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INSIDE...

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

The TAF Education Fund is a nonprofit charitable 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). The TAF Education Fund serves to inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions.

The TAF Education Fund 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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FCA Liability of Government Entities

***Donald v. Regents of the University of California*, 329 F.3d 1040 (9th Cir. May 21, 2003)**

The Ninth Circuit ruled that private plaintiffs have no right to recover a statutory share of the proceeds of an FCA action against a state or state agency. The court reasoned that because private plaintiffs have no right to bring a *qui tam* action against a state defendant, they have no right to share in the proceeds of such an action.

In 1996, Debra Krahel and Pamela Medley filed a *qui tam* suit in the Northern District of California against the Regents of the University of California, alleging that the university billed federal and state health programs for services rendered by interns and residents as if they had been rendered by faculty physicians. In 1999, Grace Donald and Dawn Cooper filed a similar *qui tam* suit against the Regents in the Eastern District of California. *Donald* was eventually transferred to the Northern District to be jointly adjudicated with *Krahel*. The Government intervened in *Krahel* in July 2000 and in *Donald* in January 2001. In January 2001, the Government reached a settlement agreement with the Regents. *See* 22 TAF QR 37 (Apr. 2001).

The relators claim that they then engaged in talks with the Government about their share of the settlement proceeds. Shortly thereafter, however, the Government terminated negotiations with the relators, citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (2000), in which the Supreme Court held that private individuals may not bring *qui tam* actions against state entities. The Government argued that because private individuals have no right to bring such actions, they have no right to share in their proceeds.

The relators filed a joint motion in the district court for a share of the proceeds. The court ruled that under *Stevens* the relators had no right to share in the recovery, and accordingly denied the motion. The relators appealed.

Relators May Not Recover Against State Entities

The Ninth Circuit affirmed. The court observed that in *Stevens* the Supreme Court held that states and state agencies are not "persons" subject to liability in *qui tam* actions by private plaintiffs. The relators argued that despite *Stevens*, they had a statutory right to recovery. They contended that by settling with the Government, the defendants waived any potential defenses to liability, including a defense under *Stevens*. They also argued that the concerns with state sovereignty at issue in *Stevens* were absent in this case. Morover, they claimed that they were entitled to recovery because they assisted the Government in pursuing the FCA claim against the defendant.

The Ninth Circuit rejected these arguments, holding that the plain language of the FCA precluded the relators' claim for relief. Because the state entity defendant in this case was not a "person" for purposes of a *qui tam* suit under § 3730(b)(1), the relators had no valid cause of action. The Government is required under § 3730(d)(1) to share settlement proceeds in an action "brought by a person under subsection (b)," but because the relators had no valid cause of action under subsection (b), the relators had no right under § 3730(d)(1) to a share of the proceeds from the Government's settlement. Because the relators had no statutory right to recovery, the Ninth Circuit affirmed the judgment of the district court.

Falsity of Claim

U.S. v. Southland Management Corp., 326 F.3d 669 (5th Cir. Apr. 1, 2003) (en banc)

The en banc Fifth Circuit affirmed the district court's grant of summary judgment to the defendants in an FCA action based on allegations that the defendant owners of federally subsidized apartments falsely certified to HUD that the apartments were in "decent, safe, and sanitary condition." The court observed that under the defendants' contract with HUD, if the property is not decent, safe, and sanitary and HUD chooses to work with the owners to remedy the property's condition, the owners remain entitled to housing assistance payments from HUD until HUD provides written notice that it intends to exercise its right to abatement of payment. Because the Government never exercised its right to abatement, the owners did not submit claims for payment to which they were not entitled, and thus as a matter of law their claims were not false under the FCA.

The defendants in this action owned an apartment complex in Jackson, Mississippi, and participated in the federally-funded Section 8 rent subsidy program, which provides housing to low-income tenants under the supervision of HUD. The defendants obtained a low-interest mortgage from HUD to renovate the complex in 1980, and entered into a Regulatory Agreement and a Housing Assistance Payment (HAP) contract with HUD pursuant to Section 8. In order to receive monthly rent subsidies, the defendants submitted monthly HAP vouchers to HUD, each of which included a certification that the property was in "decent, safe, and sanitary" condition, and indicated that HUD has the right to prosecute false claims and seek civil penalties under the FCA.

Both the Regulatory Agreement and the HAP Contract explained HUD's remedies if the owners failed to comply with the contracts' terms. If HUD notified the owners in writing that the property was not in decent, safe, and sanitary condition, and the owners failed to take corrective action within the time prescribed by the notice, HUD was authorized to exercise any of its rights and remedies under the contract, including the abatement of housing assistance payments.

From 1981 until 1997 the owners submitted HAP vouchers, which HUD paid. However, by 1993, the property was deteriorating and had become a center of criminal activity, and HUD inspectors gave it a "below average" rating. The property continued to receive a "below average" rating for the next two years, and by 1996 a HUD review rated the complex as "unsatisfactory," which is the lowest possible rating. In accordance with its standard practice, after each inspection, HUD gave the defendants an opportunity to cure the defects, and requested a written response outlining corrective measures planned to remedy the problems identified. After 1994, the owners devoted all rental income and subsidies to mortgage payments, property maintenance, and repairs, and took no distributions for return on their investment. In 1997, the owners informed HUD that they were discontinuing mortgage payments for lack of funds, but continued to manage the property for no charge until control could be transferred. HUD foreclosed, and the complex was auctioned in 1998.

The Government then brought this FCA action, alleging that the defendants made false claims each time they certified that the complex was in decent, safe, and sanitary condition. The Government sought recovery for claims made between 1995 and 1997. The district court granted summary judgment to the defendants on the grounds that the HAP certifications were not material to HUD's payment decisions and therefore could not give rise to false claims, and that because HUD was aware of the condition of the complex when the claims were submitted, the defendants did not knowingly submit false claims. *See* 95 F. Supp. 2d 629 (S.D. Miss. 2000). A divided panel of the Fifth Circuit reversed, ruling that when the Government conditions payment on certification of compliance with a contractual provision, false certification of compliance is a false claim as a matter of law. *See* 288 F.3d 665 (5th Cir. 2002), 27 TAF QR 7 (July 2002). However, the court of appeals subsequently granted rehearing en banc and vacated the panel's opinion. *See* 307 F.3d 352 (5th Cir. 2002).

Defendants Were Entitled to Payment and Thus Their Claims Were Not False

The en banc court held that the defendants made no false claims and therefore affirmed the judgment of the district court. The court indicated that policy considerations militate against the application of the False Claims Act in this context. The court stated that the terms "decent, safe, and sanitary" are subjective and imprecise: for example, the court observed, a "look at the current attire of people in our society" reveals wide "variations in notions of decency." The court worried that the imprecision of this standard could cause owners of subsidized housing "to walk away from the property at an early sign of deterioration," and if no one else were willing to assume the risk of liability, tenants could lose their housing.

However, upon rehearing the court found no need to resolve these problems, because under its interpretation of the defendants' contract with HUD, no false claims were submitted. The HAP contract provided that if the property is not decent, safe, and sanitary and HUD chooses to work with the owners to remedy its condition, the owners remain entitled to housing assistance payments until HUD provides written notice, prescribes a time for corrective action, and notifies the owners that they have failed to take the necessary action within the prescribed period. The Government did not contend that HUD ever exercised its right under the contract to abatement of payment. Therefore, the owners remained entitled to receive housing assistance payments from HUD.

The court observed that only claims for money or property to which a defendant is not entitled are "false" for purposes of the FCA. Furthermore, there is no liability under the Act for a false statement unless it is used to get a false claim paid. Because the owners were entitled to receive the housing assistance payments that they sought during the corrective action period at issue, their claims for payment were not false under the FCA as a matter of law. Therefore, the court affirmed the judgment of the district court.

Special Concurrence Rejects Majority's Contract-Based Rationale

In a special concurrence joined by four other judges, Judge Jones, who had dissented from the original panel majority's decision, applauded the en banc decision as vindicating her original judgment that this case should never have been brought. However, she was uncomfortable with the contract-based theory adopted by the en banc majority, because that theory was never presented to the district court and never briefed to the court of appeals. She warned that "the broader ramifications of the court's unprecedented reasoning, which flows from standard contractual provisions of the sort that probably exist throughout the vast breadth of federal government contracting, are uncertain and have been utterly unexplored."

Judge Jones' special concurrence urged that the ruling of the district court should have been affirmed on the grounds that the monthly HAP certifications were not material to HUD's decision to continue making subsidy payments, and that the defendants did not "knowingly" submit false claims because the Government determined the amount of funds available to maintain the project, the defendants spent every penny of those funds on the project, and the Government knew of the project's essential condition. The special concurrence characterized FCA treble damages and penalties as "punitive," and cautioned that they are "not interchangeable with remedies for ordinary breaches of contract."

False Certification

U.S. ex rel. Willard v. Humana Health Plan, 2003 U.S. App. LEXIS 12933 (5th Cir. June 26, 2003)

The Fifth Circuit affirmed the dismissal of a *qui tam* action alleging that an HMO company violated the FCA by discouraging less lucrative patients from seeking coverage. The court ruled that the relator failed to state a claim, whether under a theory of overcharging, implied false certification, or fraud in the inducement.

Irvin Willard worked as a sales representative for Humana from 1995 through 1998, selling Humana's Medicare HMO products. In 1999 he filed this *qui tam* action against Humana and other HMOs, alleging that they engaged in a "cherry-picking" scheme whereby they discouraged less healthy potential program participants and those who lived too far from Humana's established providers from participating. HCFA regulations prohibited Medicare contractors from discriminating on the basis of health, or any other basis used as a proxy for health, *see* 42 C.F.R. § 417.428(b)(1), and Willard contended that Humana undertook to serve outlying counties in order to obtain a lucrative HCFA contract in the Houston market. Willard asserted that he was fired when he persisted in soliciting and enrolling patients from the outlying counties.

The Government declined to intervene, and Willard filed an amended complaint. Humana moved to dismiss pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), and challenged the constitutionality of the FCA's *qui tam* provision. The case was stayed pending resolution (and ultimately rejection) of the constitutional claims in the Fifth Circuit, *see Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749 (5th Cir. 2001) (en banc), 23 TAF QR 1 (July 2001). The case was then transferred to a different judge, and Humana renewed its motion to dismiss pursuant to Rules 12(b)(6) and 9(b). The district court granted the motion and dismissed without further leave to amend. Willard appealed.

Relator Failed to Allege Discrimination Based on Health Within Counties

The Fifth Circuit affirmed. The court rejected Willard's theory that Humana overcharged the Government by not providing services to less healthy persons under its "cherry-picking" scheme. Because rates are determined on a county-by-county basis, the court ruled, Willard needed to allege discrimination based on health status within a single county, not among counties, in order to prevail on his overcharging theory. Because he did not do so, his overcharging claim failed.

The Fifth Circuit held that Humana accrued no unwarranted benefit and the Government suffered no loss when Humana enrolled more beneficiaries in some counties than in others. It cited with approval the district court's conclusion that all claims that Humana submitted were valid, and that Humana's contract with the Government did not obligate it to take affirmative steps to enroll beneficiaries in all counties.

Relator Failed to Establish Regulatory Predicate for Implied Certification Theory

The Fifth Circuit also rejected Willard's implied false certification theory of liability. The court has never expressly recognized such a theory, and saw no need to do so in this case. Without deciding whether such a theory is viable, the court ruled that Willard had in any case failed to state a false certification claim, for two reasons: he failed to show that HCFA conditioned its payment to the defendants on any certification of compliance with the nondiscrimination regulations, and he failed to allege facts sufficient to establish any regulatory violation.

Compliance with the regulations prohibiting discrimination based on health was clearly not a condition of payment under the contract. In the event of noncompliance, the Government has the power to suspend future participation or payments or impose monetary penalties, but may not withhold payment for those already enrolled.

Moreover, Willard failed to allege that Humana actually implemented a policy of discouraging less healthy individuals from enrolling. Willard alleged that Humana supervisors stated, as a matter of fact, that the company does not profit by insuring the sick. However, he did not allege that he and other agents responsible for enrolling potential beneficiaries ever even evaluated their medical histories or future medical needs, much less that they actually turned away or discouraged less healthy individuals from enrolling. Willard did allege that Humana marketed less aggressively to rural counties, but he did not allege that the Medicare-eligible population of those counties was less healthy on average, and because of the separate calibration of reimbursement rates such a practice would not unduly benefit Humana or harm the Government.

Fraud in the Inducement Theory Lacked Factual Support

Finally, the court rejected Willard's theory of fraud in the inducement. It ruled that the district court properly rejected this claim for failure to comply with Rule 9(b). This claim was a one-sentence allegation devoid of factual information. Willard merely asserted that Humana had agreed to serve the rural counties in order to obtain the contract. He did not allege when or how this commitment was made or who at Humana made it, and did not claim that it was ever memorialized in writing. Willard also failed to allege substantial nonperformance: he did not allege that the percentage of Medicare-eligible recipients that Humana enrolled was lower in the rural counties.

In addition to failing to comply with Rule 9(b), Willard's fraud-in-the-inducement claim also failed in light of the district court's finding that Willard failed to state a cognizable claim that Humana violated an applicable regulation or contract provision. Moreover, the court clarified that its ruling on this point should not be construed as holding that absent the defects identified, a fraud-in-the-inducement theory of this sort could support an FCA claim.

Leave to Amend Denied

The district court dismissed without leave to amend, noting that the relator had not requested leave to amend his complaint a third time. The Fifth Circuit found no abuse of discretion. It noted that a party who neglects to ask the district court for leave to amend cannot expect to receive such a dispensation from the court of appeals. Willard did not expressly seek leave to amend either before the district court dismissed his suit or in his motion for reconsideration. Willard had failed to cure deficiencies in his complaint after two opportunities to amend, the second of which was granted to address the complaint's lack of specificity. Moreover, the Fifth Circuit ruled, it appeared that any further attempt to amend would prove futile. Accordingly, it affirmed the judgment of the district court.

Pro Se Relators

***U.S. ex rel. Tingley v. 900 Monroe, LLC*, 2003 U.S. Dist. LEXIS 11630 (W.D. Mich. June 13, 2003)**

A Michigan district court granted the defendants' motion to dismiss a *qui tam* action, holding that a relator may not proceed pro se. The court also found that the *qui tam* action was clearly frivolous, and ordered the plaintiff to pay the defendants' costs, expenses and attorneys' fees.

This action was one of a series of at least six state and federal lawsuits brought by William Tingley III, his father William Tingley, and corporations under their control. After their four previous state court actions failed, the Tingleys brought this *qui tam* action as well as a second federal action raising various civil rights claims. A detailed discussion of these various lawsuits can be found in the court's decision dismissing the latter action. *See Tingley v. City of Grand Rapids*, 2003 U.S. Dist. LEXIS 11629 (June 13, 2003).

The Tingleys, who are not attorneys, brought this *qui tam* action purportedly in their own names as well as in the name of the Local Area Watch, a corporation under their control. The complaint asserted that the defendants submitted false claims in connection with alleged environmental violations on a parcel of land in Grand Rapids. The Government declined to intervene. The defendants moved to dismiss, and the Tingleys moved to impose Rule 11 sanctions on the defendants.

Relator May Not Proceed Pro Se

The court granted the defendants' motion with prejudice and denied the Tingleys' motion. Throughout its opinion, the court deliberately referred to the Tingleys as "plaintiffs" rather than "relators," because it found that the lawsuit involved only the Tingleys' private dispute with the defendants and not any legitimate interest of the Government.

The court denied the Tingleys' motion for Rule 11 sanctions as "utterly frivolous." The Tingleys asked the court to impose sanctions on the defendants for stating that state and federal agencies had taken no enforcement actions against them and had found that the Tingleys allegations were unsubstantiated. The court observed that the Tingleys' own exhibits supported the defendants' statements.

The court then granted the defendants' motions to dismiss. Because they were not attorneys, the Tingleys were not authorized to pursue any claim on behalf of others. *See* 28 U.S.C. § 1654. Thus, they could not represent the Local Area Watch or any other corporation in federal court. Moreover, the court ruled, they were not authorized to represent the United States in bringing a *qui tam* action. Accordingly, the court dismissed the complaint for failure to state a claim upon which relief can be granted.

Court Imposes Monetary and Injunctive Sanctions

The court imposed both monetary and non-monetary sanctions on the Tingleys. Under § 3730(d)(4), courts may award reasonable attorneys' fees and expenses to a prevailing defendant if it finds that the plaintiff's claims were "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." The court found that this action, which was a reformulation of the Tingleys' unsuccessful state court lawsuits, violated all three of these very high statutory standards. The court observed that the *qui tam* provisions are not intended as a consolation prize for disappointed litigators. Moreover, the court found that the defendants were also entitled to recover costs pursuant to 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54. *Cf. United States ex rel. Costner v. United States*, 317 F.3d 889 (8th Cir. 2003), 30 TAF QR 47 (Apr. 2003). Accordingly, the court ordered the Tingleys to pay the defendants' reasonable attorneys' fees, costs, and expenses.

However, the court observed that the state courts had already imposed more than $27,000 in sanctions against the Tingleys with no discernable deterrent effect. There was no evidence that the Tingleys ever paid these sanctions, which apparently did not dissuade them from continuing to file frivolous and vexatious lawsuits. Therefore, the court found that injunctive relief was necessary to prevent continued abuse of the judicial system.

Therefore, the court entered a permanent injunction against the Tingleys, prohibiting them from filing any civil action against any defendant in this case unless (1) they had first paid all the attorneys' fees, costs and expenses levied against them in this action and filed proof of payment with the court, and (2) they posted a cash bond of $25,000 to cover sanctions that might be levied against them in the new litigation. The court also ordered them to attach copies of its opinion and injunction to any future complaints they might file, and warned the Tingleys that any violation of these requirements could be grounds for contempt proceedings.

<u>U.S. ex rel. Rockefeller v. Westinghouse Electric Co.</u>, 2003 U.S. Dist. LEXIS 10722 (D.D.C. June 23, 2003)

A District of Columbia district court held that a relator in a *qui tam* action may not proceed pro se. The court reasoned that a lay relator in a *qui tam* action needs qualified legal counsel to ensure that the United States, the real party in interest, is adequately represented.

Tod Rockefeller, a former environmental scientist with Westinghouse Electric Company at the Department of Energy (DOE) Waste Isolation Pilot Plant nuclear repository (WIPP), brought this *qui tam* action against Westinghouse, alleging that the company made various false claims to DOE pursuant to its contract to operate the WIPP. Proceeding pro se, Rockefeller purported to assert common law claims as well as FCA claims on behalf of the Government. The Government declined to intervene.

The defendant moved to dismiss, arguing that a relator in a *qui tam* action may not proceed pro se, and that the relator lacked standing to pursue his non-FCA claims. In his response, Rockefeller conceded that he could not proceed pro se and requested sixty days to obtain the representation of an attorney. At the expiration of the sixty-day period, Rockefeller requested another ninety days but still failed to obtain counsel.

Relator May Not Proceed Pro Se

The court ruled that the relator lacked standing to pursue the common law claims and could not proceed with the *qui tam* FCA claims without the representation of an attorney. Although the relator conceded that he could not pursue the FCA claims pro se, the court undertook an independent inquiry into the issue in view of the scarcity of decisions on point.

The court observed that generally, a layperson cannot appear as counsel for others in court. *See* 28 U.S.C. § 1654. Thus, courts have held that a lay stockholder cannot represent other stockholders in a derivative action, and a lay class member may not represent the class in a class action, because counsel is needed to adequately represent the interests of the corporation or the class, respectively. While a relator has a stake in the *qui tam* action, he represents the interests of the United States, which remains the real party in interest. The court concluded that like a stockholder in a derivative action or a class member in a class action, the relator in a *qui tam* action needs qualified legal counsel to ensure that the real party in interest, the Government, is adequately represented.

The court also observed that the FCA does not specifically authorize pro se actions. As far as the court could determine, the only area where Congress has expressly authorized third-party representation by laypersons in federal proceedings is the appeal of denials of supplemental security income benefits to a minor child. Courts have permitted non-attorney parents to represent their minor children in SSI appeals because such children usually cannot afford an attorney, and the interests of the minor child plaintiff and the parents are essentially the same. In the FCA context, in contrast, there is no statutory authorization for lay representation, and no policy reasons for creating an exception to the general proscription of such representation.

The court noted that the FCA partially assigns the Government's damages claims to the relator. Nevertheless, the court ruled, the relator cannot bifurcate his claims from the Government's and proceed pro se on his claims alone. Rather, the partial assignment is conditioned on the Government's receipt of at least seventy percent of any recovery. Thus the Government's interest is always at risk in an FCA case, even when it chooses not to intervene. Because the court had concluded that *qui tam* plaintiff cannot proceed pro se on behalf of the Government, and the relator's claim cannot be bifurcated from the Government's, the court ruled that a *qui tam* plaintiff may not proceed pro se.

Accordingly, the court ruled that it would grant the defendant's motion to dismiss, without prejudice to the Government. Before dismissing the FCA action, however, the court gave the Government a final opportunity either to file a written consent to the dismissal, or to reconsider its decision not to intervene.

Section 3729(b) Knowledge Requirement

***Hays v. Hoffman*, 325 F.3d 982 (8th Cir. Apr. 9, 2003)**

See "Section 3730(e) Public Disclosure Bar and Original Source Exception" below at page 12.

***U.S. ex rel. Barrett v. Johnson Controls, Inc.*, 2003 U.S. Dist. LEXIS 5973 (N.D. Tex. Apr. 9, 2003)**

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

Section 3730(b)(2) Seal Provision

***Under Seal v. Under Seal*, 326 F.3d 479 (4th Cir. Apr. 14, 2003)**

The Fourth Circuit affirmed a district court order unsealing the Government's complaint in intervention in a *qui tam* action. The court observed that the FCA does not support continued sealing once the Government has elected to intervene, and rejected the defendants' argument that the applicability of the Federal Arbitration Act to this case created a privacy interest sufficient to overcome the public's right of access.

In 2000, an unidentified relator filed a *qui tam* action under seal against two corporations that participate in the National Flood Insurance Program (NFIP). In January 2002, the

Government announced its intention to intervene. Before the Government filed its complaint, the defendants moved to compel the Government to arbitrate the controversy, as required by the Subsidy Agreement that governs participation in the NFIP. Shortly thereafter, the Government filed its complaint in intervention, together with a motion to unseal the action. The district court issued an order compelling arbitration, staying the Government's complaint, and unsealing the action, but stayed the effect of its unsealing order to permit the defendants to appeal.

Unsealing Was Not Abuse of Discretion

The court of appeals asserted jurisdiction and affirmed. The Government and the appellants disputed the appropriate standard for review under the collateral order doctrine. The court recognized that the Fourth Circuit has issued inconsistent rulings on this question, but concluded that the appellants' interpretation was most easily reconciled with the Supreme Court and Fourth Circuit precedent.

Turning to the merits, the court reviewed the district court's order for abuse of discretion. The appellants contended that the FCA's seal provision for *qui tam* actions, in conjunction with the Subsidy Agreement's commitment of government suits against NFIP insurers to private arbitration, combined to create a privacy interest that overcame the public's right of access. The Government countered that the presumption in favor of public disclosure of court records can only be overcome by a significant countervailing interest, and that the purpose of the FCA's seal provision, which is to permit the Government to investigate the case in order to decide whether to intervene, does not support continued sealing once the Government has made its intervention decision.

The court of appeals agreed with the Government. The purpose of the FCA did not support continued sealing, and neither the Subsidy Agreement nor the Federal Arbitration Act prohibited the Government from placing its complaint in the public domain. Accordingly, the district court did not abuse its discretion in unsealing the record, and the court of appeals affirmed.

Section 3730(b)(5) First-to-File Bar

U.S. ex rel. McMenamin v. Paranich, No. 3:CV-00-1165 (M.D. Pa. May 7, 2003)

A Pennsylvania district court denied the defendants' motion to dismiss a *qui tam* action pursuant to the first-to-file bar. The court ruled that the later action was not related to the earlier action for purposes of the first-to-file bar because the two actions shared no common defendants.

In May 1997, Dr. Deborah McMenamin began employment with Comprehensive Medical Network (CMN) under a two-year contract. McMenamin alleges that Dr. Stephen Paranich required her to sign false patient documentation for submission to government health programs. She refused to do so, and on June 30, 1997 resigned her position. McMenamin brought this action in 2000 against Paranich and CMN. McMenamin alleged that the defendants submitted claims for electromagnetic "Matrix" machines, which they falsely contended had been approved as a "nerve block" by the FDA. She also alleged that CMN submitted claims for ultrasound and blood tests performed by other providers, and that the defendants submitted claims for a neurologist's services that were not actually performed by a neurologist.

Meanwhile, in December 1998 Paranich filed a 555-count *qui tam* complaint against Matrix Biokinetics, Inc. and various individuals, none of whom were named as defendants in McMenamin's subsequent action. *See United States ex rel. Paranich v. Sorgnard*, No. 98-2070 (M.D. Pa.). Paranich contended that the defendants in his action marketed the Matrix in a fraudulent manner, causing Paranich and others to present false claims to Medicaid and Medicare. Paranich made no allegations concerning ultrasound, blood tests, and neurologist services.

Paranich moved to dismiss McMenamin's *qui tam* action pursuant to the first-to-file bar. Paranich contended that McMenamin's claims duplicated his own claims in his previously-filed *qui tam* action.

Two Actions Were Not Related Because They Involved Different Conduct by Different Defendants

The court denied Paranich's motion. The court observed that § 3730(b)(5) bars "related" *qui tam* actions based on the facts underlying a pending *qui tam* action. The court ruled that McMenamin's claims were not related to Paranich's because they were based on different conduct by different defendants.

Under any test, McMenamin's allegations of false ultrasound treatment, blood testing, and nerve testing were unrelated to Paranich's claims. As for the Matrix claims in both actions, the court found that they also were unrelated. Although in each case the claims involved (the claims submitted by Paranich and CMN to Medicare and Medicaid for Matrix machines) were the same, the defendants were different, and disposition of the two lawsuits would depend on entirely different questions as to whether the respective defendants "knowingly" "presented or caused to be presented" the claims in question. Because McMenamin's action was not the sort of opportunistic suit that § 3730(b)(5) seeks to prohibit, the court denied the defendants' motion to dismiss.

Section 3730(e)(3) Government Proceedings Bar

***U.S. ex rel. Foundation for Fair Contracting, Ltd. v. G&M Eastern Contracting, Inc.*, 259 F. Supp. 2d 329 (D.N.J. Apr. 29, 2003)**

A New Jersey district court dismissed a *qui tam* action under the provision in the FCA that bars actions "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party." The court found that the relator's allegations that the defendants submitted false wage certifications were already the subject of a Department of Labor investigation, which constituted an administrative civil money penalty proceeding.

The Foundation for Fair Contracting, Ltd. (FFC), a New Jersey nonprofit organization that monitors public works projects for compliance with state and federal wage laws, brought this *qui tam* action in 2001 against G&M Eastern Contracting Inc. and Double E LLC. FFC alleged that G&M and Double E submitted false wage certifications in violation of the Davis-Bacon Act, 40 U.S.C. § 276a, to the Camden Housing Authority (CHA) on a HUD-funded construction project. According to FFC, the defendants underpaid the workers by misclassifying them, and misstated the number of hours worked and employees utilized. The Government declined to intervene.

Meanwhile, the Department of Labor (DOL) conducted an investigation regarding the wages and proper classification of G&M's workers after receiving word in 2000 from a CHA official regarding possible Davis-Bacon violations. The DOL investigation concluded that certain workers were misclassified and that the employees' work logs did not match the payroll certifications submitted. As a result of this investigation, G&M and Double E agreed to pay back wages. G&M argued that this DOL investigation constituted an "administrative civil money penalty proceeding" barring the *qui tam* claim under § 3730(e)(3), and accordingly moved for summary judgment on the *qui tam* claim.

DOL Investigation Was "Administrative Civil Money Penalty Proceeding" Barring *Qui Tam* Claim

The court granted G&M's motion. Although there was no Third Circuit case construing the scope of the term "administrative civil money penalty proceeding" for purposes of § 3730(e)(3), the court noted that the Third Circuit has construed the term "civil hearing" in § 3730(e)(4) quite broadly. *See U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154, 1157 (3d Cir. 1991). The court concluded that this broad construction of § 3730(e)(4), along with the FCA's statutory purpose of preventing parasitic litigation by opportunistic latecomers, favored a similarly broad interpretation of § 3730(e)(3). The court observed that FFC's *qui tam* suit was based on the very same facts that underlay the DOL's investigation. It would make little sense, the court ruled, to permit the *qui tam* claim to proceed after the Government had already obtained redress in its enforcement proceeding for the harm it had suffered.

The court observed that the regulatory framework governing DOL investigations, which is set out in 29 C.F.R. § 5, provides for penalties including debarment, restitution, liquidated damages, and criminal action. This regulatory context supported the court's conclusion that the DOL investigation constituted an "administrative civil money penalty proceeding." That DOL chose to compromise and settle for the back wages with no additional monetary civil penalty was, in the court's view, not dispositive. Moreover, it did not matter that DOL did not plead all possible violations and remedies in its enforcement investigation, because § 3730(e)(3) bars new suits "based upon allegations or transactions" which were the subject of the prior suit or administrative proceeding, and the transactions at issue in the DOL investigation and FFC's *qui tam* suit were identical.

Accordingly, the court ruled that it lacked subject matter jurisdiction over FFC's *qui tam* action against G&M, and granted G&M's motion for summary judgment. Although Double E had failed to file an answer in this action, and the clerk had entered default against it, the court ruled that it was also clear that default judgment against Double E was unavailable as a matter of law, and dismissed the complaint against it as well.

Section 3730(e)(4) Public Disclosure Bar and Original Source Exception

<u>U.S. ex rel. Kinney v. Stoltz</u>, 327 F.3d 671 (8th Cir. May 5, 2003)

The Eighth Circuit affirmed the dismissal of a *qui tam* action pursuant to the public disclosure bar. The court ruled that the action was based upon allegations that were publicly disclosed in an earlier, related *qui tam* action, and that the relator was not the original source of the allegations on which the later action was based.

James Kinney, a paramedic at Hennepin County Medical Center (HCMC)1983, filed a *qui tam* action (*Kinney I*) against HCMC and Hennepin Faculty Associates (HFA) in 1997, alleging that the defendants billed the Government for ambulance runs that were medically unnecessary. The Government declined to intervene. The court dismissed Kinney's claims against HCMC, and

Kinney proceeded against HFA. During discovery, Kinney deposed eight HCMC employees, including administrators Rebecca Stoltz, Geraldine Peterson, and Jennifer Peterson. Prior to the depositions, Kinney never indicated that he knew of the existence of these individuals, or any alleged misdeeds committed by them. In August 2001, the district court granted summary judgment to HFA, on the grounds that Kinney had failed to establish that the defendants caused false claims to be submitted. *See United States ex rel. Kinney v. Hennepin County Medical Center*, 2001 WL 964011 (D. Minn. Aug. 22, 2001), 24 TAF QR 10 (Oct. 2001).

Meanwhile, in July 2001, Kinney filed the present *qui tam* action (*Kinney II*) against Stoltz, Jennifer Peterson, Geraldine Peterson, and her successor as manager of ambulance services, Kelly Spratt, alleging that they made false claims to Medicare for reimbursement of ambulance runs. The defendants moved to dismiss, arguing that the court lacked subject matter jurisdiction under the public disclosure bar, because the claims were based on information publicly disclosed during *Kinney I*. Alternatively, the defendants argued that the doctrines of res judicata and collateral estoppel precluded the second action. The district court granted the defendants' motion, ruling that *Kinney II* was based on publicly disclosed allegations of which Kinney was not the original source, because he did not have direct knowledge of the alleged violations, and did not make a voluntary disclosure to the Government before filing suit. *See United States ex rel. Kinney v. Stoltz*, 2002 WL 523869 (D. Minn. Apr. 5, 2002), 27 TAF QR 13 (July 2002). Kinney appealed.

Relator Lacked Direct Knowledge of Fraud

The Eighth Circuit affirmed. The central issue in the appeal was whether Kinney had direct knowledge of the facts underlying his lawsuit and could thus qualify as an original source. The court ruled that while Kinney might have had direct knowledge that some patients transported by ambulance were not eligible for Medicare reimbursement, he did not have direct knowledge of the appellees' alleged wrongdoings. In *Kinney I*, Kinney alleged that the doctors were responsible for the fraud. If he had known of the fraud allegedly committed by the administrative personnel named as defendants in *Kinney II* at the time he filed *Kinney I*, he should have named the *Kinney II* defendants in his *Kinney I* complaint. Because he failed to do so, the court of appeals ruled that Kinney did not have direct knowledge of the information on which his allegations in *Kinney II* were based, and thus the district court lacked jurisdiction in that action pursuant to the public disclosure bar.

Hays v. Hoffman, 325 F.3d 982 (8th Cir. Apr. 9, 2003)

The Eighth Circuit reversed in part a district court judgment awarding civil penalties of $1.68 million in a *qui tam* action alleging that a nursing home and its CEO sought Medicaid reimbursement for a variety of improper expenditures. The court ruled that most of the *qui tam* claims were based upon public disclosures in a state Medicaid audit, and that the relator was an original source of only one of those disclosures. Furthermore, the court of appeals rejected the district court's method of determining the number of false claims submitted pursuant to the one remaining viable *qui tam* claim, and accordingly reduced the civil penalties to $80,000.

Patrick Hays worked as administrator of the Villa of St. Francis, a nursing home run by St. Francis Health Services (SFHS) of Morris, Minnesota. In 1997 Hays filed a *qui tam* action against SFHS, its CEO Luverne Hoffman, its former executive Kay Knock, and various other entities under their control. The complaint alleged that the defendants sought Medicaid reimbursement for a variety of improper expenditures on items such as a Lake Tahoe condominium timeshare; maintenance work at car washes, laundromats, and private apartments; vans employed for private or commercial uses; and apples from Hoffman's private orchard sold to SFHS for use as gifts to employees and board members. The Government declined to intervene. The defendants moved to dismiss pursuant to the public disclosure bar, arguing that Hays' suits was based upon allegations publicly disclosed in an audit report by the Minnesota Department of Human Services (DHS). The court denied the defendants' motion, and the case proceeded to trial.

In December 2000 the jury found the defendants liable for eleven different fraud schemes and for illegally retaliating against Hays for his whistleblowing activities. However, the jury found that the United States suffered no actual damages. The legal question of the number of false claims involved was submitted to a magistrate judge, who issued a report in April 2001 finding that the defendants submitted 336 false claims. The court adopted the magistrate's finding. The defendants objected, arguing that a fine ranging from $1.68 million to $3.36 million would violate the Eighth Amendment. The district court rejected the defendants' argument, and entered judgment for $771,736 plus interest for lost wages and benefits on the retaliation claim, and $1.68 million in civil penalties on the *qui tam* claim. *See* 2001 WL 1141827 (D. Minn. Aug. 20, 2001), 24 TAF QR 27 (Oct. 2001).

The defendants appealed the *qui tam* portion of the judgment, arguing that the district court erred in denying their motion to dismiss pursuant to the public disclosure bar; that Hays failed to prove that the defendants knowingly submitted false claims; that Hays failed to introduce evidence to support the district court's conclusion that 336 false claims were submitted; and that the $1.68 million penalty violated the Excessive Fines Clause of the Eighth Amendment. The Government intervened on appeal to express its view on the public disclosure issues and oppose the defendants' contention that the total penalty violated the Excessive Fines Clause.

State Medicare Audit Reports Were Public Disclosures

The Eighth Circuit concluded that the DHS audit reports on which Hays relied were relevant public disclosures, and that Hays was an original source of only one of those disclosures. Thus, the court of appeals held, the district court lacked jurisdiction over most of Hays' *qui tam* claims. The public disclosure bar applies to disclosures "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation, or from the news media." Hays and the Government argued that the DHS audits do not fall within the category of "administrative . . . report [or] audit" because that category refers only to federal, not state, administrative reports or audits. They relied on *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 745 (3d Cir. 1997), 11 TAF QR 1 (Oct. 1997), where the court reasoned that because the word "administrative" is surrounded by "congressional" and "Government Accounting Office," Congress must have intended to include only reports, audits, and investigations by federal government agencies.

The Eighth Circuit rejected the Third Circuit's approach, and concluded that Medicaid compliance audits and audit reports conducted by the state Medicaid agency are public disclosures. The Eighth Circuit observed that a fraudulent payment request submitted to the state Medicaid agency is clearly a false claim under the federal FCA, and held that it would be anomalous to conclude that an audit by this same agency is not an "administrative audit" for purposes of the FCA. Noting that Congress has delegated many administrative tasks under Medicare and Medicaid to private insurance companies or state and local agencies, the court indicated that audits by such companies or agencies should qualify as public disclosures if they are prepared at the behest of the relevant federal agency, or by or at the behest of a state agency that administers the federal grant program under significant federal regulation and involvement.

Because state governments administer Medicaid under detailed federal statutory and regulatory controls, the court concluded that state Medicaid audits clearly qualify as public disclosures under the FCA. Viewed from this perspective, the court observed that the Third Circuit's decision in *Dunleavy* was readily distinguishable from the case at bar. The alleged public disclosure in that case was a report to HUD submitted by a unit of local government accused of violating the FCA. The principal motivation of the party that prepared the report (assuming the truth of the fraud claim) was to eliminate the paper trail of the fraud. Moreover, under the federal grant program at issue there, grantee compliance audits are conducted by federal agencies: Congress did not delegate that function to a state agency, as it did with Medicaid. Therefore, while the Eighth Circuit did not disagree with the result in *Dunleavy*, it concluded that the Third Circuit ruled more broadly than necessary in concluding that a state agency audit may never be an "administrative audit" for purposes of the FCA.

Court Rejects Catalyst Theory

The court ruled that Hays was not the original source of most of his *qui tam* claims. Hays argued that he was the original source of all information in the DHS audit reports because his whistleblower letters were the reason DHS conducted its field audit. The district court agreed, commenting that "[i]f a man is able to discern a small amount of fraud and there is in fact a seething snake pit," he ought to receive the credit if he tips the Government off. The defendants and the Government argued that this ruling contravened the plain language of § 3730(e)(4)(B), which requires that an original source have "direct and independent knowledge of the information on which the allegations are based."

The court of appeals agreed with the Government and the defendants, rejecting the "catalyst" theory advanced by the relator. On appeal, the defendants conceded that Hays was the original source of one allegation that was confirmed by the DHS audit—the defendant's false claim that apples given as gifts to SFHS employees were a Medicaid-reimbursable food expense. However, Hays had failed to establish that he was an original source as to his ten other claims. The court concluded that the district court lacked subject matter jurisdiction over the remaining ten claims, and ruled that the portion of the $1.68 million fine attributable to those claims must be vacated. The court also dismissed the complaint against defendant Knock, who was absolved of liability for the apple claims.

Defendant Acted Knowingly

The court then addressed the defendants' remaining arguments as they pertained to the surviving apple claim. The defendants argued that Hays failed to prove that any person knowingly submitted false claims. Upon reviewing the trial record in the light most favorable to the jury's verdict, the court found that the evidence established that the defendants knew that gifts to employees are not reimbursable under Medicare and nevertheless instructed Hays and at least one other employee to continue to enter the apple invoices on the general ledger accounts as "resident food." Thus the evidence supported a finding that the defendants acted knowingly. Furthermore, the court rejected the defendants' arguments that the district court failed to instruct the jury properly on materiality, and that the court abused its discretion in various evidentiary rulings.

District Court Erred in Determining Number of False Claims

Finally, the court turned to the defendants' contentions that (1) Hays failed to introduce evidence supporting the district court's conclusion that 336 false claims were submitted, and (2) that the $1.68 million penalty (at $5,000 per false claim) violated the Excessive Fines Clause of the Eighth Amendment. The court of appeals agreed with the first contention, and therefore did not decide the second, although it stated that it agreed with the Ninth Circuit that FCA penalties are punitive in nature and therefore fall with in the reach of the Excessive Fines Clause. *Cf. United States v. Mackby*, 261 F.3d 821, 829-31 (9th Cir. 2001), 24 TAF QR 26 (Oct. 2001).

In *United States v. Bornstein*, 423 U.S. 303, 313 & n.8 (1976), the Supreme Court instructed that in determining the number of false claims for which the statutory penalty should be assessed, the statutory "provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms," and that courts must focus on "the specific conduct of the person from whom the Government seeks to collect the statutory forfeiture." Although this inquiry is fact-intensive, the court of appeals found that the trial record was woefully inadequate for the purpose of determining the number of false claims. Moreover, under the Medicaid rate-based cost report reimbursement system, a one-time expense for a multi-facility provider may be reimbursed over hundreds or thousands of claims for services provided to individual residents. Thus, under the analysis adopted by the district court, the improper claim for reimbursement of $6,000 spent to purchase apples resulted in 200 claims. This analysis led to a penalty of one million dollars (200 claims times $5,000 per claim) that bore no rational relationship to the false claim misconduct, especially given the potential Excessive Fines Clause implications. Accordingly, the Eighth Circuit rejected the district court's analysis.

In reviewing the record, the court of appeals noted that the DHS audit reports showed that eight SFHS facilities had submitted improper claims for apples. The court ruled that the decision to claim apples as a reimbursable expense clearly resulted in eight false claims for FCA purposes. Therefore, taking into account the district court's judgment that the defendants engaged in serious misconduct, the court of appeals imposed the maximum $10,000 penalty per violation, and reduced the total FCA penalty from $1.68 million to $80,000.

<u>U.S. ex rel. Barrett v. Johnson Controls, Inc.</u>, 2003 U.S. Dist. LEXIS 5973 (N.D. Tex. Apr. 9, 2003)

A Texas district court denied a motion to dismiss a *qui tam* action pursuant to the public disclosure bar, but granted motions to dismiss for failure to plead fraud with particularity. The court ruled that there had been no public disclosure of "allegations or transactions" of fraud. However, the relator failed to satisfy Rule 9(b) because he did not identify the particular claim or statement that violated the FCA. The court also dismissed certain claims on the grounds that they fell outside the statute of limitations.

Acting pro se, Brian Barrett, the sole proprietor of Industrial Energy Consulting, a potential contractor for energy-related government projects, brought this *qui tam* action in 2001 against

Westinghouse Hanford Company and Viacom (both collectively designated as WHC), Johnson Controls Inc., and Northeast Energy Services Company (NORESCO). Barrett also sought to assert claims under the Sherman Act and the Anti-Kickback Act, as well under certain criminal statutes and the common law. Barrett alleged that the defendants submitted false claims pursuant to energy savings performance contracts (ESPCs) awarded pursuant to the Energy Policy Act of 1992, by misrepresenting to various federal agencies that their services would result in energy savings. Throughout the complaint, Barrett also made apparent allegations against the Government itself. The Government declined to intervene.

The defendants each moved to dismiss, on different grounds: Johnson Controls for lack of subject matter jurisdiction, NORESCO for failure to state a claim, and WHC pursuant to the statute of limitations. All three defendants also moved to dismiss pursuant to Fed. R. Civ. P. 9(b) for failure to plead fraud with particularity. All defendants also moved to dismiss the non-FCA claims.

No Public Disclosure of "Allegations or Transactions" of Fraud Occurred

The court undertook both a facial and a factual inquiry into subject matter jurisdiction. Turning first to the facial analysis, the court observed that the relator had alleged that the Government could not have known of the facts in the case before the relator in 1998 filed the final amendment to his 1997 bid protest. The court found that this allegation implied that the relator had direct and independent knowledge of the information on which his complaint was based and that he had voluntarily provided the information to the Government before filing suit. Thus, under a facial analysis, the relator had sufficiently alleged that he was an original source.

However, because Johnson Controls had submitted documentary evidence in connection with its attack on subject matter jurisdiction, the court also undertook a factual analysis of this issue. Johnson Controls contended that the allegations or transactions upon which Barrett's suit was based were publicly disclosed in two requests for proposals (RFPs) for ESPCs issued in 1995 and 1997 by the Department of Energy, as well as in Barrett's 1997 bid protest.

The court ruled that the RFPs were publicly disclosed administrative reports. However, the court observed, the RFPs (with one irrelevant exception) did not mention any of the defendants. Therefore, the RFPs did not disclose "allegations or transactions" of fraud because they did not raise an inference that the defendants had committed fraud.

Similarly, the court ruled that Barrett's 1997 bid protest was a public disclosure in an administrative hearing. However, while Barrett's bid protest objected to various actions taken by the Government, it did not mention any of the defendants, and thus did not disclose "allegations or transactions" of their alleged fraud. Accordingly, the court ruled that Barrett's *qui tam* allegations survived both a facial and a factual attack on the court's subject matter jurisdiction.

Court Rejects Government Knowledge Defense

NORESCO observed that Barrett never attributed a specific false or fraudulent statement to it, and thus contended that Barrett's only possible claim against it was that it allegedly used false or fraudulent data supplied to it by the Government. However, NORESCO argued, the Government's knowledge and approval of the particulars of the claim negated the scienter required by the FCA. *Cf. United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 543 (7th Cir. 1999). The court nevertheless rejected the approach of *Durcholz*, relying on *United States v. Southland Management Corp.*, 288 F.3d 665 (5th

Cir.), *vacated*, 307 F.3d 352 (5th Cir. 2002). [*Editor's Note*—The court failed to observe that the *Southland* decision on which it relied had been vacated, and that earlier in the month, following rehearing en banc, the Fifth Circuit had issued a new opinion in that case that did not address the issue of scienter. *See supra* page 2].

Statute of Limitations Barred Some Claims

WHC moved to dismiss the claims against it on the grounds that they were barred under the statute of limitations. Barrett alleged that WHC fraudulently inflated energy costs from at least the 1970s and "possibly as far back as . . . 1943" until 1981. The court agreed that these allegations fell well outside the statute of limitations. However, Barrett also alleged that WHC's subcontractor, IFC-Kaiser (now bankrupt), committed the same fraud from 1981 until 1998. Because at least part of this period fell within the relevant statute of limitations, the court denied WHC's motion to dismiss Barrett's entire *qui tam* claim against it.

Complaint Failed to Satisfy Rule 9(b)

The court also granted the motions of each defendant to dismiss for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). Barrett failed to specify the particular false claims or statements by the defendants that violated the FCA. Accordingly, the court dismissed Barrett's *qui tam* claims without prejudice. The court also dismissed Barrett's antitrust, antikickback, common-law, and criminal claims for lack of standing.

U.S. ex rel. Ervin & Associates, Inc. v. Hamilton Securities Group, Nos. 96-CV-1258, 99-CV-1698 (D.D.C. May 1, 2003)

A District of Columbia district court denied a motion to dismiss a *qui tam* action pursuant to the public disclosure bar. The court found that an amended complaint in this action was supported by and thus "based upon" publicly disclosed allegations. However, the court ruled that the relator was the original source of the information upon which its suit was based because the relator acquired knowledge of the fraud through direct observation and investigation and because the relator's original complaint disclosed core allegations of fraud not previously known to the public.

In 1994, Hamilton Securities Group, Inc. obtained a HUD contract to plan and conduct a series of mortgage auctions. In 1996, Ervin and Associates, Inc. filed this *qui tam* action (No. 96-1258) against Hamilton and other defendants, alleging that they conspired to defraud the Government in the course of HUD mortgage auctions. The Government declined to intervene, and in 1999 Ervin filed an amended complaint. Hamilton subsequently filed its own action (No. 99-1698) against Ervin, alleging tortious interference with contractual relations.

In 1998, Hamilton sued HUD in the Court of Federal Claims after HUD terminated Hamilton's contract upon learning that the computer program that Hamilton used to determine winning bids yielded lower proceeds than would otherwise have been generated. In 1999 the Government filed an amended counterclaim against Hamilton in that case, alleging breach of contract or negligence.

In 2001, Ervin sued the Government, seeking a declaratory judgment that the Government's counterclaim in Hamilton's action in the Court of Claims was an "alternate remedy" under the False Claims Act. Hamilton also sought a stay of the action in the Court of Claims. The Government moved to dismiss Ervin's action against it. However, the court withheld a ruling on the Government's motion, because it could partially dispose of Ervin's *qui tam* action: the Government argued, *inter alia*, that

Ervin's *qui tam* action was barred because it was based upon public disclosures.

Thereupon the court in the *qui tam* action invited Hamilton to state its view regarding the public disclosure issue. Hamilton moved to dismiss Ervin's *qui tam* action pursuant to the public disclosure bar.

Suit Was Based Upon Publicly Disclosed Allegations

The court denied the motion, finding that Ervin's suit was based upon publicly disclosed allegations, but that Ervin was the original source of the information. Hamilton contended that information supporting the allegations in the complaint was publicly disclosed in 1997 newspaper articles and in HUD's termination letter to Hamilton. Ervin had filed both of the articles and the letter as an attachment to a pleading in a *Bivens* action that he brought against various HUD officials. Because these materials were filed in a federal civil proceeding (and the articles were published in the news media), the court concluded that they were publicly disclosed.

Moreover, the court concluded that Ervin's amended *qui tam* complaint was based upon the public disclosures. The court observed that under D.C. Circuit precedent, "based upon" for purposes of § 3730(e)(4)(A) means "supported by," not "derived from." The publicly disclosed documents, which spoke of bid-rigging and misuse of the computerized bid optimization process, supported Ervin's allegations that Hamilton rigged the optimization process to favor large Wall Street bidders.

Relator Was Original Source

Nevertheless, the court found that Ervin was an original source of the information, because it had direct and independent knowledge of the fraud and voluntarily provided information to the Government. Ervin had direct knowledge because it obtained the information through direct observation, analysis, and investigation.

Ervin's knowledge was also independent of any public disclosures. Ervin's original complaint contained the essential elements of the fraudulent transaction, identifying the perpetrator and scheme in general terms. It was true that some of the allegations in Ervin's amended complaint were supported by publicly disclosed information, and some of Ervin's investigation between the filing of the original complaint in 1996 and the amended complaint in 1999 "piggy-backed" on other disclosures. However, because Ervin's original complaint disclosed core allegations of fraud previously unknown to the public, the court ruled that Ervin had independent knowledge of the information.

Finally, Ervin voluntarily provided the information to the Government before filing the amended complaint. Ervin willingly cooperated with the Government without the need for a subpoena. Therefore, because Ervin was an original source, the court denied Hamilton's motion to dismiss pursuant to the public disclosure bar.

***U.S. ex rel. Dingle v. BioPort Corp.*, 2003 U.S. Dist. LEXIS 11628 (W.D. Mich. June 18, 2003)**

A Michigan district court dismissed a *qui tam* action alleging that the defendants defrauded the Government in connection with a contract for the production of anthrax vaccine. The court ruled that the complaint was based upon public disclosures, and that the relators were not original sources of the information.

Russell Dingle and Thomas Rempfer were members of the Air National Guard for Connecticut, where they worked in a military research team investigating the anthrax vaccine and its safety for human use. BioPort Corporation acquired a federal anthrax vaccine contract from the Michigan Biologic Products Institute in 1998. In 2000, Dingle and Rempfer filed this *qui tam* action against BioPort and its CEO Robert Myers, alleging that they defrauded the Government of millions of dollars in connection with this contract. In particular, they claimed that defendants used unapproved materials in the fermentors and filters employed for vaccine production. In 2001 the Government declined to intervene.

The defendants moved to dismiss on various grounds, and in 2002 the court denied the motion, but ordered the relators to file an amended complaint to comply with Federal Rule of Civil Procedure 9(b). *See United States ex rel. Dingle v. BioPort Corp.*, No. 5:00-CV-124 (W.D. Mich. Aug. 29, 2002), 28 TAF QR 45 (Oct. 2002). The relators filed an amended complaint, and the defendants filed a motion for reconsideration of the August 29 order as well as a renewed motion to dismiss. The court did not take immediate action on the motion for reconsideration because it believed that evidence submitted by the defendants suggested that subject matter jurisdiction was lacking under the public disclosure bar.

Complaint Was Based On Public Disclosures

Upon examining the evidence, the court ruled that the complaint was based upon public disclosures, and that the relators were not an original source of the information. The court took judicial notice of six congressional documents and a newspaper article submitted by the defendants. However, the court declined to take judicial notice of information posted on three private websites, because it could not verify the information's accuracy or authenticity. The court found that the sources of which it took judicial notice disclosed the changes to the fermentors and filters, and identified deficiencies that could compromise the potency, purity, safety, and efficacy of the vaccine produced. Thus the disclosures indicated a discrepancy between the vaccine that was approved by the FDA and the vaccine that was actually being produced, from which an inference of fraud could be drawn.

Moreover, the court observed, in the Sixth Circuit an action is "based upon" public disclosures if it is supported at least in part by the disclosures. Under this broad definition, the disclosures in this case clearly put the Government on notice of the possibility that the vaccine it had been purchasing was not the FDA-approved vaccine that BioPort claimed to be selling.

Finally, the court ruled that the relators were not original sources of the information. The relators' own testimony, as well as a report they attached to their complaint, indicated that they relied on government reports and published scientific documents to support their allegations of fraud. Accordingly, the court determined that it lacked jurisdiction and dismissed the action with prejudice.

***U.S. ex rel. Laird v. Lockheed Martin Engineering & Science Services Co.*, 2003 U.S. App. LEXIS 12820 (5th Cir. June 24, 2003)**

The Fifth Circuit vacated a grant of summary judgment to the defendant in a *qui tam* action. The court ruled that the original source exception to the public disclosure bar does not require a relator to have direct and independent knowledge of each false claim alleged. The court thus joined the Fourth, Sixth, Eighth, and D.C. Circuits to hold that the statutory phrase "direct and independent knowledge of the information upon which the

allegations are based" refers to information upon which the publicly disclosed allegations are based, and rejected the approach of the Third, Ninth, and Tenth Circuits, which hold that the phrase refers to information contained in the *qui tam* complaint. The court also held that a prior state court judgment in a wrongful discharge action did not extinguish the relator's *qui tam* claim under the doctrine of res judicata.

James Mayfield was employed with Lockheed Martin Engineering and Science Company from 1989 until 1995. Mayfield was responsible for preparing reports to NASA pursuant to an engineering contract. The contract made payments to Lockheed contingent upon compliance with provisions requiring the company to report accurate cost data. Mayfield alleges that in 1994 he became aware that Lockheed was knowingly failing to report excessive costs and anticipated cost overruns as required by the contract. In 1995 Lockheed dismissed Mayfield.

Mayfield filed a wrongful discharge suit in state court. In 1996, the court granted summary judgment to Lockheed, and the state court of appeals affirmed the judgment.

In 2000, Mayfield filed a *qui tam* suit against Lockheed in federal court, alleging that Lockheed knowingly failed to report excessive costs and anticipated cost overruns as required by the contract. In 2002, the district court granted Lockheed's motion for summary judgment. *See United States ex rel. Mayfield v. Lockheed Martin Eng'g & Sciences Co.*, 186 F. Supp. 2d 711 (S.D. Tex. 2002), 26 TAF QR 34 (Apr. 2002). The court ruled that the doctrine of res judicata precluded litigation of Mayfield's FCA claims to the extent that they were based on conduct complained of in the prior state court action. The court also held that any later-arising claims not barred by res judicata were barred pursuant to the public disclosure provision, because they were still based, at least in part, on facts disclosed in the state court lawsuit, and Mayfield was not an original source with respect to any wrongful conduct occurring after the filing of the state suit. Mayfield appealed.

Original Source Exception Refers to Information on Which Publicly Disclosed Allegations Are Based

The Fifth Circuit vacated the district court's judgment. It ruled that the district court ought to have considered the question of subject matter jurisdiction first, before addressing the affirmative defense of res judicata. Accordingly, the court of appeals turned first to the public disclosure question. Because Mayfield did not dispute that the state court action served as a "public disclosure" of the information alleged in the federal *qui tam* action, nor that the *qui tam* allegations were "based upon" that public disclosure, the question turned on the statutory construction of the original source exception.

The district court had held that Mayfield was not an original source with respect to any wrongful conduct occurring after the filing of his state court suit because he was laid off from Lockheed before that suit was filed, and thus did not have direct knowledge of conduct occurring there afterward. Thus, the district court apparently assumed that the requirement in § 3730(e)(4)(B) that an original source must have "direct and independent knowledge of the information upon which the allegations are based" refers to the information in the *qui tam* complaint rather than the information in the public disclosure.

The court of appeals rejected this approach, and held that the original source requirement does not require that a relator have direct and independent knowledge of each false claim alleged in his complaint. The court noted that courts of appeals are divided over the interpretation of the term "information" in the phrase "direct and independent knowledge of the information on which the allegations are based." The Fourth, Sixth, Eighth, and D.C. Circuits read the term "information" in the original source provision, § 3730(e)(4)(B), in tandem with the same term as used in the immediately preceding public disclosure provision, § 3730(e)(4)(A). Thus these courts conclude that the term "information" in the original source provision refers to the information on which the publicly disclosed allegations are based rather than the information on which the allegations in the *qui tam* complaint are based. The Third, Ninth, and Tenth Circuits have followed a contrary approach, and construe the term "information" in the public disclosure provision to refer to information contained in the *qui tam* complaint.

The Fifth Circuit adopted the majority view espoused by the Fourth, Sixth, Eighth, and D.C. Circuits. The court ruled that the term "information" logically ought to mean the same thing in both subparagraphs of the provision addressing public disclosure, especially since subparagraph (B) is clearly intended to define a term identified in subparagraph (A).

The court also observed that courts following the majority view have no trouble assigning distinct meanings to the statutory terms "direct" and "independent": "direct" information is based on first-hand knowledge, while "independent" information is independent of the public disclosures. Courts following the minority approach, in contrast, have difficulty distinguishing the two terms. For example, the Tenth Circuit defined "direct" knowledge as "knowledge gained by the relator's own efforts and not acquired from the labors of others" and "independent" knowledge as "knowledge not derivative of the information of others." *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 (10th Cir. 1999). The Fifth Circuit, ruling in the present case, could perceive no distinction between these terms as defined by the Tenth Circuit, and concluded that the failure to draw a meaningful distinction between "direct" and "independent" knowledge is a further flaw in the minority approach.

Direct Knowledge Defined

The court observed that because Mayfield was responsible for filing the publicly disclosed information in the state action, dismissal on the basis that his knowledge was not "independent" would have been error. However, the court ruled that remand was appropriate to allow the district court to make factual findings as to whether Mayfield also satisfied the "direct" knowledge requirement. To aid the district court in this endeavor, the court of appeals undertook to discuss that requirement in some detail.

The Fifth Circuit interpreted "direct" knowledge as "knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others." Significantly, Congress used the phrase "an original source," not "the original source." Thus, in the Fifth Circuit's view, courts are "not charged with the duty of finding 'the' single one true whistleblower." Rather, they must look to the factual subtleties of the cases before them and attempt to strike a balance between those individuals who simply stumble upon a seemingly lucrative nugget and those actually involved in unearthing important information about a false or fraudulent claim.

Res Judicata Did Not Bar *Qui Tam* Claim

Although the court found it beneficial to remand for factual findings on the direct knowledge requirement, in the interest of judicial efficiency, it also noted that the district court erred in concluding that res judicata barred some of Mayfield's FCA claims. Assuming *arguendo* that subject matter jurisdiction existed, the prior state court judgment did not preclude Mayfield from raising his federal *qui tam* claims.

Under Texas law, res judicata precludes relitigation of a claim where (1) there was a prior final judgment on the merits by a court of competent jurisdiction, (2) the parties in the two actions were identical or in privity, and (3) the second action is based on the same claims as were raised or could have been raised in the first action. The district court erred in holding that the third element was satisfied.

Mayfield did not contest that the first element was satisfied. The second element, the identity of parties requirement, was also satisfied as to Mayfield. The district court's statement that the United States was not a party was simply incorrect. Nevertheless, inclusion of additional parties to the second suit does not vitiate satisfaction of the second element with respect to a party that was represented in the first suit.

Nevertheless, the Fifth Circuit ruled, there was no identity of claims between the two suits. While there was factual overlap between the two actions, the wrongful termination claim raised in the state action and the FCA claim raised in the federal action did not form a convenient trial unit for purposes of claim preclusion. The central issue in the state action was whether a certain exception to the doctrine of employment at will should be extended to situations where an employee is allegedly terminated for asking whether an act he is required to perform is illegal. In contrast, the central issues in the FCA action were the terms of the NASA contract, and whether Lockheed knowingly submitted false bids and reports pursuant to that contract. The remedies sought and the measures of damages in the two cases were also completely different. Therefore, the Fifth Circuit could see no convenience in trying the two cases together, especially given the special procedural requirements and potential involvement of the Government in the *qui tam* suit. Therefore, assuming that the district court were to find on remand that Mayfield satisfied the "direct" knowledge requirement, the Fifth Circuit held that Mayfield's *qui tam* claims were not extinguished under the doctrine of res judicata.

Section 3730(h) Retaliation Claims

***U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital*, 2003 U.S. Dist. LEXIS 8846 (D. Mass. May 21, 2003)**

See "Rule 9(b)" below at page 26.

***Robbins v. Provena Hospitals, Inc.*, 2003 U.S. Dist. LEXIS 10692 (N.D. Ill. June 24, 2003)**

An Illinois district court dismissed an FCA retaliation action for failure to state a claim. The court ruled that the plaintiff failed to adequately plead that the defendant hospital was on notice that she was investigating fraud when it discharged her.

Pamela Robbins, a registered nurse, worked at Provena Saint Joseph Hospital from 1979 until her discharge in 2002. Robbins was co-chair and later chair of the Illinois Nurses Association, the exclusive bargaining unit for the registered nurses at the hospital. In this capacity she complained about the adequacy of nurse staffing. In 2001 she discussed her concerns with the Illinois Department of Public Health. IDPH officials advised her to record any delays in patient treatment and informed her that such delays could affect the hospital's right to participate in and receive reimbursement under Medicare and Medicaid. The nurses at the hospital subsequently filed hundreds of forms notifying the management of delays in patient treatment and unsafe staffing levels.

In early 2002, Robbins and other nurses organized public hearings on patient safety legislation, and later that year Robbins also circulated petitions addressed to IDPH demanding an investigation into nursing safety standards at the hospital. On June 7 the hospital discharged Robbins for allegedly violating an agreement prohibiting strikes and work stoppages.

Robbins sued, alleging violations of the anti-retaliation provision of the FCA, as well as retaliatory discharge in violation of Illinois law and public policy. The hospital moved to dismiss the FCA retaliation claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and in the alternative, to dismiss the state law claims on the grounds that an adequate alternative remedy was available.

Employer Had No Notice of Protected Conduct

The court dismissed the FCA retaliation claim. To establish such a claim, a plaintiff must show that (1) she engaged in protected conduct (acts "in furtherance of" an FCA action); (2) her employer knew she was engaged in this conduct; and (3) the employer discriminated against her at least in part because of the conduct. The court found that Robbins had adequately pleaded that she engaged in protected conduct but failed to allege that her employer was aware of such conduct.

It was clear that Robbins was attempting to increase the number of registered nurses on staff. She also alleged that she had learned that the inadequate staffing and resultant delays in patient treatment could affect the hospital's right to participate in and receive reimbursement from Medicare and Medicaid. The court ruled that documenting staffing levels and delays in services could be one way to investigate the hospital's compliance with regulations, which could later be used to show false representations. Therefore, the court ruled that Robbins had adequately alleged that she was investigating the possibility that the hospital was submitting false claims to the Government.

However, the court ruled, Robbins failed to put the hospital on notice that she was investigating Medicare or Medicaid fraud. The hospital did know that Robbins was investigating staffing inadequacies and treatment delays, and that she had contacted government authorities regarding that investigation. However, there was no indication that she threatened a *qui tam* action, notified the hospital that she was investigating fraud, or accused the hospital of making false representations, violating the FCA, or defrauding the Federal Government.

Therefore, the court dismissed Robbins' FCA retaliation claim. However, the court declined to dismiss her state law claims, because the defendant's argument that the FCA provided an adequate alternative remedy was moot now that the FCA claim had been dismissed.

Section 3731(b) Statute of Limitations

***U.S. ex rel. Barrett v. Johnson Controls, Inc.*, 2003 U.S. Dist. LEXIS 5973 (N.D. Tex. Apr. 9, 2003)**

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

***U.S. ex rel. Malloy v. Telephonics Corp.*, 2003 U.S. App. LEXIS 12010 (3d Cir. Apr. 16, 2003)**

The Third Circuit affirmed the dismissal of a *qui tam* action based on the statute of limitations. In an unpublished opinion, the court

rejected the relator's contention that the complaint should relate back to the date of the complaint in an earlier action that was subsequently dismissed. The court also rejected the argument that the complaint was timely under the doctrine of equitable tolling. Without deciding whether equitable tolling principles apply in FCA cases, the court ruled that the complaint was untimely even under the most liberal application of those principles.

On June 30, 1997, John Malloy filed a *qui tam* action in South Carolina against his former employer, Telephonics Corporation, alleging that Telephonics filed a false claim on September 21, 1991, and unlawfully dismissed him in July of 1991 in retaliation for protected activity. The Government declined to intervene, and in 1998 the action was transferred to New Jersey. In 1999 the New Jersey district court dismissed the action for insufficient service of process and failure to effect service.

On April 2, 2001, Malloy, proceeding pro se, filed a second *qui tam* action, using the same complaint from his 1997 suit. The Government again declined to intervene, and Telephonics moved to dismiss based on the statute of limitations. The district court dismissed with prejudice and denied a subsequent motion for reconsideration. Malloy appealed.

Complaint Did Not Relate Back to Complaint in Prior Action

In an unpublished opinion, the Third Circuit affirmed. The court rejected Malloy's contention that his 2001 complaint should relate back to the filing of the 1997 complaint in South Carolina. Under the plain language of Federal Rule of Civil Procedure 15(c), the relation back doctrine applies only to the amendment of a pleading in the same civil action. Accordingly, the court ruled, Rule 15(c) does not permit a complaint filed in one civil action to relate back to a complaint filed in a separate civil action.

Equitable Tolling Argument Failed

The court also rejected Malloy's attempt to invoke the doctrine of equitable tolling. The court observed that it had cautiously applied the equitable tolling doctrine in cases where tolling is not inconsistent with the statute in question. Equitable tolling may apply in cases where a plaintiff has been prevented from asserting his claim by extraordinary circumstances. Malloy alleged that the attorney who represented him in the 1997 action was incompetent. The district court had in fact found that the dismissal of that action was due to the attorney's neglect, and the attorney was subsequently disbarred and ordered to disgorge his fees. Malloy also argued that the statute of limitations should be tolled for an additional four months due to his recovery for brain surgery he underwent in 1996.

The Third Circuit observed that it has never addressed whether the equitable tolling doctrine applies in FCA cases. However, the court ruled that it had no need to reach that issue, because Malloy's complaint was untimely even under the most liberal application of the equitable tolling doctrine. Even if the statute of limitations were tolled while Malloy's 1997 action was pending, the statute began to run again on September 27, 1999, when the 1997 action was dismissed. After the remaining 82 days had run, the statute expired on approximately December 18, 1999.

Malloy did file a motion for reconsideration on May 1, 2000, and the court observed that some courts have tolled statutes of limitations during the pendency of a timely motion for reconsideration. However, it stated that Malloy's motion for reconsideration was extremely untimely, and noted that in any case tolling during the pendency of this motion would not save Malloy's second action, which was not filed until April 2, 2001.

The court rejected Malloy's contention that the statute of limitations should be tolled for an additional four months due to his recovery from brain surgery in 1996. The court noted that Malloy did not present any certification, affidavit, or other verification from any medical professional indicating that he required a four-month recovery period.

Accordingly, the court of appeals ruled that even under the most liberal application of the equitable tolling doctrine the statute of limitations on Malloy's claim expired in 1999 and thus his 2001 complaint was time-barred. Therefore, the court affirmed the judgment of the district court.

Rule 9(b)

***U.S. ex rel. Barrett v. Johnson Controls, Inc.*, 2003 U.S. Dist. LEXIS 5973 (N.D. Tex. Apr. 9, 2003)**

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

***U.S. ex rel. Willard v. Humana Health Plan*, 2003 U.S. App. LEXIS 12933 (5th Cir. June 26, 2003)**

See "False Certification" above at page 4.

***U.S. ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374 (7th Cir. May 8, 2003)**

The Seventh Circuit affirmed the dismissal with prejudice of a *qui tam* complaint for failure to comply with Federal Rules of Civil Procedure 8 and 9(b). The court ruled that the complaint was so long and disorganized that it failed to present a short and plain statement of the claim, and nevertheless, despite its prolixity, also failed to plead fraud with particularity.

Joseph Garst, a former employee of the Department of Veterans Affairs (VA), brought this *qui tam* action in 1998 against Lockheed Martin Corporation and several of its subsidiaries (Lockheed), alleging that the defendants made false representations in order to obtain an office automation contract, and then failed to deliver on their promises under the contract. The Government declined to intervene, and Lockheed moved to dismiss for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). Before the court could rule on this motion, Garst filed a 16-page amended complaint that was 50% longer than his initial complaint. Nevertheless, the district court ruled that the amended complaint was no better, and dismissed it without prejudice for failure to comply with Rule 9(b). *See* 158 F. Supp. 2d 816 (N.D. Ill. 2001), 22 TAF QR 16 (Apr. 2001).

Garst then filed a 74-page second amended complaint, and before Lockheed could respond, he filed a 109-page third amended complaint with 74 attachments, many of them lengthy. Lockheed again moved to dismiss pursuant to Rule 9(b), and also on the grounds that Garst had failed to provide a "short and plain statement of the claim," as required by Fed. R. Civ. P. 8(a)(2). In May 2002, the district court ruled that the complaint was so sprawling that it was essentially incomprehensible, violating Rule 8, and that despite the bloat it lacked details outlining fraud, violating Rule 9(b). Rather than dismissing the third amended complaint, the court directed Garst to file a more definite statement, with detailed instructions regarding the requirements of brevity and specificity. Garst filed a more more definite statement of 23 single-spaced pages with 25 new attachments, and Lockheed supplemented its motion to dismiss. Ruling that Garst had failed to cure the defects identified, the court granted Lockheed's motion and dismissed the third amended complaint with prejudice. *See* 2002 WL 1794004 (N.D. Ill. Aug. 2, 2002), 28 TAF QR 35 (Oct. 2002). Garst appealed.

Complaint Violated Both Rule 8 and Rule 9(b)

The Seventh Circuit affirmed. The court noted that Garst's third amended complaint and more definite statement amounted to 155 double-spaced pages with 99 attachments, but that nonetheless, Garst's appellate brief failed to identify a single false claim. The court found Garst's pleadings "so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters." In exasperated tones, the Seventh Circuit characterized Garst's pleadings as "distended," "unsavory," and "pestilential," and chastised him for wasting judicial resources with his unintelligible submissions. Accordingly, the court of appeals affirmed the judgment of the district court.

***U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital*, 2003 U.S. Dist. LEXIS 8846 (D. Mass. May 21, 2003)**

A Massachusetts district court dismissed with prejudice a *qui tam* action with an accompanying retaliation claim. The court ruled that the *qui tam* action failed to set forth the allegations of fraud with particularity, or to identify a single specific false claim. Furthermore, the plaintiff failed to state a claim for retaliation upon which relief could be granted.

John Karvelas, a former respiratory therapist at Melrose-Wakefield Hospital, alleges that in 1996 and 1997 he notified his superiors of inadequate staffing, administrative improprieties, and the absence of blood gas quality control. He was discharged in early 1997. In 2000 he filed a federal action (*Karvelas I*) alleging retaliation in violation of the FCA, wrongful discharge, and defamation. The court found that Karvelas had failed to state a cognizable claim for FCA retaliation, and dismissed the supplemental state law claims for lack of federal jurisdiction.

In 2001 Karvelas then filed the instant action (*Karvelas II*) as a *qui tam* action under the FCA, repleading as part of the allegations the retaliation claim that the court had previously dismissed in *Karvelas I*, and also adding a purported RICO claim. The Government declined to intervene and the complaint was unsealed. The defendants moved to dismiss for failure to state a claim upon which relief can be granted. The Government submitted a statement of interest taking no position on the merits but requesting that any dismissal be without prejudice to it.

Relator Failed to Plead Fraud With Particularity

The court granted the defendants' motion and dismissed with prejudice. The court noted that Karvelas' *qui tam* allegations had failed to identify any specific false claim submitted by the defendants. Karvelas did outline several "schemes" in which the defendants allegedly participated, but in none of these schemes did he allege FCA violations with the particularity required by Rule 9(b). Karvelas claimed that the defendants made false representations regarding staffing, performed inadequate blood tests, provided substandard and medically unnecessary services, and were involved in upcoding, double-billing, unbundling, kickbacks, self-referrals, and numerous additional schemes. However, Karvelas provided no specifics regarding these claims.

In the court's view, Karvelas' complaint, despite its prolixity, did not provide the particulars required by Rule 9(b). Therefore, the court granted the defendants' motion to dismiss Karvelas' *qui tam* claims.

Defendant Was Unaware That Plaintiff Was Investigating Fraud

The court also dismissed Karvelas' retaliation claim. The court had dismissed a similar claim in *Karvelas I* under Rule 12(b)(6), and the defendants urged that the renewed retaliation claim should be dismissed on res judicata grounds. Although the court noted that there is authority in the First Circuit that a dismissal under Rule 12(b)(6) operates as a dismissal on the merits with res judicata effect, the court was reluctant to dismiss on this basis because the dismissal in *Karvelas I* occurred in the early stages of litigation.

Instead, the court dismissed the retaliation claim for failure to state a claim upon which relief can be granted. In order to state a retaliation claim, the court observed, the plaintiff must prove three elements: (1) that the employee was engaged in protected conduct; (2) that the employer knew that the employee was engaged in such conduct; and (3) that the employer discriminated against the employee because of the protected conduct.

On the issue of notice to the employer, the court quoted with approval the position of the Seventh Circuit: "An employer is entitled to treat a suggestion for improvement as what it purports to be rather than a precursor to litigation." *Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999). Therefore, the court ruled, general complaints about deficiencies in care or billing problems are not sufficient to put an employer on notice that an employee engaged in protected conduct.

Karvelas alleged that he notified various hospital officials about problems with substandard care, understaffing, regulatory violations, and job dissatisfaction. These statements could give the hospital no indication that he was investigating it for defrauding the Government in violation of the FCA. Therefore, because the hospital was not on notice that Karvelas was investigating a potential FCA matter, the court dismissed his retaliation count for failure to state a claim. The court also dismissed the RICO claim for lack of standing.

The court dismissed with prejudice, observing that despite ample opportunity to sharpen his pleadings, Karvelas appeared content to rest with conclusory allegations. However, the dismissal was without prejudice to the Government, which remains free to pursue these or any related claims.

***U.S. ex rel. Barmak v. Sutter Corp.*, 2003 U.S. Dist. LEXIS 10446 (S.D.N.Y. June 20, 2003)**

A New York district court dismissed a *qui tam* action with prejudice pursuant to Federal Rule of Civil Procedure 9(b). The court rejected the defendant's argument that res judicata barred the relator's claims. However, the court ruled that the complaint failed to satisfy Rule 9(b) because it did not allege specific facts regarding the submission and timing of the alleged false claims.

David Barmak brought this *qui tam* action against Sutter Corporation and its parent company Orthologic Corporation. He alleged that the defendants fraudulently obtained government overpayments by waiving copayments on continuous passive motion exercisers (CPMs) and related equipment; by forging certificates of medical need; and by paying kickbacks to hospitals and doctors for patient referrals.

In 2001, the Government intervened in part and subsequently settled the claims in which it intervened. Barmak thereupon filed a second amended complaint, which the defendants moved to dismiss pursuant to Rule 9(b) and the doctrine of res judicata. In March 2002, the court granted the defendants' motion, holding that the second amended complaint included claims that were covered by the settlement and thus barred by res judicata, and that the remaining claims failed to satisfy Rule 9(b).

Barmak then filed a third amended complaint. The defendants moved to dismiss with prejudice pursuant to the doctrine of res judicata and Rule 9(b).

Res Judicata Did Not Bar Relator's Claims

The court granted the defendants' motion. The court ruled that res judicata did not bar any of the claims asserted in Barmak's third amended complaint. However, the court held that the complaint failed to satisfy Rule 9(b) because it did not identify specific details of the submission of the alleged false claims to the Government.

The defendants argued that a settlement agreement between Orthologic and the Government in a separate *qui tam* action, *United States ex rel. Einer v. Orthologic Corporation*, had preclusive effect on Barmak's claims under the doctrine of res judicata. The court ruled that this argument was without merit. In the *Einer* settlement, the Government expressly reserved the right to bring claims related to devices other than the one at issue in that suit. The court observed that the third amended complaint asserted only CPM claims, which were not at issue in *Einer*.

Court Adopts *Clausen* Approach to Rule 9(b)

Barmak's third amended complaint provided details regarding the alleged scheme to defraud the Government, but did not provide details of the actual submission of invoices to the Government pursuant to the scheme. Instead, Barmak averred that the details regarding the allegedly fraudulent claims were within the defendants' exclusive or particular control. However, the court observed, the Government, physicians and patients also possessed that information. Barmak also argued that he was entitled to a less stringent pleading standard because he was a corporate outsider and thus not privy to the defendants' internal records.

The court found the decision in *United States ex rel. Clausen v. Laboratory Corporation of America*, 290 F.3d 1301 (11th Cir. 2002), 27 TAF QR 14 (July 2002) to be directly on point. In *Clausen*, the relator identified a number of specific schemes under which a medical testing company allegedly ordered medically unnecessary tests. However, he was unable to provide specific information about the submission of bills to the Government pursuant to the schemes. The district court dismissed the action pursuant to Rule 9(b) and the Eleventh Circuit affirmed. The court of appeals held that Clausen's complaint did not satisfy Rule 9(b) because it did not specify the exact dates on which the false claims for payment were submitted to the Government, nor the exact amounts of the claims.

After summarizing *Clausen* at some length, the court concluded that Barmak's complaint failed to satisfy Rule 9(b). The court noted that Barmak did not specify the "who, what, when and where" of the alleged false submissions. It ruled that Barmak was not entitled to a lesser pleading requirement because he had failed to exhaust all avenues for obtaining the detailed information lacking in the complaint. Furthermore, the court ruled, Barmak's outsider status did not entitle him to an exception to the requirements of rule 9(b). Accordingly, the court granted the defendants' motion to dismiss with prejudice.

***U.S. ex rel. Grandeau v. Cancer Treatment Centers of America*, 2003 U.S. Dist. LEXIS 11036 (N.D. Ill. June 27, 2003)**

An Illinois district court denied the defendant's motion to dismiss a *qui tam* action pur-

suant to Rule 9(b). The court ruled that the relator had provided the defendants sufficient notice of their role in the alleged fraud to enable them to prepare a defense.

Jacqueline Grandeau worked at Midwest Regional Medical Center (MRMC) in Zion, Illinois from 1997 to 2000. She brought this *qui tam* action against MRMC, its corporate parent Cancer Treatment Centers of America (CTCA), and various other individuals and entities, alleging that they engaged in numerous billing practices to defraud the governments of Illinois and the United States. She also alleges that she was unlawfully terminated in retaliation for her willingness to report these alleged improprieties. The defendants moved to dismiss, and Grandeau moved to compel discovery and for sanctions.

Allegations Satisfied Rule 9(b)

The court denied the defendants' motion to dismiss with respect to the relator's first count and deferred ruling with respect to the second and third counts. The court also denied the relator's motions.

Grandeau identified nine categories of fraudulent schemes, with enough details to allow the defendants to respond and prepare a defense. Assuming that her allegations were true, it would have been virtually impossible for her to list every instance of fraudulent activity. While the complaint frequently stated that "the defendants" engaged in a certain activity, it was specific when necessary. Throughout the complaint Grandeau listed specific patients and the doctors who treated them. This information, along with the other details in the complaint, was enough to inform the defendants of their alleged role in the fraud.

The court stated that this case exemplified a continuing conundrum in *qui tam* cases. Although fraud must be pleaded with particularity, the breadth of the claims may be such that alleging all the "who, what, when and where" of the fraud would lead to an extremely long, complex, and incomprehensible complaint. In this case, however, the relator alleged specific examples, saving her complaint from dismissal.

The court denied Grandeau's motion to compel at this time, noting that the defendants represented that they had turned over approximately two million pages of records to her. The court suggested that the parties ought to be able to reach an agreement on discovery absent a motion to compel, and assigned a magistrate judge to oversee discovery in order to assist them.

The court deferred ruling on the defendants' motion to dismiss the second and third counts. The court stated that the defendants' contentions with respect to this count had "been largely lost in the welter of paper" and ordered the parties to finish briefing the issues involved.

Statutory Preclusion

U.S. v. Sforza, 326 F. 3d 107 (2d Cir. Apr. 10, 2003)

The Second Circuit affirmed a district court ruling denying a motion to dismiss an FCA action for lack of subject matter jurisdiction and enforcing a settlement agreement reached in that action. The court ruled that the preclusion-of-review provision in the Federal Employee Compensation Act does not bar jurisdiction over an FCA action to recover damages for false claims for federal employee compensation.

The Government brought this FCA and common law action against Alfred and Josephine Sforza, seeking recoupment of disability payments made to Alfred Sforza (Sforza) following a slip and fall. Sforza, a former letter carrier with the United States Postal Service (USPS), submitted the claim in 1982, asserting that he had slipped on ice and suffered a back injury. In 1984, the Office of Workers Compensation Programs (OWCP), which makes eligibility determinations pursuant to the Federal Employee Compensation Act (FECA), found Sforza eligible for FECA benefits, retroactive to 1983. Sforza continued to receive FECA benefits over the next fifteen years by regularly providing OWCP with sworn affirmations that he remained disabled and by submitting to physical examinations by Department of Labor (DOL) doctors. In his sworn affirmations and medical examinations, Sforza claimed he could not sit, stand, walk, lie down, or drive for any significant period of time because of pain in his back or leg.

DOL doctors became skeptical as early as 1990, and in 1996 the USPS put Sforza under surveillance. Over the next year he was observed and videotaped while driving, shopping, mowing his lawn, and performing other yard work. In 1997, Sforza appeared with his wife Josephine at a DOL rehabilitation interview. They made statements that were belied by the videotapes.

In 1998, Sforza was indicted for making false statements in connection with claims for FECA benefits. He pleaded guilty in 1999 to one count, admitting he made false statements in the 1997 interview, and was sentenced to probation and ordered to pay restitution for the benefits he received after the 1997 interview.

In 2000 the Government brought this FCA action against the Sforzas, seeking recovery for false claims made between 1990 and 2000. The defendants moved to dismiss for lack of subject matter jurisdiction, arguing that the FECA's preclusion-of-review provision barred the FCA claim. The district court denied the motion, ruling that FECA only precludes review of the decision by the OWCP to award or deny benefits, and the Government was not directly challenging OWCP's decision.

In 2001 the parties agreed in open court to settle the case for $200,000, subject to approval by the Chief of the Civil Division of the U.S. Attorney's Office for the Southern District of New York, which was later obtained. However, the Sforzas subsequently refused to execute the written settlement agreement, claiming that they had intended that the release cover criminal liability as well, thereby protecting Josephine Sforza from prosecution for complicity. The district court nevertheless ruled that the Sforzas' oral statements on the record were legally binding, entered judgment for $200,000, and dismissed the case with prejudice. The Sforzas appealed, challenging the district court's denial of their motion to dismiss and contesting the enforceability of the settlement.

FECA Does Not Preclude FCA Claims

The Second Circuit affirmed. The court observed that preclusion of one federal statute by another is strongly disfavored absent an express manifestation of preclusive intent or a positive repugnancy between the two statutes. Furthermore, numerous courts of appeals have held that FECA's preclusion-of-review provision, 5 U.S.C. § 8128(b), is not an absolute bar to jurisdiction over claims in which a factual or legal conclusion previously reached by OWCP in awarding or denying benefits might be undermined or even reversed. Thus, the Second Circuit concluded that the preclusion-of-review provision delimits the jurisdictional bar to cases in which the consideration of the Government's FCA claim would necessarily entail a relitigation of OWCP's decision to pay benefits in the first instance.

In this case, the Government's FCA suit sought damages and penalties for the Sforzas' actions in affirmatively defrauding OWCP. This suit was not based on the presupposition that

OWCP erred, since OWCP could have correctly awarded benefits based on the information that the Sforzas fraudulently submitted to it. Therefore, the court ruled, FECA's preclusion-of-review provision did not preclude the Government's FCA suit.

The Sforzas also contended that other sections of FECA, including 5 U.S.C. § 8129, which allows OWCP to recover overpayments, and § 8148, which triggers forfeiture of entitlement in certain circumstances, when read in conjunction with the preclusion-of-review provision, precluded jurisdiction under the FCA. The court rejected this contention, observing that neither provision furnishes an adequate mechanism for recovering benefits obtained by fraud or deterring fraud generally. Both provisions provide only prospective relief, and do not allow the Government to recoup benefits previously paid as a result of fraud. Moreover, even the prospective recovery is limited to the value of the benefit itself, providing no real economic disincentive against fraud.

Settlement Agreement Was Enforceable

The Second Circuit also found no error in the district court's entry of judgment on the terms agreed to by the parties on the record. Settlement agreements are construed according to contract principles, and there was ample evidence that the parties reached a meeting of the minds. Accordingly, the court of appeals affirmed the judgment of the district court.

Calculation of Damages and Penalties

***Hays v. Hoffman*, 325 F.3d 982 (8th Cir. Apr. 9, 2003)**

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" above at page 12.

Damages and Penalties/Excessive Fines Clause

***Hays v. Hoffman*, 325 F.3d 982 (8th Cir. Apr. 9, 2003)**

See "Section 3730(e)(4) Public Disclosure Bar and Original Source Exception" above at page 12.

***U.S. v. Mackby*, 2003 U.S. App. LEXIS 11152 (9th Cir. June 3, 2003)**

In an unpublished opinion, the Ninth Circuit affirmed a district court ruling that a monetary judgment of $729,454 was not constitutionally excessive in a case where the defendant made repeated false claims using his father's physician identification number. The Ninth Circuit held that the judgment was not grossly disproportionate to the gravity of the offense, particularly in light of the potential civil and criminal penalties that could have been imposed.

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).

On remand, the district court held that the judgment was not constitutionally excessive. *See* 221 F. Supp. 2d 1106 (N.D. Cal. 2002), 28 TAF QR 32 (Oct. 2002). The court observed that the judgment was far less than the maximum recovery that could have been sought in this case, and that a sizeable deterrent was appropriate, especially since Mackby had refused to accept responsibility for his wrongdoing. Mackby appealed.

Judgment Was Not Excessive

In an unpublished opinion, the Ninth Circuit affirmed. In reviewing the fine under the Eighth Amendment, the court took into account Congress' judgment about maximum and minimum penalties as a general (though not dispositive) guide. The court observed that if the Government had sought the minimum statutory penalty for each of the 1459 claims for which it sought damages, the fine would have been over $7 million. The court also observed that the potential criminal penalties included fines, restitution, and several years' imprisonment, and that Mackby's conduct was not harmless. The court concluded that the fine imposed on Mackby was not grossly disproportional to the gravity of his offense.

<u>U.S. v. Williams</u>*, *2003 U.S. Dist. LEXIS 9988 (N.D. Ill. June 10, 2003)

An Illinois district court rejected the defendants' constitutional challenges and granted judgment on the pleadings to the Government in an FCA action. The court rejected a double jeopardy challenge because no criminal charges had been brought, and rejected an equal protection challenge because the FCA does not create any classifications, suspect or otherwise. The court also ruled that a monetary judgment of less than five times the measurable actual loss to the Government was well within the bounds of proportionality, and thus did not violate the Excessive Fines Clause of the Eighth Amendment.

The Government brought this FCA action against Perry and Gwendolyn Williams, alleging that they submitted false income statements in support of their son's federal educational grant applications. In their answer the defendants admitted all allegations relating to liability, but raised several constitutional challenges, both facial and as applied, to the FCA's damages provisions. The Government moved for judgment on the pleadings.

Fifth Amendment Challenges Rejected

The court granted the Government's motion. The Government alleged that it incurred $14,387 in single damages, yielding $43,161 in treble damages, and that the defendants presented a false claim in each of the five academic years from 1996 through 2001, yielding civil penalties between $25,000 and $50,000.

The defendants argued that the FCA's damages provisions violate the Double Jeopardy Clause and the equal protection component of the Due Process Clause of the Fifth Amendment. The court rejected the double jeopardy argument because even if the FCA's penalties are properly characterized as quasi-criminal, the defendants had not been charged with any criminal violation, and thus lacked standing to raise a double jeopardy challenge.

The defendants' equal protection challenge was premised on two arguments: (i) that the FCA's damages provisions do not allow for mitigation due to negligence or mistake; and (ii) that the provisions do not take into account the defendant's ability to pay. The first argument failed because the FCA does not impose liability for negligence or honest mistakes. The second argument apparently sought to assert that by failing to consider a defendant's ability to pay, the FCA discriminates against poorer defendants. However, the court concluded, because the FCA does not classify defendants in any manner, suspect or otherwise, it is not subject to equal protection scrutiny even under a deferential rational basis analysis.

Eighth Amendment Challenges Rejected

The court also rejected the defendants' argument that the imposition of treble damages and penalties in their case would violate the Eighth Amendment's Excessive Fines Clause. The court held that because the FCA's damages provisions are deemed punitive, at least in part, the Eighth Amendment's Excessive Fines Clause applied. The court therefore undertook to examine whether FCA damages and penalties in this case would be grossly disproportionate to the gravity of the offense.

In approaching this question, the court observed that Congress' well-articulated basis for the current damages scheme is entitled to substantial deference. In passing the 1986 amendments to the FCA, Congress emphasized that fraud against the Government is significant and pervasive in large and small programs alike, and that double damages did not provide an adequate deterrent.

The court assessed treble damages of $43,161, and penalties of $5,500 per false claim, for a total award of $70,661. The court ruled that this fine was not grossly disproportionate to the gravity of the defendants' offense. The remedial portion of the fine was at least $14,387, which represented only the Government's readily measurable loss, but not necessarily its total loss. Thus the punitive portion of the fine was at most $56,274, or less than four times the measurable actual loss to the Government. The court ruled that this penalty was well within the bounds of proportionality, especially since the FCA requires no actual loss as a prerequisite to the imposition of a fine.

Furthermore, although the court recognized that the soaring cost of higher education can place severe financial strains on families like the defendants', it could not condone self-help remedies involving willfully defrauding the Government. By imposing the minimum penalties prescribed by law, the court took into account the difficulty of the defendants' circumstances. Moreover, the defendants knowingly submitted false information on five separate occasions over five years, and thus their conduct was hardly an isolated lapse in judgment.

Because the defendants had failed to raise a viable constitutional challenge to the FCA's damages provisions, the court granted the Government's motion for judgment on the pleadings. The court entered judgment against the defendants, jointly and severally, in the amount of $70,661.

***U.S. ex rel. Gilbert v. Bay Area Rapid Transit District*, 2003 U.S. App. LEXIS 7575 (9th Cir. Apr. 18, 2003)**

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, and in an unpublished decision, the court of appeals affirmed. *See* 2002 WL 1891310 (9th Cir. Aug. 16, 2002), 28 TAF QR 44 (Oct. 2002).

Gilbert sought leave to file a successive motion for relief from judgment, but the district court denied leave, declared him a vexatious litigant, and ordered him to obtain pre-filing review of any future motions or actions involving claims that were the subject of or related to claims in this action. Gilbert once again appealed pro se to the Ninth Circuit.

In a brief unpublished opinion, the Ninth Circuit affirmed. It found no abuse of discretion in the district court's denial of leave to file a successive motion for relief, because it was clear that Gilbert could not state a claim under the public disclosure bar. Likewise, the district court did not abuse its discretion in requiring Gilbert to obtain pre-filing review for any future related motions or actions.

***Pentagen Technologies International, Ltd. v. United States*, 2003 U.S. App. LEXIS 7901 (Apr. 23, 2003)**

In April 2003, the Second Circuit affirmed a district court's grant of sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 against relator's counsel in a *qui tam* action. This case formed "a small part of a remarkable torrent of litigation" consisting of at least ten lawsuits filed in various fora arising out of the plaintiff Pentagen's failure to secure a software contract with the Department of Defense. The first, second, and fourth such lawsuits were brought in New York and based on copyright and trademark claims. The district court ultimately consolidated and subsequently dismissed these suits, observing that the litigation was a "paradigm of the situation that *res judicata* was intended to avert and resolve." The third lawsuit, brought in Virginia, was likewise dismissed; the Fourth Circuit affirmed, stating that Pentagen's motion for recusal of the district judge was "frivolous on its face" and "reprehensible," and later imposed sanctions on both Pentagen and its counsel. Pentagen then turned to the False Claims Act in its fifth and sixth lawsuits. The district court dismissed the fifth suit, characterizing some of the plaintiff's arguments as "ridiculous," as well as the sixth, which the court found to be "factually identical" to the fifth except for the insertion of an additional plaintiff. In the course of the appeal of the decision in the sixth action to the Second Circuit, Joel Robinson, Pentagen's counsel, represented to the court that he would refrain from bringing any further related actions.

Nevertheless, Pentagen and Robinson ultimately brought four more related actions. The seventh, based on intellectual property claims, and the eighth, an abuse of process claim, were dismissed. The present suit, the ninth based on the same set of facts, and the third under the FCA, alleged that Pentagen's competitor CACI colluded with the United States in filing an amicus curiae brief, in meeting with a government official to obtain a witness statement, and otherwise collaborating to defend against the first two *qui tam* lawsuits. The court dismissed the suit, holding that the Government had not waived its sovereign immunity, that the FCA does not provide for a private right of action for litigation misconduct, and that Pentagen's abuse of process claim was barred by the statute of limitations. CACI requested sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 and sought an injunction prohibiting Pentagen from pursuing any further litigation. The district court granted the motion. *See* 172 F. Supp. 2d 464 (S.D.N.Y. 2001), 25 TAF QR 17 (Jan. 2002). Robinson appealed the imposition of sanctions on him.

In an unpublished opinion, the Second Circuit affirmed. The court noted that "[p]erhaps inevitably, Mr. Robinson tried to head off oral argument on the instant appeal by filing a frivolous last-minute motion for postponement." At oral argument itself, however, Robinson continued to press claims previously rejected in his earlier lawsuits.

The court of appeals found Robinson's conduct "bizarre and intolerable," and agreed with the district court that this was "a most appropriate case" for the imposition of sanctions. Accordingly, the court of appeals affirmed the district court's decision in all respects. In addition, the court recommended that the district court consider extending the injunction to require any further papers filed on behalf of Pentagen to be signed by counsel independent of Robinson.

***U.S. ex rel. Dunleavy v. County of Delaware*, No. 00-3691 (3d Cir. May 12, 2003)**

In May 2003, the Third Circuit remanded a *qui tam* action to the district court with instructions to reinstate the previously dismissed second amended complaint. Anthony Dunleavy, a former consultant to Delaware County, brought this *qui tam* suit in 1994, alleging that the county improperly used HUD program funds for general county purposes. In 2000, in light of the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000), that states are not "persons" subject to *qui tam* suits under the FCA, the district court concluded that local governments are immune from *qui tam* suits as well, because FCA damages are "essentially punitive." *See* 2000 WL 1522854 (E.D. Pa. Oct. 12, 2000), 21 TAF QR 3 (Jan. 2001).

Dunleavy appealed and the Third Circuit affirmed the judgment of the district court. See 279 F.3d 219 (3d Cir. 2002), 26 TAF QR 4 (Apr. 2002). Noting that the term "person" is not defined in the FCA, the court of appeals concluded that "this lack of clarity in the text of the Act is insufficient indicia [sic] of congressional intent to abrogate local governmental immunity under the FCA." The Third Circuit's 2002 decision ignored a decision issued a week before in the Seventh Circuit, *United States ex rel. Chandler v. Cook County*, 277 F.3d 969 (7th Cir. 2002), 26 TAF QR 1 (Apr. 2002). In *Chandler*, the Seventh Circuit held that the FCA authorizes *qui tam* suits against local governments, and pointed out that decisions in other courts to the contrary were inconsistent with established doctrinal distinctions between states, which are sovereigns, and municipalities, which are not. Dunleavy petitioned for a writ of certiorari in the Supreme Court.

The Supreme Court granted certiorari first in *Chandler*, and on March 10, 2003 affirmed the judgment of the Seventh Circuit. *See* 123 S.Ct.

1239 (2003), 30 TAF QR 1 (Apr. 2003). The Supreme Court ruled that local governments have never enjoyed immunity under the FCA, and observed that the Act's treble damages certainly cannot be equated with classic punitive damages. Two weeks later, the Supreme Court granted Dunleavy's petition for certiorari and vacated the judgment of the Third Circuit. *See* 155 L. Ed. 2d 308 (2003), 30 TAF QR 4 (Apr. 2003). Without discussion, the Supreme Court remanded the case to the court of appeals for further consideration in light of the recent decision in *Chandler*.

On remand, the Third Circuit, in view of the Supreme Court's recent decisions, remanded the case to the district court. In its brief unpublished order, the court of appeals instructed the district court to reinstate the relator's second amended complaint.

***U.S. ex rel. Bidani v. Lewis*, 2003 U.S. Dist. LEXIS 8368 (N.D. Ill. May 16, 2003)**

In May 2003, an Illinois district court denied the defendants' motion to quash a subpoena seeking the deposition of Larry Day, a dialysis consultant, in a *qui tam* action. Dr. Anil Bidani brought this action against Edmund Lewis and two companies Lewis controlled. After an extensive procedural history, *see* 2003 U.S. Dist. LEXIS 3291 (N.D. Ill. Mar. 4, 2003), 30 TAF QR 7 (Apr. 2003), one count of the complaint remains, in which Bidani alleges that the defendants billed Medicare for dialysis supplies without reporting that they received discounts that were in fact illegal kickbacks under the provisions of the Anti-Kickback Act. The defendants argued that Day's testimony was irrelevant because Bidani's allegations related to the defendants' actions between 1991 and 1994, and Day had no direct knowledge of dialysis supply practices after 1990 and no personal knowledge of the defendants' activities.

The court denied the motion to quash, observing that the issue was whether the testimony sought to be barred was clearly inadmissible for any purpose. Day testified as to what was known in the dialysis industry regarding charges for supplies and how those charges were reported in the years leading up to the time covered by Bidani's allegations. The court ruled that these general practices were potentially relevant to show the defendants' knowledge of whether charges for supplies were reasonable or financially risky in light of the amount that would be recouped from Medicare, and thus Day's testimony could possibly shed light on whether the defendants knew of the alleged implications of the discounts they were receiving. Thus, the court ruled, Bidani had offered sufficient reasons for admitting the testimony. Accordingly the court denied the defendants' motion in limine.

***U.S. ex rel. Stewart v. Louisiana Clinic*, 2003 U.S. Dist. LEXIS 9401 (E.D. La. June 4, 2003)**

In June 2003, a Louisiana district court ruled on a variety of objections and motions in a *qui tam* action. Mary Jane Stewart, Jr. and Margaret Catherine McGinity filed this action in 1999, alleging that the Louisiana Clinic and several of its doctors billed Medicaid and Medicare for unreasonable and unnecessary services and made false statements in connection with requests for payment. In 2001 the Government declined to intervene. The defendants each moved to dismiss on the grounds that the relators failed to plead fraud with particularity as required by Rule 9(b), and two defendants moved to dismiss certain claims pursuant to the public disclosure bar. In February 2002 the court rejected the public disclosure motion, but granted the Rule 9(b) motion in part, with leave to amend. *See* 2002 WL 257690 (E.D. La. Feb. 22, 2002), 26 TAF QR 35 (Apr. 2002).

In March 2002 the relators filed a second amended complaint. The defendants again moved to dismiss, arguing that the new complaint cured none of the deficiencies identified by the court in its Feb. 22 order. In May 2002 the court granted these motions in part and denied in them part, and denied further leave to amend. *See* 2002 WL 1066745 (E.D. La. May 28, 2002), 27 TAF QR 25 (July 2002). Discovery proceeded on the remaining allegations, which included upcoding, "zoning" (*i.e.*, misrepresenting the location where services were rendered to obtain a higher reimbursement), "patient buying," and other schemes. A dispute arose over the confidentiality of non-party patient records sought in discovery, which the court resolved in December 2002. *See* 2002 U.S. Dist. LEXIS 24062 (E.D. La. Dec. 11, 2002), 29 TAF QR 27 (Jan. 2003).

Numerous other disputes arose in the course of discovery. The defendants filed various motions to compel, and also raised general objections regarding the scope of discovery and possession of discovery materials.

In its Order and Reasons issued in June 2003, the court granted in part and denied in part the motions of various physician defendants. The court sustained several of the relators' objections to the defendants' interrogatories, and declined to compel the relators to provide a narrative summary of how each document supported each claim.

The court also sustained the defendants' general objections regarding the scope of discovery. The court limited the scope of discovery to the time period and the specific patients identified in the relators' second amended complaint. The court observed that the relators had been allowed to proceed with a "bare minimum" pleading, and that all that had survived Rule 9(b) scrutiny were isolated allegations against individual physicians involving a handful of patients.

However, the court overruled the defendants' general objections regarding possession of documents. The court observed that for purposes of Federal Rule of Civil Procedure 34, documents are deemed to be within the "possession, custody of control" of a party if the party has actual possession, custody or control or has the legal or practical ability to obtain the documents. In light of the relationship between the defendant physicians and the Louisiana Clinic, the court expected the physicians to make their best efforts to respond to discovery by producing documents to which they had access.

<u>U.S. ex rel. Cericola v. Ben Franklin Bank</u>, 2003 U.S. Dist. LEXIS 10565 (N.D. Ill. June 19, 2003)

An Illinois district court denied the relator's motion to disqualify counsel in a *qui tam* action. Karen Cericola, a senior vice president of Ben Franklin Bank, brought this action against the bank and its officers, alleging that they submitted false claims for federal mortgage insurance payments under the HUD Title I Loan Insurance Program. The defendants moved to dismiss pursuant to rule 9(b), but the district court denied the motion. *See* 2003 U.S. Dist. LEXIS 1044 (N.D. Ill. Jan. 27, 2003), 30 TAF QR 43 (Apr. 2003).

Cericola moved to disqualify Steven Smith of the firm of Ross & Hardies on the grounds that Smith was a primary witness against his own client. Cericola contended that before the defendants began submitting the ineligible claims for mortgage insurance, they first tried to rescind the purchase of many of the loans by bringing a breach of warranty suit against the mortgage companies that sold them to the bank. The basis of the breach of warranty claim was that the loans violated HUD requirements and violated Title I insurance, and Ross & Hardies represented the bank in that matter.

Cericola argued that Ross & Hardies counsel was a witness to the defendants' possible spoliation of evidence and perjury. She provided excerpts from minutes of the bank's board meetings during which members discussed destroying documents and planned to have very poor memories during their depositions.

The court rejected Cericola's argument that Smith would be required to testify against his client. Smith's testimony concerning the breach of warranty claim was not needed, as both Cericola and the defendants were available to testify concerning the matter, and the complaint for breach of warranty could be introduced into evidence. Cericola's allegations of spoliation and perjury were speculative and thus insufficient to justify disqualification.

Cericola also contended that Smith should be disqualified for conflict of interest. She argued that Smith promised to keep confidential information he received in a meeting with herself and an FBI investigator. She also argued that Smith offered her legal advice regarding possible defamation liability for attempting to blow the whistle.

The court rejected these arguments as well. It ruled that Cericola had failed to demonstrate that Smith's representation of the defendants would be materially limited by his responsibilities to her. She did not identify any confidential information shared at the meeting with the FBI investigator that Smith did not already know before the meeting.

The court also ruled that an attorney-client relationship was not created by Smith's discussion of defamation with Cericola. Cericola knew that Smith was acting as the bank's attorney. Cericola provided no evidence that she was seeking legal advice from Smith, and admitted that she was "uncomfortable" with Smith because she did not trust him. Accordingly, the court denied Cericola's motion to disqualify Smith and his firm.

***U.S. ex rel. Golden v. Arkansas Game & Fish Commission*, 2003 U.S. App. LEXIS 12833 (8th Cir. June 25, 2003)**

In June 2003, the Eighth Circuit affirmed a district court's grant of summary judgment in a *qui tam* action. Douglas Golden was employed for almost thirteen years with the Arkansas Game & Fish Commission (AG&FC). In 1996, Golden's superiors ordered him to cease patronizing a restaurant in the local Holiday Inn. (Apparently, management had received complaints from the public that uniformed AG&FC employees were spending substantial amounts of on-duty time drinking coffee and socializing at this establishment). Golden continued to patronize the prohibited establishment, and in 1999 he was discharged from his employment.

Golden brought claims against both the AG&FC and its individual employees under the *qui tam* and whistleblower protection provisions of the FCA as well as under 42 U.S.C. § 1983. In January 2002, the court dismissed Golden's claims against AC&FC and the individual defendants in their official capacities. In September 2002, the court granted summary judgment on the remaining claims against the individual defendants in their individual capacities. Golden appealed this second decision.

The Eighth Circuit affirmed. The court of appeals ruled that Golden's failed to raise a prima facie *qui tam* claim against the defendants in their individual capacities, because he proffered no evidence that they knowingly made false claims for government reimbursement. The court also ruled that Golden's retaliation claim failed as a matter of law, because the individual defendants were not Golden's employer.

The court also ruled that Golden's civil rights claims under 42 U.S.C. § 1983 were fatally deficient. Accordingly, the Eighth Circuit affirmed the judgment of the district court.

ALLEGATION: FRAUDULENT SALES OF ELECTRONICS EQUIPMENT

U.S. ex rel. Hayes v. CMC Electronics Inc., No. 01-33 (D.N.J.)

In April 2003, DOJ announced it had intervened in a *qui tam* suit against CMC Electronics. The Government alleges that the subcontractor provided used and refurbished radio equipment to the U.S. Army in violation of its contract. CMC allegedly concealed the fact that the equipment was made from used parts by destroying evidence of prior use and removing serial numbers. The Government estimates its damages at $10 million. Assistant U.S. Attorney James Clark III is handling the matter for the Government.

ALLEGATION: UPCODING AND UNBUNDLING

U.S. v. Abington Memorial Hospital, No. CV-03-2412 (E.D. Pa.)

In April 2003, DOJ announced that it had filed an FCA suit alleging that Abington Memorial Hospital improperly billed for outpatient laboratory testing. The complaint alleges that Abington billed for medically unnecessary tests and engaged in upcoding and unbundling. The Government estimates that over a nine-year period, Abington submitted more than 70,000 false claims worth approximately $1 million. Assistant U.S. Attorney Paul Shapiro is handling this case for the Government.

ALLEGATION: FALSE REPRESENTATIONS REGARDING STORAGE OF WASTE

U.S. ex rel. Natural Resources Defense Council v. Lockheed Martin Corp., No. 5:99CV00170-M (W.D. Ky.)

In May 2003, DOJ announced it had intervened in a *qui tam* suit against Lockheed Martin Corporation. The Government alleged that the company submitted billions of dollars in false claims while failing to properly store and dispose of radioactive waste in Kentucky. The Natural Resources Defense Council filed this *qui tam* action in 1999.

ALLEGATION: UPCODING CLAIMS

U.S. v. Bourseau, No. CV-03-00907 (S.D. Cal.)

In May 2003, DOJ announced that it had filed an FCA suit against former owners of Bayview Hospital in Chula Vista, California. The complaint alleges that Robert Bourseau and other defendants inflated claims in cost reports and knowingly made material misrepresentations in order to keep Medicare funds to which they were not entitled. The Government estimates its damages at $7.7 million. HHS OIG investigated this matter.

ALLEGATION: FRAUDULENT PRICING AND RECORD KEEPING

U.S. ex rel. Hunt v. Merck & Co., No. 00-737 (E.D. Pa.)

In June 2003, DOJ announced it had intervened in two *qui tam* suits against Medco Health Solutions, a subsidiary of Merck & Co. The actions allege that the company filled mail order prescriptions with less than the prescribed number of pills, but billed patients and health plans for the full prescribed amount; cancelled, destroyed, or deleted patients' mail order prescriptions on days of heavy prescription volume so that Medco could avoid penalties for its delays in filling and mailing prescriptions; and favored drugs manufactured by Merck over those of other manufacturers, even when those drugs were more expensive. The two actions have been consolidated and assigned to Judge Anita Brody. George Bradford Hunt and Walter Gauger, two pharmacists who worked in Medco's mail order facility, filed the first *qui tam* action in 1999. Marc Raspanti of Miller, Alfano & Raspanti (Philadelphia) and Alison Duncan of Porter, Wright, Morris & Arthur (Washington, D.C.) represent Hunt and Gauger. Joseph Piancentile, a physician, filed the second *qui tam* action in 2000. Mitchell Kreindler of Kreindler & Associates (Malvern, Pennsylvania) represents Dr. Piacentile.

***U.S. ex rel. Estate of Couto v. Bayer Corp.*, No. 00-10339 (D. Mass.)**

In April 2003, DOJ announced that Bayer Corp. and GlaxoSmithKline (GSK) had agreed to pay over **$344 million** to settle allegations of Medicaid fraud. Bayer will pay a total of **$257,200,00** and GSK will pay **$87,600,922.** This represents the largest-ever Medicaid fraud settlement. The Federal Government, 49 states, the District of Columbia, and Public Health Services entities will share the settlement proceeds.

The Government alleged that Bayer and GSK, in a scheme referred to as "lick and stick," sold relabeled drugs to an HMO at deeply discounted prices, and then concealed this information in order to avoid their obligation to pay millions of dollars in additional rebates to the Medicaid program. The drugs involved included Bayer's Cipro, an antibiotic, and Adalat, an antihypertensive, as well as GSK's Paxil, an antidepressant, and Flonase, a nasal spray. The Medicaid Rebate program requires drug manufacturers to report to CMS the best price they offer to any commercial, for-profit customer, and to pay a quarterly rebate based on that best price.

George Couto, a former manager at Bayer who is now deceased, filed this *qui tam* action against Bayer in 1999. The relator's share of the Bayer portion of the settlement is $34 million, which will go to Couto's estate. Neil Getnick and Lesley Ann Skillen of Getnick & Getnick (New York) represented the relator. The FBI, HHS OIG, and FDA's Office of Criminal Investigations investigated this matter. Susan Winkler, Deputy Chief of the Health Care Fraud Unit of the U.S. Attorney's Office in Boston, and Assistant U.S. Attorney George Vien of the same office handled the matter for the Government.

***First Health Services Corp.* (D.D.C.)**

In April 2003, First Health Services Corporation reportedly agreed to pay **$13 million** to settle allegations that it neglected to correct a computer glitch that caused the District of Columbia Medicaid program to overpay millions of dollars between 1993 and 1996. As a result of that computer program error, First Health recorded thousands of ineligible Medicaid beneficiaries as eligible, and thus they received Medicaid benefits to which they were not entitled. HHS OIG, the Office of Inspector General for the District of Columbia, as well as a task force from the office of Mayor Anthony Williams handled the matter. Assistant U.S. Attorney Rudolph Contreras represented the United States.

***U.S. ex rel. Nivens v. United Airlines*, No. 03-CV-386 (D.S.C.)**

In April 2003, United Airlines reportedly agreed to pay **$3.2 million** to settle allegations that it defrauded the Air Force. The Government alleged that United Airlines, under its contract to maintain troop and cargo carriers, certified that United mechanics had completed engine work that in fact had not been completed. Doug Nivens, a former United mechanic, filed this *qui tam* action. The relator's share is $640,000 or approximately 20% of the total recovery amount.

***U.S. ex rel. Burkholder v. Poudre Valley Health System*, No. 00-K-1938 (D. Colo.)**

In April 2003, Poudre Valley Health System reportedly agreed to pay **$2.9 million** to settle Medicare fraud allegations. The Government alleged that Poudre Valley falsely reported home health care costs and double-billed for physical therapy services. Lee Burkholder, a former director of a Poudre Valley subsidiary, filed this *qui tam* action in 2000. The relator's share is $565,500 or approximately 19.5% of the total recovery amount. In addition, Poudre Valley will pay the relator's legal fees of $39,000. Brian Bates of Antonio, Bates & Bernard (Denver) represented the relator.

***U.S. v. Rothman* (E.D. Pa.)**

In April 2003 Richard Rothman and his company, Reconstructive Orthopedic Associates, agreed to pay **$838,453** to settle Medicare upcoding allegations. The Government alleged that Dr. Rothman, while a supervising physician at a teaching hospital, billed for medical procedures he did not actually participate in. Medicare regulations require that supervising doctors be present during medical procedures to bill for their time. HHS OIG investigated this matter. Assistant U.S. Attorneys Susan Dein Bricklin and Margaret Hutchinson handled the matter.

***Baptist Health System of East Tennessee* (E.D. Tenn.)**

In April 2003, Baptist Health System of East Tennessee reportedly agreed to pay **$810,000** to settle Medicare fraud allegations. The Government alleged that Baptist Health System billed Medicare for treatment of acute respiratory failure cases before tests were given to confirm the diagnoses. The FBI and HHS-OIG investigated the matter. Assistant U.S. Attorney Cynthia Freemon Davidson handled the case for the Government.

***U.S. ex rel. Broach v. Boeing Company*, No. 98-CV-1842 (E.D. Pa)**

In April 2003, DOJ announced that Boeing Co. had agreed to pay **$492,163** to settle allegations that it employed uncertified welders. The Government alleged that Boeing improperly stated that it was employing certified welders to manufacture military aircraft parts, when in fact the welders were not properly tested and certified. James Broach and Fred Noss filed this *qui tam* action. The Army's Criminal Investigation Division and DCIS investigated the matter. Assistant U.S. Attorney Seth Weber handled this case for the Government.

***U.S. v. MVM, Inc.* (D. Mass.)**

In April 2003, DOJ announced that MVM, Inc. had agreed to pay **$67,500** to settle allegations that the company submitted false invoices for security services provided for various federal buildings in New England. The Government alleges that MVM, Inc., a security contractor based in Virginia, billed for security services it did not provide. Specifically, the Government alleges that MVM billed for supervisors who had not been trained as supervisors and failed to provide the ratio of security guards to supervisors required under its contract with the Government. *See* 30 TAF QR 70 (April 2003). GSA OIG investigated this matter. Assistant U.S. Attorney Jeremy Sternberg handled this case for the Government.

***Hiroshi Mashimo, M.D.* (D. Mass.)**

In April 2003, Dr. Hiroshi Mashimo reportedly agreed to pay **$20,000** to settle an FCA suit filed against him. The Government alleged that Mashimo, a VA Hospital physician, used his government-issued credit card to make a series of unreimbursable personal purchases totaling over $10,000. The Veterans Affairs OIG and GSA OIG investigated the matter. Assistant U.S. Attorney Jeremy Sternberg handled this case for the Government.

<u>Albert Einstein Healthcare Network</u> (E.D. Pa.)

In May 2003, Albert Einstein Healthcare Network agreed to pay **$1,982,017** to settle Medicare fraud allegations. The Government alleged that AEHN submitted claims for services that it represented as having been personally performed by AEHN physicians when it lacked sufficient documentary evidence to support the claims. The Government further alleged that AEHN submitted claims for services rendered by AEHN physicians that were improperly upcoded or represented a greater level of service than that actually provided. The civil settlement arose out of investigation and audit conducted by the Department of Health and Human Services. HHS OIG investigated the matter. Assistant U.S. Attorney Margaret Hutchinson handled this case for the Government.

<u>U.S. ex rel. Ohman v. Primary CareNet</u>, No. SA-01-CA-150-IV (S.D. Tex.)

In May 2003, Texas affiliates of Christus Health of Houston reportedly paid the United States **$1.36 million** to settle allegations that the affiliates defrauded Medicare and Medicaid from 1997 to 2000. The Government alleged that the affiliates defrauded the programs by improperly charging Medicare and Medicaid for physicians' evaluation and management services. As a result, the affiliates received more reimbursement than was warranted. HHS OIG investigated the matter. Assistant U.S. Attorney Glenn MacTaggart handled this case for the Government.

<u>U.S. v. Arango</u> (S.D. Tex.)

In May 2003, Dr. Luis Fernando Arango reportedly agreed to pay **$900,000** to the United States to settle Medicare fraud allegations. The Government contended that Dr. Arango submitted claims to Medicare for services that were not performed, services that were not medically necessary, and services that were not performed as identified on the submitted claim. HHS OIG investigated the matter. Assistant U.S. Attorney Andrew Bobb handled the case for the Government.

<u>U.S. v. Wetsman</u> (S.D. Cal.)

In May 2003, Dr. Herman Eric Wetsman reportedly agreed to pay **$126,285** to the Government to settle allegations of Medicaid fraud. The Government alleged that Dr. Wetsman billed for surgical nasal endoscopies that were either not performed or were upcoded from diagnostic nasal endoscopies. HHS OIG and the FBI conducted the investigation. Assistant U.S. Attorney Kathleen Clark handled the matter for the Government.

<u>U.S. v. Chui Lun Lui</u>, No. PJM 01-CR 0559 (D. Md.)

In May 2003, Dr. Chui Lun Lui reportedly agreed to pay **$100,000** to the Government to settle allegations that he had filed false claims to the TRICARE program. Dr. Lui was convicted in a separate criminal prosecution of filing claims for medically unnecessary periodontal scaling and root planing performed on children from two to fifteen years of age. The DOD investigated this case. Assistant U.S. Attorney Virginia Evans handled the matter for the Government.

<u>In re Columbia/HCA Healthcare Corp.</u>, No. 01-MS-50 (D.D.C.)

In June 2003, DOJ announced that HCA (formerly known as Columbia/HCA and HCA The Health Care Company) agreed to pay **$631,000,000** to settle allegations of false claims resulting from a variety of allegedly unlawful practices. The settlement resolves nine False Claims Act *qui tam* lawsuits pending in federal court in the District of Columbia.

The settlement requires HCA to pay $356 million to resolve *qui tam* lawsuits alleging it defrauded Medicare, Medicaid and TRICARE through hospital cost reports. Additionally, $20 million out of this settlement is earmarked for resolution of a separate *qui tam* case being pursued by relators James Alderson and John Schilling. Together they will receive a total of $100 million as their statutory share of the settlements.

Also under the settlement, HCA will pay $225.5 million to resolve lawsuits alleging that HCA hospitals and home health agencies unlawfully billed Medicare, Medicaid, and TRICARE for claims generated by the payment of kickbacks and other illegal remuneration to physicians in exchange for patient referrals. Dr. James Thompson, the doctor who filed suit against HCA in 1995, will receive $41.5 million as his statutory share of the settlement. Gary King, a former HCA employee, will receive $5 million, and Ann Mroz, a former HCA nurse, will take a share of $837,500.

HCA will pay $17 million to resolve allegations that certain company-owned hospitals billed Medicare for unallowable costs incurred by a contractor that operated HCA wound care centers, and for a non-covered drug that the contractor manufactured and sold to hospital patients. As relators in this lawsuit, Joseph Parslow, a former HCA financial officer, will take $2,990,000 and Francesco Lanni, a former Reimbursement Manager at the Wound Care Center at New York Methodist Hospital in Brooklyn, New York will receive $680,000 as a statutory share.

HCA will pay $5 million to resolve allegations concerning patient transfers from one HCA facility to another for which it claimed excessive costs. HCA will also pay $5 million to resolve allegations that its Lawnwood Regional Medical Center in Fort Pierce, Florida submitted false claims in Medicare cost reports by inflating its entitlement to funds to treat indigent patients and by shifting employee salary costs to increase reimbursement amounts under Medicare.

Lastly, HCA will pay $950,000 to settle allegations brought by Michael Marine that HCA improperly shifted its home office costs to hospitals. Mr. Marine will receive a share of $116,500.

In a separate agreement, HCA agreed to pay $1.5 million to resolve allegations that an Atlanta, Georgia hospital paid kickbacks for referral of diabetes patients. This settlement arose from a *qui tam* suit brought in 1996 by a former employee of a co-defendant in the case. The case is captioned *U.S. ex rel. Pogue v. American Healthcorp, Inc.* Pogue will receive $405,000 as a statutory share of the settlement.

John Phillips, Gerald Stern, Peter Chatfield, and Stephen Meagher of Phillips and Cohen (Washington, D.C. and San Francisco) represented John Schilling and James Alderson; Robert Palmer of Hennigan, Bennett & Dorman LLP (Los Angeles) served as co-counsel, and Christopher Hoyer and Christopher Casper of James, Hoyer, Newcomer & Smilijanich P.A. (Tampa) served as local counsel. Other firms representing the cost report whistleblowers were Heller Ehrman; Irell & Manella; and Boies, Schiller & Flexner LLP.

In a separate administrative agreement concluded on the same date, HCA agreed to pay

CMS $250 million to resolve claims arising out of cost reports and home office cost statements for reporting periods ending July 31, 2001. In a previous settlement reached in December 2000, HCA agreed to pay $840 million in civil and criminal fines to resolve allegations that it billed for services provided to ineligible patients, falsified diagnostic codes, improperly billed for laboratory tests, and billed for home health services that were medically unnecessary or not provided. *See* 21 TAF QR 16 (Jan. 2001). When all these settlements are combined, the Government's total recovery against HCA now amounts to $1.7 billion, by far the largest recovery ever reached in a health care investigation.

***U.S. ex rel. Durand v. AstraZeneca Pharmaceuticals LP*, No. 03-122-JJF (D. Del.)**

In June 2003, DOJ announced that AstraZeneca agreed to pay $355,000,000 to resolve criminal charges and civil allegations in connection with its pricing and marketing practices with regard to Zoladex, a drug used primarily for the treatment of prostate cancer.

AstraZeneca pleaded guilty to conspiring to violate the Prescription Drug Marketing Act by causing the submission of claims for payment for Zoladex that had been provided as free samples to urologists. Damages to the Government as a result of this conduct totaled $39,920,098 across Medicare, Medicaid, and other federally funded insurance programs. AstraZeneca agreed to pay a $67,872,156 criminal fine.

AstraZeneca will pay **$266,127,844** to settle allegations that it caused false claims to be filed with the Medicare, TRICARE, DOD and Railroad Retirement Board Medicare programs as a result of fraudulent drug pricing schemes, sales, and marketing misconduct. In addition, AstraZeneca settled claims of civil liability to the Medicaid program by paying the United States and the states **$24,900,000** to resolve allegations that it caused false and fraudulent claims to be filed with the states as a result of its drug pricing and marketing misconduct. The Government alleged that AstraZeneca failed to provide the state Medicaid programs the best price for those drugs as required by law.

This investigation commenced after Douglas Durand, former Vice President of Sales for TAP Pharmaceutical Products, Inc. filed a civil lawsuit under the False Claims Act. As part of this settlement, Durand will receive 17% of the civil recovery pursuant to the False Claims Act *qui tam* whistleblower provisions. This amounts to approximately $47.5 million. HHS OIG conducted investigation into this case. For the criminal charges against AstraZeneca, Assistant United States Attorney Beth Moskow-Schnoll conducted prosecution. Assistant U.S. Attorney Virginia Gibson handled settlement of civil allegations against AstraZeneca in this case.

***U.S. ex rel. Bagley v. TRW Inc.*, CV 95-4153 (C.D. Cal.)**

In June 2003, Northrop Grumman reportedly agreed to pay **$111.2 million** to settle claims that TRW, acquired by Northrop Grumman in December 2002, misclassified various costs and improperly charged them to various federal contracts. The Government alleged that TRW engaged in five separate schemes to increase costs paid to TRW by the Government. The settlement resolves two lawsuits filed in 1994 and 1995 by Richard Bagley, the former director of financial control for TRW's Space & Technology Group. The relator's share is $27.2 million, or 24.5% of the settlement. Eric Havian of Phillips & Cohen (San Francisco) and Michael Bierman of Luce, Forward, Hamilton & Scripps (Los Angeles) represented the relator. David Long of DOJ in Washington, D.C. along with Assistant U.S. Attorneys Susan Hershman, Howard Daniels, and David Ringnell negotiated the settlement on behalf of the Government.

U.S. ex rel. Ven-A-Care v. Dey Inc. ***(S.D. Fla.)***

In June 2003, Dey, Inc. agreed to pay the United States **$9,207,000** to settle claims that it made false representations to the Texas Vendor Drug Program and the Texas Medicaid program. As a result of those false claims, Medicare reimbursed drug purchases at a higher rate than the actual cost of the drugs. Ven-A-Care, the relator, is a closed pharmacy which sells medicines that are injected, inhaled, or otherwise administered by a physician. Ven-A-Care's share is $1,841,400, or 20% of the recovered amount. John Clark of Goode, Casseb, Jones, Riklin, Choate & Watson (San Antonio) represented Ven-A-Care.

In a separate case against Dey to recover Medicaid funds for the State of Texas, Dey agreed to pay $5,624,000 to settle identical claims that it made false representations to the Texas Vendor Drug Program and the Texas Medicaid Program.

U.S. ex rel. Russo v. Sprint Corp., CV 02-03481 (C.D. Cal.)

In June 2003, DOJ announced that Sprint Corporation had agreed to pay the United States **$5,565,250** to settle claims that it defrauded the General Services Administration from 2000 to 2002. The Government alleged that Sprint had charged for costs and fees associated with Presubscribed Interexchange Carrier Charges in excess of the permitted amount under the Federal Technology Service contract of 2001. John Russo, telecommunications specialist, filed this *qui tam* action in April 2002. The relator's share is approximately 17% of the total recovery. Don Warren of the Warren-Benson Law Group (San Diego) represented the relator. Assistant U.S. Attorney Lisa Palumbo handled the matter for the Government.

Massachusetts General Hospital ***(D. Mass.)***

In June 2003, Massachusetts General Hospital (MGH) reportedly agreed to pay the United States **$75,000** to settle allegations that it caused false claims to be submitted to the Medicare program for reimbursement of needle electromyography ("EMG"). The Government alleged that during the period of 1996 through 1999 MGH improperly billed and received reimbursement from Medicare for needle EMG procedures performed by resident physicians when an attending physician was not present to supervise the procedures. The FBI investigated the matter. Assistant U.S. Attorney Peter Levitt handled the matter for the Government.

Corrections:

In *U.S. ex rel King v. San Diego Hospital* (S.D. Cal.), 30 TAF QR 74 (Apr. 2003), the relator's share was 20% of the total recovery. Bonny Harbinger of Phillips & Cohen LLP (Washington, D.C.) represented the relator.

Due to a layout error, Legal Resources Administrator Lorena Ahumada was not listed on the masthead of the last three issues of the *Quarterly Review* (volumes 28 through 30). TAF apologizes for this omission and would like to thank Lorena for preparing the reports of suits filed, interventions, judgments and settlements in those issues.

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.