TAF EDUCATION FUND
Vol. 33
January 2004

TAXPAYERS AGAINST FRAUD

False Claims Act and *Qui Tam* Quarterly Review

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

U.S. ex rel. Honeywell, Inc. v. San Francisco Housing Authority, 2003 U.S. App. LEXIS 24826 (9th Cir. Dec. 9, 2003)

The Ninth Circuit vacated a district court judgment that had erroneously held that local governments are not "persons" subject to *qui tam* actions. In an unpublished opinion, the court vacated the dismissal of the local government entity and its employees in their official capacities.

In 1996 Honeywell, Inc. signed an agreement to provide energy conservation improvements to public housing units operated by the San Francisco Housing Authority (SFHA). The SFHA is primarily funded by the U.S. Department of Housing and Urban Development (HUD). In order to encourage energy conservation, federal law provides that HUD-funded public housing authorities may continue to receive HUD funding "frozen" at previous levels despite savings realized in energy costs, provided that they obtain HUD approval of the energy conservation contract. Under HUD regulations the public housing authority is allowed to keep fifty percent of the savings realized and is required to pay the contractor the other fifty percent (up to the amount of the contract). The SFHA obtained HUD approval of the Honeywell energy conservation contract but refused to pay Honeywell its share of the savings realized. In 1997 Honeywell sued for breach of contract and the SFHA denied that the contract existed. In 2000 a jury found that there was a valid contract but no breach; however, on equitable and other grounds, the trial judge awarded Honeywell its fifty percent share of the savings realized.

Additionally, Honeywell brought this *qui tam* action against the SFHA as well as the current and former executive directors of the SFHA both in their official and personal capacities. Honeywell argued that if there was no contract (as SFHA maintained) then SFHA submitted a false claim to HUD when it sought the funding "freeze" based on the contract, and if there was a valid contract (as Honeywell maintained) then SFHA submitted a false claim because it had no intention of complying with its obligation to pay Honeywell its share of the savings realized. The SFHA moved to dismiss.

The district court granted the motion, ruling that *qui tam* claims cannot be brought against local governments or government agencies. *See* 2001 WL 793300 (N.D. Cal. July 12, 2001), 24 TAF QR 6 (Oct. 2001). The court also dismissed claims against individual employees of the SFHA in their personal capacities, ruling that there could be no personal liability absent allegations that the SFHA employees personally profited from the alleged FCA violations.

Subsequently, the Supreme Court ruled that local governments are "persons" subject to *qui tam* actions. *See Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), 30 TAF QR 1 (Apr. 2003). The SFHA appealed from the judgment of the district court.

District Court Judgment Against Local Entity Vacated

In an unpublished opinion, the Ninth Circuit vacated the judgment in favor of the SFHA. In light of *Chandler*, the court of appeals observed, the district court's judgment was erroneous. Similarly, the Ninth Circuit vacated the district court's erroneous dismissal of the SFHA employees in their official capacities. However, the Ninth Circuit did not disturb the judgment against the SFHA employees in their

personal capacities, as the relator had waived or abandoned those claims.

The court of appeals declined SFHA's invitation to affirm the judgment in its favor for other reasons. The record on appeal did not support SFHA's contentions that the relator failed to state a justiciable controversy, or that SFHA was entitled to Eleventh Amendment immunity.

FCA Liability/Materiality

U.S. ex rel. Harrison v. Westinghouse Savannah River Co., 2003 U.S. App. LEXIS 25789 (4th Cir. Dec. 19, 2003)

The Fourth Circuit affirmed a verdict of FCA liability for a government contractor that falsely certified that its subcontractor had no organizational conflicts of interest. The court ruled that the false certification was material, and that the evidence presented was sufficient for the jury to conclude that the defendant acted knowingly.

Edwin Harrison brought this *qui tam* action against Westinghouse Savannah River Company alleging a variety of violations of the False Claims Act. Harrison was formerly a vice president at General Physics Corporation (GPC), a Westinghouse subcontractor. The Government declined to intervene, and the district court dismissed the complaint in its entirety. On appeal, the Fourth Circuit affirmed in part and reversed in part. *See* 176 F.3d 776 (4th Cir. 1999), 17 TAF QR 5 (July 1999) (*Harrison I*). The court of appeals reinstated two claims: (1) that Westinghouse understated contracting costs, and (2) that Westinghouse falsely certified that GPC had no organizational conflicts of interest (OCIs) relating to the subcontract.

On remand the case was tried before a jury. The district court granted judgment as a matter of law on the cost understatement claim, and Harrison did not appeal that ruling. However, the jury found that Westinghouse knowingly falsely certified that GPC had no OCIs, and the district court ruled that the certification was material. The court found that Harrison had failed to prove actual damages, but awarded civil penalties of $7,500 per request for each of twenty-six funding requests, for a total award of $195,000. Of this total, the court awarded Harrison the maximum allowable relator's share of 30% or $58,000.

Westinghouse appealed, arguing that the district court erred in finding that the OCI certification was material. Westinghouse also argued that it lacked the requisite scienter under the FCA, and that Harrison had failed to satisfy Rule 9(b). Harrison cross-appealed, arguing that the district court improperly limited damages, and should have awarded him personal expenses and the full amount of attorneys' fees requested.

FCA Plaintiffs Must Prove Materiality

The Fourth Circuit affirmed the judgment of the district court in its entirety. As an initial matter, the court of appeals declined Harrison's invitation to affirm on the grounds that materiality is not a required element of an FCA claim. Harrison sought to rely on *Neder v. United States*, 527 U.S. 1 (1999), which was decided less than a month after *Harrison I*, and in which the Supreme Court stated that the use of the term "false statement" as opposed to "fraudulent statement" in a criminal statute does not imply a materiality requirement. However, the Fourth Circuit concluded that *Neder* does not control whether materiality is required in the context of civil FCA cases.

Rather, the Fourth Circuit continued to adhere to its prior FCA materiality jurisprudence set

out in *United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir. 1997), 9 TAF QR 9 (Apr. 1997). In *Berge*, the court held that the FCA imposes a materiality requirement, and that materiality is a question for the judge rather than the jury. The standard for materiality that the *Berge* court adopted is "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action."

False Certifications Were Material

The Fourth Circuit ruled that the district court correctly applied the *Berge* standard. Westinghouse contended that the district court erred in finding that the certification was material because the Department of Energy continued to fund the subcontract even after it was informed about and had investigated the alleged OCI. The court of appeals stressed that the certification of the absence of conflicts of interest serves an important role in the procurement process by insuring that bidding on all contracts is fair. By knowingly passing on the false certification to the Government, Westinghouse undermined the integrity of the procurement system. Although Westinghouse apparently managed to convince Department of Energy investigators that there was no conflict of interest, the jury clearly disbelieved the company's denials.

The court rejected Westinghouse's invitation to change the standard of proof required to establish materiality in an FCA case. Under Westinghouse's proposed standard, a court would be bound to find no materiality whenever a governmental entity investigates an alleged violation but decides to continue funding the contract. This standard is inconsistent with *Berge*, which focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered. Moreover, the court observed, there are instances where the Government might reasonably choose to continue funding a contract despite earlier wrongdoing. Furthermore, the standard proposed by Westinghouse did not further the FCA's goal of policing the integrity of the Government's dealings with its contractors.

Contrary to Westinghouse's suggestion, the certification of absence of conflict of interest at issue in this case was not an insignificant technical requirement. The Fourth Circuit stated that it was hard to imagine that the Department of Energy, had it known the details of the conflict, would have allowed GPC to receive the subcontract. Accordingly, the district court correctly ruled that the false certification was material.

Defendant Acted Knowingly

The Fourth Circuit also rejected Westinghouse's argument that it was entitled to judgment as a matter of law on the issue of scienter. The district court judge had instructed the jury that in order to find that Westinghouse acted knowingly, it needed to find that at least one individual Westinghouse employee "knew that GPC was submitting a bid on the subcontract, and knew of facts which would have required disclosure of an organizational conflict of interest by GPC." However, the district court judge told the jury that it did not need to consider "whether this individual knew that a certification would be required or what information GPC was actually disclosing on it."

Westinghouse argued that this instruction was overly broad. In Westinghouse's view, in order to show the requisite scienter, the relator would have to show that there was one particular Westinghouse employee who knew of the conflict of interest and also knew that Westinghouse was required to submit and did submit the certification of absence of conflicts. The Fourth Circuit rejected this so-called "single actor" requirement.

If courts were to adopt the rule that a single employee must know both the wrongful conduct and the certification requirement, the court reasoned, then corporations would establish segregated "certifying" offices that did nothing more than execute government contract certifications, thus immunizing themselves from liability.

At the same time, the court rejected the "collective knowledge" standard championed by Harrison and the Government, who argued that the district court should have instructed the jury that it could piece together the collective knowledge of all Westinghouse employees to find the requisite scienter. This approach would allow a plaintiff to prove scienter by piecing together scraps of innocent knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim for government funds.

Instead, the district court's instruction correctly focused on the issue of material importance, namely, whether there was at least one Westinghouse employee who knew or should have known that GPC was submitting a bid seeking government funds and that this bid was tainted by a conflict of interest. Therefore, the Fourth Circuit ruled, the instruction was not impermissibly broad. Moreover, viewed in the light most favorable to Harrison, the evidence was sufficient for the jury to decide that Westinghouse, through one of its employees, knew that GPC was submitting a bid that was tainted by conflict of interest. Accordingly, there was sufficient evidence for the jury to find the requisite scienter for liability.

Westinghouse sought to rely on *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 289 (4th Cir. 2002), 28 TAF QR 9 (Oct. 2002), for the proposition that prior government knowledge of an allegedly false claim can negate the scienter required for an FCA violation. However, the court observed, the facts in *Becker* were substantially different from the facts in the case at bar. In *Becker*, the plaintiff claimed that Westinghouse spent government funds for an unauthorized purpose, but the facts showed that the Department of Energy had directed Westinghouse to move surplus money from one account to another, and had full knowledge of the material facts related to the expenditures. Accordingly, the *Becker* court was unwilling to hold Westinghouse liable for following the Government's directions. In the case at bar, however, the Government did not have full knowledge of the material facts, and Westinghouse was clearly not following the Government's directions.

Relator Satisfied Rule 9(b)

Westinghouse also argued that Harrison improperly raised new fraud allegations for the first time at trial, thus violating the requirement of Fed. R. Civ. P. 9(b) that fraud allegations must be pleaded with specificity in the complaint. The court disagreed, finding that Harrison's amended complaint gave Westinghouse sufficient notice of the allegations of misconduct that Harrison eventually proved at trial. Moreover, the court found that Harrison had evidence of facts supporting his claims before discovery. Accordingly, the court of appeals ruled, the district court properly denied Westinghouse's motion for judgment as a matter of law relating to the purported Rule 9(b) violation.

Cross-Appeal Arguments Rejected

The Fourth Circuit also affirmed the judgment of the district court on the points raised in Harrison's cross-appeal. Harrison argued that the subcontract was void *ab initio* because of the fraud, and thus the district court should have allowed him to seek disgorgement of the $9 million that the Government ultimately paid for the work GPC performed. However, Harrison presented no evidence that that GPC failed to perform the work it was required to

perform under the contract or that the Government did not receive the benefit of the work performed. Therefore, the Fourth Circuit ruled, the district court correctly disallowed disgorgement of the entire contract amount, and instead required Harrison to prove damages by showing how much more the Government paid to GPC than it would have paid to another firm absent the false certification of absence of conflict of interest.

Harrison argued that Westinghouse's fraudulent conduct made quantifying damages virtually impossible, and contended that Westinghouse should have borne the burden of proving the added costs the Government would have incurred. However, the court of appeals declined to shift the burden of proving damages, which § 3731(c) of the FCA expressly places on the Government.

Harrison also appealed the district court's denial of his claim for $786 for travel expenses and $3,250 for time away from his business. The district court had ruled that the term "expenses" in § 3730(d)(2) of the FCA does not include such personal expenses. The Fourth Circuit, which in other contexts has limited "expenses" or "costs" to direct costs of litigation such as transcriptions, photocopying, and court costs, found no abuse of discretion in this ruling.

Finally, Harrison appealed the district court's attorney fee award of only $144,000 of a requested amount that exceeded $300,000. In determining this award, the district court divided the request into three time phases: (1) from the initiation of suit through *Harrison I*; (2) from *Harrison I* though the granting of judgment as a matter of law on the claim that Westinghouse understated contract costs; and (3) from judgment on the cost understatement claims to judgment for Harrison on the claim of false certification of conflict of interest. For the first phase, which ended with the dismissal of eight of Harrison's ten claims, the district court reduced Harrison's fee request by 60%. For the second phase, which ended with judgment for the defendant on the much more significant of the two remaining claims, the district court reduced Harrison's fee request by 50%. For the third phase, which ended with Harrison's victory on the remaining claim, the district court awarded all the requested fees. The Fourth Circuit found no abuse of discretion in these awards. Accordingly, the court of appeals affirmed the judgment of the district court.

False Certification

***Gross v. AIDS Research Alliance-Chicago*, 2003 U.S. Dist. LEXIS 19816 (N.D. Ill. Oct. 31, 2003)**

See "Rule 9(b)" below at page 19.

***U.S. ex rel. Holder v. Special Devices, Inc.*, No. 99-8298 (C.D. Cal. Oct. 3, 2003) (Order Denying Defendant's Motion for Summary Judgment); 2003 U.S. Dist. LEXIS 22571 (C.D. Cal. Dec. 3, 2003) (Order re Motion for Reconsideration and Motion to Continue Trial Date)**

A California district court denied the defendant's motion for summary judgment in a *qui tam* action based on allegations that the defendant filed false claims by violating contractual obligations to follow health and safety regulations. The court found that at least one of the defendant's contracts with the Government apparently required it to certify compliance with environmental regulations as a condition of receiving federal funds. Moreover, in a subsequent order, at the Government's urging, the court clarified that False Claims Act liability may properly be based on a theory of implied false certification.

Charles Holder worked for four months in 1999 as Corporate Director for Safety with Special Devices, Inc. (SDI) at the company's Newhall and Moorpark, California facilities. At this time, SDI manufactured explosive and pyrotechnic devices for use in products sold to the Defense Department, NASA, and other federal agencies. Holder alleges that within weeks of his employment he discovered that SDI was systematically violating federal, state, and local environmental, health, and safety laws. He states that he informed his superiors of his concerns.

Eventually, Holder reported the matter to the Government and filed a *qui tam* action against SDI. He alleged that SDI falsely certified to its prime contractor and to the Government that it was in compliance with environmental, health, and safety laws such as the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right to Know Act, and the Resource Conservation and Recovery Act.

SDI moved for summary judgment, arguing that Holder had failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b) because he failed to identify a contract in which SDI made a claim for payment based on a false certification. Of the documents produced by SDI in discovery, Holder identified eighteen that incorporated various Federal Acquisition Regulations provisions requiring compliance with various environmental, health, or safety laws. However, SDI asserted, the contracts did not contain a provision requiring certification of compliance as a condition to payment, and thus there was no liability under the FCA.

Contract Conditioned Funding on Compliance With Environmental Laws

On October 3, 2003, the court denied the defendant's motion. The defendant sought to rely on *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996), 7 TAF QR 8 (Oct. 1996), which held that "violations of laws, rules, or regulations do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." However, in *Hopper*, there was little relationship between regulatory compliance and the receipt of funding from the Government. In the instant case, in contrast, at least one of SDI's government contracts with Raytheon apparently conditioned the receipt of funding on the proper certification of compliance with the Clean Water Act and Clean Air Act.

SDI's Raytheon contract gave rise to an inference that certifications existed, but SDI did not respond to Holder's discovery requests on this point. Until they were produced, the court had no choice but to deny SDI's motion for summary judgment.

The court was unwilling to rule that the environmental compliance requirements were immaterial to the contract. The cost of compliance was undoubtedly factored in to the price that the Government offered and paid, and reflected the Government's desire to reduce the risk of pollution and cleanup.

SDI moved for reconsideration of the court's Oct. 3 ruling, arguing that it misapplied *Hopper* and failed to heed material facts. Meanwhile, Holder had filed a motion, which was still pending, to continue the date for trial.

Hopper Further Distinguished

On December 3, 2003, the court denied SDI's motion for reconsideration and granted Holder's motion to continue. However, the court issued a revised order and opinion in order to clarify its grounds for denial of SDI's motion for summary judgment, and to address points raised by the Government in an amicus brief on the issue of false implied certification.

The court rejected SDI's assertion that the grant of government funds in *Hopper* was contingent on compliance with government regulations. The court stated that it could not be clearer from *Hopper* that the defendant in that case did not have to comply with the regulations in question in order to receive government funds. In the instant case, in contrast, compliance was required and thus *Hopper* was not controlling.

Court Endorses False Implied Certification Theory

Moreover, the court ruled, as the Government asserted in its amicus brief, the *Hopper* court did not address the issue of false implied certification. The court agreed with the Government that FCA liability may be imposed under a theory of false implied certification even where no explicit false statement was made. In the instant case, SDI was accused of withholding vital information regarding compliance with federal regulations. Accordingly, liability might be appropriate whether or not affirmative certification of compliance was required.

The court reaffirmed that the SDI-Raytheon contract, which apparently conditioned receipt of funding on proper certification of compliance with the Clean Air Act and Clean Water Act, raised a triable issue of material fact as to whether SDI was liable for explicit or implicit false certification of compliance. Accordingly, the court denied SDI's motion for reconsideration. Finally, the court granted the relator's motion for a continuance, and set pretrial conference and trial dates in March 2004.

U.S. ex rel. Cooper v. Gentiva Health Services, Inc., 2003 U.S. Dist. LEXIS 20690 (W.D. Pa. Nov. 4, 2003)

A federal magistrate judge in Pennsylvania recommended that the defendant's motion for summary judgment be granted on FCA *qui tam* claims based on allegations that the defendants provided inaccurate and improperly maintained drug infusion pumps. The magistrate ruled that the relator failed to allege a claim for false certification because he could not show that the defendants' certification of compliance with pump accuracy standards was a condition of payment. However, the magistrate recommended denial of the defendant's motion for summary judgment on the plaintiff's FCA and state law retaliation claims, as well as the defendant's counterclaim for attorneys' fees and expenses under § 3730(d)(4).

Mark Cooper brought this action against his former employer, Gentiva Health Services, Inc., alleging *qui tam* and retaliatory discharge claims under the FCA, as well as claims for violation of the Pennsylvania Whistleblower Law. Cooper alleged that Gentiva provided inaccurate and improperly maintained infusion pumps for provision of the prescription drug Flolan to patients suffering from pulmonary hypertension, resulting in the supply of unnecessary quantities of medication to Medicare and Medicaid patients and the billing of the Government for services not provided or rendered below accepted medical treatment standards. Gentiva raised a counterclaim against Cooper under § 3730(d)(4), seeking attorneys' fees and expenses on the grounds that Cooper's claims were frivolous or vexatious. Gentiva moved for summary judgment, and Cooper filed a cross-motion for summary judgment on Gentiva's counterclaim.

For Implied Certification Claim Statute Must Expressly Condition Payment on Compliance

The magistrate judge recommended that the court grant the defendant's motion for summary judgment on Cooper's *qui tam* claims. The magistrate adopted the analytical framework of *Mikes v. Straus*, 274 F.3d 687 (2d Cir.

2001), 25 TAF QR 6 (Jan. 2002). In *Mikes*, the Second Circuit ruled that a false certification is a legally false claim under the FCA only where a party certifies compliance with a statute or regulation as a condition to governmental payment. Moreover, the *Mikes* court ruled, an implied false certification theory is viable only where the underlying statute or regulation expressly states that the provider must comply in order to be paid. Although the Third Circuit has not yet explicitly endorsed this view, other courts have, and the parties in the case at bar did not dispute that it is an accurate statement of the law. Under the *Mikes* standard, the magistrate ruled, Cooper failed to state an FCA claim for false certification.

Cooper alleged that Gentiva falsely certified that its pumps had a Flolan delivery accuracy of plus or minus 6%. However, this 6% accuracy standard was derived not from a statutory, regulatory, or contractual provision, but rather from the *Physician's Desk Reference* and the pump manufacturer's operator's manual. These facts precluded reliance on an express certification theory. Moreover, Cooper could point to no statutory, regulatory, or contractual provision conditioning payment on compliance, ruling out an implied certification theory as well.

Cooper also alleged that Gentiva failed to perform timely and proper maintenance on the infusion pumps provided to its customers. In support of this claim, Cooper pointed to 42 C.F.R. § 424.57(c)(14), which requires Medicare equipment suppliers to certify that they satisfy certain standards, including the "maintenance and repair" of Medicare-covered items rented to beneficiaries. However, the magistrate ruled, Gentiva did not expressly certify compliance with this provision in connection with a request for payment. Gentiva did expressly certify compliance with the provision in its Supplier Enrollment Application, but that certification was made as a condition of enrollment, not as a condition of payment. Furthermore, because the provision itself does not expressly condition payment upon compliance, it could not serve as the basis for an implied certification claim.

Cooper's allegations that Gentiva supplied pumps that it did not own or contract for similarly failed to support liability under a false certification theory. Cooper pointed to 42 C.F.R. § 424.57(c)(4), which requires suppliers to certify in their application for billing privileges that they fill orders from their own inventory or by contract with other companies. However, the magistrate ruled, like subsection (c)(14), subsection (c)(4) requires certification as a condition of enrollment, not payment, and thus cannot serve as the basis for a false certification claim.

Cooper also sought to impose liability on the grounds that Gentiva caused more Flolan to be delivered than was medically necessary, in violation of the certification of medical necessity on Gentiva's HCFA-1500 forms. However, again quoting *Mikes*, the magistrate ruled that the term "medically necessary" does not impart a qualitative element mandating a particular standard of care, and applies to *ex ante* coverage decisions but not *ex post* critiques of how providers executed a particular procedure. Because Cooper's allegation addressed the quality of services rendered and not whether the patients' receipt of the treatment was medically justified, the magistrate recommended rejection of these claims. In the magistrate's view, it is beyond the courts' primary area of competence to apply a qualitative standard measuring the efficacy of medical procedures.

Finally, the magistrate rejected Cooper's attempt to invoke a "worthless services" theory of liability. The magistrate ruled that Cooper's evidence failed to support a reasonable inference that the services Gentiva provided had no medical value. If Gentiva's services were indeed totally worthless, the evidence would

establish that patients essentially went untreated, presumably causing serious deterioration of their condition or death. However, no such evidence was brought forward.

Denial of Summary Judgment Recommended on Retaliation Claim

However, the magistrate judge recommended that the defendant's motion for summary judgment on Cooper's retaliation claim be denied. The magistrate found that Cooper had raised genuine issues of fact precluding summary judgment on all the elements of a claim under § 3730(h), namely that he engaged in protected activity, and that his employer was aware of the activity and discriminated against him because of it.

Cooper presented evidence that he made internal complaints about his concerns over possible "Medicare fraud" through Gentiva's corporate compliance hotline. Internal complaints, the magistrate ruled, may constitute protected conduct under appropriate circumstances. In this case, Cooper presented a genuine issue as to whether he engaged in protected activity.

Cooper's hotline call led to an internal Gentiva investigation and ultimately reimbursement of some Medicare payments. The very same management employees who conducted the investigation were the ones who decided to terminate Cooper's employment. These facts bolstered the conclusion that Gentiva knew Cooper had engaged in protected activity.

Gentiva argued that it discharged Cooper for inadequate job performance, not in retaliation for whistleblowing. The company alleged that Cooper failed to manage equipment, inventory, and personnel properly, and did not maintain professional relationships with other employees. However, the magistrate noted, there appeared to be "gross inconsistencies" in Gentiva's explanation. Evidence from Gentiva's own files suggested that the decision to fire Cooper was actually made at a different time, by different persons, and for different reasons than Gentiva claimed. Observing that "[t]his case reeks of disputed material fact," the magistrate recommended that Gentiva's motion for summary judgment on Cooper's retaliation claims be denied. Similarly, the magistrate ruled that Gentiva was not entitled to summary judgment on Cooper's Pennsylvania Whistleblower Law claims.

Relator's Claims Were Not Frivolous

The magistrate judge recommended that Cooper's cross-motion for summary judgment on Gentiva's counterclaim for attorneys' fees be granted. Even assuming that Gentiva could properly bring a counterclaim under § 3730(d)(4), the magistrate ruled, it had failed as a matter of law to show that Cooper's action was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment" as the FCA requires for relief under that section. Cooper's retaliation claim easily survived summary judgment, and was in fact "one of the stronger retaliation claims to have come before the [magistrate] in recent memory." Moreover, while Cooper's *qui tam* claims ultimately did not survive summary judgment, they were hardly clearly frivolous or vexatious. Accordingly, the magistrate recommended that Cooper's cross-motion be granted.

Section 3729(b) Knowledge Requirement

U.S. ex rel. Harrison v. Westinghouse Savannah River Co., 2003 U.S. App. LEXIS 25789 (4th Cir. Dec. 19, 2003)

See "FCA Liability/Materiality" above at page 2.

U.S. ex rel. Asch v. Teller, Levit & Silvertrust, P.C., 2003 WL 22594587 (N.D. Ill. Nov. 5, 2003)

An Illinois district court granted the relator's motion for a revised judgment and vacated its earlier grant of summary judgment to the defendant in a *qui tam* action. The court ruled that there was a question for the jury as to whether the defendant acted knowingly, with deliberate indifference, or reckless disregard as to the truth or falsity of its claims when it included certain interest payments in fees charged to the Government.

Thomas Asch brought this *qui tam* action under the Federal False Claims Act and the Illinois Whistleblower Reward and Protection Act against the law firm of Teller, Levit, and Silvertrust, P.C. (Teller). Asch alleged that Teller violated the federal and state statutes by falsely reporting delinquent student loan payments it had collected under contract with the Illinois Student Assistance Commission (ISAC). ISAC, an Illinois state agency, provides insurance to lenders on student loans for Illinois residents. If the borrower defaults, ISAC purchases it from the lender and is reimbursed by the Federal Government. Asch alleged that Teller failed to post payments received in its office until it deposited the payment into the trust account it maintained on behalf of ISAC, which could result in a delay of several days. This delay, Asch argued, increased post-judgment interest, resulting in an increase in Teller's fees, which are based on a percentage of the total amount collected.

The United States and Illinois declined to intervene. Teller moved for summary judgment. The court granted the motion, finding that there was no evidence that Teller had any idea that what it was doing was false or fraudulent. *See* 2003 U.S. Dist. LEXIS 14216 (N.D. Ill. Aug. 13, 2003), 32 TAF QR 10 (Oct. 2003). Asch moved pursuant to Fed. R. Civ. P. 59(e) and 60(b) for a revised judgment.

Relator Raised Jury Question Regarding Knowledge

The court granted the relator's motion and vacated its earlier grant of summary judgment to the defendant. In its August 13 decision, the court stressed that there was no evidence that the defendant acted with fraudulent intent. However, the relator subsequently convinced the court that proof of intent to defraud is not necessary in an FCA case. All that is required is that a defendant knowingly present a false claim for payment to the Government, and the Act defines "knowingly" to include, in addition to actual knowledge, deliberate indifference and reckless disregard as to the truth of the statements.

In this case Teller admitted that it was late in crediting delinquent debtors with payments approximately 85% of the time, and it arguably knew or should have known that such delays would cause an increase in interest due on judgments, which would in turn inflate the fees that Teller charged to the Governement. It was therefore a question for the jury whether Teller acted "knowingly" as defined by the FCA in including the increased interest in its fee requests. Accordingly, the court denied Teller's motion for summary judgment.

Section 3729(c) Definition of 'Claim'

U.S. ex rel. Hayes v. CMC Electronics Inc., 2003 U.S. Dist. LEXIS 23261 (D.N.J. Dec. 1, 2003)

A New Jersey district court denied the defendant's partial motion to dismiss a *qui tam* action based on allegations that the defendant

sold used radios pursuant to Foreign Military Sales (FMS) contracts, but charged for new radios. The court ruled that the fact that the U.S. Government resold the radios to a foreign government under the FMS program did not negate the defendant's potential liability for submitting inflated claims to the U.S. Government.

Russell Hayes brought this *qui tam* action against his former employer, Canadian Marconi Corporation, which subsequently changed its name to CMC Electronics, Inc. Hayes was a former project manager for CMC and was responsible for ensuring that radio production was completed within budget and on time. CMC designed and manufactured radio sets (secure radios allowing communication between Patriot missile shelters and command elements), most of which it sold to the U.S. Defense Department. According to Hayes, CMC began to purchase surplus and used equipment to fulfill its orders after surpluses emerged in the market during the 1980s and early 1990s.

Throughout the 1990s, the U.S. Government entered contracts under the FMS program to sell to Saudi Arabia various types of military hardware, including radio sets. CMC entered a subcontract with AEC Electronics to sell 97 radio sets to the U.S. Army pursuant to an FMS sale to Saudi Arabia. CMC's contract provided that "all the Equipment it provides under this Contract will be newly manufactured and that no used, reconditioned or overhauled Equipment will be provided." Hayes alleges that CMC violated this provision by filling the contract with radio sets built from used and surplus parts, and thus charged for new radios while supplying used ones.

The Government intervened. The defendant filed a partial motion to dismiss the FCA counts of the complaint pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, for partial summary judgment pursuant to Fed. R. Civ. P. 56(c).

False Claims in Foreign Military Sales Contracts Can Give Rise to FCA Liability

The court denied the defendant's motions. Hayes had alleged that CMC presented fraudulent invoices to the Government, and thus stated a claim for relief under the FCA. The fact that the U.S. used funds obtained from Saudi Arabia to pay for the radios did not mean that the defendant's alleged false claim was not a demand for payment from U.S. funds.

The court endorsed the reasoning of another recent district court decision in a case almost identical to the case at bar. *See United States ex rel. Campbell v. Lockheed Martin Corp.*, 2003 WL 22128833 (M.D. Fla. Aug. 5, 2003), 32 TAF QR 14 (Oct. 2003). In *Campbell*, the defendant allegedly double-billed the Government and submitted false invoices in connection with contracts for military navigation and targeting pods. The defendant sought to argue that the FCA did not apply because the pods were paid for by foreign funds pursuant to FMS contracts. Observing that the procurement contract between the defendant and the Government and the contract between the United States and the foreign government were separate transactions, the *Campbell* court rejected the defendant's contentions. The funds received from the foreign government belonged to the U.S. Government, and the application of the FCA to the false claim did not depend on when the U.S. Government received payment from the foreign government.

Assuming the allegations in Hayes' complaint were true, the court observed, the U.S. Government sustained monetary losses due to CMC's false invoices. First, the Government paid more money than it would have had CMC disclosed that the radios contained false parts. Second, the U.S. Government was likely to be

required to reimburse Saudi Arabia for losses sustained by the latter. Third, the U.S. Government suffered damage to the integrity of the contracting process, as Saudi Arabia received used radios despite paying for new ones. Finally, the court suggested, as a result of the alleged fraud, Saudi Arabia might have less money to spend on other defense needs, thereby compelling the United States to increase its expenditures to obtain the same level of global security.

The court observed that even if the false claim had resulted only in potential loss to the U.S. Government, this would be sufficient to support a cause of action under the FCA. CMC had argued that the FCA requires the Government to show an actual and quantifiable monetary loss, and sought to rely on *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001), 24 TAF QR 8 (Oct. 2001). However, the court observed, the *Hutchins* court recognized that "the False Claims Act seeks to redress fraudulent activity *which attempts to* or actually causes economic loss to the United States Government." *Hutchins*, 253 F.3d at 184 (emphasis added by *Hayes* court). Moreover, in *Hutchins*, the alleged false claims were submitted to a non-governmental third party (a bankruptcy estate), and thus there was no cause of action under the FCA. In the case at bar, in contrast, CMC's claim was made for funds in the U.S. Treasury.

Accordingly, the district court denied CMC's partial motion to dismiss. The court also denied CMC's motion for partial summary judgment, which suffered from the same flaws as the motion to dismiss. In the latter motion CMC sought to limit the Government to statutory penalties, but the relator's allegations that the Government sustained actual damages of at least $14.6 million, in the court's view, raised a genuine issue of material fact precluding summary judgment.

Section 3730(b)(3) Extension of Seal

U.S. ex rel. Sarmont v. Target Corp., *2003 U.S. Dist. LEXIS 18729 (N.D. Ill. Oct. 17, 2003)*

An Illinois district court denied the defendants' motions for summary judgment in a *qui tam* action in which more than nine and a half years elapsed between the filing and the unsealing of the complaint. The court rejected the defendants' arguments that the delay violated Federal Rule of Civil Procedure 41(b), the FCA's seal extension provision, and the Fifth Amendment's guarantee of due process.

Target Corporation is a small Illinois company that produced electronic components of signal equipment used by the U.S. military. In 1990, Leland Sarmont, a Target employee, allegedly discovered that Target had substituted commercial components for higher-quality military-grade components, falsely certified that the components met military specifications, and misrepresented to the Government the costs of producing the components. He also states that he learned that Motorola, a Target subcontractor, was not properly testing the components and falsely certifying that they met military specifications. Sarmont claims that he reported these findings to his superiors but was told to continue to ship the noncompliant products or risk losing his job. Sarmont reported the mater to the NIS and the DCIS and wore a wire at the Government's request. Target fired Sarmont on October 19, 1990.

On October 21, 1991, Sarmont filed this *qui tam* action under seal in the Central District of California. Shortly after he filed suit, the U.S. Attorney for the Northern District of Illinois began a criminal investigation, which would last seven years. Throughout the seven-year period, the Government sought and obtained fifteen sep-

arate extensions of the seal period in Sarmont's *qui tam* action. During this time, both Target and Motorola, though not served with the *qui tam* complaint, were aware of the nature of the Government's investigation. In 1990 the Government executed a search warrant at Target's premises and DCIS and NIS agents interviewed various Target and Motorola employees. Throughout the pendency of the criminal investigation, Target's counsel engaged in extensive negotiations with the U.S. Attorney's Office.

In 1998 the Government requested a partial lifting of the seal to allow it to confer with Target regarding a possible settlement of civil and criminal charges. The court granted this request, but no settlement ensued, and the seal remained in place. Ultimately the Government decided not to pursue criminal charges, but indicated that it needed more time to intervene in Sarmont's *qui tam* action. Another two and a half years elapsed until, on August 1, 2001, the Government filed notice of election not to intervene. Later that month, the court ordered the complaint to be unsealed and served. However, this was apparently not immediately done.

Meanwhile, during that summer Sarmont's California counsel had informed Sarmont that he did not intend to pursue the case if the Government declined to intervene. Sarmont sought and ultimately found new counsel in Chicago. In December 2001, the court granted Sarmont's request to transfer the case, under seal, to the Northern District of Illinois and to extend the time to serve the defendants until January 31, 2002. However, because of a delay in the transfer of the file from California to Illinois and miscommunication in the clerk's office, the seal was not actually lifted until March, 2002, and the defendants were served the following month.

The defendants moved for summary judgment. They argued that Sarmont (along with the Government) failed to prosecute the case with reasonable diligence as required by Fed. R. Civ. P. 41(b); that Sarmont (and the Government) failed to show good cause as required under § 3730(b)(3) for extension of the seal; and that Sarmont's (and the Government's) delay in prosecuting the case violated their due process rights.

Government's Delay Was Legitimate and Not Attributable to Relator

The court denied the motion. It rejected the underlying premise of all three of the defendants' arguments, which lumped the Government and the relator together in their allegations of unreasonable delay. Rather, given the FCA's statutory framework and the procedural timeline in this case, the court ruled that Sarmont's role must be evaluated in isolation from that of the Government. Under the statute, the relator is obligated to remain idle and may not pursue the case alone while the Government is deciding whether or not to intervene. Thus, the nine and a half year delay between the filing of the suit and the Government's declination could not simply be imputed to Sarmont. Furthermore, the fact that Sarmont joined in multiple requests for extension of the seal merely reflected his rational desire to have the Government on board in prosecuting his claim, and did not reflect a bad-faith "failure to prosecute." Therefore, this case was hardly one of those extreme situations in which a lawsuit may be involuntarily dismissed for failure to prosecute under Fed. R. Civ. P. 41(b).

The court likewise rejected the defendants' arguments that Sarmont and the Government did not show good cause under § 3730(b)(3) for extending the seal period. Bad faith may not simply be inferred from the length of an investigation alone, and the defendants offered no support for the notion that the investigative delay in this case was due to the bad faith of any party. Several factors appeared to have contributed to the delays, including staff changes at the U.S. Attorney's Office, as well as

extensive negotiations between Target and the Government. Absent any showing that the Government in fact lacked good cause to seek extensions of the seal period, the court declined to revisit the rulings on this question by the California court.

Finally, the court observed that because the complaint was within the statute of limitations, the defendants' due process argument was weak. If courts could conclude that a mere temporal delay amounted to a deprivation of due process even where the statute of limitations had not run, it would be a judicial override of legislative prerogative. In order to show a due process violation when an action was timely filed, a defendant must demonstrate that the Government intentionally delayed to gain a tactical advantage and that actual prejudice resulted. Here there was no showing that the Government deliberately delayed to acquire a tactical advantage. Moreover, the court was not impressed with Motorola's claims that its record destruction policy likely led to the destruction of exculpatory evidence, and that it was not given adequate notice of a suit to prepare its defense. Motorola's arguments regarding document destruction and witness availability were entirely speculative, and moreover, Motorola was on notice of its potential liability through interviews conducted in 1990 and 1996 in the presence of Motorola counsel. Finally, the court observed that although nine and a half years will take its toll on the freshness of any party's evidentiary arsenal, such a situation is expressly contemplated by the FCA with its ten-year statute of limitations.

Therefore, the court concluded, the Government's facially legitimate, albeit glacial investigative process could not foreclose Sarmont's right to have his suit heard on the merits. Accordingly, the court denied the defendants' motions for summary judgment.

Section 3730(d)(4) Frivolous Claims

U.S. ex rel. Cooper v. Gentiva Health Services, Inc., 2003 U.S. Dist. LEXIS 20690 (W.D. Pa. Nov. 4, 2003)

See "False Certification" above at page 7.

U.S. ex rel. Paranich v. Sorgnard, 286 F. Supp. 2d 445 (M.D. Pa. Oct. 8, 2003)

A Pennsylvania district court dismissed a *qui tam* action for lack of subject matter jurisdiction pursuant to the public disclosure bar. The court ruled that the complaint was based upon public disclosures, and that the relator was not an original source.

Stephen Paranich, a chiropractor practicing in Pennsylvania, is co-owner of Comprehensive Medical Network (CMN). In late 1996 he decided to acquire an electric nerve stimulation device known as the Matrix. Paranich entered into a series of lease agreements with Irwin Leasing Corporation to obtain the Matrix device for CMN from Matrix Biokinetics, Inc. The Matrix pulsates electricity to the nerves at various frequencies through electrodes placed on the body, which allegedly relieves pain. In June 1994, the FDA had approved the Matrix for sale, but did not approve it as a nerve block.

In January 1997, Paranich began submitting claims for reimbursement for Matrix procedures under the Current Procedural Terminology (CPT) code for "nerve block injections." Medicare reimburses nerve blocks at rates of $150 to $350 per procedure; however, it reimburses "electronic stimulation" at rates of only $35 to $80 per procedure.

Dr. Deborah McMenamin, a former employee of CMN, believed Paranich was overbilling

Medicare for his services using the Matrix. McMenamin reported the matter to the FBI, which launched an investigation. In October 1997 the Department of Justice served Paranich with a grand jury subpoena for his Matrix-related billing documents. In February 1998 Paranich ceased billing his Matrix services as a nerve block. (Later, in 2000, McMenamin brought a *qui tam* action against Paranich based on her allegations of overbilling. *See United States ex rel. McMenamin v. Paranich*, No. 3:CV-00-1165 (M.D. Pa. May 7, 2003), 31 TAF QR 9 (July 2003).)

After receiving the grand jury subpoena, Paranich's counsel began an investigation of the Matrix device. In December 1998, Paranich filed a *qui tam* action against various individuals and corporations, including Irwin and Matrix Biokinetics, alleging that they induced him to file false Medicare claims. Irwin moved for summary judgment, arguing that it was not liable for Paranich's false claims, and that in any case the court lacked jurisdiction pursuant to the public disclosure bar.

Action Was Based Upon Public Disclosures

The court granted Irwin's motion and dismissed Paranich's complaint for lack of subject matter jurisdiction. The undisputed facts showed that Paranich's attorney learned of the Matrix billing problems from (1) the grand jury subpoena; (2) a FOIA report concerning 1998 hearings on Matrix billing commenced by the Transamerica Occidental Life Insurance Company; and (3) two California state court lawsuits brought by various doctors against Matrix Electromedical. All of these disclosures occurred long before Paranich filed suit. Thus the information was just as available to strangers to the fraud as it was to Paranich.

In the Third Circuit, a *qui tam* action is based upon a public disclosure if it sets out either the allegations advanced in the *qui tam* action or all of the essential elements of the *qui tam* action's claims. The court had little difficulty in finding that this standard was satisfied: for example Irwin's allegedly unlawful billing advice was directly at issue in one of the California cases. Therefore, the court ruled, Paranich's action was based upon public disclosures.

Relator Was Not Original Source

Moreover, the court ruled, Paranich was not an original source. Paranich did not have direct and independent knowledge of the information on which his allegations were based. The record was devoid of evidence that Paranich investigated the alleged fraud: rather, his attorney conducted the investigation as a defensive measure in response to the Government's subpoena. The attorney apparently informed Paranich about the potential *qui tam* claims after learning of the California lawsuits and the Transamerica report. Therefore, Paranich's knowledge of the fraud was derivative rather than direct and independent as the FCA requires. Accordingly, because Paranich was not an original source, the court dismissed his complaint for lack of jurisdiction.

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

U.S. ex rel. Longstaffe v. Litton Industries, Inc., 2003 U.S. Dist. LEXIS 23020 (C.D. Cal. Dec. 15, 2003)

A California district court dismissed a *qui tam* action pursuant to the public disclosure jurisdictional bar. The court ruled that the allegations in the *qui tam* complaint were substantially similar to and therefore "based upon" publicly disclosed allegations in the news media. Moreover, the court ruled, the relator was not an original source of the allegations, because he did not have a significant role in the public disclosure.

Leslie Longstaffe, a former senior contract administrator for Litton Industries, Inc., brought this *qui tam* action against Litton in 1998, alleging that the company hired influence peddlers in order to secure foreign contracts and illegally passed the cost on to the Government using fraudulent accounting practices to hide the fees paid. More than six years before Longstaffe filed his complaint, the Government launched a criminal investigation that eventually broadened to cover most of Litton's foreign consultants. The investigation and related allegations were widely reported by the Wall Street Journal, the Los Angeles Times, the Associated Press, Reuters, and other news outlets. In 1999 the grand jury investigation of Litton concluded with guilty pleas to allegations of criminal misconduct in connection with sales to Taiwan and Greece. Longstaffe relied on the grand jury documents in drafting his first amended complaint, which he filed in February 2002.

In August 2002, Litton moved to dismiss on the ground that the allegations in the complaint were based upon publicly disclosed allegations of which the relator was not an original source. Litton also moved to dismiss on the ground that the relator had failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). In February 2003, the Government declined to intervene.

Allegations Were Publicly Disclosed Before *Qui Tam* Suit

The court granted Litton's motion to dismiss based on the public disclosure bar, and thus Litton's Rule 9(b) motion was rendered moot. Litton contended that Longstaffe's suit was parasitic in that the allegations in the first amended complaint had been publicly disclosed by the news media and the government investigation. Longstaffe countered that he made numerous allegations not found in the public disclosures proffered by Litton.

The court adopted a broader definition of the term "allegations and transactions" in the § 3730(e)(4)(A) public disclosure bar than that advocated by Longstaffe. The court ruled that the jurisdictional bar is triggered whenever a plaintiff files a *qui tam* complaint containing allegations or describing transactions substantially similar to those already in the public domain so that the publicly available information is already sufficient to place the Government on notice of the alleged fraud.
The court ruled that allegations disclosed in the news articles proffered by Litton were "substantially similar" to the allegations in Longstaffe's complaint. These articles made public allegations of bribery and influence peddling, resulting in fraudulent billing on government contracts, and focused on the same specific foreign consultants highlighted in Longstaffe's complaint. Based on the articles, the court found that Longstaffe's allegations were publicly disclosed before he filed his complaint. Longstaffe may have identified specific regulations allegedly violated, but the media coverage was more than enough to put the Government on Litton's track, which would have inevitably led to categorization of the misdeeds by law or statute. Because the public disclosures were sufficient to enable the Government adequately to investigate the case and decide whether to prosecute, the court found that the suit was based upon publicly disclosed allegations or transactions.

Longstaffe argued that he had gone much farther than anything revealed by the news media, identifying more than 400 questionable consultants. Moreover, he asserted, if he was not able to pursue these fraudulent transactions, no one would. The court was unconvinced, noting that the broad scope of Litton's allegedly improper activities was publicly disclosed. Moreover, the fact that the Government might

not have the resources to fully pursue all meritorious claims was insufficient to overcome the jurisdictional bar imposed by the FCA.

Relator Was Not Original Source

The court ruled that Longstaffe was not an original source of the allegations upon which his suit was based. In addition to the statutory requirements that an "original source" must have "direct and independent knowledge of the information on which the allegations are based" and have "voluntarily provided to the information to the Government before filing" suit, the Ninth Circuit also requires that the relator have had a hand in the public disclosure of the allegations. *See United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). The court found that even if Longstaffe satisfied the express statutory requirements he would not qualify as an original source because he did not have a hand in the public disclosure of the allegations at the heart of his complaint.

The court also took into account the four-factor test propounded more recently by the Ninth Circuit to determine whether a relator is the original source of information discovered in an investigation triggered by his initial disclosures. *See Seal 1 v. Seal A*, 255 F.3d 1154, 1163 (9th Cir. 2001), 24 TAF QR 22 (Oct. 2001). Under that test, courts must evaluate the relative roles of the relator, other private actors, and the Government in uncovering the allegations, as well as whether the allegations in the prior public disclosure and in the complaint were brought against the same entity. Taking into account these factors, the court found that Longstaffe played too insignificant a role in the public disclosure of the allegations to qualify as an original source. Accordingly, the court dismissed Longstaffe's first amended complaint for lack of subject matter jurisdiction.

Section 3730(h) Retaliation Claims

U.S. ex rel. Cooper v. Gentiva Health Services, Inc., 2003 U.S. Dist. LEXIS 20690 (W.D. Pa. Nov. 4, 2003)

See "False Certification" above at page 7.

Chomer v. Logansport Memorial Hospital, 2003 U.S. Dist. LEXIS 19877 (S.D. Ind. Oct. 29, 2003)

An Indiana district court denied the defendants' motion to dismiss a retaliation claim brought by a physician who sought to dissuade Medicare and Medicaid patients from coming to the emergency room for non-emergency medical conditions. The court rejected the defendants' argument that the Emergency Medical Treatment and Active Labor Act precluded the plaintiff's claim.

Dr. John Chomer, an emergency room physician under contract with NES Healthcare Group, was jointly employed by Logansport Memorial Hospital and Logan Emergency physicians (LEP). In May 2002, Chomer told certain Medicare and Medicaid patients that it was inappropriate for them to come to the emergency room for colds and other non-emergency medical conditions. Chomer's advice reflected his understanding of 42 U.S.C. §§ 1320a-7 and 1320c-5, which prohibit the provision of medically unnecessary health care services to Medicaid and Medicare patients.

LEP President Lazo Krszenski instructed Chomer to stop trying to dissuade Medicare and Medicaid patients from coming to the emergency room for non-emergency conditions, because this would reduce LEP's revenues. Nevertheless, Chomer reported the alleged abuses to the Indiana Family and Social Services Administration (IFSSA). Krszenski

subsequently learned of Chomer's actions, and a heated altercation ensued. The hospital and LEP thereupon removed Chomer from the emergency room schedule, and NES subsequently terminated its contract with him.

Chomer filed suit against the hospital and LEP in May 2003, alleging unlawful retaliation in violation of the FCA's whistleblower provision as well as a claim under Indiana state law for tortious interference with his contract with NES. The defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

EMTALA Did Not Preclude Retaliation Claim

The court denied the defendants' motion. As a threshold matter, the court rejected the defendants' argument that Chomer's actions were unlawful and therefore not protected under the FCA's retaliation provision. The defendants argued that the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd, requires hospital emergency departments and physicians practicing in those departments to provide treatment to any individual who seeks it. Moreover, they argued that the allegedly medically unnecessary services that Chomer complained of were required to be provided under EMTALA. However, the court noted, Chomer did not allege that he refused to treat Medicare or Medicaid patients who sought treatment in the emergency department, but only that he informed them that it was inappropriate for them to come to the emergency room for non-emergency medical conditions. EMTALA prohibits refusal of treatment, not the reporting of medically unnecessary services. At this stage of the litigation, the defendants' argument that Chomer acted unlawfully was premature.

Plaintiff Stated Claim for Retaliation

The court ruled that Chomer had adequately alleged all of the required elements of a retaliation claim under the FCA: (1) that he engaged in protected conduct, that is, conduct "in furtherance of" an FCA action; (2) that his employer was aware that he had engaged in protected conduct; and (3) that he was discharged at least in part because of the protected conduct. Although Chomer did not specifically threaten to file an FCA action, he did report the alleged fraud to the IFSSA, which initiated an investigation. Supplying information that sets off an investigation qualifies as protected conduct for purposes of the retaliation provision. Moreover, Chomer's employer was on notice of the protected conduct, because Chomer told Krszenski that federal law required him to deter and report the alleged abuses of the Medicare and Medicaid systems.

Finally, Chomer adequately alleged that he was discharged at least in part because of the protected conduct. Chomer alleged that his job performance met the legitimate expectations of his employers at all relevant times. After he told Krszenski that he would continue to report the alleged fraud, however, the defendants allegedly removed him from the work schedule, thereby terminating his employment. These allegations, if true, would tend to show that the discharge was motivated at least in part because of the protected conduct.

Therefore, Chomer had adequately stated a claim for relief under § 3730(h). Moreover, the court ruled, he had alleged facts sufficient to state a claim for tortious interference with contract under Indiana law. Accordingly, the court denied the defendants' motion to dismiss.

Rule 9(b)

U.S. ex rel. Holder v. Special Devices, Inc., No. 99-8298 (C.D. Cal. Oct. 3, 2003) (Order Denying Defendant's Motion for Summary Judgment); (Dec. 3, 2003) (Order re Motion for Reconsideration and Motion to Continue Trial Date)

See "False Certification" above at page 5.

U.S. ex rel. Harrison v. Westinghouse Savannah River Co., 2003 U.S. App. LEXIS 25789 (4th Cir. Dec. 19, 2003)

See "FCA Liability/Materiality" above at page 2.

Gross v. AIDS Research Alliance-Chicago, 2003 U.S. Dist. LEXIS 19816 (N.D. Ill. Oct. 31, 2003)

An Illinois district court dismissed a *qui tam* complaint for failure to comply with Federal Rule of Civil Procedure 9(b). The court observed that the complaint failed to specify the dates, content, and amount of the alleged false claims.

Beginning in 1998, Sanford Gross was a voluntary participant in a study sponsored by the National Institutes of Health (NIH) to determine the effectiveness of certain medication in HIV-positive patients. He subsequently brought this action against the AIDS Research Alliance-Chicago and participating physicians, alleging that they made false claims to NIH in order to receive funding. Gross alleged that participating doctors prescribed medication that reduced the effectiveness of other drugs used in the study, failed to obtain informed consent, misplaced or lost patient files or records, and failed to inform patients when their viral loads increased, in violation of various federal regulations. He argued that the defendants falsely certified their compliance with applicable regulations, and that NIH would not have funded the study had it known of the regulatory noncompliance. The defendants moved to dismiss, arguing that Gross failed to plead his allegations of fraud with specificity as required by Fed. R. Civ. P. 9(b).

Relator Failed to Plead Fraud with Specificity

The court granted the motion and dismissed the complaint. In order to satisfy Rule 9(b), the court observed, a plaintiff must plead the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated. Although the complaint referred generally to the applicable regulations and required forms, Gross failed to specify which forms the defendants falsely submitted, which defendants submitted them, the dates on which they were submitted, or the amounts of the allegedly false claims.

Gross argued that the defendants falsely certified compliance with the applicable regulations on the grant application forms when they indicated their intent to comply with the laws, regulations, and policies to which the grant was subject. However, the court observed, only statements that are materially false when made can be fraudulent. There is no "fraud in hindsight," and mere regulatory noncompliance will not give rise to an FCA claim. Gross pointed to no specific facts indicating that, at the time the defendants certified their compliance, they had no intention of complying or even had a motive not to comply. Because Gross alleged no facts to demonstrate that the alleged regulatory violations resulted from anything more than ordinary negligence, his conclusory

allegations of false certification failed to satisfy Rule 9(b). The court also dismissed Gross' conspiracy allegations, because he failed to allege the time, means, or other particulars of the alleged conspiracy.

U.S. ex rel. Chandler v. Hektoen Institute for Medical Research, 2003 U.S. Dist. LEXIS 17569 (N.D. Ill. Oct. 1, 2003)

In October 2003, an Illinois district court granted in part and denied in part the relator's motion for a protective order in a *qui tam* action. Dr. Janet Chandler brought this action in 1997 against the Hektoen Institute for Medical Research (Hektoen), Cook County, and Cook County Hospital (CCH). CCH had obtained a grant from the National Institute of Drug Abuse for a research and treatment program for drug-dependent pregnant women known as New Start. The grant was later transferred to Hektoen, which is a CCH affiliate. The terms of the grant required the grantee to comply with federal regulations for research on human subjects. Chandler's lawsuit alleged that the defendants forged data pertaining to nonexistent "ghost" research subjects and submitted false progress reports to the Government. She also alleged that they failed to comply with the regulations governing research on human subjects, failed to obtain informed consent or thorough medical histories from participants, and failed to keep accurate records or provide proper care. Finally, she alleged that CCH unlawfully retaliated against her by firing her for speaking out about these abuses.

In 1999, in response to Chandler's request for discovery of New Start treatment and research records, the court ordered the county to produce the records with all patient-identifying information redacted. In the following months, confusion and contention about the redacted records ensued. In 2001, the court ordered the county to produce unredacted records to Chandler's representatives, and entered a protective order limiting disclosure to three attorneys and one paralegal for ten days. The county appealed, arguing that the court's order violated 42 U.S.C. § 290dd-2 because it did not require renewed notice to New Start participants, and violated 42 C.F.R. § 2.63(a) because it allowed Chandler's representatives to view confidential communications contained in the records. The Seventh Circuit agreed and issued mandamus, ordering the district court to enter a new protective order that would satisfy both the privacy regulations and Chandler's legitimate need to view some non-confidential communications. *See* 277 F.3d 969, 981-83 (7th Cir. 2002), 26 TAF QR 1, 3-4 (Apr. 2002), *aff'd*, 123 U.S. 1239 (2003), 30 TAF QR 1 (Apr. 2003).

Accordingly, in December 2002, the court issued a new protective order requiring that confidential communications in the New Start files produced to Chandler be removed or masked. Chandler then moved for a protective order applying the same restrictions to the county, and requiring the county to divulge to her any documents that it might review to prepare its defense.

In its October 2003 ruling, the court granted Chandler's motion for a protective order applying the terms of the existing protective order to the county's attorneys, but declined to require the county to divulge to Chandler any records it might use to prepare its defense. The court noted that 42 C.F.R. § 2.63(a) permits a court to order disclosure of a patient's confidential information only if one of three narrow exceptions applies. Because none of these exceptions applied in this case, the court ruled that the county could not disclose confidential patient communications to its attorneys. The court observed that Congress sharply restricted the use of confidential records in such cases in order to encourage patients to seek treatment for substance abuse. There is no exception for

attorneys in the regulations, and the patients had not consented to disclosure of the communications.

The court recognized that under the current protective order the county's attorneys were required to perform the task of masking the confidential communications. However, the court ruled, this did not mean that the entire office should get unlimited access. The court ruled that the county could either assign the task of redaction to a limited group of attorneys and their assistants, or the parties could share the cost of hiring a third party to mask the confidential communications. The court also observed that notice might again have to be sent to New Start participants to inform them that the county's attorneys would be viewing their files, and invited the parties to submit brief position statements on this question.

Kahn v. Money Store Investment Corp., 2003 U.S. Dist. LEXIS 18754 (N.D. Tex. Oct. 20, 2003)

In October 2003, a Texas magistrate judge determined that a *qui tam* suit brought by a federal prisoner was frivolous and recommended summary dismissal. Mahmmadu Kahn, who is currently serving a 37-month sentence for conspiring to defraud the Government in connection with a small business loan, filed this action *pro se* and *in forma pauperis*, alleging that the Money Store and its employees, by attesting to the accuracy of the loan documents, were "unwitting partners" in the conspiracy.

The court ruled that Kahn, who sought more than $2 million for loss of earnings, damage to his reputation, and pain and suffering, was suing purely on his own behalf, not on behalf of the Government as required by the FCA. Moreover, the court ruled, Kahn was prohibited from maintaining this action under § 3730(d)(3), which provides that "[i]f the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." Because Kahn conceded that he was convicted of criminal conduct relating to the claims raised in the complaint, he was precluded from maintaining this *qui tam* action under the FCA.

THE MEDICARE PRESCRIPTION DRUG ACT OF 2003 AND THE FALSE CLAIMS ACT

*Bret Boyce**

On December 8, 2003, President Bush signed into law the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MPDIMA).[1] This statute enacts extensive changes to the Medicare program, most notably by providing for a new voluntary outpatient prescription drug benefit. It also includes two provisions of potentially great significance for FCA health care fraud cases. First, it phases out the average wholesale price (AWP) methodology heretofore used in calculating the Government's rate of reimbursement for prescription drugs. The AWP has been widely criticized as subject to manipulation, and several recent major FCA settlements have involved allegations of such price manipulation by defendant pharmaceutical manufacturers. Second, the legislation clarifies that the private insurers that contract with the Government to process Medicare claims are subject to FCA liability for the knowing submission of false claims for payment.[2]

FCA LIABILITY FOR DRUG PRICE MANIPULATION

Prior to the enactment of MPDIMA, Medicare covered only drugs directly administered by a physician. In contrast, Medicaid has provided broader drug coverage that includes outpatient medications. Government reimbursements for these drugs have been made at a fixed percentage of the "average wholesale price" (AWP), which is the price manufacturers report to drug price compendia. Often this figure is set at unrealistically high levels that do not reflect the deeply discounted prices at which the drug is actually sold to physicians, pharmacists, hospitals, and managed care plans.

* TAF Staff Attorney. I would like thank Jim Moorman, Amy Wilken, and Andy Schneider for very helpful comments on earlier drafts of this article.

[1] Pub. L. No. 108-173, 117 Stat. 2066 (2003) (to be codified in scattered sections of 42 U.S.C.).

[2] The final version of the statute did not include a provision from the Senate bill that would have increased the upper and lower limits on FCA civil penalties to $15,000 and 7,500 respectively. H.R. Rep. No. 108-391, at 826-27 (2003).

As Andy Schneider has documented in a recent report prepared for the Taxpayers Against Fraud Education Fund, several major recent settlements have occurred in FCA actions based on allegations that pharmaceutical manufacturer defendants manipulated the AWP in order to market to physicians the "spread" or difference between the price the Government pays doctors (based on the AWP) and the discounted price that the manufacturer actually charges.[3] Among these companies settling such allegations were Bayer (January 2001, $14 million), TAP Pharmaceuticals (October 2001, $875 million), and AstraZeneca (June 2003, $355 million).[4] The largest of these settlements, in the TAP and AstraZeneca cases, involved allegations that the defendants marketed the AWP spread on their prostate cancer drugs (Lupron and Zoladex, respectively). A class action lawsuit brought by the Prescription Access Litigation Project is also currently pending against numerous pharmaceutical manufacturers, alleging that the defendants inflated average wholesale prices on a great number of medications.[5] After analyzing the FCA settlements, Schneider concluded that they highlight the vulnerabilities of the AWP-based methodology employed by Medicare, which burdens taxpayers and program beneficiaries alike. He recommended that the Government abandon that methodology not only for drugs previously covered under Medicare and Medicaid, but also for the outpatient medications covered under MPDIMA, which was still under consideration in Congress at the time his report was issued.[6]

The new provisions in the Medicare Prescription Drug Act should serve to deter practices such as "marketing the spread." Beginning in 2005, drugs and biologicals (with the exception of certain vaccines and dialysis medications) will no longer be reimbursed according to a formula based on average wholesale price. Instead, the Government will pay for them either using a new methodology based on average sales price, which was pioneered in the corporate integrity agreements imposed on TAP and AstraZeneca in their settlement agreements, or through the competitive acquisition program.[7] The statute provides a clear definition of average sales price in an effort to ensure that it is not subject to the same sort of manipulation as was average wholesale price under the old regime. Average sales price is calculated by dividing total sales by

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[3] ANDY SCHNEIDER, REDUCING MEDICARE AND MEDICAID FRAUD BY DRUG MANUFACTURERS: THE ROLE OF THE FALSE CLAIMS ACT (2003). The report is available at www.taf.org/publications/PDF/drug report.pdf.

[4] *See* 22 TAF QR 35 (Apr. 2001)(Bayer); 25 TAF QR 32 (Jan. 2002) (TAP Pharmaceuticals); 31 TAF QR 46 (July 2003) (AstraZeneca). All of these cases also involved allegations that the defendants concealed their best price from the Government.

[5] *Citizens for Consumer Justice v. Abbott Laboratories,* No. 01-12257 (D. Mass. filed Dec. 20, 2001). The complaint is available at www.prescriptionaccess.org/pdf/complaint-abbott.pdf.

[6] *See* SCHNEIDER, *supra* note 3, at 47, 49.

[7] MPDIMA sec. 303, § 1847A, Pub. L. No. 108-173, 117 Stat. 2066 (2003).

the number of units sold, and must take into account discounts, free goods, and certain rebates (not including Medicaid rebates).[8] The statute also directs the Inspector General to conduct market surveys to determine market prices of covered drugs, and authorizes the Government to pay lower amounts if the average sales price reported by the manufacturer exceeds the market price as determined by the Inspector General by a specified threshold percentage.[9]

The conference report on the statute suggests that Congress was very much concerned about practices such as "marketing the spread" highlighted in the FCA cases discussed above. The report notes that the statute requires participants in Medicare and Medicaid to submit detailed sales and pricing data, and specifies that Congress intends that if a manufacturer knowingly submits false information, such a submission should be considered a "false record or statement" made or used "to get a false claim paid or approved" within the meaning of 31 U.S.C. § 3729(a)(2). "Thus," the report concludes, "if a manufacturer knowingly submits any false information, the manufacturer would be fully subject to liability under the False Claims Act."[10]

FCA LIABILITY OF MEDICARE ADMINISTRATIVE CONTRACTORS

MPDIMA also contains important clarifications on the issue of FCA liability of Medicare fiscal intermediaries. In *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama, Inc.*,[11] the Eleventh Circuit held that Medicare fiscal intermediaries enjoy immunity from liability under the FCA even for knowing payment of fraudulent claims. The court relied on a provision of the Social Security Act that immunized in three separate paragraphs (1) designated individuals, (2) disbursing officers, and (3) agencies such as fiscal intermediaries from liability from certain wrongfully disbursed payments:

> Liability of certifying and disbursing officers designated under agreement for negligent, etc., payments.
>
> > (1) No individual designated pursuant to an agreement under this section as a certifying officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payments certified by him under this section.

[8] *Id.* § 1847A(c).

[9] *Id.* § 1847A(d).

[10] H.R. Rep. No. 108-391, at 592 (2003).

[11] 156 F.3d 1098 (11th Cir. 1998), 15 TAF QR 8 (Oct. 1998).

> (2) No disbursing officer shall, in the absence of gross negligence or intent to defraud the United States, be liable with respect to any payment by him under this section if it was based upon a voucher signed by a certifying officer designated as provided in paragraph (1) of this subsection.
>
> (3) No such agency or organization shall be liable to the United States for any payments referred to in paragraph (1) or (2).[12]

While paragraphs (1) and (2) specified that the immunity applied only "in the absence of gross negligence or intent to defraud," paragraph (3), which governed fiscal intermediaries, merely provided that they would not "be liable to the United States for any payments referred to in paragraph (1) or (2)," without expressly repeating the language about the absence of gross negligence or intent to defraud. The Eleventh Circuit concluded that Medicare fiscal intermediaries enjoyed absolute immunity from FCA liability for payments certified and disbursed by their officers in the normal course of business. More recently, the Eleventh Circuit reaffirmed the rule announced in *Body*, holding that it extended to bar a *qui tam* action alleging that the defendant fiscal intermediary failed to audit a provider's claims.[13]

The *Body* court's conclusion that fiscal intermediaries enjoy absolute immunity was hardly the only possible interpretation of the provision quoted above, and absolute immunity from liability for willful fraud is very difficult to defend on policy grounds. Arguably the immunity granted to fiscal intermediaries in paragraph (3) "for any payments referred to in paragraph (1) or (2)" should have been read to incorporate by reference the proviso "in the absence of gross negligence or intent to defraud" contained in the first two paragraphs. Under such an interpretation, intermediaries would not be liable for honest mistakes or the unwitting submission of false claims, but would be liable for the submission of claims they knew or should have known were false. Indeed, no other federal court of appeals followed the Eleventh Circuit in holding Medicare fiscal intermediaries absolutely immune from FCA liability for intentionally defrauding the Government. Moreover, numerous FCA settlements with fiscal intermediaries have been reached in other jurisdictions, several of which have been quite substantial.[14]

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[12] 42 U.S.C. § 1395h(i).

[13] *See United States ex. rel. Sarasola v. Aetna Life Insurance Co.*, 319 F.3d 1292 (11th Cir. 2003), 30 TAF QR 16 (Apr. 2003).

[14] *E.g., United States ex rel. Knoob v. Health Care Service Corp.*, No. 95-4071 (S.D. Ill.), settled July 16, 1998, 15 TAF QR 41 (Oct. 1998); *United States ex rel. Riggs v. General American Life Ins. Co.*, No. 4:99CV00608 (E.D. Mo.), settled June 25, 2002, 27 TAF QR 52 (July 2002). In *Knoob*, Health Care Service Corporation (also known as Blue Cross Blue Shield of Illinois), which was the Medicare contractor for Illinois and Michigan, agreed to pay $140 million to settle allegations that it failed to process claims properly and concealed evidence of poor performance in processing claims. In *Riggs*, General American, the Medicare Part B carrier for the state of Missouri, paid $76 million to settle claims that it systematically manipulated quality assurance data in order to enhance its ability to obtain Medicare contracts.

However, the *Body* decision created significant uncertainty as to the scope of the FCA liability of Medicare carriers.

New provisions in MPDIMA clarify the legal liability of Medicare contractors and should eliminate the loophole that *Body* threatened to create. The Act provides:

> Nothing in this title shall be construed—
>
> (1) to compromise or affect existing legal remedies for fraud or abuse, whether it be criminal prosecution, civil enforcement, or administrative remedies, including under sections 3729 through 3733 of title 31, United States Code (commonly known as the 'False Claims Act').[15]

Moreover, the Act consolidates Medicare contractor authority in a new provision that clarifies the extent of contractor liability for knowingly false claims. Such contractors will henceforth be known as Medicare Administrative Contractors (MACs), a term which eliminates the old distinction between Part A contractors (fiscal intermediaries) and Part B contractors (carriers). Most significant for our purposes is the following provision, which clarifies that MACs are liable for knowing submission of false claims:

> Limitation on Liability of Medicare Administrative Contractors and Certain Officers.—
>
> (1) Certifying officer.—No individual designated pursuant to a contract under this section as a certifying officer shall, in the absence of the reckless disregard of the individual's obligations or the intent by that individual to defraud the United States, be liable with respect to any payments certified by the individual under this section.
>
> (2) Disbursing officer.—No disbursing officer shall, in the absence of the reckless disregard of the officer's obligations or the intent by that officer to defraud the United States, be liable with respect to any payment by such officer under this section if it was based upon an authorization (which meets the applicable requirements for such internal controls established by the Comptroller General of the United States) of a certifying officer designated as provided in paragraph (1) of this subsection.

[15] MPDIMA sec. 901(a), Pub. L. No. 108-173, 117 Stat. 2066 (2003).

(3) Liability of Medicare Administrative Contractor.—

(A) In general.—No medicare administrative contractor shall be liable to the United States for a payment by a certifying or disbursing officer unless, in connection with such payment, the medicare administrative contractor acted with reckless disregard of its obligations under its medicare administrative contract or with intent to defraud the United States.

(B) Relationship to false claims act.—Nothing in this subsection shall be construed to limit liability for conduct that would constitute a violation of sections 3729 through 3731 of title 31, United States Code.[16]

The new paragraph (3)(A) makes clear that Medicare contractors are subject to liability for intentionally fraudulent conduct or conduct in reckless disregard of their contractual obligations. Moreover, paragraph (3)(B) clarifies that FCA liability is not limited in any way by these provisions.

In comments on the Senate floor explaining the conference agreement, Senator Charles Grassley, the Chairman of the Finance Committee, indicated that the language subjecting Medicare contractors to liability represents not a change but merely a clarification of existing law:

> [T]he language contained in section 911 of the conference agreement clarifies that Medicare administrative contractors are not liable for inadvertent billing errors but, as in the past, are liable for all damages resulting from reckless disregard or intent to defraud the United States. Importantly, the reckless disregard standard is the same as the standard the standard [sic] under the False Claims Act. This standard balances the practical need to shelter Medicare administrative contractors from frivolous civil litigation by disgruntled providers or beneficiaries with the Medicare program's interest in protecting itself from contractor fraud.
>
> The False Claims Act, 31 U.S.C. 3729-3733, applies to Medicare fiscal intermediaries and carriers under current law. This legislation makes it clear that the False Claims Act continues, as in the past, to remain available as a remedy for fraud against Medicare by certifying officers, disbursing officers, and Medicare administrative contractors alike and that, among other things, the remedy subjects Medicare contractors to administrative, as well as trust fund, damages.[17]

[16] *Id.* sec. 911, § 1874A(d).

[17] 149 Cong. Rec. S15644 (Nov. 23, 2003).

Senator Grassley's statement that Medicare fiscal intermediaries and carriers are subject to FCA liability even under the pre-MPDIMA legislative framework is a clear repudiation of the *Body* doctrine that fiscal intermediaries enjoy absolute immunity from such liability. Significantly, Senator Grassley also suggested that the general standard of scienter required for liability under subsection (3)(A) is identical to the FCA standard despite differences in wording between the two provisions.[18]

Congress' clear insistence on FCA liability for intentionally or recklessly false claims by Medicare carriers in the MPDIMA brings to a halt the line of cases developing from *Body*. Even in cases arising under preexisting law, Congress' affirmation of carrier liability under the FCA, as well as Senator Grassley's uncontradicted statement that this standard of liability does not represent a change in preexisting law, discredits the *Body* court's view that Congress intended for carriers to enjoy absolute immunity even for claims they knew to be false, provided they were processed in the normal course of business.

CONCLUSION

The new provisions in MPDIMA governing drug reimbursement and contractor liability will significantly strengthen the Government's ability to combat fraud by pharmaceutical companies and Medicare Administrative Contractors. The new reimbursement formula based on average sales price is much more clearly defined than the old average wholesale price methodology, and is subject to independent verification by the Government. Moreover, by clarifying that the submission of false price information will lead to FCA liability, the new legislation should deter pharmaceutical manufacturers from engaging in manipulative practices such as "marketing the spread," which have cost the general taxpayers and beneficiaries of federal health care programs hundreds of millions of dollars in the past. Likewise, the provisions clarifying that Medicare Administrative Contractors are liable under the FCA for the knowing submission of false claims will prevent such contractors from invoking the *Body* doctrine of absolute immunity, which was tantamount to an invitation to fraud. By clarifying that the same standard of liability applies to MACs as to other government contractors, Congress emphatically rejected the notion that it intended to immunize administrative contractors for the knowing or reckless submission of false claims.

[18] Subsection (3)(A), quoted in full above, provides for liability where the contractor "acted with reckless disregard of its obligations under its medicare administrative contract or with intent to defraud the United States," while the FCA provides for liability for "knowing" violations, which is defined to include false claims where a contractor "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b).

THE FOLLOWING WAS PROVIDED BY THE U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION:

QUI TAM STATISTICS

October 1, 1986 - September 30, 2003

U.S. RECOVERIES IN *QUI TAM* CASES

FY	*QUI TAM* CASES FILED	RECOVERIES IN *QUI TAM* CASES U.S. INTERVENED IN OR OTHERWISE PURSUED	RECOVERIES IN *QUI TAM* CASES U.S. DECLINED	TOTAL RECOVERIES
1987	32			
1988	60	$355,000	$35,431	$390,431
1989	95	$15,111,719	$0	$15,111,719
1990	82	$40,483,367	$75,000	$40,558,367
1991	90	$69,705,771	$69,500	$69,775,271
1992	119	$134,099,447	$994,456	$135,093,903
1993	132	$171,438,383	$5,978,000	$177,416,383
1994	222	$379,646,074	$1,822,323	$381,468,397
1995	277	$245,463,627	$1,813,200	$247,276,827
1996	364	$124,565,203	$14,033,433	$138,598,636
1997	533	$622,746,381	$7,136,144	$629,882,525
1998	470	$432,813,410	$29,225,385	$462,038,795
1999	482	$454,268,984	$62,509,047	$516,778,031
2000	367	$1,197,911,907	$1,814,847	$1,199,726,754
2001	310	$1,163,857,206	$125,658,963	$1,289,516,169
2002	320	$1,063,152,824	$26,101,582	$1,089,254,406
2003	326	$1,395,344,339	$85,042,086	$1,480,386,425
TOTAL	4281	$7,510,963,642	$362,309,397	$7,873,273,039

RELATOR SHARE RECOVERIES

Relator share recoveries in cases U.S. intervened in or otherwise pursued	$1,218,734,385
Relator share recoveries in cases U.S. declined	$89,058,682
TOTAL	$1,307,793,067

This table reports only those amounts recovered by relators as their share of the Government's recovery in False Claims Act cases. In addition, relators have recovered hundreds of millions of dollars in subsection (h) and other personal claims.

RECOVERIES IN HEALTH & HUMAN SERVICES AND DEFENSE DEPARTMENT CASES

	CASES FILED	UNITED STATES RECOVERY	RELATOR SHARE RECOVERY
Health and Human Services	2,200	$5,177,682,597	$851,646,391
Defense	1,277	$1,592,513,253	$291,031,106

INTERVENTION DECISIONS AND CASE STATUS AS OF SEPTEMBER 30, 2003

	ACTIVE	SETTLEMENT OR JUDGMENT	DISMISSED; NO RECOVERY	INACTIVE	UNCLEAR	TOTALS
U.S. Intervened	79	639	27	3	2	750
U.S. Declined	268	153	2,184	10	38	2,653
Under Investigation						891
						4,294

ALLEGATION: FALSE CLAIMS FOR FEDERAL STUDENT AID

Apollo Group, Inc. (E.D. Cal.)

In September 2003, the Government reportedly declined to intervene in a *qui tam* action alleging that Apollo Group, Inc. maintained false records and submitted false claims for payment to various federal student aid programs. Apollo Group is the largest private institution of higher learning in the United States, with over 187,000 students. It provides educational programs to working adults through various subsidiaries, such as the University of Phoenix, Inc., and other continuing education campuses. The relators are two current employees, and may elect to continue the litigation on behalf of the Government, and receive part of the settlement if they are successful.

ALLEGATION: SUBMITTING FALSE CLAIMS FOR REIMBURSEMENT

U.S. ex rel. Kaplan v. Metropolitan Ambulance & First Aid Corp., No. CV-00-3010 (E.D.N.Y.)

In October 2003, DOJ announced it had intervened in this *qui tam* action filed by Larry Kaplan against Metropolitan Ambulance and First Aid Corporation. The Government alleges that the defendants used fraudulent documents to avoid repaying over $30 million in wrongful claims to the Medicare program, including claims for ambulance services which were not medically necessary, as well as claims supported by fabricated documentation. The defendants used these documents in a successful challenge to a CMS audit. Assistant U.S. Attorney Varuni Nelson is representing the Government.

ALLEGATION: FALSIFICATION OF TEST DATA

U.S. ex rel. Smith v. Western Sales and Testing (N.D. Tex.)

In November 2003, the court unsealed the complaint in a *qui tam* suit filed by Timothy Smith, a former quality control manager with Western Sales and Testing (WST), against his former employer. The unsealing occurred after the DOJ notified the judge that it was not likely to intervene. WST is engaged primarily in the business of testing and reconditioning high pressure gas cylinders, and the mobile trailers to which the cylinders are attached. The relator alleges that WST fabricated test results for government-owned gas cylinders. Over an unspecified number of years, WST services approximately 200 to 400 such trailers and cylinders per year, at $60,000 to $120,000 per trailer. Philip Russ (Amarillo) represents the relator.

ALLEGATION: BILLING FOR MEDICALLY UNNECESSARY SERVICES AND SERVICES NOT PROVIDED

U.S. ex rel. Hudnall v. ResCare, Inc., No. 3:01cv1154-H (N.D. Tex.)

In November 2003, the complaint was unsealed in a *qui tam* action filed on June 18, 2001 by Jennifer Hudnall, a former mental health provider who was employed by a ResCare facility in Texas. The complaint alleges that ResCare and Citadel have defrauded and continue to defraud the State of Texas and the Federal Government out of millions of dollars through various fraudulent schemes. The defendants allegedly falsified records, backdated treatment plans, and billed the Government for services that were not reimbursable, not actually pro-

vided, or purportedly performed at times when patients were in fact asleep. Marc Raspanti (Philadelphia) represents the relator.

ALLEGATION: BILLING FOR MEDICATIONS NOT PROVIDED

***U.S. ex rel. Piancentile v. Medco Health Solutions*, No. 00-CV-737 (E.D. Pa.)**

In December 2003 DOJ announced it had filed an amended complaint in this case, in which it had intervened on September 29, 2003. The amended complaint adds two new defendants, Robert Blyskal of New Jersey, and Diane Collins of Florida. Blyskal is the former executive vice president of Medco, and is charged with causing the submission of false claims to the United States by conducting a coverup of intentional destruction of patient prescriptions at Medco's Health Tampa mail order pharmacy in 1998. Blyskal is also alleged to have made misleading statements to the DOJ when questioned about his conduct. Collins is charged with destroying and directing the destruction of patient prescriptions in order to appear to be providing prescriptions on a timely basis in 1999 and 2000. The amended complaint also adds an additional charge against Medco under the Public Contract Anti-Kickback Act, for making improper payments to health plans to induce them to select Medco as a pharmacy benefit manager for government contracts. Marc Raspanti (Philadelphia) is representing the relator. Assistant U.S. Attorney James Sheehan is representing the Government in this matter.

ALLEGATION: FALSE CLAIMS FOR FARM SUBIDIES

***Peterson Farms* (D. Minn.)**

In December 2003, DOJ announced that it had filed a complaint against Peterson Farms, Division III Farms, and Keywest Farms for submitting false claims to the U.S. Department of Agriculture to circumvent farm subsidy limits. The Government alleged that all three defendants, which operated from the same address, fraudulently misrepresented their status as distinct farming operations when in fact they were not, and submitted claims for people who were not in fact engaged in farming. The Government alleges that the defendants submitted 176 false claims totaling $4,208,450. Assistant U.S. Attorney Greg Booker is representing the Government.

ALLEGATION: FALSIFICATION OF ROYALTY REPORTS FOR SAND

***State ex rel. Lockyer v. Hanson Building Materials America, Inc.*, No. 323842 (Cal. Super. Ct.)**

In October 2003, California Attorney General Bill Lockyer intervened in a *qui tam* action filed against three San Francisco area mining companies, alleging that they stole state-owned sand and defrauded the state of tens of millions of dollars of royalty payments for sand harvested from the San Francisco and Suisun Bays. Kevin Bartoo, a former employee of one of the companies, filed this *qui tam* action in 2001 pursuant to the California False Claims Act. The state alleges that the defendants manipulated the sales price they reported to the State Lands Commission in order to evade full royalty payments, underreported the amount of

sand harvested from lease sites, and mined sand outside their lease areas. The state also alleges claims for conversion of mineral deposits and unlawful business practices, and seeks approximately $200 million in damages and civil penalties. Wayne Lamprey (San Francisco) represents the relator.

[*Editor's Note:* The *Quarterly Review* generally does not cover state false claims act cases, but we have made a unique exception in this case due to the unusual nature of the fraud alleged.]

Vantage Group, Inc. **(*D. Mass.*)**

In October 2003, DOJ announced that the Vantage Group, Inc. had agreed to pay **$4.5 million** to settle allegations that it defrauded the U.S. Postal Service. The Government alleged that throughout the 1990s, Vantage improperly mailed approximately 78 million pieces of mail at a reduced non-profit rate, knowing that it was not entitled to use the reduced rate. The Government further alleged that Vantage made false statements to attempt to cover up the improper use of mailing rates. The relator, former Vantage salesman Lawrence Saklad, received 22% of the settlement, or $990,000 as his reward. The Postal Inspection Service and the Postal Service IG investigated this case. Assistant U.S. Attorney Peter Levitt represented the Government.

U.S. ex rel. Dunteman v. Tenet Health Systems, No. 4:98-CV-01903 (E.D. Mo.)

U.S. ex rel. Padda v. Baudendistel, No. 4:99-CV-01339 (E.D. Mo.)

In October 2003, DOJ announced that St. Louis University had agreed to pay **$1.8 million** to settle allegations that it defrauded Medicare and Medicaid. The Government alleged that the university submitted claims to Medicare and Medicaid for services ostensibly provided by faculty physicians that were in fact performed by interns or residents. Edwin Dunteman and Gurpreet Padda, physicians working at St. Louis University, filed separate *qui tam* actions in 1998 and 1999 respectively. The two actions were subsequently consolidated. HHS OIG and DCIS investigated this case. Assistant U.S. Attorneys Claire Schenk and Joe Landolt represented the Government.

U.S. ex rel. Clawson v. Intrepid of North Carolina, No. 5:01CV168-V (W.D.N.C.)

In October 2003, DOJ announced that Intrepid of North Carolina, a home health organization, had agreed to pay **$865,000** to resolve allegations that it violated the FCA. The relator alleged that Intrepid billed Medicaid for services that were not provided or not properly documented. Laura Clawson filed this *qui tam* action in 2001. Louis Vinay, Jr. represented her. As relator, she will receive $198,256 as her statutory share of the recovery in this case. Assistant U.S Attorney Donald Caldwell represented the Government.

General Living Centers, Inc. (W.D. La.)

In October 2003, DOJ announced that General Living Centers, Inc. had agreed to pay **$750,000** to settle allegations that it violated the FCA by submitting claims to Medicaid for services that it did not perform or performed in such a deficient manner as to breach applicable regulations. The Government alleged, among other things, that a resident of the nursing home died after slumping in her wheelchair as a result of the deficiencies in patient care at the facility. As a condition of the settlement, General Living has agreed to divest itself of all its nursing home facilities. According to the U.S. Attorney's Office, this is the largest FCA settlement a case of this nature. HHS OIG and the Louisiana Medicaid Fraud Control Unit investigated this matter.

U.S. ex rel. Kaplan v. Magid Manufacturing Co., No. 98 C 7030 (N.D. Ill.)

In October 2003, DOJ announced that Magid Manufacturing had agreed to pay **$719,000** to settle allegations that it violated the FCA in sales of work gloves, protective clothing, and

other safety equipment. The Government alleged that Magid substituted lower-priced and lower-quality goods for the goods that were actually ordered and paid for. Substituted goods were inferior in material, density, weight, and durability, were factory "seconds," or lower quality foreign-made products. Scott Kaplan, a former sales representative for Magid, filed this *qui tam* action in 1998. Thomas Scorza (Chicago) represented the relator. The relator will receive $143,800 as his statutory share of the settlement. The U.S. Postal Inspection Service and the General Services Administration investigated this case. Assistant U.S. Attorney Linda Wawzenski represented the Government.

U.S. ex rel. Coleman v. Columbia University, 99 CIV. 5860 (S.D.N.Y.)

In October 2003, DOJ announced that Columbia University had agreed to pay **$480,000** to settle allegations that it improperly billed Medicare, Medicaid, and CHAMPUS/Tricare. The Government alleged that Columbia submitted claims for payment for procedures that did not qualify for reimbursement and committed other billing irregularities. Attorneys David Koenigsberg of Menz, Bonner & Komar LLP (New York) and Brian Kenney (Philadelphia) represented the relator. The relator's share in this case is $86,400 or 18% of the federal recovery. The FBI and HHS OIG investigated this case. Assistant U.S. Attorney Sheila Gowan represented the Government.

U.S. ex rel. Pumroy v. Western Maryland Health System, No. 99-2362 (D. Md.)

In November 2003, DOJ announced that Western Maryland Health System, Sacred Heart Hospital of the Sisters of Charity, Memorial Hospital and Medical Center, and three radiology practices all located in Cumberland, Maryland, had agreed to pay **$1.6 million** to resolve allegations that they submitted false claims to the Government. The Government alleged that the defendants billed Medicare for various radiological exams and other procedures that were not ordered by a physician, and that were not medically necessary. Additionally, Sacred Heart Hospital billed Medicare for percutaneous transluminal angioplasty and stenting of carotid arteries, procedures that do not qualify for reimbursement under Medicare rules. Keith Pumroy, a Pennsylvania physician, filed this *qui tam* action. HHS OIG investigated the matter. Assistant U.S. Attorney Roann Nichols represented the Government.

Cathedral Healthcare System, Inc. (D.N.J.)

In November 2003, DOJ announced that Cathedral Healthcare System, Inc. had agreed to pay **$1.5 million** to settle allegations that it overcharged Medicare. The Government alleged that between 1992 and 1998, Cathedral wrongfully submitted claims for inpatient hospital stays for patients who received outpatient care, resulting in reimbursements that were higher than they should have been. HHS OIG investigated this case. Assistant U.S. Attorney Stuart Minkowitz represented the Government.

U.S. ex rel. Pollak v. University of Illinois at Chicago, No. 99 C 710 (N.D. Ill.)

In November 2003, DOJ announced that the University of Illinois at Chicago had agreed to pay **$1,001,645** to settle allegations that it defrauded Medicare by improperly diagnosing and hospitalizing patients to allow them to become eligible more quickly for liver transplants. This case arose out of a *qui tam* suit

filed by Dr. Raymond Pollak in 1999. This settlement follows settlements reached last July by two other Chicago hospitals named as defendants in this case. *See* 32 TAF QR 60 (October 2003). Dr. Pollak will be paid $250,411 as his statutory share of the settlement proceeds. Robin Potter (Chicago), Laurie Wasserman (Chicago), and Ronald Osman (Marion, Illinois) represented the relator. HHS-OIG and the FBI investigated this case. Assistant U.S. Attorney Lisa Noller represented the Government.

***Cooper Health System** (D.N.J.)*

In November, DOJ announced that the Cooper Health System had agreed to pay **$476,544** to settle claims that from July 1995 to June 1996 it wrongfully submitted claims for services to Medicare patients that it represented as having been personally provided by teaching faculty physicians. The Government alleged that Cooper lacked the proper documentation to verify these billing practices. HHS OIG investigated this case. Assistant U.S. Attorney Stuart Minkowitz represented the Government.

***HealthAmerica Pennsylvania** (D.D.C.)*

In December 2003, DOJ announced that HealthAmerica Pennsylvania had agreed to pay **$29,006,771** to the Government to resolve civil claims against it. The Government alleged that HealthAmerica had overcharged the Government for health insurance by failing to apply a market price adjustment to the Federal Employees Health Benefits Program (FEHB) comparable to the market price adjustment given to similar subscriber groups. HealthAmerica also lacked support for demographic information used in developing its rates. Assistant U.S. Attorney Doris Coles-Huff represented the Government.

U.S. ex rel. Scott v. Metropolitan Health Corp., No. 1:02CV485 (W.D. Mich)

In December 2003, DOJ announced that the Metropolitan Hospital in Grand Rapids, Michigan, had agreed to pay **$6.25 million** to settle allegations that it submitted false claims to Medicare. The Government alleged that from 1995 to 2003 the hospital engaged in financial relationships with various physicians that were prohibited under applicable federal law, and subsequently received Medicare reimbursement for patients referred to the hospital by those physicians. Mary Scott, a former vice president of a Metropolitan affiliate, filed this *qui tam* action in 2002. She will receive $1.125 million as her statutory share of the recovery. Patricia Stamler (Southfield, Michigan) represented the relator during the first fourteen months of litigation. Mark Scott, the relator's husband, as well as David Haron and Monica Navarro of Frank, Haron & Weiner (Troy, Michigan) subsequently served as the relator's counsel. Assistant U.S. Attorney Phil Green represented the Government.

***Science and Applied Technologies, Inc.** (S.D. Cal.)*

In December 2003, DOJ announced that the defense contractor Science and Applied Technologies, Inc. and its president, Parthasarathi Robert Majumder, had agreed to pay **$3,049,098** to settle a civil case filed against them by the Government on January 31, 2003. The Government alleged that the defendants submitted false claims under a Government contract with the Navy to develop the Advanced Anti-Radiation Guided Missile Program. Assistant U.S. Attorneys Kevin Seely and Karen Hewitt represented the Government.

***Charleston Area Medical Center* (D.W. Va.)**

In December 2003, DOJ announced that the Charleston Area Medical Center (CAMC) had agreed to pay **$1.3 million** to resolve allegations that it submitted false claims to the Medicare program for physical therapy services. The Government alleged that from 1999 to 2001 CAMC upcoded claims for various services, billed for services it had not provided, and submitted claims for services provided by employees who were unqualified. The FBI and the HHS OIG investigated this case. Assistant U.S. Attorney Carol Casto represented the Government.

Without help from our friends in the relators' bar and grateful whistleblowers, TAF Education Fund could not continue to perform the important work of supporting whistleblowers and educating the public about the FCA. It is therefore with deep appreciation that we thank the following contributors for their generosity, support and leadership in 2003:

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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.

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- 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.