized them to seek reimbursement for allowable costs in connection with the contract work. The Government alleges that between November 1994 and October 1996, the defendants routinely submitted claims for unallowable costs, including consultant fees, embryo surgery, personal renting expenses, legal fees, personal travel, retail purchases, and home repairs. The Government asserts that the defendants concealed the personal nature of these costs by accounting for them as salaries, overhead, and travel allowances, and that it did not learn of the false claims until a Defense Contract Agency (DCA) audit was performed in 1998.

The Government filed suit in April 2001, asserting both FCA and common-law claims. In May 2002, the defendants moved to dismiss, asserting that the complaint was not pleaded with particularity as required by Fed. R. Civ. P. 9(b), that the invoices were not false as a matter of law, and that the statute of limitations barred the Government's claims.

Complaint Satisfied Rule 9(b)

The court granted the defendant's motion in part and denied it in part. The court found that the complaint was pleaded with sufficient particularity to comply with Rule 9(b). The defendants contended that although the complaint contained adequate details of the claim against Intrados, the corporate defendant, it failed to plead the claims against the individual defendants with sufficient particularity. The court noted that the complaint specified the false claims that the individual defendants allegedly submitted to the Government, and provided a detailed listing of the unallowable costs discovered in the DCA audit and subsequent DOJ investigation. The court ruled that an FCA plaintiff need not allege with specificity every element of its cause of action if the complaint contains allegations from which an inference may be drawn that the plaintiff will produce evidence on the essential elements. By naming the individual defendants, stating the time period when the alleged fraud took place, and specifically highlighting the unallowable costs, the court held, the Government had provided an adequate basis under Rule 9(b) for its fraud allegations. Therefore, the court denied the defendants' motion to dismiss pursuant to rule 9(b).

Complaint Adequately Pleaded Submission of False Claims

The court also rejected the defendants' contention that the invoices submitted were not false as a matter of law because they were in accordance with the required calculations. The court noted that the Government alleged that the defendants included wrongful expenses in direct salaries that were used in calculating amounts included in invoices submitted to the Government for reimbursement. Taking these allegations as true for purposes of the defendants' Rule 12(b)(6) motion, the court ruled that the Government had pleaded sufficient facts to support its claim that the invoices were false, and denied the defendants' motion.

Statute of Limitations Not Tolled Absent Due Diligence

The court granted the defendants' motion to dismiss based on the statute of limitations FCA allegations involving invoices submitted before April 1995, but declined to dismiss allegations based on later invoices. The court rejected the defendants' argument that a three-year statute of limitations should apply to the invoices, noting that § 3731(b)(2) provides that an action must be brought within the six-year period or the three-year period specified in the statute, "whichever occurs last." Therefore, claims brought within six years of the time when the alleged violations occurred were timely and survived the motion to dismiss.

The Government contended that the statute of limitations was tolled for its claims regarding invoices submitted before April 1995 because the defendants fraudulently concealed material facts giving rise to the claims, and because the DOJ was not aware of the relevant facts until October 1998. The court rejected these contentions. The doctrine of equitable tolling as set out in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) provides that a statute of limitations is tolled only until the time that a reasonably diligent plaintiff could have discovered the elements of his claim. Therefore, assuming *arguendo* that the equitable tolling doctrine applied, the court ruled that it would not be operable in this case, because the Government failed to exercise due diligence in uncovering the fraud.

The court noted that the DCA audit was completed in January 1998, but the Government did not file its complaint until more than three years later, in April 2001. Thus, by the Government's own admission, it knew of the material facts giving rise to its claims in sufficient time to file its complaint before the expiration of the statute of limitations. Because the Government had not proffered any excusable neglect as the basis for its failure to assert its claims in a timely manner, the Court dismissed as time-barred the Government's claims relating to invoices submitted before April 1995.

The court also rejected the Government's attempt to invoke the three-year limitations period, which, the Government argued, began to run in October 1998, when DOJ commenced its investigation. The court ruled that the three-year period began to run when the DCA audit was released, in January 1998. Thus, the three-year period expired in January 2001, before the Government filed suit in April of that year.

Finally, the court turned to the Government's common-law claims. The court declined to dismiss the Government's claims based on unjust enrichment and payment by mistake, which sounded in contract, and were thus subject to a six-year limitations period under 28 U.S.C. § 2415. However, the court dismissed the Government's claim for common-law fraud, which sounded in tort, and was thus subject to a shorter three-year period.

Calculation of Damages

***U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. Sept. 12, 2002)**

The Sixth Circuit held in a *qui tam* action against a military contractor that the Government could recover as damages the value of a helicopter that crashed as the result of a defective transmission gear that was critical for flight. The court also held that the High-Value Items Clause of the Federal Acquisitions Regulations does not bar the Government from recovering damages under the FCA.

Brett Roby brought this *qui tam* action in 1995 against Boeing Company and its supplier Speco Corporation, alleging that the defendants violated the FCA by making false statements about the manufacture and sale of defective transmission gears that Boeing used to remanufacture CH-47A/B/C Chinook helicopters to the CH-47D configuration. In 1985 and 1989 Boeing obtained Army contracts worth approximately two billion dollars to remanufacture about four hundred helicopters, and was required under the contracts to inspect and ensure the quality of all the parts used.

In January 1991, after fifty-six flight hours, one of the helicopters, which Boeing had remanufactured at a cost to the Government of $4.1 million, crashed in Saudi Arabia during Operation Desert Shield due to the failure of a defective flight-critical transmission gear. The reconditioned helicopter and its contents were completely destroyed at a loss of at least $10 million. The Army replaced it with a new CH-47D at a cost of $13 million.

Roby's *qui tam* action included a claim arising out of this crash as well as other claims. In 1997 the Government intervened, and in 1998 it moved for partial summary judgment, challenging Boeing's assertion of an affirmative defense based on the High-Value Items Clause (HVIC) of the Federal Acquisitions Regulations (FAR). The court granted the motion in *United States ex rel. Roby v. Boeing Co.*, 73 F. Supp. 2d 897 (S.D. Ohio 1999). Boeing cross-moved for summary judgment, and the district court granted that motion with respect to the issue of consequential damages, but denied it as it related to the Government's damages in this case. *United States ex rel. Roby v. Boeing Co.*, 79 F. Supp. 2d 877 (S.D. Ohio 1999).

In August 2000, before trial, the parties reached a settlement under which Boeing made an immediate payment of $25 million. The settlement did not include the claim arising out of the Saudi crash; an additional payment of $15 million was made contingent on the outcome of an appeal to the Sixth Circuit. [*Editor's Note*: The $15 million figure cited by the court apparently refers to the Government's net recovery. The total recovery made contingent on the outcome of the appeal was $19 million, including a relator's share of $4 million.] The district court approved the settlement and certified for interlocutory appeal two questions: (1) Whether the Government can recover damages under the FCA for the loss of a helicopter resulting from the failure of a defective flight-critical component part; and (2) Whether the High-Value Items Clause incorporated in the Boeing contract operated as a defense to such damages.

HVIC Does Not Bar Recovery Under FCA

Taking up the second question first, the court of appeals ruled that the HVIC does not provide a defense to damages sought under the FCA. Since 1984, pursuant to the FAR, the HVIC has been inserted in certain government contracts to limit the liability of contractors for loss to property resulting from defects after the Government takes possession. While the HVIC represents the Government's assumption of the risk that a high-value item may be lost or damaged after acceptance as a result of a defect, the court noted that it does not necessarily imply that the Government has self-insured for damages that result from violations of federal law.

The district court ruled that the HVIC limits only a contractor's contractual liability, not its liability under the FCA. In affirming, the Sixth Circuit held that the district court did not err in concluding that the HVIC does not provide a defense to FCA damages. If the HVIC were a typical insurance policy, the court of appeals noted, it would have considered resolving any ambiguity in Boeing's favor. However, the purpose of the HVIC is to reduce the Government's procurement costs by limiting the contractor's risk. By its own terms, it is a self-insurance policy, under which the Government is both insurer and insured. The HVIC insures contractors only indirectly, and nothing in the HVIC suggests that it limits contractor liability for statutory violations.

Boeing sought to rely on *United States v. United States Cartridge Co.*, 198 F.2d 456 (8th Cir. 1952), which held that a liability-limiting contract provision did limit the Government's FCA claims. The court ruled that this case was inapposite, because the contract at issue there was made in the emergency situation preceding World War II, and the contractor was subject to extensive government supervision and control. In contrast, the contract in the case at bar was for the remanufacture of helicopters almost entirely during peacetime, and Boeing was not subject to government supervision or control. From these differences the court concluded that the limitation of liability at issue in *United States Cartridge Co.* allocated risks in a manner much more favorable to the contractor than does the HVIC.

Boeing's proposed interpretation of the HVIC would absolutely foreclose the Government from recovering more than a $10,000 civil penalty for damages sustained because of a false claim for a high-value item, when actual damages sustained could be far higher. The court noted that in amending the FCA in 1986, Congress expressly recognized "that a large number of fraud cases and many of the larger-dollar cases arise out of Department of Defense contracts." H.R. Rep. No. 99-660, at 20. In light of this statement, the court ruled, it would be incongruous to construe the HVIC to relieve contractors for high-value items from FCA damages. As the court noted, "the motivating purpose of the FCA is to combat and deter fraud, which would not be served in the context of defense contracts by the civil penalty alone." Accordingly, the court ruled that the HVIC did not bar the Government from recovering damages for the loss of the helicopter.

Government Could Recover Market Value of Helicopter

The court then discussed the appropriate measure of damages in this case. The court noted that FCA damages are to be liberally calculated to afford the Government complete indemnity for the injuries done to it, and that the Government is entitled to full damages where it proves it received no value at all. In *United States v. Bornstein*, 423 U.S. 303, 317 (1976), the Supreme Court explained that the Government's actual damages are "equal to the difference between the market value of the [goods] it received and retained and the market value that the [goods] would have had if they had been of the specified quality."

Boeing argued that the proper measure of damages was the value of the defective gear only, but later conceded that damages might equal the amount of its claim (*i.e.*, the $4.1 million value of its contract to remanufacture the helicopter). The court ruled that because the gear, which was necessary for flight, was defective, the entire aircraft was defective, and therefore Boeing's entire claim was false under the FCA.

Under the "diminished value" or "benefit of the bargain" rule of *Bornstein*, the court subtracted the market value of what the Government received from what it was promised. The market value of the helicopter as received, the court ruled, was zero. Boeing disagreed, noting that the Army did get fifty-six hours of flight time from the helicopter before it crashed. But the court observed that a setoff based on value purportedly received would create a perverse incentive which would deter the Army from correcting dangers to the lives of American soldiers by forcing it to bear the cost of any use it received from substandard goods before their defects were discovered.

Because the Government did not contract with Boeing for a new helicopter, it was not entitled to recover the $13 million value of the new helicopter it bought to replace the remanufactured helicopter. But the Government was entitled to recover the benefit of its bargain with Boeing, and thus the proper measure of damages was the market value of a remanufactured helicopter. The court did not presume to estimate this amount, but limited itself to answering the question certified for interlocutory appeal, and affirmed the judgment of the district court. In a footnote, however, the court noted that under *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1372-73 (Fed. Cir. 1998), if the actual loss in value could not be ascertained, the Government would be entitled to recover the very high cost of replacing the downed helicopter.

Dissent Argues HVIC Bars FCA Damages

In a dissenting opinion, Judge Boggs argued that the HVIC barred the Government from seeking compensation for the loss of the helicopter under any theory, including the FCA. The dissent maintained that the plain language of the HVIC prohibited the recovery of damages for the helicopter. According to the dissent, the HVIC does not preempt the FCA or preclude

FCA liability, but where it applies the Government may recover only civil penalties, not damages, under the FCA. In the dissent's view, the HVIC should be read as an assumption of risk clause, which seeks to encourage manufacturers not to obtain liability insurance, which would ultimately increase the Government's costs. Under the rule adopted by the majority, the dissent worried, contractors will have to insure against potential FCA liability for the loss of high-value items resulting from fraudulent actions by any of their personnel, and this cost will be passed on to the Government.

Damages/Excessive Fines Clause

***U.S. v. Mackby*, 2002 WL 31086120 (N.D. Cal. Sept. 3, 2002)**

A California district court held that a monetary judgment of $729,454 was not constitutionally excessive in a case where the defendant made repeated false Medicare claims using his father's physician identification number. The court noted that the judgment was far less than the maximum recovery that could have been sought in this case (nearly $86 million), and that a sizable deterrent was appropriate, especially since the defendant had refused to accept responsibility for his wrongdoing.

In 1998, the Government brought an FCA action against Peter Mackby, alleging that he instructed his physical therapy clinic's billing service to submit false claims by substituting the physician identification number of his physician father for that of the treating physician on Medicare claim forms. Following a bench trial, the district court entered a judgment of $729,454.92 for the Government, based on a $5,000 penalty for each of 111 claims submitted and treble damages in the amount of $174,454.92. Mackby appealed, challenging both his liability and the money judgment pursuant to the Excessive Fines Clause of the Eighth Amendment to the Constitution. The court of appeals affirmed the district court's finding of liability, but ruled that the award of damages and civil penalties was subject to review under the Excessive Fines Clause, and remanded to the district court to determine whether the judgment was grossly disproportionate to the gravity of the offense. *See U.S. v. Mackby*, 261 F.3d 821 (9th Cir. 2001), 24 TAF QR 26 (Oct. 2001).

Judgment Did Not Violate Excessive Fines Clause

On remand, the district court found that the judgment it had previously entered did not violate the Eighth Amendment. The court noted that under Ninth Circuit precedent, factors to be considered in determining whether a judgment is grossly disproportionate to the gravity of the offense include: (1) whether the violation was related to other illegal activities, (2) the availability of other penalties and the maximum penalties that could have been imposed, (3) the extent of the harm caused, and (4) the amount of the judgment relative to the gravity of the offense. In regard to the first factor, the court found no indication that Mackby was involved in other illegal activity.

However, in regard to the second factor, the court noted that Mackby caused 8,499 false claims to be submitted, thereby exposing him to a maximum civil penalty of $84,990,000. In addition, based on the improper payment of $331,078 in federal funds, the maximum treble damage award the court could have imposed was $993,234. Thus, Mackby's maximum exposure was almost $86 million.

Thus, there was no dispute that the actual judgment imposed—$729,454—was within the range prescribed by the statute, and as such was presumptively constitutional. The judgment was but a fraction of what could have been imposed. The Government did not seek a penalty for each of the 8,499 false claims that Mackby submitted between 1992 and 1996, but requested the imposition of penalties for only 111 claims, reflecting one claim per beneficiary per year that exceeded the limit for physical therapists in independent practice (PTIP). As to those 111 claims, the Government sought the minimum penalty of $5,000 rather than the statutory maximum of $10,000. Furthermore, the Government limited its damages claim to $58,151 of the total of $331,078 in damages sustained. This lower figure reflected the difference between the amount the clinic received and the amount it would have been entitled to if it were a qualified PTIP provider, which it was not.

The court observed that the fact that the penalties and damages requested by the Government and ultimately entered by the court were far below the amounts that could have been imposed supported the conclusion that the judgment was not grossly disproportionate to the gravity of Mackby's offense. Federal courts have consistently found that civil penalty awards below the statutory maximum do not violate the Excessive Fines Clause.

Although Mackby conceded that the judgment imposed was far less than the maximum permitted under the FCA, he argued that the FCA does not unilaterally permit the Government to determine the amount of the damages and penalties sought, and contended that the Government had abused its prosecutorial discretion. The court found that the import of these contentions was not clear. While an FCA plaintiff may request an amount certain in penalties and damages, the court determines the actual amount of the award. Therefore, the court ruled that the relation between the amount of the judgment imposed and the maximum that could have been imposed weighed in favor of the Government.

In assessing the third factor, whether the forfeiture is grossly disproportionate to the gravity of the offense, the court noted that the Government's actual loss must be considered. The Government paid $331,078 in Medicare claims improperly bearing the physician identification number of Mackby's father. Had his claims been truthful, Mackby would have been entitled to nothing. However, as noted above, the Government voluntarily limited its claimed loss to $58,151.

Nevertheless, Mackby argued that the Government incurred no loss because all the patients for whom he submitted claims actually received physical therapy services. Indeed, Mackby contended that he actually saved the Government money, because if the patients had gone to another rehabilitation center, Medicare would have paid the reasonable costs of physical therapy without imposing a cap on Medicare payments.

The court rejected these arguments, noting that the measure of the Government's damages is not a function of the value of the underlying services provided nor the amounts that it would have legitimately paid to another authorized provider. Instead, the measure of damages is the amount the Government paid in response to the false claims. Even if the services were provided as described, they were not reimbursable because Mackby was not a qualified provider and used false information to make it appear that they were eligible for reimbursement. Mackby's argument, the court ruled, was a transparent attack on the court's finding of liability, which was specifically addressed and affirmed on appeal. Therefore, the court found no merit in Mackby's contention that the Government was unharmed by his FCA violations.

Applying the fourth factor, the court considered the amount of the judgment in relation to the gravity of the offense. Mackby characterized his conduct as a "mere billing technicality" involving "arcane Medicare billing rules." Indeed, he suggested that he should never have been found liable under the FCA, and in his briefs consistently presented terms such as "offense," "violation," "misrepresentation," and "wrongdoing" in quotation marks. In Mackby's view, "any penalty in excess of $5,000 in this case would constitute an excessive fine."

The court found these contentions without merit, noting that the Ninth Circuit had finally resolved the issue of Mackby's culpability, and that the law of the case doctrine forbade reconsideration of that issue. Despite Mackby's protestations to the contrary, his submission of false claims was a serious offense, which undermined public confidence in the Government's ability to manage its programs. It was clear from the record that Mackby submitted thousands of false claims over the course of four years.

Furthermore, the court found that the full amount of the judgment previously imposed was necessary and appropriate for purposes of deterrence. Mackby's recalcitrant denial of any wrongdoing and his unwillingness to accept responsibility for his own actions simply underscored the propriety of the judgment entered. Given Mackby's attitude, the court found his assertion that a $5,000 fine would be an adequate deterrent absurd.

Finally, the court denied Mackby's request for an offset of $100,000 for services purportedly provided to Medicare patients in 1996. Although the court suggested that this request was without merit, it was in any case beyond the scope of the present action, as Mackby had failed to exhaust his administrative remedies.

In conclusion, the court stressed that Mackby engaged in serious, ongoing and deliberate misconduct, not a mere technical violation. His continuing refusal to accept responsibility for his actions underscored the need for a sizable deterrent judgment. The court found that the damages and penalties previously entered were not grossly disproportionate to the gravity of the offense, and thus did not violate the Excessive Fines Clause of the Eighth Amendment. Therefore, the court ordered that the judgment should remain as previously entered, and directed the clerk to close the file.

Rule 9(b)

***U.S. ex rel. Schuhardt v. Washington University*, No. 4:99-CV-1202 (E.D. Mo. Aug. 20, 2002)**

See "FCA Liability/False Certification" above at page 4.

***U.S. ex rel. Coppock v. Northrop Grumman Corp.*, 2002 WL 1796979 (N.D. Tex. Aug. 1, 2002)**

***U.S. ex rel. Atkinson v. Pennsylvania Shipbuilding Co.*, 2002 WL 2014135 (E.D. Pa. Aug. 30, 2002)**

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" above at pages 5, 18.

***Shekoyan v. Sibley International Corp.*, 217 F. Supp. 2d 59 (D.D.C. Aug. 16, 2002)**

See "Section 3730(h) Retaliation Claims" above at page 26.

***U.S. v. Intrados/International Management Group*, No. 01-0769 (D.D.C. Aug. 2, 2002)**

See "Section 3731(b) Statute of Limitations" above at page 27.

__U.S. ex rel. Garst v. Lockheed-Martin Corp.__, 2002 WL 1794004 (N.D. Ill. Aug 2, 2002)

An Illinois district court dismissed a *qui tam* complaint with prejudice, ruling that it failed to satisfy both the particularity requirement of Rule 9(b), and Rule 8's requirement that it provide "a short and plain statement of the claim." Because the relator had failed to cure defects in the pleading despite several opportunities to do so, the court denied him further leave to amend.

Joseph Garst, a former employee of the U.S. Department of Veterans Affairs (VA), brought this *qui tam* action against the Lockheed-Martin Corporation and related entities, alleging that Lockheed defrauded the VA in connection with an office automation contract obtained by its subsidiary Lockheed Integrated Solutions Company. Garst amended his complaint several times, and his third amended complaint stated ten counts arising under the FCA. Lockheed moved to dismiss the third amended complaint on the grounds that it failed to plead fraud with particularity and failed to state a claim. In May 2002, the court directed Garst to file a more definite statement because it appeared that the complaint failed to comply with Federal Rules of Civil Procedure 8 and 9(b). Garst filed a more definite statement, and Lockheed supplemented its motion to dismiss.

Complaint Failed to Satisfy Rules 8 and 9(b)

The court granted Lockheed's motion, noting that the particularity requirement of Rule 9 in no way negates Rule 8's requirement that the complaint set forth "a short and plain statement of the claim." Taken together, the two requirements underscore the Rules' emphasis on clarity and brevity in pleading. Although Garst had amended his complaint several times, the court found that the third amended complaint suffered from many of the same defects as the earlier versions, and was "so needlessly prolix and confusing that it fail[ed] to comply with Rule 8." In the court's view, the complaint was an example of "shotgun" pleading, in which it was virtually impossible to know which factual allegations supported which claims for relief.

In the court's order directing Garst to file a more definite statement, the court instructed him to identify specific false claims or statements and connect them to specific claims for payment, and to explain briefly why the claims or statements were false. The court found that Garst's more definite statement failed to comply with these instructions. Although the relator offered reasons why he believed all the listed claims were false, he did not explain why each particular claim was false.

The court ruled that the third amended complaint could not serve as an orderly basis for litigation. Because the court had already afforded the relator several opportunities to amend his complaint to comply with the Federal Rules of Civil Procedure, it declined to grant him a further opportunity to amend. Accordingly, the court dismissed the third amended complaint with prejudice.

__U.S. ex rel. Campbell v. Lockheed Martin Corp.__, No. 6:95-cv-549-Orl-28 (M.D. Fla. Aug. 21, 2002)

A Florida magistrate judge recommended denial of the defendant's motion to dismiss a *qui tam* action for failure to plead fraud with particularity. The court ruled that where a complaint has specified the time, location, content, and individual perpetrators of a fraudulent scheme, it need not identify who made each false statement or misrepresentation or the particulars of each invoice or bill. However, the magistrate judge recommended dismissal of the relator's conspiracy allegations based on the intracorporate conspiracy doctrine.

In 1995, Albert Campbell filed two *qui tam* actions against his former employer, Lockheed Martin Corporation, and one of its predecessor corporate entities, Martin Marietta Corporation. In 1994 Lockheed entered into a contract with the Air Force to produce and deliver Low Altitude Navigation and Targeting Infrared for Night (LANTIRN) Systems to Saudi Arabia, Greece, and Bahrain (SGB contract). Campbell's first *qui tam* action was based on allegations that Lockheed knowingly failed to disclose cost or pricing data in connection with the LANTIRN SGB contract. His second *qui tam* action was based on allegations that Lockheed inflated billings or double billed by failing to track transfers of parts among a number of LANTIRN contracts, including the SGB contract. The two cases were subsequently consolidated, and Campbell amended both complaints in 1997. The action was stayed from 1997 to 2001 because of a parallel criminal investigation. In 2001 the Government intervened in the claims originally raised in Campbell's first *qui tam* action only, and filed its own complaint.

Lockheed moved to dismiss both of Campbell's complaints as well as two counts of the Government's complaint for failure to plead fraud with particularity. Lockheed also moved to dismiss two counts of Campbell's second complaint for failure to allege a "knowing" violation of the FCA, and two other counts in the same complaint for failure to allege essential elements of an FCA conspiracy claim.

Relator Need Not Identify Particulars of Each False Statement or Invoice

The magistrate judge recommended that Lockheed's motion to dismiss for lack of particularity be denied. Lockheed contended that the relator and the Government had failed to identify the individuals involved in the alleged fraud and the dates of the alleged fraudulent acts. Campbell replied that his complaints provided sixty-five pages of detailed description of fraudulent schemes covering nine contracts worth more than $4.5 billion. Similarly, the Government argued that it had met the particularity standard of Rule 9(b), which does not require a complaint to plead detailed evidentiary matter. Both Campbell and the Government argued that the details sought by Lockheed were peculiarly within Lockheed's own knowledge and control.

The magistrate judge noted that several district courts considering FCA allegations in complaints containing a similar level of detail have rejected motions to dismiss under Rule 9(b). In the case at bar, the relator and the Government had pointed to specific parties, contracts, and fraudulent acts, and accused specific corporate officials of participating in the alleged fraud. The magistrate judge ruled that this was sufficient to satisfy Rule 9(b), stating that "the complaint does not have to identify each false statement or misrepresentation." The Government had identified specific Lockheed employees who allegedly failed to disclose cost data and billed the Air Force for obsolete parts that the Government had refused to fund. Because the relator and the Government had sufficiently alleged the time, location, content and perpetrators of the fraudulent schemes, the court held that they did "not need to allege the particulars of each invoice or bill."

Relator Satisfied FCA's Scienter Requirement

The court also rejected Lockheed's motion to dismiss two counts of Campbell's second complaint for failure to allege a "knowing" violation of the FCA. Lockheed contended that Campbell alleged merely that its computer systems failed to accurately track transfers of parts from one contract to another, which, the company claimed, did not amount to a "knowing" violation. Pointing to specific language in the second complaint, Campbell replied that he did allege that Lockheed knowingly submitted false claims.

The magistrate judge observed that the scienter requirement under the FCA is lower than the corresponding requirement at common law. The court found that the relator's allegations that the false billings resulted from the defendant's "conscious dereliction" in failing to correct cost accounting inaccuracies satisfied this relaxed scienter requirement. Accordingly, the magistrate recommended that these counts not be dismissed.

Intracorporate Conspiracy Doctrine Applies to FCA

However, the magistrate judge recommended that the conspiracy allegations of Campbell's second complaint be dismissed. Campbell alleged that Lockheed and Martin Marietta conspired with each other and other persons prior to 1991 to submit false claims and conceal the failure of the accounting system to track costs. However, Lockheed pointed out that Lockheed Martin was not formed until 1994 and thus could not have participated in a conspiracy with Martin Marietta prior to that date. Moreover, Lockheed maintained, assuming arguendo that the alleged co-conspirators were employees of Lockheed (or its predecessor), the conspiracy claims would still fail because, under the intracorporate conspiracy doctrine, a corporation's agents or employees cannot conspire among themselves or with the corporation. Campbell replied that the Eleventh Circuit had recognized an exception to the intracorporate conspiracy doctrine in criminal cases, and that this exception should be extended to civil conspiracy cases.

The court disagreed with Campbell's interpretation, noting that the cases on which he relied had been overruled. The court could find no cases extending to civil conspiracies the exception to the intracorporate conspiracy doctrine for criminal conspiracies. Furthermore, in his conspiracy counts Campbell had not expressly alleged an agreement among the parties. Therefore, the magistrate judge recommended the conspiracy counts be dismissed.

U.S. ex rel. Schell v. Battle Creek Health System*, 2002 U.S. Dist. LEXIS 18063 (W.D. Mich, Sept. 17, 2002)

A Michigan district court granted in part and denied in part motions to dismiss a *qui tam* complaint pursuant to Rule 9(b). The court denied a motion to dismiss claims that one defendant overcharged for anesthetic medications, but granted that defendant's motion to dismiss claims that it improperly charged for anesthesiologists' services. The court also granted the motion of a second defendant to dismiss all claims against it.

Thomas Schell worked from 1991 to 1999 as a certified registered nurse anesthetist for Battle Creek Health System. In 1999 Battle Creek dismissed Schell. Schell then brought a *qui tam* action against Battle Creek and Mercy Health Services, which owns Battle Creek and a number of other Midwestern hospitals. Schell alleged that the defendants overcharged the Government for anesthetic medications by charging for a full multi-dose vial every time a single dose was administered. He also alleged that the defendants mischarged for anesthesiologists' time because the anesthesiologists did not comply with the requirements for medical direction of anesthesia services. In 2000 the Government declined to intervene, and in 2001 the complaint was served on the defendants. Both defendants moved to dismiss for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

Overcharging Allegations Against Battle Creek Sustained

The court denied Battle Creek's motion to dismiss Schell's claims that it overcharged for multi-dose vials of anesthetic medications. The court noted that Schell identified specific patients who received a single dose of medication although the Government was billed for a full vial containing multiple doses. The bills Schell identified described the time, place, and content of the alleged false claims submitted to the Government. Moreover, Schell's allegations supported his assertion that Battle Creek submitted the false claims knowingly. Schell alleged that once a vial had been opened, Battle Creek generally kept the vial and administered the additional doses of medication to other patients. However, when the hospital was being audited, Schell alleged, nurse anesthetists were instructed to discard any partially used vials, presumably to hide them from auditors.

Allegations of Improper Billings for Anesthesiologists' Services Dismissed

However, the court dismissed Schell's allegations that Battle Creek improperly billed the Government for the services of anesthesiologists. The court ruled that Schell had failed to plead with particularity that Battle Creek intended to defraud the Government in these bills. Battle Creek did not attempt to hide its practices for billing for anesthesiologists' time, as it allegedly hid its practices for billing anesthetic medications. Therefore, the court ruled that Schell failed to plead these allegations with particularity.

Allegations Against Mercy Dismissed

The court also dismissed all of Schell's allegations against Mercy. While Schell pointed to specific bills to support his allegations against Battle Creek, he merely alleged "upon information and belief" that Mercy engaged in similar practices. Because Schell failed to specify the time, place, and content of the alleged false claims that Mercy submitted to the Government, the court granted Mercy's motion to dismiss the allegations against it for lack of particularity.

U.S. ex rel. Wilson v. Graham County Soil & Water Conservation District, *2002 WL 31104581 (W.D.N.C. Sept. 19, 2002)*

A North Carolina district court granted in part and denied in part motions to dismiss a *qui tam* complaint pursuant to Rules 9(b) and 12(b)(6). The court held that the relator had alleged false claims under the Federal Emergency Watershed Program and the Farm Services Agency Programs with sufficient particularity, but dismissed the relator's other allegations on the grounds that they were too general to satisfy Rule 9(b). The court also dismissed claims against individual defendants in their individual capacities, but declined to dismiss claims against them in their official capacities.

Karen Wilson, a former employee of the Graham County Soil and Water Conservation District, brought this *qui tam* action in 2001 against her former employer and other municipal entities, as well as a number of individuals. Wilson alleged that the defendants submitted false claims to the Government through the Emergency Watershed Protection Program (EWP) and the Farm Services Agency Program (FSA). She also asserted a claim for retaliation in violation of § 3730(h). The municipal defendants moved to dismiss based on common-law municipal immunity to punitive damages, and in March 2002, a magistrate judge recommended that this motion be granted. *See* 2002 WL 487162, 26 TAF QR 6 (Apr. 2002). However, in an unpublished memorandum and order filed in May 2002, the court denied the motions to dismiss based on municipal immunity as to all defendants and granted Wilson's motion to amend her complaint. Nevertheless, the court dismissed Wilson's action for retaliatory discharge based on the statute of limitations. In June 2002, Wilson filed a second amended complaint. Several defendants moved to dismiss pursuant to Rules 9(b) and 12(b)(6). Wilson moved for reconsideration of the dismissal of her retaliation claim, or in the alternative, for certification of the May 2002 memorandum and order for appeal.

Relator Satisfied Rule 9(b) in Specific Claims

The court denied the defendants' motions to dismiss Wilson's allegations of fraud under the EWP and FSA. With regard to the these allegations, Wilson specified the time period and contents of the alleged misrepresentations, the dates on which requests for payment were made and checks were issued, the specific meetings and offices where the alleged false claims were made, and the identities of the perpetrators. Her allegations regarding the defendants' motives and the benefits that they obtained were more general, but the court ruled that this was sufficient, as the motive and benefit gained are the type of information that is in the exclusive control of each defendant.

However, Wilson also made further, more general allegations of FCA violations that did not specify the time, place, and nature of the false claims. The court dismissed these claims pursuant to Rule 9(b), because they were not stated with sufficient particularity.

Rule 12(b)(6) Motions

The court next addressed the defendants' Rule 12(b)(6) motions. The defendants argued that Wilson had failed to state a claim in her allegations of fraud under the EWP and FSA, and had failed to allege injury in fact to the Government and personal benefit to the defendants. The court rejected these arguments. Wilson had properly alleged all the required elements of her false claims causes of action based on the EWP and FSA fraud allegations. Moreover, the court ruled, injury in fact is not a required element in an FCA action, as the plaintiff need not show that the Government suffered actual damages. Finally, the court noted that Wilson did allege in general terms that the defendants personally benefited from their actions.

However, the court agreed with the arguments of several of the individual defendants that claims against them in their individual capacities should be dismissed under Rule 12(b)(6). The court held that individual liability under the FCA must be pleaded with specificity and cannot be based exclusively on inserting the words "individual capacity" into the complaint. Nevertheless, the court did not dismiss claims against these defendants in their official capacities.

The court denied a motion by one of the defendants to dismiss Wilson's conspiracy claim against him pursuant to Rule 12(b)(6). The court noted that Wilson had properly alleged that the defendant conspired with other persons to get a false claim paid or approved, and that one or more conspirators performed an overt act in furtherance of the conspiracy.

Court Certifies for Appeal its Decision on Statute of Limitations for Retaliation Claims

The court then turned to Wilson's motion for reconsideration or (alternatively) certification for interlocutory appeal of its May 2002 ruling on the statute of limitations. In that ruling, the court followed *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), which held that in retaliation claims under § 3730(h), the applicable statute of limitations is taken from the most closely analogous state statute. Because North Carolina's statute of limitations for wrongful discharge bars claims brought more than three years after the date of discharge, the court held that Wilson's retaliation claim was time-barred.

However, Wilson urged the court to reconsider this ruling in light of *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431 (E.D. Va. 2002), 27

TAF QR 17 (July 2002), which held that the six-year statute of limitations set forth in § 3731(b) applies to retaliation claims arising under § 3730(h). The court declined to follow *Storey* and denied Wilson's motion for reconsideration. Nevertheless, the court granted certification of this issue for interlocutory appeal. The court noted a difference of opinions among the courts of appeals on this question. Although the Ninth Circuit, in *Lujan*, held that the most closely analogous state statute of limitations applies, the Seventh Circuit, in *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), like the *Storey* court, held that a six-year statute applies. Under the rule in Lujan, Wilson's claim was time-barred, while under the rule of *Neal* and *Storey*, it was timely. Therefore, because this issue involved a controlling question of law as to which there is substantial ground for difference of opinion, and immediate appeal could materially advance the ultimate termination of the litigation, certification for interlocutory appeal was appropriate.

***Caruso v. St. Jude Children's Research Hospital, Inc.*, 215 F. Supp. 2d 930 (W.D. Tenn. July 9, 2002)**

In July 2002, a Tennessee district court granted summary judgment to the defendants in a case that raised, *inter alia*, claims of retaliation in violation of § 3730(h). June Caruso was employed in January 2000 as a post-doctoral research associate in the Department of Radiation Oncology at St. Jude Children's Hospital. Caruso was not credentialed or granted clinical privileges, and all of her clinical activities were under the direct supervision of the attending supervision. Almost from the beginning of her employment, Caruso made repeated complaints about what she perceived to be gross medical mistreatment of patients at St. Jude. According to St. Jude officials, Caruso repeatedly violated institutional policy by sending confidential patient information outside the institution on a regular basis, refusing to follow instructions regarding interactions with patients, and countermanding orders of the attending physician. After repeatedly warning Caruso both orally and in writing, the hospital relieved her of her clinical responsibilities. According to the hospital, Caruso nevertheless continued to treat patients, and in August the hospital terminated her employment for insubordination and disclosure of patient confidential information.

Caruso sued St. Jude's in 2001, asserting state law claims of defamation, outrageous conduct, and retaliatory discharge. In 2002 Caruso amended her complaint, adding a host of federal claims, including a claim for retaliation in violation of § 3730(h). St. Jude moved for summary judgment on all claims.

The court granted the hospital's motion. The court's discussion of Caruso's FCA claim was brief. The court noted that in her opposition to St. Jude's motion, Caruso made no arguments in support of her FCA claim. Accordingly, the court granted summary judgment to the hospital on that claim, because Caruso failed to "point to any evidence in the record showing that she in any way participated in the filing of an action under the False Claims Act."

***U.S. ex rel. Goodstein v. McLaren Regional Medical Center*, 2002 U.S. Dist. LEXIS 15700 (E.D. Mich. July 9, 2002)**

In July 2002, a Michigan district court granted the Government's motion to amend its complaint in a *qui tam* action. Peter Goodstein and Charles Grossman brought this action in 1997 against Family Orthopedic Associates, P.L.C. (FOA), Family Orthopedic Realty, L.L.C. (FOR), and McLaren Regional Medical Center. In 2000, the Government elected to intervene and filed a complaint.

FOA is a professional limited liability company that employs nine physicians who provide orthopedic services. FOR is a limited liability company that owns the building where FOA provides its services. FOR also leases space in that building to other entities, including McLaren, a health care facility that provides physical therapy. The Government alleged that McLaren paid the FOA physicians, through FOR, remuneration in the form of a lease at above-market rates, in exchange for referrals of Medicare patients. This financial arrangement, the Government alleged, violated the Stark II statute, 42 U.S.C. § 1395nn(a)(1), and the anti-kickback statute, 42 U.S.C. § 1320a-7b.

The Government moved to amend its complaint, explaining that it had become aware that only five of the physician members of FOA were also members of FOR. Thus, the

Government sought to remove FOA as a defendant, and to substitute the five individual physicians. FOA and FOR did not oppose removing FOA as a defendant, but they objected to the substitution of the individual physicians. They argued that the individual physicians would be prejudiced by the application of judicial estoppel and by the rapidly approaching cutoff date for discovery.

The court rejected the defendants' arguments and granted the Government's motion. The court noted that Fed. R. Civ. P. 15(a) provides that leave to amend should be freely granted when justice so requires, and that a motion for leave to amend will generally not be denied absent a significant showing of prejudice to the opposing side. The court observed that it had declined to invoke the doctrine of judicial estoppel in this case, and therefore the defendants would suffer no prejudice in that respect. Moreover, in response to the defendants' argument about the discovery cutoff date, the court stated that it would consider a request by the defendants to extend discovery.

<u>U.S. ex rel. Sanders v. Allison Engine Co.</u>, No. C-1-95-970 (S.D. Ohio July 26, 2002)

In July 2002, a federal magistrate judge in Ohio recommended that the relators' motion for partial summary judgment be granted in a *qui tam* action based on allegations that the defendant misrepresented its cost savings in an engineering change proposal submitted to the Government. Allison Engine Co. contracted to provide generator sets to the Navy. In 1993 Allison submitted an engineering change proposal requesting a change from the AG9130 generator sets to a different model, the AG9140. The proposal form required Allison to disclose its estimated costs and savings, and Allison wrote: "The recurring costs of the AG9140 remain unchanged from those of the AG9130." The Navy approved the change proposal.

Roger Sanders and others filed a *qui tam* action against Allison and other defendants, alleging that the company's written statement was false, and that the engineering change resulted in a savings of approximately $74,000 per unit. The relators moved for partial summary judgment as to Allison on the allegations of submission of false claims relating to recurring costs on the AG9140.

The magistrate judge recommended that the motion be granted. A number of internal Allison memoranda indicated that company official knew that the manufacturing costs for the redesigned units would decrease substantially. Although Allison may not have known the precise amount of the decrease before the Navy accepted the design change, the magistrate ruled that this did not create an issue of fact sufficient to overcome summary judgment.

The magistrate rejected Allison's argument that the anticipated lower costs resulting from the redesign would be offset by other cost increases and a possible production gap. The court found no proof of any substantial offset or production gap. Accordingly, the magistrate found that there was no disputed issue of material fact and recommended that summary judgment be granted.

The magistrate pointed to three provisions in the Federal Acquisition Regulations that mandated disclosure of the cost reductions. FAR 52.215-24 requires a contractor to certify its cost data when any change involves a price adjustment expected to exceed $500,000 over the life of the contract. FAR 52.215-22 requires a contract modification to reflect a reduced price if misinformation was furnished relative to costs. DFAR 252.243-7000 requires the submission of all data that would enable the Government to determine the "total impact" of a design change.

The magistrate also rejected Allison's attempt to invoke an estoppel defense, ruling that the relators had not taken an inconsistent position in a different action, and that the court had not accepted any inconsistent arguments purportedly raised by the relators in the present action. Accordingly, because Allison breached its duty to disclose ongoing costs and misrepresented the facts regarding those costs, the magistrate recommended that summary judgment be entered in favor of the relators.

Sweigert v. Control Data Systems, Inc., 2002 WL 1792186 (6th Cir. Aug 2, 2002)

In August 2002, the Sixth Circuit, in an unpublished opinion, affirmed the dismissal of a pro se § 3730(h) retaliation claim for lack of venue. D.G. Sweigert, an Indiana resident, was employed as a consultant by Techaid, an engineering firm, and was assigned in early 1994 to Control Data Systems, Inc., a defense contractor, at Control Data's Ohio facility. According to Sweigert, his supervisor Randy Baker became "suspicious" when he learned that Sweigert was prosecuting two whistleblower lawsuits. Sweigert was transferred to North Carolina, and on April 8 his employment was terminated. Sweigert subsequently obtained a copy of his security background investigation from the Defense Department Securities Services in Baltimore and learned that on April 10 the Department received unfavorable information about him from a Control Data officer.

Sweigert first filed suit in federal court in Maryland, but that action was dismissed without prejudice in 2000 for failure to effectuate service of process upon the defendants. Sweigert then filed suit in the Eastern District of Kentucky. Noting that the events giving rise to Swigert's complaint occurred in Maryland, Ohio, North Carolina, and other undisclosed locations, but not in Kentucky, the Kentucky district court dismissed for lack of venue. Sweigert appealed.

The Sixth Circuit affirmed, noting that venue is proper in a judicial district in which a substantial portion of the events giving rise to the claim occurred. Because Sweigert did not allege that any of the events occurred in Kentucky, the district court did not abuse its discretion in dismissing the complaint.

Hayes v. Danarb Food Group, 2002 WL 1822897 (6th Cir. Aug. 7, 2002)

In an unpublished opinion issued in August 2000, the Sixth Circuit affirmed a district court's denial of leave to amend to add a claim for retaliation under the FCA. Terry Hayes, a former assistant manager at an Arby's restaurant in Louisville, Kentucky, alleged that his former employer filed a claim with its insurance company to pay for an air conditioner that was damaged in a storm. Hayes further alleged that his employer fired him after he contacted the insurer to report what he considered to be a fraudulent claim. Acting pro se, Hayes filed suit against his former employer. He did not cite any federal law in his original complaint, but invoked the Whistleblower Protection Act of 1989 and the Americans with Disabilities Act in his amended complaint. The defendants moved to dismiss, and Hayes moved to amend his complaint a second time in order to add claims under the Rehabilitation Act of 1971 and the whistleblower protection provisions of the FCA. The district court denied Hayes' motion to amend as futile and dismissed the case for failure to state a claim. Hayes appealed only the district court's denial of his motion to add a claim under the whistleblower protection provision.

The court of appeals affirmed, ruling that the district court properly denied Hayes' motion to amend. The court ruled that Hayes had no claim under the whistleblower protection provision of the FCA because the FCA only addresses fraud against the Federal Government.

***Larry D. Barnes, Inc. v. United States*, 2002 WL 1890798 (Fed. Cir. Aug. 14, 2002)**

In August 2002, the Federal Circuit affirmed a decision of the Court of Federal Claims finding a contractor liable to the Government under the False Claims Act. Larry D. Barnes, Inc., doing business as Tri-Ad Constructors, obtained a federal contract for the replacement of underground water lines. Arguing that it encountered more underground utility obstructions than anticipated, Tri-Ad sued the Government for an equitable adjustment. The Government counterclaimed pursuant to the Forfeiture of False Claims Act, the Contract Disputes Act anti-fraud provision, and the False Claims Act. The Court of Federal Claims found that if Tri-Ad had attended the pre-bid site inspection attended by other bidders, it would have known to expect more underground obstructions than it claimed it anticipated. Because it found that Tri-Ad's interpretation of the contract was unreasonable, and Tri-Ad's claims were barred by accord and satisfaction, the court rejected Tri-Ad's claim for an equitable adjustment. Furthermore, the court found in favor of the Government on each of its three counterclaims. Tri-Ad appealed.

In an unpublished opinion, the Federal Circuit affirmed. The court of appeals found no errors of law or clearly erroneous findings of fact in the ruling of the Court of Federal Claims. With regard to the Government's FCA counterclaim, the court of appeals noted that Tri-Ad's claim for payment rested on its assertion that it expected to use a trenching machine on the project rather than a (much more time-consuming) backhoe. However, the evidence at trial indicated, and the trial court found, that Tri-Ad in fact planned to use a backhoe. The court of appeals ruled that this finding was not clearly erroneous.

Moreover, the court of appeals agreed with the trial court that Tri-Ad's conduct satisfied the intent requirements of § 3729. Tri-Ad refused to verify its claim after being put on notice that several items were unfounded, and refused to document the added costs claimed. Ruling that Tri-Ad's conduct demonstrated (at the very least) its reckless disregard of the truth or falsity of its claims, the Federal Circuit affirmed the trial court's imposition of FCA liability.

***U.S. ex rel. Gilbert v. Bay Area Rapid Transit District*, 2002 WL 1891310 (9th Cir. Aug. 16, 2002)**

In August 2002, the Ninth Circuit affirmed the dismissal of a *qui tam* action pursuant to the public disclosure bar. Herbert Gilbert sued the Bay Area Rapid Transit District (BART) and others, alleging that the defendants submitted false information to the Government about BART's ability to run more frequent trains safely. The district court dismissed Gilbert's complaint, finding that it was based on prior public disclosures and that Gilbert was not the original source of the information on which his allegations were based. Gilbert appealed pro se.

In a brief unpublished decision, the court of appeals affirmed. The court noted that under

Ninth Circuit precedent, information revealed in prior litigation is considered to be publicly disclosed, and that a relator cannot be the original source of allegations that are based purely on speculation and conjecture. Therefore, the court ruled, the district court properly dismissed Gilbert's complaint for lack of subject matter jurisdiction.

U.S. ex rel. Dingle v. Bioport Corp., No. 5:00-CV-124 (W.D. Mich. Aug 29, 2002)

In August 2002, a Michigan district court denied a motion to dismiss a *qui tam* action based on allegations that the defendants submitted false claims in connection with a contract for the production of anthrax vaccine. Russell Dingle and Thomas Rempfer served in the Connecticut Air National Guard, where they worked on a military research team investigating the anthrax vaccine and its safety for human use. In October 2000, acting pro se, they filed a *qui tam* action under seal against Bioport Corporation and its chief executive officer Robert Myers. Bioport acquired federal anthrax vaccine contracts in September 1998 from the Michigan Biologic Products Institute (MBPI), which was formerly the Biologic Products Division (BPD) of the State of Michigan's Department of Public Health. The complaint alleged that Bioport's predecessors failed to disclose changes in manufacturing processes and equipment after the original process and equipment had been approved by the Government, rendering every invoice submitted false. In September 2001 the Government declined to intervene and the complaint was unsealed. The defendants moved to dismiss on various grounds.

The court denied the defendants' motion. It rejected the defendants' assertion that service of process was not timely, noting that the plaintiffs were well within the time requirement. It also rejected the defendants' argument that the plaintiffs had failed to plead subject matter jurisdiction, noting that the FCA does not require plaintiffs to plead specific subsections of the Act when bringing a claim.

The court also generally rejected the defendants' argument that the relators failed to comply with Fed. R. Civ. P. 9(b), noting that the complaint alleged that because Bioport's predecessors failed to disclose changes in their manufacturing processes and equipment, every claim they submitted was false. However, during oral argument, the defendants stated that the Government had in fact ratified the changes. The relators disagreed, but the court ruled that the relators were required to allege with particularity the specific dates of the changes, as well as the dates, if any, that the Government had notice of those changes. Thus, the court required the relators to amend the complaint to comply with this requirement.

The court rejected the defendants' contention that the statute of limitations barred the relators from raising any claims arising prior to October 1994. The defendants argued that the six-year limitations period of § 3731(b)(1) applied, but that the three-year tolling provision of § 3731(b)(2) was inapplicable because the Government had not intervened. The court disagreed, noting that subsection (b)(2) does not restrict its application solely to cases brought directly by the Government, and does not draw any distinction between private and government plaintiffs. Moreover, the court reasoned, because a *qui tam* relator is a partial assignee of the Government, a relator should share in the Government's ability to avail itself of the extended statute of limitations.

The court rejected the defendants' argument that the relators had failed to state a claim, noting that the complaint alleged that the defendants knowingly submitted nonconforming goods to the Government. The court also observed that in *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409 (6th Cir. 2002), 27 TAF QR 6 (July 2002), the court of appeals held that liability may be imposed based on a theory of false implied certification for failure to comply with a continuing legal duty even if the claim was not false at the time it was submitted. Such a theory formed an alternative basis for recovery in the instant action. The court also ruled that the relators had properly stated claims for conspiracy in violation of the FCA.

Finally, the court ruled that the relators had properly alleged that the defendants had incurred liability as successors to MBPI or BPD. The defendants argued that Bioport had not assumed the liabilities of its predecessors, and that those predecessors enjoyed sovereign immunity as state agencies. The court disagreed, noting that a novation agreement between Bioport and MBPI provided that Bioport assumed the government contracts at issue "as if the Transferee were the original party to the contracts," and "ratifie[d] all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee." Therefore, the court ruled, Bioport had affirmed and adopted the acts of MBPI and BPD as if Bioport itself had performed those acts, and could not rely on sovereign immunity to avoid liability arising from those acts. Accordingly, the court denied the defendants' motion to dismiss, but directed the relators to amend their complaint to comply with Rule 9(b) as discussed above.

<u>U.S. ex rel. Phillips v. Pediatric Services of America, Inc.</u>, 2002 WL 31121974 (W.D.N.C. Sept. 11, 2002)

In September 2002, a North Carolina district court denied a joint motion of the parties in a *qui tam* suit for an indicative ruling. In 1997 Linda Phillips brought this action, alleging that the defendants submitted false Medicare claims for home oxygen therapy, and that she was unlawfully discharged for her acts taken in furtherance of her *qui tam* suit. In March 2001, the court granted the defendants' motions for summary judgment and dismissed the action. *See* 142 F. Supp. 2d 717 (W.D.N.C. 2001). Phillips appealed, and her appeal remains pending. Meanwhile, after mediation, the parties reached an agreement in principle to settle the case, and the Government agreed to the settlement on the condition that the parties file a motion for an indicative ruling that the court would grant a Rule 60(b) motion for modification of its March 2001 order. The parties requested that the district court either vacate that order in its entirety or modify it by deleting its discussion of whether the submission of Certificate of Medical Necessity (CMN) forms completed by the oxygen therapy provider but signed by the physician and containing no false information violated the False Claims Act.

The court denied the motion, ruling that the parties had mischaracterized its March 2001 ruling. The court did not hold that the submission of previously prepared CMN forms does not violate the FCA so long as the information contained therein is not false. Rather, the court held that the plaintiff had not presented sufficient evidence to withstand summary judgment and had failed to specify the regulations that she claimed had been violated. Therefore, the court saw no need to modify or vacate its earlier order.

***U.S. ex rel. Bidani v. Lewis*, 2002 WL 31103459 (N. D. Ill. Sept. 19, 2002)**

In September 2002, an Illinois district court ruled on nineteen pending motions in a *qui tam* action. In 1997, Dr. Anil Bidani brought this action against Dr. Edmund Lewis and two companies he controlled, alleging that Lewis, in violation of Medicare regulations, used related corporate entities to obtain excessive Medicare reimbursements for kidney dialysis supplies. The Government declined to intervene. In January 2002, on cross-motions for summary judgment, the district court granted judgment for the defendants based on an advice of counsel defense. *See* 2001 WL 32868 (N.D. Ill. Jan. 12, 2001), 22 TAF QR 10. However, on the relator's motion for reconsideration, the court reinstated an unlawful discount claim, as there was no dispute that Lewis' company American Medical Supply Corporation (AMS) purchased dialysis supplies at a discount but billed the Government for the list price, and it could be inferred that Lewis was aware that such discounts were illegal remuneration absent disclosure. *See* 2001 U.S. Dist. LEXIS 9204 (June 28, 2001). Later that year the court granted in part and denied in part the relator's motion to for leave to file an amended complaint. *See* 2001 U.S. Dist. LEXIS 20947 (Dec. 13, 2001).

Although a summary judgment motion was pending, nineteen old evidentiary motions were still pending as well, and in its September 2002 ruling, the court now chose to resolve those motions. The court denied the relator's motion to bar the testimony of Lewis' former attorneys. The court ruled that Lewis' state of mind was a central issue in the case, and the attorneys' testimony as to what they believed the law required was relevant to the issue of what advice they may have given the Lewis.

The court also denied the relator's motion to bar testimony regarding Lewis' competence as a scientist was denied, but only to the extent that it was relevant to Lewis' state of mind, insofar as he may have been devoted largely to practice and research, and may have relied on the advice of others in making business decisions. Further, the court denied the relator's motion to bar the testimony of other witnesses, including the relator and his attorney.

The court denied the relator's motion to strike affirmative defenses. The court was unwilling to rule on this issue based on the sketchy presentations in the motion papers, but stated that it would revisit this issue upon the filing of fuller briefs and supplemental materials.

The court also granted in part and denied in part a number of motions by the defendants to bar certain evidence, including references to prior litigation, as well as the defendants' motion to bar any suggestion that the relator's counsel represented the Government. The court expected to explain to the jury what a *qui tam* action is, but barred the parties from suggesting that the Government had any position on the merits of the case.

The court granted motions by the defendants to exclude references to the identity or state of mind of any patient, as well as evidence of Lewis' personal income and the overall profits of AMS. However, the court ruled that the jury was entitled to know that Lewis owned AMS, and that it submitted claims to Medicare for very large amounts. Finally, the court granted a number of unopposed evidentiary motions by the defendants, including motions to exclude references to the property, marital status, or family affairs of any witness or party, to exclude the testimony of any witness not previously disclosed.

***Kinney v. County of Hennepin*, 2002 WL 31163092 (D. Minn. Sept. 25, 2002)**

In September 2002, a Minnesota district court denied a motion for sanctions against relator's counsel in a *qui tam* action. In 1997 James Kinney brought a *qui tam* action (*Kinney I)* against Hennepin County Medical Center (HCMC) and others, alleging that the defendants billed Medicare and Medicaid for medically unnecessary ambulance services. In January 2001, the district court dismissed HCMC from the lawsuit based on the common-law presumption against awarding punitive damages against a governmental entity. *See United States ex rel. Kinney v. Hennepin County Medical Center*, 2001 WL 930780 (D. Minn. 2001). Kinney then filed a second action, *United States ex rel Kinney v. Stoltz*, Civ. No. 01-1287 (D. Minn.) (*Kinney II*), naming four individual employees of HCMC as defendants. The defendants moved to dismiss based on the public disclosure bar, arguing that the second action was based on information produced during discovery in the first action. Before the court could rule on this motion, Kinney filed an amended complaint adding Hennepin County as a direct defendant, arguing that because the county had undertaken to indemnify the individual defendants, it had waived its immunity and could thus be sued as a person under the FCA. In April 2002, the district court in *Kinney II* struck Kinney's amended complaint for failure to seek leave of court pursuant to F. R. Civ. P. 15(a), and dismissed Kinney's claim against the individual defendants based on the public disclosure bar. *Kinney II* is currently on appeal to the Eighth Circuit.

Meanwhile, Kinney filed the current lawsuit, his third, seeking a judicial declaration that because Hennepin County undertook to indemnify its employees, it had waived immunity and could now be sued under the FCA. On June 3, 2002, Hennepin County moved to dismiss, and also informed Kinney in writing that it intended to seek Rule 11 sanctions if the complaint was not withdrawn. On June 11, Hennepin formally served its Rule 11 motion on relator's counsel, thus triggering the 21-day safe harbor provision under Rule 11(c)(1)(A). On July 11, nine days after the safe harbor period expired, Kinney filed a notice of voluntary dismissal pursuant to Rule 41(a)(1). Thereupon the court directed the parties to brief the issue whether the court retained jurisdiction over the Rule 11 motion after the case was dismissed.

After reviewing the briefs, the court concluded that it retained jurisdiction to entertain the sanctions motion, but nonetheless denied the motion. Because neither an answer nor a summary judgment motion had been filed, the plaintiff was entitled to file his notice of dismissal, terminating the action without prejudice. Nevertheless, under *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), the filing of a notice of dismissal does not divest the district court of jurisdiction over a Rule 11 motion, which is a collateral issue. Moreover, the court ruled, the 1993 revisions to Rule 11 did not overrule *Cooter*.

Nevertheless, the court declined to award sanctions. The court took into account the fact that the plaintiff ultimately did dismiss his complaint, and found that his minor delay in dismissing outside the 21-day period was *de minimis*. However, the court issued a strong cautionary warning to the plaintiff on the need to comply with Rule 11.

FCA News

GOVERNMENT ARGUES VIOLATION OF ANTIKICKBACK STATUTE MAY GIVE RISE TO FCA LIABILITY

On August 7, 2002, the Government submitted a Second Statement of Interest on Defendants' Motion to Dismiss in *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, No. 99-3304 (D.D.C.). This case, which is one of several pending in multidistrict litigation against HCA, is a declined *qui tam* action in which the relators allege that the defendants' violation of the Antikickback Statute and the physician self-referral provisions of the Medicare Statute (Stark II) rendered certain claims for reimbursement false or fraudulent under the FCA. In April 2001, the defendants moved to dismiss on various grounds, and in October 2001, they submitted a new brief arguing that violation of the Antikickback Statute does not render subsequent claims for payment false under the FCA. The Government filed its Second Statement of Interest to correct what it considers to be fundamental flaws in analysis in HCA's brief.

The Government observed that the overwhelming weight of federal case law establishes that in deciding whether a statutory, regulatory, or contractual violation gives rise to FCA liability, the appropriate inquiry is whether there is a nexus between compliance with the provision in question and the defendant's claim for payment, or in brief, whether compliance is a prerequisite to payment. Thus, when a defendant has violated an applicable statutory, regulatory, or contractual provision, courts have imposed FCA liability in three classes of cases: (1) where the items or services for which the claim is submitted were defective, (2) where the claimant falsely expressly certified compliance with the provision, and (3) where compliance with the violated provision was a prerequisite to payment. The case at bar belonged to the third class of cases, which are often described as "implied false certification" cases. In such a case, presentment of the claim falsely represents an entitlement that the claimant forfeited by violation of the applicable provision.

The plain language of the FCA establishes that liability may attach for the submission of a false claim even in the absence of an express false statement, because while § 3729(a)(2) imposes liability for the use of a "false record or statement to get a false or fraudulent claim paid," § 3729(a)(1) imposes liability for the mere submission of a "false or fraudulent claim for payment or approval" without the additional element of a false record or statement. The legislative history of the 1986 amendments also clearly supports this view. The Senate Report stated that "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program," and that among the most common types of false claims are claims for goods or services "provided in violation of contract terms, specifications, statute, or regulation." S. Rep. No. 99-345 at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

Accordingly, courts have consistently imposed FCA liability on defendants who violate the law in order to bill the Government. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Supreme Court held that claims submitted under a contract obtained by bid rigging were false under the FCA. Similarly, federal courts have imposed FCA liability on defendants who engaged in other prohibited financial conflicts of interest, including the payment of illegal kickbacks and bribes. When a defendant has violated a statutory, regulatory, or contractual provision, courts impose FCA liability for claims when compliance with the provision is a prerequisite to payment of the claim.

D.C. Circuit Recognizes Implied Certification Theory

The defendants sought to rely on *United States ex rel. Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000), 19 TAF QR 5 (July 2000), to support their argument that violation of a statute like the Antikickback Statute cannot form the basis for FCA liability. The Government argued that this reliance was misplaced, as demonstrated by a more recent decision, *United States v. TDC Management Corp.*, 288 F.3d 421 (D.C. Cir. 2002), 27 TAF QR 21 (July 2002), *reh'g and reh'g en banc denied* (July 5, 2002). TDC had contracted with a government agency to serve as a neutral ombudsman between minority businesses bidding on large transportation construction projects and private investors willing to help fund those projects. TDC failed to disclose that it had obtained financial interests in the projects, and the unrefuted evidence showed that the agency would have terminated the contract had it known of the conflicts. Therefore, the D.C. Circuit held that TDC's claims violated the FCA because TDC failed to disclose "information critical to the decision to pay" concerning compliance with a "core program term." This was so even though there was no express certification or requirement of compliance with this "core program term" in the contract or the claims submitted.

In *Siewick*, on the other hand, a former government employee, who had assisted in the award and administration of a contract with the defendant Jamieson, retired from government service and then represented Jamieson in successful bids on two follow-on contracts. The relator invoked the former government employee's alleged violation of the federal "revolving door" statute, 18 U.S.C. § 207, as a premise for FCA liability. However, that statute does not on its face indicate any nexus to eligibility for payment, and a violation of the statute does not necessarily constitute an actual conflict of interest. As the Government explained, the D.C. Circuit declined to impose FCA liability in *Siewick* not because it rejected the implied certification theory per se, but because Siewick had failed to show that compliance with the revolving door statute was a prerequisite to payment.

Therefore, the Government argued, in both *Siewick* and *TDC* the D.C. Circuit recognized the legitimacy of the implied certification theory. In the D.C. Circuit, as elsewhere, FCA liability will attach when the defendant violates a legal provision so long as compliance with the provision affects the claimant's right to payment.

Kickbacks May Give Rise to FCA Liability

The Government argued that compliance with the Antikickback Statute, especially in the context of kickbacks paid to referring physicians, is a prerequisite to a provider's right to receive or retain Medicare payments. Because the Antikickback Statute criminalizes the inducement of referrals by kickbacks, claims on such referrals may not be presented for payment. Under this statutory scheme, compliance with the Antikickback Statute is a prerequisite to a provider's right to receive or retain payment under Medicare. The Government concluded that by prohibiting the practice of paying off referral sources for the opportunity to bill federal programs, Congress intended to prevent kickback-tainted claims from entering the federal payment system.

Moreover, the Government argued, even beyond the clear import of the Antikickback Statute itself, a sufficiently direct nexus between compliance with the statute and submission of a claim is established by the general legal principle that providers who violate statutes that relate directly to the integrity of a federally funded program are not entitled to payment from the federal fisc for the resulting claims. In *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), the Supreme Court ruled that a contract negotiated in violation of the federal conflict-of-interest statute then in effect was tainted by the conflict and rendered unenforceable. The Court noted that the statute did not specifically provide that contracts made in violation of the statute were to be invalidated, but held nevertheless that the proper inquiry was "whether the sanction of nonenforcement is consistent with and essential to effectuating the public policy embodied in" the statute. *Id.* at 563. If the Government's sole remedy in such cases were criminal prosecution, "then the public would be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent." *Id.*

Similarly, in *United States v. Acme Process Equipment Company*, 385 U.S. 138 (1966), the Supreme Court unanimously held that a contract tainted by the payment of kickbacks is unenforceable. Likewise, in the D.C. Circuit's *TDC* opinion, the court held that the defendants were liable under the FCA for the full value of any amount paid to them after they engaged in prohibited conflicts of interest.

The Government argued that, while the case at bar involved a government benefits program rather than a procurement contract, the relevant analysis is similar. The payment of kickbacks to referring physicians creates a real conflict of interest, which so infects the entire relationship as to render any resulting obligation of the United States unenforceable as a matter of law. Therefore, the Government urged the court to reject the defendants' contention that claims submitted pursuant to a kickback scheme cannot violate the FCA.

U.S. ex rel. MJ Research, Inc. v. PE Corp., No. 00-CV-2262 (D.D.C.)

ALLEGATION: PATENT FRAUD

In March 2002, the Government declined to intervene in a *qui tam* suit alleging fraud on a patent claim, and the complaint was unsealed. MJ Research, a medical and scientific instruments manufacturing company, filed the lawsuit in 2000, alleging that Applera Corporation, its subsidiaries Applied Biosystems Inc. and Celera Genomics Group, and the California Institute of Technology filed a false patent claim on the automated DNA-sequencing machine. The suit alleges that Henry Huang, whose research was funded by a grant from the National Institutes of Health, first invented the apparatus in 1979 at Cal Tech. Federally funded inventions produced before the1981 Bayh-Dole Act went into effect are the property of the Government; those produced afterward belong to the patent holders, but the Government is exempt from royalty payments under those patents. MJ Research, which is a competitor of the defendant corporations, alleges that Applied Biosystems improperly charged the Government for approximately one billion dollars in royalties.

Technical Management Concepts, Inc. (S.D. Ohio)

ALLEGATION: FALSE BILLINGS

In August 2002, the Government reportedly filed an FCA suit against Technical Management Concepts, Inc., its president Gregg Steinhauer, and its vice president, Margaret Solomon-Gujer, alleging that the defendants submitted premature bills, bills for unallowable costs, bills for work for which they had already been paid, and bills based on cost quotations from fictitious vendors. The Government claims the company submitted $500,000 worth of fraudulent bills. The Air Force Office of Special Investigations is investigating the matter.

Baylor University Medical Center et al.

ALLEGATION: BILLING FOR EXPERIMENTAL DEVICES

In August 2002, the Government intervened in cases filed by Kevin Cosens against forty-seven hospital defendants in twenty-eight different judicial districts nationwide. Among the defendants against whom the Government intervened are Baylor University Medical Center, Cleveland Clinic Hospital, Cedars Sinai Medical Center, Crawford Long Hospital of Emory University, Johns Hopkins Hospital, Massachusetts General Hospital, and Washington Hospital Center. The Government alleges that the hospitals knowingly billed Medicare hundreds of millions of dollars for experimental cardiac devices undergoing clinical trials, in violation of a Medicare manual rule excluding coverage for such services as not reasonable and necessary. The relator, a former medical device salesman, filed this case as a single action in the Western District of Washington in March 1994, but the defendants were subsequently transferred to their home districts. The case was the subject of considerable legal maneuvering, as the American Hospital Association lobbied unsuccessfully to have the rule against billing for experimental devices retroactively rescinded, and many of the defendants sought, but ultimately failed to obtain, a declaratory judgment that the Medicare manual rule was invalid. Don Warren and Phil Benson of the Warren & Benson Law Group (San Diego & Los Angeles) represent the relator. David Cohen and Lani Remick of DOJ's Civil Division are handling these cases for the Government.

<u>L.S. Starrett Co.</u> (D. Mass)

On Sept. 12, 2002, the *Wall Street Journal* reported that DOJ is investigating L.S. Starrett Co., based in Athol, Massachusetts. The company sells coordinate-measuring machines used for quality control by NASA, the Defense Department, and private industry. According to the *Journal*, Richard Parks, a technician with a Starrett subcontractor, filed a *qui tam* suit against Starrett in Boston in March 2002, alleging that the company supplied defective machines and failed to take appropriate corrective action when advised of the problem. In September, federal agents reportedly raided the company's metrology systems division in North Carolina, seizing documents.

***U.S. ex rel. Cosens v. St. Joseph's Regional Medical Center of Indiana*, No. C94-474 L (W.D. Wash.)**

***U.S. ex rel. Cosens v. Baptist Medical Center of Oklahoma*, No. C94-474 L (W.D. Wash.)**

***U.S. ex rel. Cosens v. Daniel Freeman Hospital*, No. C94-474 L (W.D. Wash.)**

***U.S. ex rel. Cosens v. Hackensack Hospital*, No. C94-474 L (W.D. Wash.)**

***U.S. ex rel. Cosens v. Passaic Medical Center*, No. C.94-474 L (W.D. Wash.)**

***U.S. ex rel. Cosens v. Presbyterian Hospital*, No. C99-1472 (W.D. Pa.)**

***U.S. ex rel. Cosens v. Beth Israel Hospital*, No. 02-CV-11153 (D. Mass.)**

***U.S. ex rel. Cosens v. Good Samaritan Hospital of Santa Clara Valley*, No. C99-4121 (N.D. Cal.)**

In July and August 2002, settlements occurred in eight different *qui tam* actions brought by Kevin Cosens, alleging that the defendant hospitals knowingly billed Medicare for experimental cardiac devices undergoing FDA clinical trials, in violation of a Medicare manual rule excluding coverage for such services as not reasonable or necessary. In July, Presbyterian Hospital in Pittsburgh agreed to pay $1.5 million, Baptist Medical Center of Oklahoma agreed to pay $629,000, Daniel Freeman Hospital agreed to pay $250,000, and St. Joseph's Regional Medical Center of Indiana agreed to pay $107,000. In August, Beth Israel Hospital and New England Deaconess Hospital agreed to pay $3.2 million, Passaic Medical Center of New Jersey agreed to pay $760,000, Hackensack Hospital of New Jersey agreed to pay $314,000, and Good Samaritan Hospital of Santa Clara Valley agreed to pay $115,000. Thus the Government's total recovery in these eight cases was **$6.875 million**. Cosens, a former medical device salesman, has brought similar actions against dozens of defendants. To date, the Government has settled with 27 defendants for more than $40 million. Don Warren and Phil Benson of the Warren & Benson Law Group (San Diego & Los Angeles) represented the relator. The relator's share in each case is 20%, for a total of $1.375 million for the eight cases. HHS OIG investigated the matter. David Cohen and Lani Remick of DOJ's Civil Division handled these cases for the Government.

***U.S. ex rel. Vaid v. Blue Cross of California*, No. CV-00-1521 (C.D. Cal.)**

In July 2002, DOJ announced that Blue Cross of California (BCC) and its parent company, WellPoint Health Networks, had agreed to pay the Government **$9.25 million** to settle a *qui tam* lawsuit alleging that between 1990 and 2000, BCC knowingly falsified data regarding its performance of cost report audits for Medicare. The complaint alleged that BCC, which is responsible for auditing cost reports submitted by hospitals and other Medicare providers, falsified audit activity dates to deceive the Government into believing that the company had performed more audit work than it actually performed. Vipul Vaid, a former company auditor, filed the *qui tam* suit in 1997. The relator's share is 16.5% or $1.52 million. Donald Warren and Phillip Benson of the Warren & Benson Law Group (San Diego & Los Angeles) represented the relator. HHS OIG and the FBI investigated the matter. Assistant U.S. Attorney Cathy Ostiller handled the case for the government.

U.S. ex rel. Hindin v. Hewlett-Packard Co., No. 97-10243 (D. Mass.)

In July 2002, Hewlett-Packard Co. and Agilent Technologies reportedly agreed to pay **$7 million** to resolve allegations that they knowingly sold faulty medical equipment to the Government. Between January 1991 and July 1997, the companies allegedly sold faulty patient monitors, anesthesia gas modules, and oxygen monitors to the Government, and failed to comply with federal regulations mandating investigation and documentation of equipment failures. Robert Hindin, a former engineer for Hewlett-Packard, filed the *qui tam* suit in 1997, and the Government recently intervened. The relator's share is approximately 23% or $1.61 million. Erika Kelton of Phillips & Cohen (Washington) and Kevin Powers of Rodgers Powers & Schwartz (Boston) represented the relator. The Army Criminal Investigation Command's Major Fraud Procurement Unit and the Department of Veterans Affairs OIG investigated the matter. Assistant U.S. Attorney Sara Miron Bloom and Patricia Davis of DOJ's Civil Division handled the case for the Government.

Hackensack University Medical Center (D.N.J.)

In July 2002, Hackensack University Medical Center agreed to pay the Government **$4.2 million** to settle allegations that the hospital overbilled the Medicare program from 1993 to 1999 on inpatient pneumonia cases. In early 2000 the Medical Center disclosed the overbillings to the Government, and following an investigation, it agreed to a settlement under which the Government refrained from seeking treble damages. Assistant U.S. Attorney Michael Chagares represented the government.

Howard University Hospital and College of Medicine (D.D.C.)

In July 2002, DOJ announced that Howard University Hospital and College of Medicine had agreed to pay **$1.8 million** to settle claims arising out of a national review of compliance with the rules governing Medicare payments for physicians at teaching hospitals (the so-called "PATH initiative"). The audit uncovered numerous claims that lacked proper documentation to establish that the services rendered were personally provided by faculty physicians, as well as claims that failed to comply with the rules governing calculation of reimbursement for physician services. HHS OIG investigated the matter. Assistant U.S. Attorney Doris Coles-Huff handled the case for the Government.

IBC Advanced Technologies

In July 2002, DOJ announced that IBC Advanced Technologies, a specialty chemicals company based in Salt Lake City, agreed to pay **between $700,000 and $1.2 million** over the next five years to settle a *qui tam* suit alleging that it mischarged the Government under two research awards. The complaint alleges that IBC charged labor and other costs to the National Institute of Standards and Technology, an agency of the Department of Commerce, for work actually performed for IBC's commercial customers. IBC failed to implement required accounting procedures to ensure that the funds were spent for the purposes intended, and submitted false and misleading reports regarding its progress on the research programs funded by the awards. Five former IBC employees filed this *qui tam* action. The Government intervened in 1999. The level of IBC's gross income over the next five years will determine the final amount of the settlement.

McMahon Home Title Services, Inc.

In July 2002, DOJ announced that Joseph McMahon and McMahon Home Title Services, Inc. agreed to pay the Government **$176,000** to resolve allegations that they violated the False Claims Act in connection with real estate transactions involving three residential properties in Maryland. The settlement arose out of an investigation into property "flipping" in the Maryland suburbs of Washington, D.C. The Government alleged that McMahon and his company, acting as settlement agent in each case, arranged the transfer the properties from the original seller through an intermediary to the ultimate buyer. The Government claims that McMahon represented that the true seller was the intermediary rather than the original seller in order to obtain mortgage insurance coverage from HUD. Each of the properties went into default and HUD was required to purchase two of them under the mortgage agreement. (The Government incurred no loss on the third property, which McMahon purchased.) HUD OIG investigated the matter. Assistant U.S. Attorney Allen Loucks represented the Government.

Suburban Woods, LLC

In July 2002, DOJ announced that Suburban Woods, a nursing home in East Norriton, Pennsylvania, agreed to pay **$75,000** and establish a $75,000 "quality of life" fund to settle allegations that it submitted claims for inadequate services for the alleviation of pain, dehydration, and bedsores. The Government also accused the nursing home of providing inadequate staffing, needs assessments, and documentation in a number of cases. The settlement, which resolved the dispute without the filing of a lawsuit, also requires Suburban Woods to conduct quality of care reviews, implement a pain management program, provide training to staff, and continue a corporate compliance program already in effect. Assistant U.S. Attorney David Hoffman handled the case for the Government.

U.S. ex rel. Health Outcomes Technologies v. Southcoast Hospital Group Inc., No. 10cv11375 (D. Mass)

In August 2002, Southcoast Hospital Group Inc., formerly Charlton Hospital and St. Luke's Hospital in Boston, agreed to pay **$3 million** to settle a *qui tam* action alleging that it upcoded claims for pneumonia treatment. The Government alleged that from October 1992 through September 1995, the defendants submitted claims for treatment of complex pneumonia when the corresponding medical records only supported claims for simple pneumonia, which is reimbursed at a lower rate. Health Outcomes Technologies, a company that provides software to the health care industry, originally filed this action in 1996 in the Eastern District of Pennsylvania. The relator's share is 14% or approximately $420,000. Michael Holdston of Drinker, Biddle & Reath (Philadelphia) represents the relator. HHS OIG investigated the matter. Assistant U.S. Attorney Susan Winkler of the Health Care Fraud Unit and Assistant U.S. Attorney Sara Miron Bloom of DOJ's Civil Division handled the matter for the Government.

Lockheed Martin Corporation

In August 2002, DOJ announced that a unit of Lockheed Martin Corporation, Tactical Systems Division, had agreed to pay over **$2.12 million** to settle a *qui tam* suit alleging that it submitted false claims to the Navy. The lawsuit alleged that the Tactical Systems Division, while still a part of Unisys Corporation, improperly charged the Navy's Strategic Systems Program for bid and proposal costs on a series of defense contracts for services for the

Trident Missile Program from 1988 to 1996. Barbara Groshans filed the *qui tam* suit. The relator's share is approximately 13% or $281,000. The FBI and the Navy Criminal Investigative Service investigated the matter.

U.S. ex rel. Cox v. Naomi Heller & Associates Inc., No. 99-CV-3280 (C.D. Cal.)

In August 2002, DOJ announced that Naomi Heller & Associates, Inc. (NHA), a Los Angeles outpatient rehabilitation clinic, and its owners, Naomi and Eri Heller, had agreed to pay $440,000, and to credit to the Government an additional $100,000 that they would have received in audits of unresolved cost reports, to settle a *qui tam* suit alleging that they submitted false claims to Medicare. Thus the Government's total recovery in this case is **$540,000**. Although the Hellers owned several businesses, only NHA was certified to provide services to Medicare beneficiaries. The complaint alleged that the Hellers billed expenses incurred by the other businesses to Medicare as if they had been incurred by NHA. Under the settlement, NHA and Naomi Heller entered into a corporate integrity agreement, while Eri Heller was debarred from participation in the Medicare program for six years. Greg Cox, who was NHA's clinical director from 1994 to 1997, brought this *qui tam* action in 1999. The relator's share is 22% or $118,000. Mark Kleiman (Los Angeles) represented the relator. Assistant U.S. Attorney Vipal Patel handled the case for the Government.

U.S. v. Hill, 2002 WL 1879256 (N.D. Ill. Aug. 15, 2002)

In August 2002, an Illinois district court entered a judgment of **$33,770** against Richard and Lillie Hill for submitting false claims to the Government. The Government alleged that the Hills made false statements regarding their household income and marital status to the Government in order to obtain federal need-based financial aid for their daughter Tiffany. The Government moved for summary judgment, and although they received several extensions of time, the Hills failed to file an opposition. Accordingly, the court entered judgment against the Hills, which it calculated by trebling the $9,590 in loans received and adding a civil penalty of $5,000.

U.S. ex rel. Roby v. Boeing Co., No. 00-4157 (6th Cir. Sept. 12, 2002)

In August 2002, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's award of judgment to the Government in a *qui tam* action alleging that the defendant supplied the Government with helicopters that contained faulty flight-critical transmission gears. In August 2000, Boeing paid about $40 million to settle claims against it in this litigation, *see* 20 TAF QR 39 (Oct. 2000), but an additional **$19 million**, covering losses arising out of the crash of one of the helicopters in operation desert storm, was made contingent on the outcome of this appeal. The relator's share is $4 million, or approximately 21%. James Helmer Jr. of Helmer, Martins & Morgan (Cincinnati) represented the relator. For a full summary of the opinion, see p. 29 above.

Lockheed MartinCorp./General Electric Co. (S.D. Ohio)

In September 2002, Lockheed Martin Corporation and General Electric Company agreed to pay **$6.2 million** to settle a *qui tam* action alleging that they produced and sold flight control electronics sets that contained defective accelerometer sensor assemblies. Because these assemblies fell short of the Navy specifications for controlling the effects of electrical magnetic interference, they could have caused uncontrolled rudder movements on the Hornet fighters on which they were installed. General Electric produced the defective assemblies in Johnson City, New York from 1987 to 1993, when Martin Marietta Corporation purchased the production operation. In 1995, Martin Marietta merged with Lockheed Corporation to form Lockheed Martin Corporation. Raymond Anderson, who worked at the Johnson City facility as a quality test technician, brought this *qui tam* action in 1997. The relator's share is 20% or $1.24 million. Paul Martins of Helmer, Martins & Morgan (Cincinnati) represented the relator. The NCIS investigated the matter. Dennis Phillips of DOJ's civil division handled the case for the Government.

Blue Ridge Area Mental, Developmental Disabilities and Substance Abuse Authority

In September 2000, the Blue Ridge Area Mental, Developmental Disabilities and Substance Abuse Authority reportedly agreed to pay **$750,000** to settle allegations that the authority overbilled the Government pursuant to a program to encourage the development of community based mental health services. The reported settlement follows a government investigation lasting several years.

U.S. ex rel. Kaisler v. Christus Health Gulf Coast, No. 01-CV-1592 (S.D. Tex.)

In September 2002, DOJ announced that Christus Health Gulf Coast, owner of Christus St. Joseph Hospital in Houston, had agreed to pay **$220,000** to settle a *qui tam* suit alleging that the hospital knowingly requested reimbursement of $78,000 in non-recoverable costs incurred by two of its outpatient senior health clinics. The suit alleged that the hospital obtained reimbursement for evaluation and management services and supplies provided without the direct personal supervision of a physician, in violation of Medicare regulations. Connie Kaisler and Thereze Rendon, two former employees of the hospital, filed the *qui tam* action. HHS OIG investigated the matter.

U.S. v. Galioto, No. 4:00-CV-1991 (E.D. Mo.)

In September 2002, Salvatore Galioto reportedly agreed to pay **$175,000** to settle allegations that he defrauded Medicare by participating in a scheme to supply nursing home residents with unnecessary incontinence supplies. Galioto pleaded guilty in 2000 to a criminal charge of violating the anti-kickback statute. According to the Government, Galioto and his co-conspirators billed Medicare for approximately $1.5 million worth of unnecessary supplies in 1995. $557,000 in fraudulent payments were directed to a company under the control of Galioto, who in turn paid out about half of that amount to friends and family members. Assistant U.S. Attorneys James Crowe Jr. and Suzanne Gau handled the case for the Government.

TAF News

FCA Conference Materials

- As part of its information clearinghouse activities, TAF has materials available for distribution at conferences and other programs. Information can be tailored to a legal or general audience. Resource material, including statistical information, is also available for those writing articles on the FCA.

Qui Tam Practitioner Guide

- The *TAF Qui Tam Practitioner Guide: Evaluating and Filing a Case* can be ordered at no charge by phone, fax, or mail. This "how to" manual includes sections on evaluating the merits and viability of a case, pre-filing and practical considerations, and preparing and filing the complaint.

TAF on the Internet

- TAF's Internet presence is designed to educate the public and legal community about the False Claims Act and *qui tam*. TAF's site is located at http://www.taf.org.

Previous Publications

- Back issues of the *Quarterly Review* are available in hard copy as well as on TAF's Internet site.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). To discuss a potential article, please contact *Quarterly Review* Editor Bret Boyce.

Anniversary Reports and Video

- To mark the anniversary of the 1986 FCA Amendments, TAF has available a variety of resources including a Tenth Anniversary Report, an Assessment of Economic Impact, and an educational video highlighting the effectiveness of the Act. These materials are available at no charge.

Call for Experts and Investigators

- In response to inquiries, TAF is working to compile a list of experts and investigators across an array of substantive areas. Please contact TAF with any suggestions you may have.

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For an Attorney Network Application or a description of activities, please contact TAF. Be sure to ask about TAFNET, our electronic mail system for Attorney Network members.

TAF Library

- TAF's FCA library is open to the public, by appointment, during regular business hours. Submissions of case materials such as complaints, disclosure statements, briefs, and settlement agreements are appreciated.

Acknowledgments

- TAF thanks the Department of Justice and *qui tam* counsel for providing source materials.