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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.

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Decisions Summarized In This Issue

Litigation Developments

Constitutionality of FCA

***U.S. ex rel. Bantsolas v. Superior Air & Ground Ambulance Transport, Inc.*, 2004 U.S. Dist. LEXIS 4540 (N.D. Ill. Mar. 18, 2004)**

See "Rule 9(b)" below at page 40.

FCA Liability of Government Entities

***U.S. ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140 (9th Cir. Jan. 20, 2004)**

The Ninth Circuit reversed a grant of summary judgment for the defendant construction management firm in a *qui tam* action. The court ruled that the defendant firm did not share the state's immunity from *qui tam* liability merely because it contracted to perform construction work for the state.

In 1994, A. Amir Ali worked from February to September for the California State University at Northridge (CSUN) as an architect coordinating the reconstruction of buildings damaged by an earthquake that January. In December, after terminating Ali's employment, CSUN retained Daniel, Mann, Johnson & Mendenhall (DMJM) as its construction management firm.

In 1996, Ali filed a *qui tam* action against CSUN and two of its employees, alleging that they submitted false claims to FEMA for repairs unrelated to the Northridge earthquake. In May 2000, Ali amended his complaint to include claims against DMJM, and in June the court dismissed the claims against CSUN and its officials pursuant to the joint stipulation of the parties. Thus only DMJM remained as a defendant.

In January 2001, the district court denied DMJM's motion to dismiss based on its claim of immunity under *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), 19 TAF QR 1 (July 2000). However, in June 2002, the district court granted summary judgment for DMJM, holding that the undisputed facts demonstrated that DMJM employees were acting as agents of CSUN, and therefore DMJM enjoyed immunity from liability for actions within the scope of their official duties. Ali appealed.

Private Contractor Did Not Enjoy Sovereign Immunity

The Ninth Circuit reversed. The district court erroneously treated the two DMJM employees who allegedly violated the FCA as if they were state employees who enjoyed the same immunity as state government officials. However, Ali sued DMJM, not the individual DMJM employees. Moreover, those employees were at no time employed by CSUN, and their on-site work managing the reconstruction of government facilities under the supervision of government officials did not transform them into government employees. Similarly, the relator's allegation that DMJM was an agent of CSUN did not confer sovereign immunity on DMJM if it could be shown that DMJM or its employees knowingly submitted false claims to FEMA

The district court also erroneously relied on the independent contractor exception to federal government liability under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. §§ 1346(b), 2671. The district court concluded that the DMJM employees were not independent contractors under the FTCA, and reasoned that because the Federal Government could have been liable under the

FTCA if CSUN were part of the Government and the DMJM employees committed a tort, conversely DMJM should be immune from FCA liability. However, the Ninth Circuit observed, even granting arguendo the district court's conclusions regarding the FTCA, agency for tort liability has little bearing on immunity from FCA liability, and the district court's reasoning would lead to the surprising result that all private corporate contractors acting on behalf of a state are immune from *qui tam* actions.

The Ninth Circuit also rejected DMJM's invocation of the government contractor defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). This defense shields government contractors from liability for actions that are tortious when committed by private parties but not wrongful when done by the Government. It does not confer sovereign immunity on contractors.

Contractor Was Not Arm of the State

As a private corporation, DMJM is a "person" under the FCA. Therefore, it was subject to suit under the FCA unless it shared CSUN's immunity because of its relationship to CSUN. The Ninth Circuit ruled that the arm-of-the-state test for sovereign immunity is the proper analysis to undertake when determining immunity under the FCA. Under this test, the court examines the following factors: (1) whether the money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity. The most important of these factors is the first.

Because the second factor is construed broadly, the Ninth Circuit assumed that managing the reconstruction of state university buildings is a central governmental function. However, all the other factors weighed against a finding that DMJM enjoyed immunity. There was no indication that the state would have any legal obligation to pay any judgment against DMJM, which was a private corporation with the power to sue and be sued and take property in its own name. Therefore, the court of appeals concluded, DMJM did not enjoy immunity from *qui tam* liability.

Relator Raised Genuine Issue Whether Defendant Knowingly Submitted False Claims

The Ninth Circuit declined DMJM's invitation to affirm the district court's grant of summary judgment on the grounds that the relator failed to raise a genuine issue of material fact regarding the existence of false claims or DMJM's knowing submission of such claims. Viewing the evidence in the light most favorable to Ali, a reasonable factfinder could conclude that DMJM knowingly misrepresented that it had planned before the earthquake to reoccupy an abandoned building in order to obtain FEMA funds for which it was not eligible. Accordingly, the court of appeals reversed and remanded the case to the district court for further proceedings.

FCA Liability of Medicare Administrative Contractors

U.S. ex rel. Watson v. Connecticut General Life Insurance Co., 2004 U.S. App. LEXIS 1736 (3d Cir. Jan. 16, 2004)

The Third Circuit affirmed a grant of summary judgment in a *qui tam* and § 3730(h) action in favor of the defendant Medicare carrier, which was alleged to have manipulated claims to increase its reimbursement and enhance its chances of obtaining and receiving contracts. The court ruled that the relator had failed to provide evidence that the carrier caused false

claims to be submitted, or that its alleged false certifications influenced the Government's payment decisions. Moreover, as an independent contractor, the plaintiff lacked standing to bring a 3730(h) action.

Michael Watson contracted in 1994 with the Connecticut General Life Insurance Company (CGLIC), a Medicare carrier that processes durable equipment claims for the western part of the United States, to serve as an independent hearing officer in the Medicare appeals process. Under the contract, Watson was an independent contractor who was compensated on a case-by-case basis, received no employee benefits, set his own schedule, and provided the bulk of his own supplies. CGLIC terminated Watson's contracts pursuant to their terms in 1998. Later that year, Watson filed a *qui tam* action against CGLIC, alleging that it engaged in a multitude of deceptive practices that caused its claims processing costs to rise and thereby increased the reimbursements it received from HCFA. Watson also stated a claim for retaliatory discharge in violation of § 3730(h) as well as various state law claims. In 2000 the Government declined to intervene.

CGLIC moved for summary judgment, and the district court granted the motion. *See* 2003 U.S. Dist. LEXIS 2054, 30 TAF QR 17 (Apr. 2003). The court ruled that Watson failed to raise a genuine issue for trial on his allegations that the defendant manipulated its software to ignore duplicate claims and engaged in other improper conduct that could give rise to FCA liability, and had not even attempted to demonstrate that the defendant acted with the required scienter. The court also granted summary judgment to the defendant on Watson's retaliation claim, ruling that as an independent contractor rather than an employee of the defendant, he lacked standing to bring such a claim. Watson appealed.

Relator Failed to Provide Evidence Supporting *Qui Tam* Claims

The Third Circuit affirmed. Watson argued on appeal that CGLIC adopted a policy of resubmitting incomplete claims in order to manipulate its claims processing volume and costs, and thus its eventual compensation, and that the district court erred in failing to find a sufficient nexus between the resubmission policy and CGLIC's compensation. However, even assuming that the district court had found such a nexus, the Third Circuit observed, Watson had not shown that CGLIC acted wrongfully in encouraging the resubmission of incomplete claims, or that its resubmission policy was fraudulent or violated any Medicare regulations. Because Watson had not shown any fraudulent claim for payment, his resubmission argument failed.

Watson also argued that CGLIC manipulated its Carrier Performance Evaluation (CPE) scores by inflating its claims count and fraudulently certifying its compliance with the Medicare Carriers Manual. However, Watson provided no evidence that CGLIC's CPE scores would have been deficient absent a higher claims count, or that the CPE score or the certification influenced the Government's payment or renewal decisions. Invoking *Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002), the court ruled that FCA liability exists only "if certification of compliance influenced the government's payment decision." Accordingly, the court of appeals ruled, the district court did not err in granting summary judgment to the defendant on Watson's *qui tam* claims.

Independent Contractor Lacked Standing to Bring Retaliation Claim

Watson also appealed the district court's conclusion that he was an independent contractor rather than an employee protected under the

FCA's anti-retaliation provisions. Watson argued that the district court erred in limiting its consideration to the factors enumerated in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), and that the court should have considered additional factors, such as the twenty factors listed by the IRS. However, the court of appeals observed, the district court did recognize that the *Darden* factors are not exhaustive, and it did consider additional factors not enumerated in *Darden.* Watson's argument that the district court misconstrued the *Darden* factors was wholly without merit, and he cited no authority for his promotion of the IRS factors as a necessary supplement to the *Darden* factors.

Most of the *Darden* factors pointed to the conclusion that Watson was an independent contractor. He required no training from CGLIC, often trained less experienced officers, provided the bulk of his own supplies, largely controlled the location of his own work, enjoyed significant discretion in setting his own hours, and was paid according to the amount of work performed rather than by salary. While a few factors, such as the four-year duration of the work, may have pointed in the opposite direction, they were insufficient to create a factual dispute in light of the weight of the other factors. Accordingly, the court of appeals affirmed the grant of summary judgment to the defendant.

***U.S. ex rel. Drescher v. Highmark, Inc.*, 305 F. Supp. 2d 451 (E.D. Pa. Feb. 20, 2004)**

A Pennsylvania district court denied the defendant's motion to dismiss a *qui tam* action alleging that the defendant, which acted both in a private capacity as a medical insurer and in a public capacity as a Medicare contractor, violated the FCA in both capacities by shifting primary payment responsibility from itself to the Government. The court found causation was potentially the most problematic element of the FCA claim against the defendant as a private insurer, but ruled that this claim could go forward if the Government could show that the defendant specifically directed the provider to submit to Medicare claims that the defendant had denied. The court also declined to dismiss the claim against the defendant in its public capacity as a Medicare contractor, which the defendant argued entitled it to absolute immunity from liability.

Elizabeth Drescher filed this *qui tam* and retaliation action against Highmark, Inc. in 2000. In 2003 the Government intervened and filed its own complaint, superseding Drescher's *qui tam* allegations. *See* 30 TAF QR 69 (April 2003). Counts I and II asserted FCA claims against Highmark in its capacity as a private insurer and in its capacity as a public insurer, respectively. In Count I, the Government alleged that Highmark, as a private insurer, improperly paid Medicare claims as the secondary payer, when it should have paid as the primary payer. In Count II, the Government alleged that Highmark, as a Medicare contractor, knowingly paid claims from the Medicare Trust Fund as a primary payer, in situations where Highmark, as a private insurer, actually had primary payer responsibility. Counts III, IV, and V were claims for overpayment, unjust enrichment, and breach of contract. Highmark moved to dismiss the Government's complaint in its entirety as well as the relator's retaliation claims.

Plaintiff Must Show Causation

The court denied the defendant's motion. The court found that potentially the most problematic area of Count I was causation. The court summarized the Government's unprecedented theory of causation as follows: (1) Highmark, in violation of the Medicare Secondary Payer Statute, incorrectly denied claims or paid claims as the secondary payer when it should have paid as the primary payer; (2) as a result the claims were returned to the providers who submitted

them; (3) the providers then submitted the claim to Medicare for payment; and (4) Medicare paid the claim (or paid the claim as primary) even though it was not obligated to do so under law.

The court stated that the providers were not mere conduits to the submission of false claims, because it was not clear that they passed along the denied claims to the Government in a sufficiently foreseeable and predictable manner. Nevertheless, the court ruled, there could potentially exist facts under which Highmark could be liable. For example, if Highmark specifically directed the provider to submit the denied claim to Medicare for payment, or otherwise suggested that Medicare should be the primary payer, then the Government's claim could be viable. However, the more options that the provider had when presented with a rejected claim (for example, the option to dispute the rejection), the less likely the Government would be able to sustain the necessary causal connection. As the parties' submissions did not completely address these issues, the court permitted the Government to go forward on this count in order to permit further development of the facts.

Court Declines to Follow *Body*

The court also denied Highmark's motion to dismiss the allegations in Count II that it violated the FCA in its public capacity as a Medicare Administrative Contractor (MAC). The Government alleged that Highmark violated the FCA in its public capacity in two ways: (1) Highmark knowingly paid claims from the Medicare Trust Fund as primary payer when Highmark, as private insurer, actually had primary payer responsibility, and (2) Highmark falsely billed CMS for contractual administrative services performed in breach of its contract.

Highmark sought to rely on *United States ex rel. Body v. Blue Cross & Blue Shield of Alabama, Inc.*, 156 F.3d 1098, 1111 (11th Cir. 1998), which interpreted ambiguous language in the Social Security Act to "give fiscal intermediaries full immunity from liability for payments that are certified by its [sic] certifying officers and disbursed by its [sic] disbursing officers." However, the district court observed that a recently enacted provision in the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MPDIMA) suggested that Congress intended otherwise. *See* MPDIMA Sec. 911(d), Pub. L. No. 108-173, 117 Stat. 2066, *codified at* 42 U.S.C. § 1395kk-1 (2003). This provision unambiguously states that Medicare contractors have the same limited liability as certifying and disbursing officers. The court stated that Congress' insertion of this specific language eliminated the ambiguity upon which *Body* rested and suggested that Congress did not in fact intend Medicare contractors to have full statutory immunity. Moreover, the court observed, the discussion on the Senate floor, and in particular Senator Grassley's remarks, indicate that the purpose of this new provision in MPDIMA was to clarify, not change, existing law. *See* 149 Cong. Rec. S15644 (Nov. 23, 2003).

For these reasons, the court denied Highmark's motion to dismiss count II, and deferred ruling on the issue of statutory immunity until the parties had the opportunity to fully brief the issue and present oral arguments, preferably at the summary judgment stage. The court also denied Highmark's motion to dismiss the Government's non-FCA claims, as well as the relator's retaliation claim.

FCA Liability/Causation

U.S. ex rel. Drescher v. Highmark, Inc., 305 F. Supp. 2d 451 (E.D. Pa. Feb. 20, 2004)

See "FCA Liability of Medicare Administrative Contractors" above at page 4.

FCA Liability/False Certification

U.S. ex rel. Watson v. Connecticut General Life Insurance Co., 2004 U.S. App. LEXIS 1736 (3d Cir. Jan. 16, 2004)

See "FCA Liability of Medicare Administrative Contractors" above at page 2.

U.S. ex rel. Stebner v. Stewart & Stevenson Services, Inc., 305 F. Supp. 2d 694 (S.D. Tex. Jan. 30, 2004)

See "FCA Liability/Materiality" below at page 7.

U.S. ex rel. Herrera v. Danka Office Imaging Co., 2004 U.S. App. LEXIS 4825 (4th Cir. Mar. 15, 2004)

The Fourth Circuit affirmed a district court's grant of summary judgment in a *qui tam* action. In an unpublished opinion, the court stated that to the extent the false implied certification theory is valid, it imposes liability only where the certification was a prerequisite to the government action sought.

Jose Herrera was an employee of Danka Office Imaging Co., a large distributor of photocopiers. Danka held a contract for photocopiers with the General Services Administration, under which the Defense Automated Printing Service (DAPS) issued blanket purchase agreements (BPAs) to Danka. The BPA required Danka to pay a service fee of 0.5% on the value of all sales made, and stated that if Danka failed to remit payment, the amount would be considered a contract debt to the Government.

Herrera filed this *qui tam* action against Danka in October 2000, and in January 2002 the Government declined to intervene. In his first amended complaint, Danka alleged that Danka failed to pay the service fee because it had no compliance system in place to audit its sales, thereby submitting both direct false claims and implied false certifications. Danka moved for summary judgment and in January 2003 the district court granted the motion. Herrera appealed.

Defendant Did Not Submit Direct False Claim

In an unpublished per curiam decision, the Fourth Circuit affirmed. According to Herrera's direct false claim theory of liability, each invoice Danka submitted to the Government under the BPA violated § 3729(a)(1) because the invoices included the service fee that Danka was not going to pay. However, the court observed, the BPA required Danka to include the service fee in all of its invoices, and then to remit the fee on a quarterly basis to DAPS. Therefore, the court ruled, Danka did not submit a false claim by including the service fee in its invoices as required by its government contract. Although Danka's subsequent failure to remit the fee may have breached its contract to the Government, Herrera's direct false claim allegations were insufficient.

Implied Certification Claim Failed

The court also rejected Herrera's implied false certification claim. Herrera argued that each invoice Danka submitted acted as an implied certification that it intended to comply with the service fee provision. The court ruled that to the extent the implied certification theory is valid, it imposes liability under § 3729(a)(1) where submission of the invoice constituted implied certification of compliance with the program terms, and only where the relator can show that certification was a prerequisite to the government action sought. In this case, however, the BPA did not condition payment of Danka's invoices on a certification that Danka would remit the service fee. Thus Herrera's implied certification claim failed.

Therefore, the Fourth Circuit ruled, the district court correctly granted summary judgment to Danka. Accordingly, the court of appeals affirmed.

FCA Liability/Materiality

U.S. ex rel. Stebner v. Stewart & Stevenson Services, Inc., 305 F. Supp. 2d 694 (S.D. Tex. Jan. 30, 2004)

A Texas district court granted the defendants' motions for summary judgment in a *qui tam* action alleging that they submitted false claims to the Army for trucks that did not meet corrosion resistance requirements. The court ruled that because the Government was aware of the problem, but chose to work with the defendants and obtained the benefit of its bargain with them, the defendants made no material misrepresentation in their claim for payment.

Stewart & Stevenson Services, Inc. (S&S) contracted in 1991 to produce 10,843 trucks for the Army. The contract required that the trucks be capable of resisting corrosion damage for ten years, and required that tests be performed to evaluate corrosion resistance. In 1995 the test revealed corrosion problems, and S&S entered into the first of a series of modification agreements with the Government while resolving this issue. The modification authorized the Government to withhold partial payments while conditionally accepting trucks, and to cease accepting them if S&S failed to resolve the corrosion issue.

S&S appointed its employee Werner Stebner to lead an investigation of the corrosion problem and report plans for corrective action. After meeting with S&S managers and government representatives, Stebner reported that S&S was producing "junk" and was incapable of fulfilling the contract. After a disagreement over the level of detail to include in the final report, S&S removed Stebner from the investigation and reassigned the reporting task.

In April 1996, S&S submitted the final report. After testing repairs made under the corrective action plan, in September the Government exercised its right to cease conditional acceptance. In response, S&S offered a ten-year warranty on repaired trucks if the Government would continue accepting them. In November, the Government accepted this offer, and subsequently awarded S&S two more contracts for trucks.

Meanwhile, in October 1996, Stebner brought this *qui tam* action against S&S and its subcontractor, McLaughlin Body Company (MBC). Stebner alleged that S&S violated the FCA by submitting payment claims for trucks that it knew were incapable of meeting the contract's corrosion resistance requirements. He also alleged that MBC falsely certified to S&S that its products and processes conformed to the contract, and S&S wrongfully accepted this false certification. The Government declined to intervene and the parties filed cross-motions for summary judgment.

Defendant Submitted No Express or Implied False Claims

The court denied Stebner's motion and granted summary judgment for the defendants. The court ruled that S&S submitted no express or implied false claims for payment. The court found no genuine dispute regarding the absence of an express false claim. The company's payment requests for completed trucks contained limited information such as mechanical specifications and manufacture dates, and did not claim to deliver more than the Government actually received. The company's progress payment requests did contain certifications of contractual compliance, but the certification merely represented that S&S

had complied with the contract's progress payment clause, and did not address the quality of any particular truck. Moreover, there was no evidence that S&S requested a reimbursement for costs that it did not incur.

The court also rejected the relator's implied false certification theory of liability. The court that in order to succeed on his claim that that the invoices contained implied certifications for FCA purposes, the relator would have to show that: (1) the invoices represented that the contractor has disclosed deficiencies and (2) the contractor submitted the invoices without disclosing a material deficiency. In this case, however, S&S submitted no invoice with a requirement that it disclose all deficiencies. Therefore, the false implied certification theory failed.

Defendant Made No Material Misrepresentation Because Government Received Benefit of Bargain

The court held that a request for full payment represents that the Government has received the benefit of the bargain, and thus if the Government does not receive what it bargained for, the request is a material misrepresentation which, if made knowingly, violates the FCA. However, if the Government has received the benefit of the bargain, then no false claim exists.

In this case the Government bargained for vehicles that would resist corrosion for ten years. The relator presented evidence that the vehicles tendered did not meet the required corrosion resistance standards. However, S&S warranted the vehicles for repairs for ten years, and there was no evidence that it intended to renege on its warranty.

The court found that this case fit within the same analytical framework as *United States v. Southland Management Co.*, 326 F.3d 669 (5th Cir. 2003) (en banc), 31 TAF QR 2 (July 2003). In that case, the Fifth Circuit rejected the Government's claim that owners of a low-income housing complex violated the FCA by submitting vouchers falsely certifying that the housing was "decent, safe, and sanitary." The court stated that "decent, safe, and sanitary" standard was subjective and imprecise, and observed that although the Government was aware of the problems at the complex, it had chosen to continue providing housing assistance payments while working with the defendants to improve conditions. Ultimately, the *Southland* court held that no violation occurred because the owners were entitled to be paid.

Similarly, in the case a bar, the contract terms called for proper cleaning, treatment, and protection of all parts from foreign matter that might affect corrosion resistance, and taken to the extreme, would seem to require that the trucks be constructed in a dustless vacuum. "In light of *Southland* and common sense," the court ruled, "a subjective propensity" rendered these terms immaterial. Moreover, as in *Southland*, the Government withheld its contractual right to permanently revoke its acceptance because the defendants made earnest attempts to remedy apparent deficiencies.

Considering the Government's dealings with S&S, the court ruled, the evidence indicated that the Government received the benefit of its bargain. Stebner failed to establish that S&S misrepresented a material fact in seeking payment from the Government. Therefore, the court concluded that Stebner had failed to show that the defendants made false claims, and accordingly granted the defendants' motions for summary judgment.

U.S. ex rel. Schell v. Battle Creek Health System, 2004 U.S. Dist. LEXIS 3186 (W.D. Mich. Feb. 25, 2004)

A Michigan district court granted the defendant's motion for summary judgment in a *qui*

***tam* action alleging that the defendant charged Medicare for full multiple-dose vials of medication when only single doses were administered. The court ruled that the defendant was entitled to judgment because its billing practice did not result in increased expense to Medicare.**

Thomas Schell worked from 1991 to 1999 as a certified registered nurse anesthetist for Battle Creek Health System. In 1999 Battle Creek dismissed Schell. Schell then brought a *qui tam* action against Battle Creek and Mercy Health Services, which owns Battle Creek and a number of other Midwestern hospitals. Schell alleged that the defendants overcharged the Government for anesthetic medications by charging for a full multiple-dose vial every time a single dose was administered. He also alleged that the defendants mischarged for anesthesiologists' time because the anesthesiologists did not comply with the requirements for medical direction of anesthesia services. In 2000 the Government declined to intervene, and in 2001 the complaint was served on the defendants. In 2002 the district court granted the defendants' motion to dismiss the time mischarging allegations, but not the dose overcharging allegations. *See* 2002 U.S. Dist. LEXIS 18063 (W.D. Mich. Sept. 17, 2002), 28 TAF QR 37 (Oct. 2002).

Discovery was limited to the question whether charging for a full multiple-dose vial of anesthetic medication results in increased costs to Medicare. Battle Creek then moved for summary judgment, arguing that Schell's claim failed because Battle Creek's billing practice did not increase expense for the Medicare program.

False Statement Must Be Material

The court granted the motion and dismissed the action in its entirety. While the Sixth Circuit has not decided whether the civil FCA imposes a materiality requirement, other courts of appeals have held that it does. In addition, the Sixth Circuit has imposed a materiality requirement in criminal cases involving false claims, and has said that the test for materiality is whether the false statement had a natural tendency to influence the decision of the agency. Thus, the district court was persuaded that governmental reliance on the false statement is required in false claims cases.

Relator Failed to Show Practices Caused Increased Expense

The court found that Schell had failed to present evidence that the defendant's billing practices resulted in increased expense to Medicare, or that the alleged overstatements had a tendency to influence Medicare reimbursement to the defendant. With regard to inpatient services, because Medicare reimburses such services on a flat fee basis, medication overcharges would not affect the flat fee payment. With regard to inpatient outlier payments, the defendant argued that any increase in medication charges would be offset by a corresponding reduction in the cost-to-charge ratio. Schell's expert agreed that the increased charges would ultimately lower the imputed costs, but preliminarily concluded that the time lag between the increased charge and the reduction in the ratio probably resulted in financial benefit to the defendant. However, although Schell had access to billing and medical records, his expert opinion contained no factual analysis or actual examples of overpayment. Thus, the court concluded, Schell had failed to submit evidence that the alleged overcharges affected the outlier payments.

With regard to outpatient billing, the defendant argued that the use of a cost-to-charge ratio minimized the effect on Medicare reimbursement, and that as a result of annual adjustments the defendant ultimately was reimbursed only for its actual costs. Schell alleged that the Government paid the overcharges and was not reimbursed, but failed to present any evidence supporting this claim. Moreover, his own

expert stated that Medicare might have been repaid. Furthermore, the expert's conclusion contained no analysis of the facts or any examples drawn from the billing records made available through discovery. The court found that Schell failed to identify any evidence raising a genuine issue of material fact relating to the outpatient payments.

The court concluded that the defendant had carried its burden of showing an absence of evidence to support a claim, and that the relator had failed to show that there was a genuine issue of material fact for trial. Accordingly, the court granted summary judgment for the defendant and dismissed the action.

Fraud in the Inducement

U.S. ex rel. Bettis v. Odebrecht Contractors of California, Inc., 297 F. Supp. 2d 272 (D.D.C. Jan. 28, 2004)

A District of Columbia district court granted summary judgment to the defendant contractor in a *qui tam* action based on the theory that the contractor violated the FCA by intentionally underbidding to obtain a contract to which it allegedly intended to seek modifications at a later date. The court held that allegations of underbidding will support FCA liability on a theory of fraud in the inducement only where the defendant contractor intended to and actually did submit claims for monies to which the contactor was not otherwise entitled, which was not the case here. Moreover, the court held, even if the relator's theory of liability were not fatally flawed, the undisputed facts were insufficient to support his claim.

Beginning in 1995, Alva Bettis worked for CCL Construction Consultants, Inc. as a project scheduler to assist Black and Veatch Consultants (B&V) monitor the progress of the Seven Oaks Dam in San Bernadino, California, which was being constructed by CPBO of America under a contract from the Army Corps of Engineers. CPBO had committed the resources of its affiliates Odebrecht S.A. of Brazil and Odebrecht Contractors of California, Inc. (OCC) to this project. B&V terminated Bettis' employment on the project in 1998.

In 1999 Bettis filed a *qui tam* action under seal against CPBO and its affiliates. In 2000 the Government declined to intervene, and the court ordered that the complaint be served upon the defendants. However, only OCC was ever served.

Bettis amended his complaint several times, most recently in response to the court's order in October 2002 dismissing certain counts with prejudice and others without prejudice. Bettis' fourth amended complaint, filed in January 2003, alleged that the defendants violated the FCA by intentionally submitting a low bid, intending to seek and subsequently submitting false modifications (Count I); intentionally submitting false survey data in support of progress payments; and making false claims in connection with its excavation of an abutment to the dam and in connection with its construction of an access road. Upon the completion of discovery, Bettis moved for summary judgment on Count I, while OCC moved for summary judgment on all counts.

No FCA Liability for Underbidding Absent Claim for Monies Not Due

The court denied the relator's motion and granted the defendant's motion. In his third amended complaint, Bettis had alleged that the defendants submitted a bid that was intentionally undervalued with the goal of seeking subsequent modifications to the contract price. In its October 2002 order dismissing those claims without prejudice, the court held that there can be no liability for merely submitting a low bid with the intent to obtain additional monies

unless the contractor in fact seeks an adjustment to the contract price. In response to this ruling, Bettis alleged in his fourth amended complaint that the defendants submitted requests for additional payments in excess of the bid price.

However, the court ruled, Bettis could not cure his defective claim merely by alleging that the defendants ultimately sought monies exceeding the bid price. It is commonplace in government contracting for a contract that was bid at one price ultimately to cost more. For example, in a unit-price contract such as the one at issue here, the final price will necessarily be different if the actual quantities of materials turn out to be greater that the Government's initial quantity estimates. Because there are a myriad of legitimate adjustments that can increase a contract price beyond the bid price, the court ruled, FCA liability will attach only where the contactor claims money to which it is not legitimately entitled.

In an attempt to avoid the requirement of having to prove that the defendant sought money above the contract price that it was not legitimately entitled to, Bettis argued that if a contract is obtained by fraudulent means, it is void *ab initio*, and the Government is entitled to a refund of its money on the ground that every claim has been tainted by the original fraud. The court stated that the notion of a government contract that is void *ab initio* is fraught with analytical problems, especially where, as in the case at bar, the Government has declined to join the relator's suit. Moreover, the cases upon which Bettis relied were inapposite, as they involved either collusive bidding and price inflation (resulting in claims for payment to which the defendants were not entitled) or false certification (which is actionable only when the certification is a prerequisite to obtaining a government benefit).

The court observed that Bettis was unable to cite to any FCA case involving a claim of fraud in the inducement based on a low bid. The court discovered only one, *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218 (D. Md. 1995), 2 TAF QR 19 (July 1995). However, in *Mayman*, the relator alleged that the contractor sought to recoup the shortfall on an underbid contract by mischarging work done on the project to a separate research and development contract with the Government, which was supposed to cover work unrelated to any other specific contract. Thus, *Mayman* supported the district court's holding that for FCA liability for underbidding to attach, the relator must show that the contractor sought and submitted claims for money to which it was not otherwise entitled.

Undisputed Facts Insufficient to Support Liability

Even if Bettis' fraud-in-the-inducement theory were not fatally flawed, the court held, the undisputed facts were insufficient to support a finding of liability under the FCA. The facts did not permit an inference that the defendant fraudulently induced the Government to award the contract to it. Bettis argued that the defendant made promises when it submitted the bid regarding cost-saving devices it never intended to use, failed to use "quantity take-offs" in calculating its bid, and falsely reaffirmed its bid during the protest delay period despite knowledge that its costs were escalating. The court rejected each of these arguments in turn.

The court ruled that the only reasonable inference to be drawn from the undisputed facts was that at the time the defendant submitted its bid, it had the intent and motivation to use the cost-saving measures. In fact, the defendant did implement some of the cost-saving measures, but jettisoned them when they became unmanageable and too expensive.

A "quantity take-off" is a detailed estimate of the quantity of each work item required by a

contract, and performing quantity take-offs is a standard procedure used in preparing bids. Although the relator concedes that the defendant did use some quantity take-offs, he alleged (and the defendant disputed) that it did not use them for all items in preparing the bid. But even if quantity take-offs were not prepared for all items, the court ruled, this would demonstrate, at most, that the defendant failed to conform to an industry standard for producing an accurate estimate. It would not support an inference that the bid was false or fraudulent and was not actionable under the FCA.

The court ruled that the undisputed facts did not permit an inference that the defendant's reaffirmation of its bid during the protest period was fraudulent. Furthermore, the court ruled, various requests for equitable adjustments that the defendant submitted after the contract was awarded reflected genuine contract disputes, and were not false claims within the meaning of the FCA.

Accordingly, the court denied the relator's motion for summary judgment on Count I and granted the defendant's motion for summary judgment on all counts. The court ordered that the complaint be dismissed with prejudice.

Section 3729(a)(7) Reverse False Claims

U.S. v. Universal Fruits & Vegetables Corp., 362 F.3d 551 (9th Cir. Mar. 17, 2004)

The Ninth Circuit reversed a district court judgment for the Government in an FCA action it brought to recover customs duties on a reverse false claims theory. The court of appeals ruled that the Court of International Trade has exclusive jurisdiction over such FCA actions when initiated by the Government. However, the court declined the Government's invitation to address whether a *qui tam* relator could bring a reverse FCA action to recover customs duties in district court.

In 1994 the U.S. Department of Commerce determined that fresh garlic from the People's Republic of China was being dumped into the United States. The department issued a preliminary antidumping order imposing a duty of 376.67% of the declared value of each shipment of garlic.

David Pai and his father Jason, who ran Universal Fruits & Vegetables Corporation, imported garlic from China, and were expecting a shipment at the time the duty became effective. Informed of the antidumping duty by their customhouse broker, they never posted the duty required and ultimately abandoned the shipment.

Soon thereafter, the Government began to suspect that Universal was transshipping garlic via South Korea to avoid paying the antidumping duty. In 1995 U.S. Customs agents searched Universal's premises and seized certain incriminating documents.

In November 2000 the Government brought this FCA action against Universal and the Pais in the U.S. District Court for the Central District of California, alleging that on four occasions Universal filed false customs documents indicating that South Korea rather than China was the source of the garlic it was importing. The Government alleged that Universal thereby violated § 3729(a)(7) of the FCA, the so-called "reverse false claims" provision. The total declared value of the four shipments was $170,993. Applying the 376.67% antidumping duty, the Government claimed $644,079 in actual damages, which when trebled pursuant to the FCA yielded $1,932,237, to which the Government added $5,000 civil penalties for each of the four customs declara-

tions and a fifth for David Pai's alleged false statement to a customs agent. Accordingly, the Government sought nearly $2 million from Universal and each of the Pais.

Universal moved to dismiss for lack of jurisdiction, arguing that because the Government's claim concerned a customs matter, it fell within the exclusive jurisdiction of the Court of International Trade (CIT). Universal also moved to dismiss for failure to state a claim, arguing that the customs duties sought by the Government were not sufficiently definite to constitute an "obligation" giving rise to reverse false claims liability. The district court denied both motions.

The Government then moved for summary judgment based on the evidence seized in the 1995 search. In December 2001, the district court granted the motion, and entered judgment awarding damages in the full amount sought. Universal and the Pais appealed.

CIT Has Exclusive Jurisdiction Over Reverse FCA Actions Commenced by the Government to Recover Customs Duties

The Ninth Circuit reversed. The court observed that 28 U.S.C. § 1582 confers upon the CIT "exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover customs duties." There was no dispute that the case at bar was a civil action commenced by the United States arising out of an import transaction. The central issue was whether the Government's reverse false claims action was an action to recover customs duties.

Universal contended that the measure of the Government's damages in the FCA action was essentially a tally of the duties it claimed Universal owed multiplied by three. Thus, Universal argued, the Government's claim was at bottom a customs claim. The Government countered that its FCA claim was not a suit to collect duties, but a suit to recover damages and penalties based on the defendants' fraud as provided by the FCA.

The Government sought to rely on *United States v. Blum*, 858 F.2d 1566 (Fed. Cir. 1988), in which the Federal Circuit held that the statutory scheme set out in 19 U.S.C. § 1592 provides the Government with two distinct causes of action, one to impose penalties for improper conduct and another to recover lost import duties. However, the Ninth Circuit observed, *Blum* said nothing at all about where jurisdiction over such actions would be proper, and indeed itself involved an action initiated in the CIT.

Moreover, the Ninth Circuit observed, even accepting the Government's characterization of its FCA claim as a claim for "damages," at least part of those "damages" would be customs duties, namely, the antidumping tariffs that it claimed Universal fraudulently evaded. The court pointed out that a party may not circumvent a congressional grant of jurisdiction by creatively framing its complaint. If the Government could bring an FCA claim in district court whenever a party fraudulently withheld customs duties, then exclusive jurisdiction over actions to recover customs duties in all such instances would become a virtual nullity.

The court did not believe that its decision precluded the Government from effectively employing the reverse false claims provision of the FCA in seeking to recover fraudulently evaded customs duties. Although the Federal Circuit has suggested that the district courts have exclusive jurisdiction over *qui tam* FCA actions, *see LeBlanc v. United States*, 50 F.3d 1025, 1031 (Fed. Cir. 1995), the Ninth Circuit saw little reason to believe that the CIT would extend this holding to bar its own jurisdiction to hear reverse false claims actions brought by the Government to recover customs duties. The Ninth Circuit signaled its agreement with the view of the Second

Circuit that § 3732(a) merely delineates proper venue for FCA actions, not jurisdiction over such claims. *See United States ex rel. Thistlewaite v. Dowty Woodville Polymer, Ltd.*, 110 F.3d 861, 865 (2d Cir. 1997). The Ninth Circuit added that, far from supplanting the CIT's ability to hear FCA actions, § 3732 complements it, for while the CIT's venue already is effectively universal, the number of district court venues in which FCA suits could be brought would be quite limited in the absence of § 3732. Thus, in the Ninth Circuit's view, § 3732 simply brings venue in the district courts into line with the generous venue options available to the CIT. The court observed that the CIT has tentatively signaled agreement with this view. *See United States ex rel. Felton v. Allflex USA, Inc.*, 989 F. Supp. 259 (1997).

The Ninth Circuit made clear that its holding did not address the question whether a *qui tam* relator may bring a reverse false claims action involving customs duties in the district courts. Despite the Government's invitation, the court declined to reach this issue.

Concluding that the CIT had exclusive jurisdiction over this matter, the court ruled that the district court lacked subject matter jurisdiction. Accordingly, the Ninth Circuit reversed the judgment of the district court.

Section 3729(b) Knowledge Requirement

U.S. ex rel. Ervin & Associates, Inc. v. Hamilton Securities Group, Inc., 298 F. Supp. 2d 91 (D.D.C. Jan. 7, 2004)

A District of Columbia district court granted a defendant's motion for judgment on partial findings in a *qui tam* action. The court ruled that the defendants' failure to take every possible step to insure the complete accuracy of the results of a complex and novel bid optimization calculation in the context of a time-sensitive mortgage note auction did not reflect reckless disregard of the truth or falsity of claims submitted.

Throughout the 1970s and 1980s, HUD insured the mortgages of individuals and entities in an effort to promote broad home ownership. By 1993, HUD had accumulated a portfolio of over $408 billion through the assumption of HUD-insured mortgages that had gone into default. Because this massive real estate management responsibility was a drain on HUD's resources, HUD sought to sell off its inventory of single family and multifamily mortgages and properties. Lacking the expertise to manage such a project, HUD decided to contract the note sale operations to the private sector.

Hamilton Securities Group, Inc. won the contract to provide financial advice and assistance to HUD in disposing of the mortgage notes through public auctions. Because of the novelty and complexity of the operations involved, HUD subcontracted with Bell Laboratories and Coopers & Lybrand to assist it with the auction. Bell developed an optimization model employing a computer-operated algorithm designed to select as winners the combination of bids that represented the maximum potential revenue for HUD.

The first subgroup of assets designated for sale was HUD's inventory of notes secured by properties located west of the Mississippi. In September 1995, Coopers & Lybrand accepted bids on behalf of HUD for the West of Mississippi note sale and transmitted them to Bell Labs. Bell ran the optimization model and Sol Schindler, who was in charge of the subcontracting work at Bell, transmitted a report of the results to Hamilton's associate treasurer, Robert Robinson. Schindler's e-mail transmitting the report noted some anomalies, stating that they

looked suspicious and should be checked. Robinson immediately instructed Schindler to rerun the optimization model. He instructed Bell Labs to calculate the bids as a function of unpaid principal balance (UPB) rather than gross revenue. At first Bell replied that it would take a few days to develop a UPB model but after further work determined that a UPB model could be approximated within a day. Under the new approximation, the proceeds of the sale were $622 million, almost exactly equal to the UPB on the mortgages. Schindler concluded that the results were "within $1" of optimal, and Robinson, believing the problem solved, reported the results to HUD.

A side effect of this new calculation was that one of the winning bidders (ALI #3) in the original calculation was no longer on the list of winning bids. After the sale results had been determined, Michael Brocks, an accountant at Coopers & Lybrand, began to investigate why ALI #3 didn't win, and prepared a spreadsheet analysis showing that revenue could have been increased by more than $2.5 million if the ALI #3 bid had been included. Brocks faxed this analysis to Henry Fan at Hamilton, who subsequently discussed the matter with him. Fan explained that to get a truly correct answer, Brocks would have to consider the effect of bid floors and other bids. According to Brocks, this explanation made sense to him, and he did not pursue the matter further. However, in December 1996, Hamilton conducted an internal investigation, which revealed that Hamilton had incorrectly defined bid floors for Bell Labs, and that a correct definition would have made ALI #3 a winner.

Meanwhile, John Ervin and Ervin & Associates, Inc. (collectively, Ervin) filed this *qui tam* action under seal in 1996 against Hamilton, alleging that it submitted reverse false claims in connection with the West of Mississippi sale, among other transactions. The lawsuit was unsealed in 2000 and proceeded to trial in 2003.

At the close of Ervin's case in chief against Hamilton, Hamilton moved for judgment on partial findings pursuant to Fed. R. Civ. P. 52(c). Under such a motion, the district court must weigh the evidence and decide where the preponderance lies: it may not draw any special inferences in favor of the nonmoving party.

Defendant Did Not Knowingly Submit False Claims

The court granted the defendant's motion with respect to Ervin's allegations regarding the West of Mississippi note sale. Apropos of that sale, Ervin did not argue that Hamilton had actual knowledge of any false statements, or that Hamilton acted in deliberate ignorance of the truth or falsity of the information it relayed to HUD. Rather, Ervin sought to show that Hamilton and its subcontractors acted in reckless disregard of the truth or falsity of the auction optimization results.

The court observed that Congress added the "reckless disregard" prong in the FCA's definition of the term "knowingly" in order to clarify the obligation of government contractors to make such inquiry as would be reasonable and prudent under the circumstances in order to ascertain the accuracy of claims submitted. The D.C. Circuit has taught that reckless disregard lies on a continuum between gross negligence and intentional harm, and may be defined as an extreme form of gross negligence.

Ervin argued that extreme gross negligence at both the systemic and individual levels by Hamilton and its contractors caused HUD's loss on the West of Mississippi note sale. The court found neither argument ultimately persuasive.

At the systemic level, Ervin argued that Hamilton failed to establish a system by which concerns like those voiced by Brocks would be routed to responsible personnel. The court

found this argument without merit. The court could find no authority, and Ervin cited none, for the proposition that failure to implement proper channels of communication may constitute gross negligence, let alone gross negligence extreme enough to constitute reckless disregard.

Ervin also argued that it was extreme gross negligence for Hamilton to deploy only one employee, Robinson, to oversee Bell Labs' subcontracting work. However, Ervin did not attempt to impeach the credentials of Robinson or Schindler, or to introduce evidence regarding the industry practice for communications systems in analogous projects. Considering the context, the court ruled, Ervin had not established that Hamilton's staffing arrangements evidenced extreme gross negligence.

Ervin contended that Hamilton and its subcontractors acted with reckless disregard because they failed to verify the accuracy of Bell Labs' results. Ervin relied on *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998), 13 TAF QR 12 (Apr. 1998), in which the Sixth Circuit held that a supplier knowingly made false claims when it knowingly supplied untested goods to the Government although the contract required the goods to be tested. However, the court ruled, Hamilton's conduct did not fall to this level. Hamilton never represented that it would test the results of the optimization process to verify that it had indeed yielded the optimal result. Thus Hamilton's reliance on Bell Labs, and its decision not to conduct further tests on the revised optimization model, did not constitute extreme negligence, if indeed they were negligence at all. Proof of reckless disregard, the court ruled, requires more than errors, even egregious errors. While, as is always the case, more extensive quality controls could have been in place, the court held that in the context of this massive, complex, time-sensitive, and unprecedented note sale transaction, Hamilton's failure to create a system better attuned to the possibility of error did not constitute reckless disregard.

Of course, the record showed that Hamilton and Bell Labs, and more specifically Robinson and Schindler, failed to identify errors in the optimization model. However, there was no evidence that Schindler was underqualified or unconscientious. Indeed, it was Schindler who suggested that the first optimization run be checked. Acting in good faith, Robinson quickly approved the second run. Schindler then inspected the results of the second run and pronounced them accurate to within one dollar. Given Schindler's and Bell Labs' expertise, and the time-sensitivity of the transaction, it was not extreme gross negligence for Robinson to rely on Schindler's assessment. Similarly, although Hamilton gave erroneous instructions regarding calculation of the bid floors, this was obvious only in hindsight. As the court observed, bad math is no fraud.

At the individual level, Ervin argued that Brocks and Robinson acted with reckless disregard of the truth or falsity of the optimization results. Ervin sought to rely on *United States v. Krizek*, 111 F.3d 934 (D.C. Cir. 1997), 10 TAF QR 5 (July 1997), where the court of appeals upheld the district court's finding of reckless disregard in an action involving the submission of false medical bills. However, the court observed, the facts in *Krizek* differed significantly from those in the case at bar. In *Krizek*, the defendant completed the submissions with little or no factual basis, made no effort to determine how much time was spent with each patient, failed utterly to review bills submitted, and in several instances billed for nearly twenty-four hours of services in a single day. In the case at bar, in contrast, the submission had a significant factual basis in the quantities of data entered corresponding to each of the 400 bids, which were processed according to the computer algorithm developed by Bell Labs.

Brocks' conclusion following his conversation with Fan did not reflect reckless disregard. Given the circumstances and the time-sensitive nature of the note sale, Brocks' conclusion that it would be too time consuming to perform a new calculation without the benefit of the Bell Labs algorithm was not grossly negligent. Similarly, Robinson could reasonably have believed that the problem had been fixed, given Schindler's assurance that the new results reduced any error to minimal levels.

Accordingly, the court ruled that the evidence presented was insufficient to prove that Hamilton or its subcontractors acted in reckless disregard of the truth or falsity of the optimization reports in the West of Mississippi sale. Accordingly, the court granted Hamilton's motion for partial judgment with respect to the corresponding count of the complaint, as well as several other counts, in support of which Ervin had failed to introduce evidence. However, the court denied Hamilton's motion for partial judgment with regard to a second sale, the North and Central note sale, which arguably occurred after Hamilton should have known enough about the errors in the West of Mississippi sale that replication of such errors in the later sale could have constituted extreme gross negligence. The court also let stand a number of other counts in Ervin's complaint, and set a date for the *qui tam* trial to resume.

U.S. ex rel. Riley v. St. Luke's Episcopal Hospital, 355 F.3d 370 (5th Cir. Jan. 9, 2004)

The Fifth Circuit reversed a district court's dismissal of a *qui tam* action alleging that a hospital and various physicians participated in a scheme to admit patients unnecessarily, upgrade the status of transplant recipients, and improperly bill for the services of an unlicensed physician. The court of appeals ruled that the relator had adequately alleged that the defendants made false statements and claims in violation of the FCA, and thus the district court misapplied the Rule 12(b)(6) standard in dismissing the case.

Joyce Riley, a former nurse at St. Luke's Episcopal Hospital, brought this *qui tam* action against the hospital and seven other defendants alleging that the hospital defrauded the Government by unnecessarily admitting patients, unnecessarily upgrading services, and allowing an unlicensed physician to perform services. The Government declined to intervene, and the defendants moved to dismiss on Article III standing grounds. The district court granted the motion, and Riley appealed to the Fifth Circuit. A divided Fifth Circuit panel held that although Riley had standing to sue, *qui tam* actions in which the Government does not intervene violate the constitutional doctrine of separation of powers and the Take Care Clause of Article II. *See* 196 F.3d 514 (5th Cir. 1999). However, on rehearing en banc, the Fifth circuit reversed the panel's decision, and remanded to the district court for further proceedings. *See* 252 F.2d 391 (5th Cir. 2001), 23 TAF QR 1 (July 2001).

On remand, the district court dismissed Riley's action for failure to state a claim. *See* 200 F. Supp. 2d 673 (S.D. Tex Apr. 3, 2002), 27 TAF QR 11 (July 2002), *amended,* 2002 WL 32116882 (S.D. Tex. June 27, 2002). The court held that the participation of an unlicensed physician was immaterial, and appeared to adopt the defendant's position that the upcoding claims simply arose from decisions to upgrade a patient's status, which could not be false as a matter of law. Riley appealed.

Relator Alleged Knowing Submission of False Claims

The Fifth Circuit reversed. The court of appeals ruled that to the extent the district court held that the fraud claims failed "as

unsupported by the evidence," the district court was not applying the correct standard for a motion to dismiss.

The Fifth Circuit agreed with the district court that expressions of opinion or scientific judgment about which reasonable minds may differ cannot be false: thus a lie is actionable under the FCA but not an error. However, Riley did sufficiently allege that the defendant made false, rather than merely erroneous, statements. The complaint alleged that the defendants ordered services knowing they were unnecessary, and that physicians and hospital officials participated in a scheme to admit patients unnecessarily and artificially upgrade their organ transplant status. The district court acted prematurely in dismissing the complaint and thus precluding Riley from obtaining the proof necessary to support her allegations.

The Fifth Circuit also rejected various ancillary arguments propounded by the defendants. The physician defendants contended that they could not be liable for hospitalization and upgrade claims because the hospital, not the physicians, billed the Government for those costs. The hospital defendants contended that admissions and upgrades are accomplished only on physicians' orders, and thus the hospital had no part in them. However, Fifth Circuit ruled that the FCA applies to anyone who knowingly assists in causing the submission of false claims to the Government, regardless of who actually submitted the bill.

Relator Stated Claim for False Billings for Unlicensed Physician

The Fifth Circuit likewise rejected the defendants' various arguments regarding Riley's claim that they cooperated in billing for services rendered by an unlicensed physician. The physician defendants claimed that the unlicensed physician provided services under the direction of licensed physicians, but Riley's allegations, which had to be accepted as true on a motion to dismiss, contradicted this claim. The hospital defendants argued that Riley alleged at most an inadvertent error. The Fifth Circuit disagreed, noting that Riley had alleged that the hospital knowingly enabled the unlicensed physician to practice medicine, instructed nurses to conceal the impropriety, and hid his services in false billings to Medicare and CHAMPUS.

The court ruled that Riley had adequately alleged the submission of false claims and the making of false records to get false claims paid. The scienter element was satisfied without having to resort to an implied certification theory of liability. The court also rejected as meritless the defendants' assertion that Riley had failed to allege financial injury to the Government.

The court also ruled that Riley's general allegation of conspiracy allegations survived a motion to dismiss for failure to state a claim. The viability of this claim, the court ruled, would likely depend on the viability of the underlying allegations of false statements and false claims.

The court of appeals declined the defendants' invitation to affirm the district court's judgment on the alternative ground that Riley had failed to comply with Fed. R. Civ. P. 9(b). The Fifth Circuit ruled that this argument could be addressed as necessary by the district court on remand.

Section 3730(b)(1) Voluntary Dismissal

U.S. ex rel. Dimartino v. Intelligent Decisions, Inc., 2004 WL 549799 (M.D. Fla. Mar. 10, 2004)

A Florida district court vacated the dismissal of a *qui tam* action pursuant to a purported

settlement to which the Government was not a party. The court ruled that the plain language of the FCA requires the Government's consent before a relator may voluntarily dismiss a *qui tam* action.

Carmen Dimartino filed this *qui tam* action in 2000 against Intelligent Decisions, Inc. and Tech Data Corporation. In 2002 the Government declined to intervene, and the court lifted the seal on the complaint, which it directed the relator to serve upon the defendants.

Dimartino served the complaint on Intelligent Decisions on November 25, 2002, and eleven days later, on December 6, she, her counsel, and Intelligent Decisions executed an Interim Memorandum of Understanding. On December 13, 2002, the same parties and counsel executed a Confidential Final Memorandum of Understanding (MOU), which called for Intelligent Decisions to pay Dimartino $500,000 in three installments for the release of her claims. The Government had no knowledge of the MOU, under which it received nothing.

On the same day that she executed the MOU, Dimartino filed a notice of voluntary dismissal, which did not mention the MOU or the prior interim memorandum. Dimartino's notice merely stated that she did not wish to proceed against Intelligent Decisions. On December 19, 2002 the court dismissed Intelligent Decisions as a defendant. (Tech Data still remained as a defendant until July 3, 2003 when the court granted its motion to dismiss.)

In March 2003 the Government learned that Dimartino had entered into an agreement with and received payment from Intelligent Decisions. The Government asked Dimartino's counsel to confirm or deny the existence of a settlement. Her counsel artfully replied that "there has been no compromise of the claims of the Government against Intelligent Decisions" and that to her knowledge "there has been no settlement of the claims of the Government against Intelligent Decisions nor Tech Data related to this cause." The Government finally obtained copies of the MOUs in response to the GSA Inspector General's subpoenas to Dimartino, her counsel, and Intelligent Decisions.

Upon receipt of the subpoena, Intelligent Decisions halted the third installment payment to Dimartino and her counsel, and advised them that it considered the agreement null and void due to their fraud. The Government demanded that Dimartino and her counsel remit 75% of the proceeds they received from Intelligent Decisions, but they refused to do so.

The Government then moved the court to set aside the dismissal and order Dimartino and her counsel to transfer 75% of their proceeds to the Government. Dimartino asked the court to enter an order confirming the validity of the MOU, and declaring that the Government was not entitled to any of the proceeds of that agreement. She argued that the MOU was not a settlement agreement, and only released her and her counsel's claims, not the Government's. She also argued that the Government had no right to nullify a settlement agreement by objecting to the dismissal of a case once it has decided not to intervene.

Government Must Consent to Voluntary Dismissal of *Qui Tam* Action

Rejecting the relator's arguments, the court vacated the order of dismissal and reinstated the suit. The relator sought to rely on *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Insurance Co.*, 811 F. Supp. 346 (E.D. Tenn. 1992) and *United States ex rel. Fender v. Tenet Health Care Corp.*, 105 F. Supp. 2d 1228 (N.D. Ala. 2000), 20 TAF QR 10 (Oct. 2000), which held that a relator may settle a *qui tam* action without the Government's consent once it has declined to intervene.

The court rejected the holdings in *Stinson* and *Fender*, observing that the former had arguably been overruled by *United States ex rel. Doyle v. Health Possibilities, P.S.C.*, 207 F.3d 335 (6th Cir. 2000), 18 TAF QR 1 (Apr. 2000). Moreover, the court observed, under § 3730(b) a *qui tam* "action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Thus, the court ruled, the FCA clearly requires the Government's consent before a relator may voluntarily dismiss an action. Adoption of the relator's contrary position, in the court's view, would permit relators to enrich themselves unfairly at the Government's expense.

The court found irrelevant the relator's argument that the MOU was not a settlement agreement and released only the relator's claims. Whether or not it was a settlement agreement, the court could not grant the voluntary dismissal without the Government's approval. But even if it was not a settlement agreement, the court and the Government were entitled to know of its existence before consenting to dismissal of the action.

The court also questioned what claims Intelligent Decisions settled in return for payment of $500,000 to Dimartino and her counsel. In the MOU, Dimartino specifically purported to release all claims connected this action, which only contained *qui tam* allegations, and no whistleblower or retaliation claims. The court observed that the Government is the real party in interest in a *qui tam* action.

Accordingly, the court vacated the order of dismissal and reinstated the suit. The court reserved ruling on the Government's motion to recover attorneys' fees and costs incurred in investigating and litigating these issues.

Section 3730(b)(3) Extension of Seal

***U.S. ex rel. Dahlman v. Emergency Physicians Professional Association*, 2004 WL 287559 (D. Minn. Jan. 5, 2004)**

A Minnesota district court granted the Government's motion to unseal the complaint in a voluntarily dismissed *qui tam* action in which it had declined to intervene. The relator had not shown that he would suffer any obvious prejudice from the unsealing, and the court found no sensitive information in the case file.

Henry Dahlman filed this *qui tam* action against the Emergency Physicians Professional Association. The Government declined to intervene, and the relator voluntarily dismissed the complaint with the consent of the Government. The Government then requested that the complaint, the Government's notice of election to decline intervention, and all filings occurring after the notice of declination be unsealed. The relator objected, arguing that the FCA did not authorize the court to unseal the complaint, and that unsealing the complaint posed a significant risk of harm to his interests.

Relator Faced No Obvious Prejudice

The court granted the Government's motion and unsealed the entire case file. The court observed that although § 3730(b)(2) requires that *qui tam* complaints be filed under seal and § 3730(b)(3) empowers courts to extend the seal at the Government's request for good cause shown, the FCA does not specifically dictate that complaints must be unsealed if the action is voluntarily dismissed, nor does it require or authorize that complaints remain under seal indefinitely. Moreover, the court could find no case law addressing the issue of unsealing voluntarily dismissed FCA cases.

However, in light of the FCA's language and legislative history, as well as the public interest in open and accessible court filings, the court ruled that unsealing was appropriate in this case. The legislative history of the FCA suggests that the purpose of the seal provisions is to protect the Government's interests and allow it time to investigate the relator's claims. Nothing in the FCA suggests that a court should or must keep complaints under seal after dismissal. Moreover, the courts have long recognized a general public right of access to judicial records and documents.

The court was not persuaded by the relator's argument that he faced retaliation from the defendant if the complaint were unsealed. The court observed that the relator was no longer employed by the defendant, and therefore was not at risk of termination or demotion. Although the relator also was involved in state court litigation against the defendant, the relator had not informed the court how unsealing might affect that litigation. Moreover, the court found no indication that unsealing would cause the relator any obvious or extreme prejudice.

The court noted that in some instances, certain filings containing sensitive information regarding pending investigations are maintained under seal even after the complaint has been unsealed. However, upon reviewing the entire file in this matter, the court found no document containing such sensitive information. Accordingly, the court granted the Government's motion to unseal the complaint, and directed that the entire file be unsealed within thirty days, once the parties had an opportunity to file objections to the unsealing of any particular docket entry.

U.S. ex rel. Ayers v. Bondcote Corp., No. CV403-011 (S.D. Ga. Jan. 27, 2004)

A Georgia district court denied the motions of two defendants in a *qui tam* action to extend the seal. The court ruled that the Government had had adequate time to investigate the matter, and that the defendants were not authorized by the FCA to seek extension of the seal, which exists for the Government's benefit alone.

Keith Ayers filed this *qui tam* action under seal in 2003, and the Government requested and received several extensions of the seal. In June 2003 the court granted the Government's motion to partially lift the seal so that the Government could inform defendants Bondcote Corporation and Stonebridge Partners of the allegations in the complaint.

In November 2003, the court granted the Government's request to extend the seal for an additional 75 days, but informed the Government that no further extensions would be granted. With the seal about to expire, defendants Bondcote and Stonebridge filed their own motions seeking extension of the seal for 90 and 60 additional days, respectively. Bondcote also sought partial lifting of the seal so that it could reveal the existence of the action to the 21 defendant prime contractors in the action. The relator filed a response opposing Bondcote's motion, while the Government filed a response opposing it only in part, but not opposing a 45-day extension or a partial lifting of the seal to allow it discretion to inform the other defendants. No responses were filed to Stonebridge's motion.

FCA Does Not Authorize Defendant to Seek Extension of Seal

In separate orders issued on the same date, the court denied both defendants' motions. The court observed that the Government had already been granted a number of lengthy extensions, and had been informed that no further extensions would be granted. Moreover, the court observed, the purpose of the seal is to benefit the Government in making its decision whether to intervene. It does not exist for the benefit of

defendants. Furthermore, § 3730(b)(3) authorizes only the Government, not the defendants, to seek extensions of the seal for good cause.

Although the Government did not oppose a 45-day extension, the only justification it offered was that it would use the time to discuss settlement of the case. However, the court observed, the Government had already had more than half a year to discuss the matter with Bondcote and Stonebridge. Accordingly, the court declined to extend the seal. Furthermore, as the seal would not be further extended, the court had no need to address Bondcote's motion to partially lift the seal, which it denied as moot.

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

U.S. ex rel. Walburn v. Lockheed Martin Corp., 2004 WL 764439 (S.D. Ohio Mar. 22, 2004)

An Ohio district court granted the defendant's motion to dismiss a *qui tam* action pursuant to the first-to-file bar. The court ruled that the action was barred because it was based on the same material facts as a previously filed *qui tam* action.

Jeff Walburn, who has been employed as a security officer at the Portsmouth Gaseous Diffusion Plant since 1976, filed this *qui tam* action in November 2002 against Lockheed Martin Corporation and a related company, alleging that the defendants violated the FCA by altering and submitting false invoices for compensation and incentive payments under agreements with the Government covering the operation of the plant. Walburn alleged that the defendants systematically altered the recorded values of readings on thermoluminescent dosimeters worn by employees at the plant to monitor their exposure to radiation. Walburn alleged that Lockheed's requests for payment were false because it falsely certified its eligibility to operate the plant by concealing the dosimeter readings.

The Government declined to intervene, the case was unsealed, and in 2003 Walburn filed an amended complaint. The defendants moved to dismiss pursuant to the FCA's first-to-file bar.

Action Was Based on Same Material Facts as Prior Action

The court granted the motion. The court ruled that the first-to-file bar prohibits actions that allege the same material elements of fraud as an earlier *qui tam* suit, even if the new allegations incorporate somewhat different details. Thus, the allegations in the later action need not be identical to those of the earlier action.

Walburn's essential allegation was that from at least 1991, Lockheed falsified dosage readings in order to receive payments and accreditation to operate the Portsmouth plant. Essentially the same allegations, in a more expansive version, were raised in a *qui tam* action filed in April 2000 by Kenneth Brooks, a manager at the plant from 1990 to 1994. *See United States ex rel. Brooks v. Lockheed Martin Corp.*, No. L-00-CV-1088 (D. Md.). Brooks alleged that Lockheed fraudulently induced the Government to pay tens of millions of dollars by (among other things) concealing misconduct involving exposure of workers to unlawful levels of radiation and intentionally misreporting radiation readings. The court concluded that Brooks alleged the same material elements as Walburn, and since Walburn's complaint was filed later, it was barred by the first-to-file rule. Accordingly, the court granted the defendants' motion and dismissed Walburn's action.

U.S. ex rel. LaCorte v. Merck & Co., 2004 U.S. Dist. LEXIS 4860 (E.D. La. Mar. 23, 2004)

A Louisiana district court granted the motion of the State of Louisiana to intervene in a federal *qui tam* action. The court ruled that the state was entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a), and that the bar in § 3730(b)(5) on interventions in *qui tam* actions by persons other than the Government applies only to private relators, not states.

William St. John LaCorte, a physician practicing in Louisiana, filed this *qui tam* action in 1999 against Merck & Co., alleging that the pharmaceutical company violated the FCA by failing to charge Medicaid its lowest prices as required by law. LaCorte alleged that Merck sold its heartburn drug Pepcid to hospitals for $0.10 per tablet, but charged Medicaid $1.65 per tablet.

In January 2003 the case was unsealed, although the Federal Government had not yet decided whether or not to intervene. *See* 30 TAF QR 68 (Apr. 2003). In January 2004, the State of Louisiana moved to intervene pursuant to Fed. R. Civ. P. 24. The state sought to assert claims pursuant to state consumer protection, healthcare programs integrity, and antitrust statutes, as well as state law claims for fraud and unjust enrichment. Merck opposed the motion, arguing that it was untimely and that the state did not satisfy the requirements of Rule 24. Merck also argued that the FCA expressly prohibits the state from intervening in a federal *qui tam* action.

State Was Entitled to Intervene as of Right

The court granted the state's motion. The court found that the state satisfied all the requirements for intervention of right pursuant to Fed. R. Civ. P. 24(a). The state's intervention was timely, because it did not delay unduly once it learned of its interest in the case, the intervention caused Merck no prejudice, and the state could suffer prejudice if not allowed to intervene. The state had a direct interest in the transactions that formed the basis of the suit, and the disposition of the case could impair its ability to protect that interest. Moreover, the existing parties to the suit did not adequately represent the state's interest, as the relator brought suit on behalf of the Federal Government, not the state. Accordingly, the court ruled that the state had satisfied the requirements of Rule 24(a) and should be granted leave to intervene as of right.

FCA Intervention Bar Applies to Subsequent Relators, Not States Asserting State Law Claims

The court rejected the defendant's argument that the state was not entitled to intervene because the FCA bars intervention by persons other than the Federal Government. Section 3730(b)(5) provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The state argued that this bar only applies to private relators.

The court observed that the bar on intervention in pending *qui tam* actions reflects Congress' concern that such interventions are parasitic in nature. Allowing subsequent intervenors to receive part of an award for fraud they did not uncover would do nothing to further the purpose behind such actions, which is to bring fraud to the attention of the Government.

In this action, the state was not attempting to intervene to bring federal FCA claims, but sought recovery for claims arising purely under state law. Therefore, the concerns expressed by Congress regarding parasitic lawsuits were inapplicable. The state was not seeking to take credit for LaCorte's discovery of the alleged false claims against the Federal Government, but

only to recover money lost by the state in the same transactions that formed the basis for LaCorte's action. The court could find no case law barring states from intervening in a federal *qui tam* action for such narrow purposes, and observed that allowing all claims to be resolved in a single action would serve the interests of judicial economy. Accordingly, the court granted the state's motion for leave to file a complaint in intervention.

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

***U.S. ex rel. Huangyan Import & Export Corp. v. Nature's Farm Products, Inc.*, 2004 U.S. Dist. LEXIS 600 (S.D.N.Y. Jan. 14, 2004)**

A New York district court dismissed a *qui tam* action pursuant to the public disclosure bar. The court ruled that the action was based upon public disclosures in a prior federal lawsuit, and that the relator was not an original source of the information upon which the allegations were based.

Huangyan Import & Export Corporation filed this *qui tam* action under seal in 2000 against Nature's Farm Products, Inc., Bank of China New York Branch (BOCNY), Ravine Foods, Inc., and two individuals. Huangyan alleged that Nature's Farm sent Chilean mushrooms to Canada for packaging at certain canneries, and then sent the same repackaged mushrooms to the United States, falsely disguised as products of Canada, in order to avoid the 148% import duty on brine mushrooms from Chile. BOCNY and Ravine Foods allegedly assisted Nature's Farm in the fraud.

In 2003 the Government simultaneously moved to lift the seal, intervene, and dismiss Huangyan as relator pursuant to the public disclosure bar. The Government argued that Huangyan's complaint was based upon allegations in two prior lawsuits, complaints and investigations detailed in the Federal Register, and an article in *FoodNews*, an industry publication. In 1999, prior to bringing this *qui tam* action, Huangyan had filed an action in federal court in New York for breach of contract against Nature's Farm in a dispute involving canned mandarin oranges. During discovery in that action, Huangyan obtained a number of internal Nature's Farm and BOCNY documents related to the mushroom scheme, upon which it relied heavily in its subsequent *qui tam* action. Also prior to Huangyan's filing of its *qui tam* action, Nature's Farm brought an action against BOCNY in federal court in California alleging interference with its business. The complaint in that action stated that counsel for BOCNY informed Ravine that the latter's packaging agreement with Nature's Farm was illegal. That complaint also detailed BOCNY's knowledge of Nature's Farm's illegal mushroom importation scheme.

Complaint Was Based Upon Public Disclosures

The court granted the Government's motion and dismissed Huangyan from the action. The court found that the allegations of Nature's Farm's mushroom-dumping scheme, and BOCNY's involvement in it, were publicly disclosed in the California action. Thus the court did not reach the issue of whether public disclosures also took place in the New York mandarin orange litigation, the Federal Register, or *FoodNews*. The court found that the California complaint had previously outlined the details of the fraud, and had indicated that Ravine, Nature's Farm, and BOCNY were involved in or aware of it. Therefore, the court ruled, the allegations in Huangyan's complaint was based upon public disclosures.

Relator Was Not Original Source

The court also found that Huangyan was not an original source of the publicly disclosed information underlying its *qui tam* complaint. Huangyan did not have firsthand knowledge of the fraud, nor did it directly or indirectly serve as a source to the entity that disclosed the allegations of fraud. Although Huangyan had apparently conducted significant research into the alleged fraud, this was insufficient to establish its status as an original source when the allegations were already available in a public court file. Therefore, the court dismissed Huangyan as relator for lack of subject matter jurisdiction, and ruled that the action would continue with the Government as sole plaintiff.

Section 3730(h) Retaliation Claims

U.S. ex rel. Watson v. Connecticut General Life Insurance Co., 2004 U.S. App. LEXIS 1736 (3d Cir. Jan. 16, 2004)

See "FCA Liability of Medicare Administrative Contractors" above at page 2.

U.S. ex rel. Williams v. Bell Helicopter Textron, Inc., 2004 U.S. Dist. LEXIS 236 (N.D. Tex. Jan. 5, 2004)

U.S. ex rel. Loper v. Donalsonville Hospital, Inc., No. 6:01-cv-41 (M.D. Ga. Jan. 20, 2004)

U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital, 360 F.3d 220 (1st Cir. Feb. 23, 2004)

See "Rule 9(b)" below at pages 30-39.

U.S. ex rel. Grandeau v. Cancer Treatment Centers of America, 2004 U.S. Dist. LEXIS 2799 (N.D. Ill. Feb. 24, 2004)

An Illinois court granted the defendant's motion for summary judgment on retaliation claims associated with an FCA *qui tam* action. The court ruled that the plaintiff had failed to produce evidence that her employer fired her because she was engaged in activity protected under the FCA.

Jacqueline Grandeau worked at Midwest Regional Medical Center (MRMC) in Zion, Illinois from 1997 to 2000. She was responsible for coding and assisting in billing for hospital and physician services. Shortly after she started working for MRMC, she alleges that she discovered fraudulent billing practices, and warned her supervisor that the activity was illegal. In November 1999 and January through March 2000 Grandeau took medical leave, and MRMC's records, which Grandeau disputed, indicated that as of April she had exceeded her leave by 48 hours. In March 2000 Grandeau moved to Tucson, Arizona and in April she began working for Tucson General Hospital. Although she was originally scheduled to return to work in May, she arranged instead to discuss the matter with her employer by telephone. Two days later MRMC discharged Grandeau, stating that she took excessive leave and failed to return to her job as scheduled.

Grandeau brought this *qui tam* action against MRMC, its corporate parent Cancer Treatment Centers of America (CTCA), and various other individuals and entities, alleging that they engaged in numerous billing practices to defraud the governments of Illinois and the United States. She also alleged that she was unlawfully terminated in retaliation for her willingness to report these alleged improprieties. In 2003 the district court denied the defendants' motion to dismiss the *qui tam* claims pursuant

to Rule 9(b). *See* 2003 U.S. Dist. LEXIS 11036 (N.D. Ill. June 27, 2003), 31 TAF QR 28 (July 2003). The defendants moved for summary judgment on Grandeau's retaliation claims.

Plaintiff Failed to Show She Was Fired Because of Protected Activity

The court granted the defendants' motion. The court observed that in order to prevail on a retaliation claim, a plaintiff must show that (1) she was engaging in protected activity; (2) the defendant knew of the protected activity; and (3) the defendant retaliated against her for the protected activity.

There was sufficient evidence to withstand summary judgment that the defendants in this case knew that Grandeau was engaging in protected activity. Grandeau alleged that she repeatedly told her supervisors that their billing practices were illegal and refused to enter certain codes. She allegedly warned her employers that they could go to jail for submitting fraudulent claims and one of the defendants told her to stop using the word "fraud." The court ruled that Grandeau's frequent usage of the word "fraud" and ongoing complaints about illegal billing practices were enough to put the defendants on notice that she was potentially pursuing an FCA claim.

However, the court ruled, Grandeau's retaliation claim failed because she did not produce evidence that her termination was in any way motivated by the defendants' knowledge of her protected activity. The court observed that in the non-FCA case of *Stone v. City of Indianapolis Public Utilities*, 281 F.3d 640, 643-44 (7th Cir. 2003), the court of appeals ruled that in lieu of proving a causal link in a retaliation claim, a plaintiff may demonstrate that she was treated differently from a similarly situated employee. However, the court ruled, even under this more liberal standard (assuming it applies in FCA cases) Grandeau's retaliation claim failed. The record clearly showed that Grandeau had been absent from work for significant periods, and she admitted that she used more leave than the twelve weeks allowed under the Family and Medical Leave Act. By the time of her termination, Grandeau had already moved to Arizona to live with her husband and had started a new job there; she had no plans to return to her job in Chicago at MRMC. Accordingly, the court ruled, the defendants acted reasonably and not in retaliation when they terminated Grandeau's employment.

Moreover, the court ruled, Grandeau was not treated differently from other similarly situated employees. Another MRMC employee took her twelve weeks of leave and was allowed additional personal leave, but failed to return to work on the appointed date and was discharged. Grandeau argued that their cases differed because the other employee was allowed additional personal leave, but the court observed that Grandeau had exceeded her twelve week entitlement by 48 hours as of April 21, 2000 and was not discharged until May 10, after failing to return to work. While the actual amount of leave taken may have varied slightly in the two cases, the court ruled that the defendants had established that they treated the employees in essentially the same manner and did not retaliate against Grandeau by firing her. Accordingly, the court granted the defendants' motion for summary judgment on the retaliation claims.

***Shekoyan v. Sibley International Corp.*, 2004 U.S. Dist. LEXIS 4845 (D.D.C. Mar. 19, 2004)**

A District of Columbia district court granted summary judgment to the defendant on an FCA retaliation claim. The court ruled that the plaintiff failed to raise a genuine issue of material fact that he was engaged in protected activity, or that he was discharged because of such activity.

Vladimir Shekoyan, an Armenian-born resident of the United States, was hired in 1998 by Sibley International Corporation as a training adviser for a project in the Republic of Georgia funded by the United States Agency for International Development (USAID). Shekoyan sued Sibley for discrimination on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964 and retaliatory termination of employment in violation of § 3730(h) of the FCA, as well as a variety of statutory and common-law claims under D.C. law. Shekoyan alleged that his supervisor in Georgia created a hostile work environment by discriminating against him because of his national origin. He also alleged that he reported the supervisor's discriminatory conduct and misappropriation of USAID funds to Sibley management officials in the United States, and that they advised him not to "make to much noise" about the misuse of funds. Although USAID offered to extend Shekoyan's contract, Shekoyan asserts he did not have the skills required for the extension, and declined to extend his employment beyond the original termination date. At this time Shekoyan's supervisor sent an e-mail to project employees stating that Shekoyan had been fired for insubordination.

Sibley moved to dismiss, and in August 2002 the district court dismissed the civil rights claims on the ground that Title VII does not apply extraterritorially to noncitizens, but declined to dismiss the FCA retaliation claim, because the alleged retaliation occurred in the United States and thus did not raise the issue of extraterritorial application of the FCA. *See* 217 F. Supp. 2d 59 (D.D.C. 2002), 28 TAF QR 26 (Oct. 2002). After discovery, Sibley moved for summary judgment on Shekoyan's remaining claims.

Plaintiff Failed to Show He Was Engaged in Protected Activity

The district court granted the defendant's motion. In order to prevail on a claim of retaliation under § 3730(h), the court observed, a plaintiff must show that (1) he engaged in protected activity; and (2) he was discriminated against because of that activity. To establish the second element, the plaintiff must show (a) that his employer knew he was engaged in protected activity; and (b) that the retaliation was motivated, at least in part, by his protected activity.

The court concluded that Shekoyan had failed to raise a genuine issue of material fact that he was engaged in protected activity. In order for a plaintiff to be engaged in protected activity, it is sufficient that he be investigating matters that reasonably could lead to a viable FCA case. However, simply informing supervisors of concerns about noncompliance with federal regulations is not enough.

In his deposition, Shekoyan asserted that he reported numerous transgressions to Sibley officials. He alleged that Jack Reynolds, the chief of party of the USAID-funded project in Georgia, used project vehicles, staff, and resources for personal purposes, that a mini-typographic machine was purchased at an inflated price, that USAID funds were used to rent offices located in private residences, and that branch heads were receiving USAID funds at the same time that they were drawing full-time salaries from other organizations. However, Shekoyan never reported any of these incidents to USAID. Moreover, when questioned by the defendant's attorney whether he had concluded that there was corruption in connection with the project, he replied: "Absolutely no. I do not agree with this statement. I have never concluded that there was a [sic] corruption."

Therefore, the court concluded, Shekoyan simply made internal inquiries or complaints to his supervisors about his concerns. He was adamant that he never concluded that Sibley was involved in corruption. Accordingly, the court found that he had failed to establish that he was engaged in protected activity under the FCA.

Employer Did Not Retaliate Because of Protected Activity

Moreover, the court ruled, even if Shekoyan could establish that he engaged in protected activity under the FCA, he failed to establish that his employer discriminated against him because of that activity. In his amended complaint, Shekoyan simply stated in a conclusory fashion that he was fired for reporting violations of the FCA. However, there was nothing in the record to establish that Shekoyan raised a genuine issue of material fact on this prong of his retaliation claim. Accordingly, the court granted Sibley's motion for summary judgment on the § 3730(h) claim.

Having dismissed Shekoyan's remaining federal claim, the court declined to exercise supplemental jurisdiction over his remaining statutory and common law claims as well as the defendant's counterclaims, all of which arose under D.C. law. Accordingly, the court dismissed all remaining claims.

Section 3731(b) Statute of Limitations

Moore v. Navarro, 2004 WL 783104 (N.D. Cal. Mar. 31, 2004)

A California district court dismissed FCA *qui tam allegations* pursuant to the statute of limitations. The court observed that the six-year limitations period had expired, and the relator had failed to allege any basis for her assertion that her claim was timely under the three-year period.

La Vaughan Moore, individually and doing business as B&L Trucking, filed the initial complaint in this action in September 2000 against Steve Navarro, individually and doing business as S&S Trucking. Moore asserted numerous claims for violations of various laws, including the FCA and RICO. The gravamen of Moore's FCA claim was that Navarro fraudulently applied in 1993 for payment fictitious "dump fees" in connection with the federally-funded Richmond Transportation Project, and received several hundred thousand dollars of government funding pursuant to this scheme from July 1993 through December 1995. Moore amended her complaint several times and in December 2003 filed a fourth amended complaint. Navarro moved to dismiss the RICO claims for failure to state a claim, and the FCA claims pursuant to the statute of limitations.

Complaint Filed Outside Limitations Periods

The court granted the defendant's motion. The FCA has a two-pronged statute of limitations. Under the first prong, § 3731(b)(1), an action may not be brought more than six years after the date of the violation. In the Ninth Circuit, according to the district court, the six-year period begins running upon the submission of the allegedly false claim. Alternatively, under the second prong, § 3731(b)(2), an action may not be brought more than three years after the date when the violation is known or should have been known by the responsible government official. The Ninth Circuit has held that a *qui tam* suit is timely if it satisfies either prong, and that the three-year period under the second prong begins to run once the *qui tam* plaintiff knows or reasonably should know the facts material to her right of action.

Moore alleged that Navarro presented the false claims in 1993, more than six years before she filed suit. Thus, she could not rely on the six-year limitations period set forth in the first prong.

As for the second prong, Moore failed to allege the date on which she learned of the false claims allegedly submitted by Navarro. Navarro argued that Moore had failed to allege any basis

for her conclusion that her claim was timely under the three-year limitations period set forth in § 3731(b)(2), and Moore had failed to respond to that argument. In particular, Moore failed to assert that she could not reasonably have learned about the submission of the alleged false claims before September 1997, three years before she filed her complaint. The court treated this omission as a concession that no such argument could be made. Accordingly, the court concluded that Moore's FCA claim was also time-barred under the second prong, and dismissed it with prejudice.

Section 3731(d) Estoppel Provision

U.S. ex rel. Virgin Islands Housing Authority v. Coastal General Construction Services Corp., 299 F. Supp. 2d 483 (D.V.I. Jan. 9, 2004)

A Virgin Islands district court granted summary judgment to the Government in a *qui tam* action against a defendant who had been criminally convicted for the same fraudulent acts. The court ruled that the criminal conviction estopped the defendant from contesting liability in the *qui tam* action.

In 1994, the Virgin Islands Housing Authority (VIHA) brought this *qui tam* action against the Coastal General Construction Services Corporation, its president William Koenig, its vice-president Esther Koenig, and related parties. The complaint alleged that the defendants submitted false claims by documenting fictitious costs during two separate construction contract arbitrations involving HUD-funded housing projects. In 1995 the Government announced that it was intervening and in 1996 it filed its own complaint.

In 1997 a grand jury returned criminal indictments against William and Esther Koenig, and in 1998 they were convicted. The Koenigs appealed. In 2001 the Third Circuit affirmed William Koenig's conviction, but vacated Esther Koenig's conviction.

The Government moved for summary judgment against William Koenig, arguing that his criminal conviction collaterally estopped him from denying civil liability under the FCA. The Government asked the court to impose the maximum civil penalty of $10,000 for each false record or statement used to support the false claims.

Criminal Conviction Estopped Defendant From Contesting FCA Liability

The court granted the Government's motion. Under § 3731(d) a final judgment against a defendant in a criminal proceeding estops him "from denying the essential elements of the offense in any [FCA] action which involves the same transaction as in the criminal proceeding." Because William Koenig was found guilty of knowingly and willfully making false statements in violation of 18 U.S.C. § 1001 by falsely claiming various project costs, he was estopped from denying those same elements in the civil FCA action. Accordingly, the court granted partial summary judgment for the Government on its allegations that William Koenig violated §§ 3729(a)(1) and (a)(2) of the FCA.

Civil Penalties Assessed Against Defendant

Although the Government never paid the false claims, William Koenig was still liable for civil penalties for each false claim. The Government sought the maximum civil penalty of $10,000 for each of ten false records or statements used to support a false claim, for a total penalty of $100,000. The Government pointed to the importance of deterring fraud against a public housing project, the defendant's numerous false claims, and his bad faith in inflating costs right before arbitration. Koenig argued that there was only one claim and not ten.

The court observed that in *United States v. Bornstein*, 423 U.S. 303, 309 n.4, 312 (1976), the Supreme Court instructed that in cases involving prime contractors, the number of penalties should equal the number of false payment demands submitted to the Government, or the number of fraudulent acts the defendant committed that caused false claims to be filed. Following *Bornstein*, the court ruled that each of William Koenig's ten fraudulent subcontracting bills submitted to VIHA was a false payment demand, even though only one claim was filed against HUD. Therefore, the court ruled, each of Koenig's ten fraudulent acts incurred a separate civil penalty.

However, the court assessed the minimum civil penalty of $5,000 for each of the ten false claims. The court noted that the Government suffered no actual damages, and that although it had incurred other expenses in detection, investigation, and litigation, it had not documented any of those expenses. The court also noted that Koenig had already been punished by two years of incarceration followed by three years of supervised release. Accordingly, the court awarded the Government a judgment of $50,000. Because VIHA was the original source of the information and spent a great deal of time and resources in detecting and investigating the fraud, the court awarded it the maximum relator's share of 25%, plus reasonable expenses including attorneys' fees.

Section 3732 False Claims Jurisdiction

U.S. v. Universal Fruits & Vegetables Corp., 2004 U.S. App. LEXIS 4991 (9th Cir. Mar. 17, 2004)

See "Section 3729(a)(7) Reverse False Claims" above at page 12.

Rule 9(b)

U.S. ex rel. Williams v. Bell Helicopter Textron, Inc., 2004 U.S. Dist. LEXIS 236 (N.D. Tex. Jan. 5, 2004); 2004 WL 579595 (N.D. Tex. Mar. 18, 2004)

A Texas district court in January dismissed a *qui tam* action without prejudice for failure to allege fraud with particularity as required by Federal Rule of Civil Procedure 9(b). The court also dismissed with prejudice an accompanying retaliation claim for failure to allege that the plaintiff engaged in protected activity or that his employer knew that he engaged in protected activity. Subsequently, in an attempt to cure the deficiencies in his *qui tam* claims, the relator filed a second amended complaint, but in March the district court ruled that it still failed to satisfy Rule 9(b) and dismissed the remaining claims with prejudice.

Douglas Williams worked as an electrical engineer from 1997 to 2002 for Bell Helicopter Textron, Inc., which had several government contracts to design, develop, and manufacture a variety of military aircraft. In late 2002, Williams brought this *qui tam* action against his former employer, alleging that it presented false claims to the Government for work not performed or poorly performed. Williams also alleged that Bell terminated his employment in retaliation for his lawful acts in furtherance of his *qui tam* claims against the company.

The Government declined to intervene, and Bell moved to dismiss. The company argued that Williams failed to plead his *qui tam* claims with particularity as required by Fed. R. Civ. P. 9(b). It also argued that both the *qui tam* and retaliation allegations should be dismissed for failure to state a claim.

Relator Failed to Plead Fraud With Particularity

In a ruling issued on January 5, 2004, the court granted Bell's motion in part and dismissed both the *qui tam* and retaliation claims. Although Williams named certain individuals who allegedly engaged in wrongdoing, he did not provide any specific details of the submission of false claims to the Government. The court declined to accept such conclusory allegations. Furthermore, the court ruled, Williams' allegations did not meet the standards of particularity imposed by Rule 9(b), which requires the *qui tam* relator to allege the "who, what, where, when, and how" of the submission of the false claims. However, the court granted Williams an opportunity to amend his complaint in order to bring it into compliance with the requirements of Rules 9(b) and 11.

Plaintiff Failed to State Claim for Retaliation

The court also dismissed Williams' claim for retaliation. The court ruled that he failed to allege that he engaged in any protected activity in furtherance of his FCA claims before he was fired, or that Bell knew that he was engaged in protected activity. Williams alleged that he told his supervisor that "he would not let [Bell] continue to put craft into the field that would kill his comrades in arms." In the court's view, this remark was not sufficient to put Bell on notice that Williams was engaged in protected activity. Rather, the court ruled, such a remark could have reflected Williams' belief that the craft in question was dangerous even though it was being built strictly in accordance with specifications. Thus, the court stated, a person hearing such a remark would not know what Williams was complaining about. Accordingly, the court dismissed Williams' claim for retaliation and entered final judgment against him on that claim.

Relator Files Second Amended Complaint

After obtaining an extension from the court, Williams improperly filed an amended complaint under seal and failed to serve it on Bell. The court ordered the amended complaint unfiled and stricken and again extended the deadline. Finally, Williams properly filed and served a second amended complaint. Bell again moved to dismiss pursuant to Rule 9(b).

Action Dismissed With Prejudice

In a second ruling issued March 18, 2004, the district court granted Bell's motion and dismissed Williams' action with prejudice. The court observed that apart from general allegations that Bell violated the FCA, Williams devoted the major part of his twenty-five page complaint to speculative and conclusory assertions, interspersed with averments made upon information and belief. However, the amended pleading still failed to allege facts that would support a conclusion that Bell presented a false claim for payment to the Government.

The court ruled that Williams was not authorized to obtain through discovery the information required to enable him to satisfy the Rule 9(b)'s specificity requirements. Despite repeated opportunities to amend, Williams had failed to detail the "who, what, when, where, and how" of the fraud. Moreover, the Government had had ample opportunity to participate in his claims had it desired to do so. Accordingly, the court ordered Williams' remaining claims to be dismissed with prejudice.

U.S. ex rel. Goldstein v. Fabricare Draperies, Inc., 2004 U.S. App. LEXIS 96 (4th Cir. Jan. 6, 2004)

In an unpublished opinion, the Fourth Circuit upheld the dismissal of a set of related *qui tam* complaints pursuant to Federal Rule of Civil Procedure 9(b). The court of appeals held that

the district court correctly concluded that the complaints failed to set forth the time, place, content, and perpetrators of the alleged fraud with the particularity required under the rule.

Jeffrey Goldstein, a prominent figure in the federal drapery contractor industry, filed seven *qui tam* actions in 2000 and 2001 against twelve other drapery contractors, alleging that they presented false claims and fraudulently induced the Government to make payments on claims. Six of those actions, involving eleven of the defendants, were involved in this consolidated appeal.

In October 2002, the district court dismissed four of Goldstein's seven complaints as insufficient under Rule 9(b), but granted leave to amend. *See U.S. ex rel. Goldstein v. Fabricare Draperies, Inc.*, 2002 U.S. Dist. LEXIS 19655, 29 TAF QR 12 (Jan. 2003). Goldstein thereupon filed amended complaints, alleging that the defendants lied to the General Services Administration (GSA) in order to obtain and retain a series of lucrative GSA Multiple Award Schedule (MAS) contracts. In order to be considered for a MAS contract, a supplier must certify that it meets certain criteria, for example, that it is a manufacturer or regular dealer of the solicited items, and that its prices are based on established catalog or market prices of commercial items sold in substantial quantities to the general public. Goldstein alleged that the defendants falsely certified that their prices were as required, and in certain cases also falsely certified that they were the manufacturers of the goods sold.

In addition to amending the four complaints dismissed in October 2002, Goldstein also filed an amended complaint in a fifth action, in accordance with a stipulated schedule with the defendant arising out of a delay in service of process, and in a sixth action, in which the defendant had filed an answer, and the court had granted judgment on the pleadings with leave to amend. (The defendant in the seventh action filed for bankruptcy. *See* "Bankruptcy/Stay of Proceedings" below at page 44.) The defendants again moved to dismiss pursuant to Rule 9(b), and in March and April 2003, the district court dismissed the amended complaints without further leave to amend. Goldstein appealed, and the court of appeals consolidated the appeals for disposition.

Relator Failed to Allege Fraud With Particularity

In an unpublished per curiam opinion, the Fourth Circuit affirmed. Upon reviewing the record, the court of appeals concluded that the district court correctly dismissed Goldstein's amended complaints for failure to set forth the time, place, content, and perpetrators of the alleged fraud with the particularity required by Rule 9(b). The court of appeals also found no merit in Goldstein's contention that dismissal under Rule 9(b) was unwarranted as to the defendant in the sixth action, which had already filed an answer and engaged in some discovery. Accordingly, the court affirmed the judgments of the district court.

U.S. ex rel. Loper v. Donalsonville Hospital, Inc., No. 6:01-cv-41 (M.D. Ga. Jan. 20, 2004)

A Georgia district court denied the defendants' motion to dismiss a *qui tam* and retaliation action pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6). The court ruled that because the relators were corporate insiders with personal knowledge of the defendant hospital's internal operating procedures, their *qui tam* allegations contained sufficient indicia of reliability to satisfy Rule 9(b) even in the absence of specific information as to precisely when the alleged false claims were submitted. The court did identify deficiencies in the relators' allegations of improper financial relationships among the defendants, as well their

allegations of retaliation in violation of § 3730(h), but granted them leave to amend rather than dismissing these allegations.

Jean Loper, a respiratory therapist, and Dr. John King, a former emergency room physician, brought this *qui tam* and § 3730(h) retaliation action in 2001 against their former employer, Donalsonville Hospital, Inc. (the hospital), Donalsonville Medical Association, Inc. (DMAI), Seminole Manor Nursing Home, Southwest Georgia Respiratory Care, Inc. (SGRCI), as well as Drs. Homer Breckenridge Jr., who had a one-half ownership interest in DMAI, which operates and manages the hospital, and Homer Breckenridge III, who had a one-half interest in SGRCI. The complaint alleged that the hospital, Breckenridge Jr., and Breckenridge III used their improper interests to violate Medicare and Medicaid rules and submit false claims to the Government. In particular, the defendants allegedly ordered supplies for SGRCI and the nursing home in the name of the hospital in order to inflate their reimbursements from Medicare and Medicaid, double-billed for supplies, and charged the Government for a variety of procedures that were neither medically necessary nor reasonable, such as urine cultures, oxygen therapy, chest physiotherapy tests, flutter valve therapy, croup tents, nebulizer treatments, and painful respiratory tests. The defendants allegedly completed false certificates of medical necessity to support these unnecessary procedures, and admitted patients under inappropriate diagnosis codes to increase their reimbursements from government health care programs.

In 2003 the Government declined to intervene. The defendants moved to dismiss, contending that the *qui tam* allegations failed to satisfy Fed. R. Civ. P. 9(b), and that the retaliation allegations and many of the *qui tam* allegations should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

Clausen Distinguished

The court denied the defendants' motion. The defendants sought to rely on *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301 (11th Cir. 2002), 27 TAF QR 14 (July 2002), *cert. denied*, 537 U.S. 1105 (2003). In *Clausen*, the Eleventh Circuit affirmed the dismissal of a *qui tam* action for failure to satisfy Rule 9(b), on the grounds that the relator, who was a competitor of the defendant's in the medical testing industry, failed to provide "some indicia of reliability" to support his claim that the defendant actually submitted false claims to the Government. Although the relator in that case provided specific details to support his allegations that the defendants engaged in a systematic scheme to administer medically unnecessary tests, he was unable to identify the exact amounts of the false claims and the dates on which they were submitted. This failure to identify the specific false claims submitted, in the *Clausen* court's view, was fatal to the case. Because the relators in the case at bar likewise failed to identify specific claims for payment, the defendants argued that under the rule announced in *Clausen* the district court should dismiss the complaint for failure to satisfy Rule 9(b).

The relators replied that *Clausen* did not require them to identify specific false claims for payment, and that the indicia of reliability could be supplied in other ways. They pointed to the Eleventh Circuit's recent unpublished decision in *United States ex rel. Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22019936 (11th Cir. Aug. 15, 2003), 32 TAF QR 36 (Oct. 2003), in which the court of appeals vacated the district court's dismissal pursuant to Rule 9(b) despite the fact that the relator was unable to identify the exact date that the alleged false claims were submitted. Unlike the relator in *Clausen*, who was a corporate outsider, the relator in *Hill* was an insider who worked in the defendant's billing department

and alleged that she witnessed firsthand the submission of false claims. The *Hill* court ruled that the relator's allegations of firsthand knowledge of the false submissions provided the necessary indicia of reliability that were missing in *Clausen*. Because the relators in the case at bar were corporate insiders with personal knowledge of the hospital's internal operating procedures, they argued that their allegations, like those in *Hill*, were sufficiently specific to satisfy Rule 9(b).

The court agreed with the relators that the case at bar was more similar to *Hill* than to *Clausen*. The relators were former employees of Donalsonville Hospital with detailed knowledge of the alleged fraud. Moreover, like the relator in *Hill*, they alleged that the majority of the hospital's patients received government assistance for their medical care. Thus, even in the absence of specific allegations as to precisely when the false claims were submitted, the court found that the relators had provided sufficient indicia of reliability to satisfy the requirements of Rule 9(b).

Mikes Distinguished

The court also rejected the defendants' contention that the relators' allegations that they billed the Government for medically unnecessary and unreasonable services failed to state a claim under the FCA. In support of this contention, the defendants sought to rely on *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), 25 TAF QR 6 (Jan. 2002). In *Mikes*, the Second Circuit affirmed a grant of summary judgment for the defendants on claims that they submitted requests for payment for spirometry services that were so unreliable as to be false under the FCA. The Second Circuit held that because the relator challenged "only the quality of defendants' spirometry tests and not the decisions to order this procedure for patients, she fail[ed] to support her contention that the tests were not medically necessary." *Id.* at 699.

However, the court noted, the allegations in the case at bar differed from those in *Mikes*. For example, Loper and King alleged that the defendants ordered urine cultures unnecessarily, not that the results of the cultures were unreliable. Furthermore, the relator in *Mikes* failed at the summary judgment stage to provide support for her contention that the spirometry tests were unreasonable and unnecessary. The relators in the case at bar would likewise be required to provide support for their claims that the tests ordered were unnecessary, but they did not need to do so at the initial pleading stage. For the purposes of a motion to dismiss, their allegations were sufficient.

The defendants also argued that the relators' allegations of improper financial relationships among the defendants should be dismissed for failure to state a claim. The relators alleged that the financial relationships were improper under at least two statutes, but they failed to identify the statutes or to allege a nexus between the improper relationships and the submission of a false claim. The court agreed with the defendants that these allegations were insufficient, but ruled that dismissal was not warranted, as the insufficiencies could be remedied by amendment.

Retaliation Allegations Were Insufficient

The court ruled that the relator's allegations of retaliation were insufficient to put the defendants on notice of the precise misconduct of which they were accused. Loper appeared to allege that she was discharged because of her actions in pursuance of an FCA claim, but failed to identify what those actions were, or to connect them with her claim of retaliation. She contended that she informed the hospital comptroller that outside parties were using hospital supplies, and that she examined two patients whose diagnoses appeared to her to be improper, but she did not adequately tie these incidents to her retaliation claim. Similarly, King failed to allege

any acts that would have given the defendants notice that he was acting in furtherance of an FCA claim, or what action the defendants took against him in retaliation. However, despite these deficiencies, the court did not believe dismissal of the retaliation claims was appropriate. Instead, the court allowed the relators to amend their complaint to replead these allegations with more particularity.

Accordingly, the court denied the defendants' motion to dismiss. However, it directed the relators to file an amended complaint within thirty days to cure the deficiencies it had identified. The court also ruled that the defendants would not be required to file an answer to the complaint as originally drafted, but would have ten days after service of the amended complaint within which to file a responsive pleading.

U.S. ex rel. Vosika v. Starkey Laboratories, Inc., 2004 U.S. Dist. LEXIS 2714 (D. Minn. Feb. 20, 2004)

A Minnesota district court dismissed for failure to satisfy Rule 9(b) a *qui tam* action alleging that the defendant defrauded the Government by failing to give it its best terms as required by contract. The court held that without specific allegations about the timing of lower-priced sales to nongovernmental customers and submissions of false claims to the Government, as well as the identity of the employees responsible, the complaint did not give the defendant adequate notice of the particular misconduct with which it was charged.

Starkey Laboratories, Inc. is a Minnesota corporation that manufactures hearing aids and accessories. Rob Thompson was employed in various positions at Starkey since 1991, and Dale Vosika was employed there from 1979 to 1999. Starkey entered into a contract to sell hearing aids to the Department of Veterans Affairs (VA) from 1994 to 1996, and the contract was subsequently extended to 1997. The contract recited that it was "predicated on the Government receiving terms better than the terms" that Starkey offered to its dealers. Thompson and Vosika brought this *qui tam* action against Starkey, alleging that it knowingly charged the VA more than its most favored customers. Starkey moved to dismiss on the grounds that the relators failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b) and asserted claims outside the statute of limitations.

Relators Failed to Plead With Particularity

The court granted the defendant's motion. The relators' complaint failed to provide detailed allegations regarding the timing of lower-priced sales to nongovernmental customers and submissions of false claims to the Government, or the identity of the employees responsible. Without this information, the court ruled, the defendant was unable to respond with documents or witnesses to testify as to whether such incidents occurred, and thus could not adequately defend against the fraud charge. Accordingly, the court dismissed the complaint without prejudice, in order to allow the relators to file a second amended complaint curing these deficiencies.

Because it dismissed the complaint for failure to comply with Rule 9(b), the court did not reach the defendant's argument regarding the statute of limitations. The court stated that it would take up this issue once the relators had filed their second amended complaint, if the defendants still believed at that point that the relators asserted claims outside the limitations period.

U.S. ex rel. Karvelas v. Melrose-Wakefield Hospital, 360 F.3d 220 (1st Cir. Feb. 23, 2004)

The First Circuit upheld the dismissal of a *qui tam* and retaliation action for failure to state a

claim. The court ruled that the relator failed to satisfy Rule 9(b) because he did not provide a sufficient factual basis for his conclusory allegation that the defendant submitted false claims for payment to the Government. The court also upheld the dismissal of the plaintiff's retaliation claims on the grounds that he failed to show that his employer discharged him because of conduct protected under the FCA.

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

In 2001 Karvelas then filed the instant action (*Karvelas II*) as a *qui tam* action under the FCA, repleading as part of the allegations the retaliation claim that the court had previously dismissed in *Karvelas I*, and also adding a purported RICO claim. The Government declined to intervene and the complaint was unsealed. The defendants moved to dismiss for failure to state a claim upon which relief can be granted. The district court granted the defendants' motion, ruling that Karvelas had failed to plead his *qui tam* allegations with particularity as required by Fed. R. Civ. P. 9(b) or to identify any specific false claim submitted by the defendants. The court also ruled that Karvelas' retaliation claim failed to allege that the defendant hospital was on notice that he was investigating a potential FCA matter. Accordingly, the district court dismissed the action with prejudice. *See* 2003 U.S. Dist. LEXIS 8846 (D. Mass. May 21, 2003), 31 TAF QR 26 (July 2003). Karvelas appealed.

Rule 9(b) Applies to FCA Actions

The First Circuit affirmed. The court rejected Karvelas' argument that the FCA is not a "fraud" statute and therefore does not fall within the scope of Rule 9(b). The court observed that the FCA prohibits the knowing presentation of false or fraudulent claims, and that the Supreme Court has repeatedly described it as a weapon against fraud. Thus, the court concluded that it is self-evident that the FCA is an anti-fraud statute. Accordingly, the First Circuit joined the Second, Third, Fourth, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits in holding that the heightened pleading requirements of Rule 9(b) apply to claims brought under the FCA.

Court Declines to Relax Rule 9(b) Pleading Standard

Karvelas argued that even if Rule 9(b) applies to FCA claims, its requirements should be relaxed in his case because the information necessary to plead with particularity was in the defendants' possession. However, the court of appeals declined to permit him to plead generally at the outset and then amend the complaint later, filling in the blanks through discovery.

The district court had refused to apply a relaxed standard on the grounds that the required information was in the hands of the Government and thus not exclusively in the defendants' possession. However, the First Circuit did not endorse the district court's reasoning, which seemed to assume that the relator could readily obtain the missing information from the Government. As Karvelas pointed out, if a relator attempts to seek the missing information from the Government, for example by submitting a request under the Freedom of Information Act, his action may be barred under the FCA's public disclosure provisions.

Nevertheless, the First Circuit did not agree with Karvelas that the requirements of Rule 9(b)

should be relaxed in this case. The court cited with approval the view of one commentator that if a *qui tam* relator is allowed to amend the complaint after further discovery, the Government "will have been compelled to decide whether or not to intervene absent complete information about the relator's cause of action." John Boese, *Civil False Claims and Qui Tam Actions* § 4.04[C]. Therefore, the court concluded, allowing a relator to plead generally at the outset and then amend after discovery would be at odds with the FCA's procedures and its protections for the Government, which is the real party in interest. The court also expressed concerns that a *qui tam* plaintiff, who has suffered no injury in fact, may be particularly likely to file suit as a pretext to uncover unknown wrongs, needlessly harming the defendant's goodwill and reputation. Accordingly, the court held that a *qui tam* relator may not present general allegations in lieu of the details of actual false claims in the hope that such details will emerge through subsequent discovery.

The court also rejected Karvelas' argument that a relaxed Rule 9(b) standard should apply because the alleged fraudulent schemes were complex and took place over several years. Although the court did not preclude the possibility of such an exception in a future case, the court did not consider the three-year period involved in the case at bar an exceptionally long period of time. Moreover, the court could find no basis in the FCA for relieving Karvelas of his burden of pleading fraud with particularity because he chose to allege several complex schemes.

Complaint Failed to Satisfy Rule 9(b)

The First Circuit observed that the presentation of false or fraudulent claims for payment is a central element of every FCA case. Rule 9(b)'s requirement that fraud allegations be stated with particularity means that a relator must provide details that identify particular false claims that were submitted to the Government. Among the types of information that may help to satisfy this requirement are details concerning the dates of the claims, the content of the forms or bills submitted, their identification numbers, the amount of money charged to the Government, the particular goods or services for which the Government was billed, the individuals involved in the billing, and the length of time between the alleged fraudulent practices and the submission of claims based on those practices. These details are not a checklist of mandatory requirements that must be satisfied by each allegation in the complaint. However, the court ruled, at least some of this information must be pleaded for some of the claims in order to satisfy Rule 9(b).

In the case at bar, Karvelas did not specify the dates or content of any particular false claim, and provided no identification numbers or amounts. He failed to identify the individuals involved in the improper billing or to allege with particularity any false certification to obtain payment. As Karvelas conceded in his brief, his complaint "did not set forth the specifics . . . of any one single cost report, or bill, or piece of paper that was sent to the Government to obtain funding." Nor did he provide a factual basis for his conclusory allegations that the defendants submitted false claims.

Karvelas did allege serious violations of federal standards governing the provision of patient care. However, such allegations, without more, are insufficient to support an FCA claim. In the First Circuit's view, Karvelas' failure to identify with particularity any actual false claims submitted was fatal to his *qui tam* complaint.

Relator Failed to Show Discrimination Because of Protected Conduct

The First Circuit also upheld the dismissal of Karvelas' retaliation claim, but for different rea-

sons than those relied on by the district court. In order to prevail on an FCA retaliation claim, a plaintiff must show that (1) the employee's conduct was protected under the FCA; (2) the employer knew that the employee was engaged in such conduct; and (3) the employer discriminated against the employee because of the protected conduct. The district court had held that Karvelas had failed to allege facts sufficient to support the second element. The First Circuit disagreed, but upheld the dismissal on the grounds that Karvelas had failed to allege facts sufficient to support the third element.

As to the first element, the First Circuit held that § 3730(h)'s requirement of conduct "in furtherance" of an FCA action means conduct that reasonably could lead to a viable FCA action. The court did not agree with Karvelas that his warnings to his supervisors about inadequate staffing, inappropriate documentation, inconsistent administration of treatment orders, and failure to meet Medicare and Medicaid regulatory standards constituted protected activity under § 3730(h). In the First Circuit's view, mere reporting of failures to comply with patient care standards, or of potential cover-ups of regulatory failures, without more, is not protected conduct. However, the First Circuit found that at least two of Karvelas' allegations suggested that he engaged in protected conduct. He alleged that the he complained to his employer that it falsely billed Medicare and Medicaid for evaluations of patients who had been discharged or had died, and he that he reported to the hospital that it had submitted claims for goods and services not provided. Accordingly, the court of appeals concluded that Karvelas had adequately alleged that he was investigating and reporting the hospital's fraudulent billing practices, and thus that he was engaged in protected conduct.

Unlike the district court, the First Circuit also held that Karvelas satisfied the second element. Karvelas did not merely report noncompliance with federal regulations or complain about improper billing in accordance with his responsibilities. He also notified his employer about the results of his investigation concerning its knowing submission of false or fraudulent claims to the Government. Therefore, Karvelas had adequately alleged that his employer knew he was engaged in protected activity.

However, the First Circuit ruled, Karvelas failed to allege facts sufficient to support his assertion that he was retaliated against because of his protected conduct. Karvelas alleged that he was fired after returning from a meeting with senior hospital management where he reported defective testing. After telling his boss about the meeting, the data he had collected, and the hospital's failure to meet patient-care standards, he was fired on the spot. The hospital subsequently informed him by letter that it had discharged him because of "inappropriate behavior," including reporting "alleged unsafe conditions at the Hospital" to a member of a state senator's staff. In the First Circuit's view, these allegations did not provide a factual predicate concrete enough to establish that the hospital retaliated against Karvelas because of conduct protected under the FCA. Accordingly, the court of appeals concluded, the district court properly dismissed Karvelas' retaliation claim.

Dismissal With Prejudice Was Proper

The First Circuit found no error in the district court's dismissal of Karvelas' action with prejudice. The district court's dismissal for failure to state a claim was a decision on the merits. In the absence of a clear statement to the contrary, such a dismissal is presumed to be with prejudice. Thus, in dismissing with prejudice, the district court simply stated what would have been presumed.

Moreover, court of appeals held, the district court did not err by failing to invite Karvelas to

amend his complaint before dismissing the case with prejudice. Karvelas never filed a motion to amend pursuant to Fed. R. Civ. P. 15(a), which provides for amendments as of right in the absence of a responsive pleading. The district court gave Karvelas a generous opportunity to sharpen his pleadings after he filed his first retaliation complaint, and despite the Government's decision not to intervene and the defendant's motion to dismiss, which focused on deficiencies in the pleadings, he chose to stand upon his original 93-page complaint. Under these circumstances, the First Circuit ruled, the district court did not err in failing sua sponte to provide Karvelas an opportunity to amend his complaint before dismissing with prejudice.

U.S. v. Henderson, 2004 WL 540278 (D. Minn. Mar. 16, 2004)

A Minnesota district court dismissed without prejudice an FCA action brought by the Government alleging that the defendant submitted false claims for social security benefits. The court ruled that the Government failed to satisfy Fed. R. Civ. P. 9(b) because the complaint did not identify which of the defendant's alleged representations were false.

In December 1995, Denise Henderson was involved in a car accident in Stillwater, Minnesota. In May 1996 she began receiving disability benefits from Minnesota Life Insurance Company, and in April 1997 she applied for disability benefits through the Social Security Administration (SSA). The SSA denied her claim in January 1998, and subsequently denied her request for reconsideration.

In April 1998 Henderson filed for a hearing before an SSA Administrative Law Judge (ALJ). In February 1999, the ALJ awarded her Social Security Disability Insurance (SSDI) benefits retroactive to June 1996. Between 2000 and 2002 Henderson submitted two reports maintaining that she was still disabled.

The Government's complaint states that at some point Minnesota Life became suspicious of Henderson's claims and placed her under video surveillance between September 1998 and February 1999. The video showed Henderson engaged in a variety of activities including squatting, walking, lifting, carrying, and underwater diving. Since March 1999 she also participated in five and directed three beauty pageants and traveled extensively. As of August 2003 she had collected over $190,000 in SSDI benefits.

Henderson filed her answer and a counterclaim against the Government for defamation. According to her counterclaim, a hearing had been held before a new ALJ regarding whether the previous administrative hearing should be reopened. Henderson moved the district court to enjoin the administrative proceeding. The Government moved to dismiss Henderson's counterclaim under the doctrine of sovereign immunity.

Government Failed to Specify Which Representations Were False

The court granted Henderson's motion to dismiss. In order to satisfy the particularity requirements of Rule 9(b), the court observed, a plaintiff must plead matters such as the time, place, and contents of the false representations. Although the Government's complaint spanned sixteen pages and referenced a number of representations by Henderson, it failed to identify which of those alleged representations were false. Under Rule 9(b), the Government was required to state which statements were false, as well as how, when, and to whom Henderson made those statements. Because the Government failed to plead fraud with particularity, the court dismissed the entire complaint without prejudice.

Defendant's Counterclaim for Defamation Dismissed

The court also granted the Government's motion to dismiss Henderson's counterclaim for defamation. The court noted that it lacked jurisdiction to hear a claim against the Government without a waiver of sovereign immunity, and that the limited waiver of such immunity in the Federal Tort Claims Act does not extend to claims of defamation. *See* 28 U.S.C. § 2680(h). Accordingly, the court lacked jurisdiction over Henderson's counterclaim.

Henderson argued that the court should interpret her defamation claim as including a claim for invasion of privacy, which would not be barred under the doctrine of sovereign immunity. However, the court observed, Henderson's counterclaim was narrowly written to provide notice of a defamation claim, and did not plead facts which would support a claim for invasion of privacy. Accordingly, the court granted the Government's motion to dismiss the counterclaim.

U.S. ex rel. Bantsolas v. Superior Air & Ground Ambulance Transport, Inc., 2004 U.S. Dist. LEXIS 4540 (N.D. Ill. Mar. 18, 2004)

An Illinois district court dismissed a *qui tam* complaint without prejudice for failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). The court observed that the relator failed to identify any specific false claims, and declined to relax Rule 9(b)'s particularity requirement because the claims at issue were submitted to the Government and thus were not within the defendants' sole possession.

Nathan Bantsolas, a certified emergency medical technician, worked for Superior Air & Ground Ambulance Transport, Inc. from October 1999 through June 2001. Bantsolas brought this *qui tam* action against Superior and its owner David Hill, alleging that they violated the FCA and the Illinois Whistleblower Reward and Protection Act by billing Medicare for medically unnecessary ambulance transportation. The Government declined to intervene.

The defendants moved to dismiss, arguing that the relator failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). The defendants also argued that the state and federal *qui tam* provisions are unconstitutional, and that the Illinois state claims failed because there was no nexus between the acts alleged and state funds.

Relator Failed to Identify Specific False Claims

The court granted the motion in part and dismissed the complaint for failure to comply with Rule 9(b). The court ruled that Rule 9(b) applies to FCA claims, and therefore an FCA claimant must allege the "who, what, when, where, and how" of his claims. In this case, Bantsolas described the defendants' alleged scheme only in very vague and general terms. He did not point to any specific instances of the alleged fraud, much less any details thereof. He did partially name two individuals for whom there was a "standing order" for transport, but failed to allege that their transports were not medically necessary or that the defendants billed Medicare for them. He did not allege how the claims were false, or why transport was medically unnecessary in particular cases, and failed to provide details concerning where or when such transports and the resulting false claims were made (other than a general allegation that they took place during his roughly two years of employment with Superior). Finally, he failed to cite or provide any documents supporting his allegations. Therefore, the court ruled, Bantsolas failed to satisfy the heightened pleading requirements of Rule 9(b).

Bantsolas urged that Rule 9(b)'s particularity requirement should be relaxed in this case on

the ground that the missing details were within the defendants' exclusive knowledge. However, the court observed, the crux of his claim was that the defendants submitted false claims to the Government. Therefore, the court ruled, the details were not solely within the defendants' knowledge, because they were submitted to the Government. Accordingly, the court declined to relax the particularity requirement.

Because Bantsolas alleged a long-running scheme involving the routine filing of fraudulent claims over approximately a two-year period, the court stated that it would not require him to describe in detail every fraudulent transaction undertaken as part of the scheme. Rather, the court indicated that it would be satisfied with the pleading of specifics relating to representative examples. Accordingly, the court dismissed the complaint without prejudice, and granted Bantsolas thirty days within which to file a second amended complaint complying with Rule 9(b).

Qui Tam Provisions Do Not Violate Appointments and Take Care Clauses

The court rejected the defendants' arguments that the *qui tam* provisions of the FCA violate the Appointments and Take Care Clauses of the Constitution. *See* U.S. Const. art. II, §§ 2 and 3. Federal courts have squarely rejected such arguments, and the defendants were unable to cite a single case embracing the result they urged. The court also rejected the defendants' arguments that the Illinois Whistleblower Act is unconstitutional, as well as their argument that there was no nexus between the relator's allegations and state funds. Accordingly, the court denied the remaining claims in the defendant's motion to dismiss.

Hutchinson v. Andrulis Corp., 2004 WL 691790 (N.D. Fla. Mar. 19, 2004)

A Florida district court granted the defendant's motion to dismiss FCA *qui tam* claims in a pro se action pursuant to Rule 9(b). The court ruled that because the relator was not privy to the defendant's billing practices or the details of its contract with the Government, her complaint lacked the indicia of reliability required by the Rule.

Barbara Hutchinson brought this pro se action against her former employer Andrulis Corporation, alleging that it fired her from her job at the Navy Coastal Systems Station (CSS) in Panama City, Florida, for objecting to the unauthorized use of CSS's computers and objecting to sexual harassment from her immediate supervisor. She alleged claims for sexual harassment (count I), violation of the Florida Private Sector Whistleblower's Act (count II), and *qui tam* claims under the federal FCA (count III).

The defendant moved to dismiss counts II and III. A magistrate judge issued a report and recommendation urging that the motion be granted.

Allegations Lacked Indicia of Reliability

The court adopted the magistrate's report and granted the motion, dismissing count II with prejudice and count III without prejudice. Regarding the latter count, the magistrate's report ruled that Rule 9(b) applies to FCA actions and that it requires the plaintiff to provide "some indicia of reliability . . . to support the allegation of *an actual false claim* for payment being made to the Government." *United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1311 (11th Cir. 2002), 27 TAF QR 14 (July 2002). In *Clausen*, where the plaintiff alleged six schemes to bill for unnecessary tests but was unable to provide details regarding actual bills submitted, the Eleventh Circuit held that these indicia of reliability were lacking. However, in a second case, *Hill v. Morehouse Medical Associates, Inc.*, 2003 WL 22029936 (11th Cir. Aug. 15, 2003), 32 TAF QR 36 (Oct.

2003) the Eleventh Circuit found the complaint sufficient even though the plaintiff in that case was similarly unable to provide details regarding bills submitted to the Government. The critical difference for the Eleventh Circuit was that Hill, unlike Clausen, was a corporate insider who worked in the very billing department where the fraudulent schemes occurred, and claimed to have witnessed the fraudulent alteration of billing codes firsthand, thus providing the requisite indicia of reliability.

In the case at bar Hutchinson alleged that the defendant violated security provisions of its contract with the Government and thus was not entitled to payment. However, she was not privy to the defendant's billing practices and had no personal knowledge of the text of the contract or the specific connection between the defendant's alleged duty to report security violations and its right to payment under the contract. Accordingly, the court ruled that Hutchinson's FCA allegations lacked the indicia of reliability required by *Clausen*, and dismissed count III without prejudice. The court then remanded the case to the magistrate for further proceedings.

U.S. ex rel. Allen v. Beta Construction, 2004 U.S. Dist. LEXIS 4743 (D.D.C. Mar. 24, 2004)

A District of Columbia district court denied the defendant's motion to dismiss a *qui tam* complaint for failure to comply with Rule 9(b) and the statute of limitations. The court ruled that the relator had adequately alleged the time, place, and contents of the misrepresentations, and that it was not clear from the face of his complaint that his *qui tam* claims were time-barred.

Michael Allen worked as the director of human resources for Beta Construction and Hampton Supply Inc. from 1989 to 1999. Beta provides commercial roofing, while Hampton provides commercial roofing and waterproofing services. Allen brought this *qui tam* action in 2001 against Beta, Hampton, and several associated corporations, as well as Paul Gordon, their CEO, and Jeremy Brown, a principal officer in both companies, alleging that they falsely certified compliance with the Davis-Bacon Act while paying workers on their federal projects substantially below the applicable wage requirements. In March 2003, the Government declined to intervene. The defendants moved to dismiss, arguing that the relator had failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b), and that the action was barred in whole or in part by the FCA's statute of limitations.

Relator Pleaded With Particularity

The court denied the motion. The defendants argued that the complaint failed to allege with particularity each element of each claim. For example, they argued that the complaint failed to allege which defendant participated in each false or fraudulent scheme or statement, but rather pointed to all defendants collectively. They urged that the complaint should identify by name the workers whose wages were falsified and the specific pay periods in which falsifications occurred.

The court observed that under D.C. Circuit precedents, Rule 9(b) applies to FCA actions and requires a plaintiff to go beyond mere notice pleading to plead matters such as the time, place, and content of the alleged false representations. But Rule 9(b) must still be read in harmony with the other rules of civil procedure, particularly Rule 8's admonition that the pleading should contain a short and plain statement of the claim and that each averment should be simple, concise, and direct.

In this case the relator submitted an eighteen-page complaint identifying sixteen federal contracts awarded to the defendants, and alleging that Gordon and Brown engaged in a systematic scheme over several years to certify falsely that they were paying workers certain wages as

required by law. He alleged that Gordon and Brown instructed him to falsify specific documents presented to federal agencies, and that Gordon directed employees to ignore the contract's requirement that asbestos roofing material be disposed of in accordance with EPA regulations. He also alleged that in order to secure contract work, the defendants falsely certified that contract work was performed by a minority subcontractor, whom he identified by name.

The court ruled that the complaint adequately pleaded the time, place and contents of the alleged false claims, and thus the relator had satisfied the requirements of Rule 9(b). The defendants could not credibly argue that they were not provided fair notice of the charges against them. While the relator would need to provide additional details to succeed on the merits of the case, those details were not necessary at this preliminary stage of litigation, and the court ruled that the relator should be allowed to fill in those details, which were in the defendants' possession, through discovery.

Complaint Not Facially Barred by Statute of Limitations

The court also declined to dismiss on statute of limitations grounds. The defendants argued that any claims the relator alleged between 1989 and May 29, 1995 (six years before he filed his claim) were barred under the FCA's six-year limitations period. However, the court ruled, it was unclear from the face of the complaint when the statute of limitations began to run, as many courts have held that the commission of the violation occurs on the date of the Government's final payment on the false claim. Although it was unclear from the complaint when the Government made final payment on each of the contracts, it was quite possible that some or all of the alleged false claims for each of the sixteen contracts were submitted and paid within the six-year limitations period. The court observed that if it should become clear during or after discovery that some of the claims were indeed time-barred, the defendants could certainly move for summary judgment at that juncture. Accordingly, the court denied the defendants' motion to dismiss.

U.S. ex rel. Adrian v. Regents of the University of California, 363 F.3d 398 (5th Cir. Mar. 30, 2004)

In March 2004 the Fifth Circuit affirmed the decisions of California and Louisiana district courts dismissing *qui tam* claims based on state immunity and Rule 9(b). The court of appeals ruled that the California district court properly dismissed the relator's claims against a state agency and its officials, while the Louisiana district court did not abuse its discretion in dismissing with prejudice the claims against the remaining defendants for failure to comply with Rule 9(b).

Donald Patrick Adrian was the principal owner of Icon Industrial Controls Corporation, which entered into a research and development agreement with Lawrence Livermore National Laboratory to develop software codes for use by the Departments of Energy and Defense. Adrian filed this *qui tam* action in the Northern District of California against the Board of Regents (which operates the Livermore Lab), a number of Livermore employees (all sued in their official capacity), and LCMS, a Livermore subcontractor, as well as another company, BioMed, which allegedly created LCMS to receive the subcontract. Adrian alleged that Livermore Lab and several Livermore employees diverted money received under the DoE contract to other projects, and caused further overbilling by intentionally supplying Adrian with a defective version of the product developed under the contract. Adrian also alleged a kickback scheme between Livermore and LCMS, with the participation of BioMed. The Government declined to intervene, and the Board of Regents moved to

dismiss the claims against Livermore and its employees for failure to state a claim. The remaining defendants moved dismiss for failure to comply with Fed. R. Civ. P. 9(b) and to transfer the case to Louisiana, where they were located. The California district court granted the regents' motion to dismiss and the Louisiana defendants' motion to transfer, but did not rule on the latter's Rule 9(b) motion. Thus, the court dismissed the claims against the California defendants on the grounds that as state agencies and officials they are immune from *qui tam* liability, and transferred the claims against the remaining defendants to the Western District of Louisiana. *See* 2002 WL 334915 (N.D. Cal. Feb. 25, 2002), 26 TAF QR 36 (Apr. 2002).

Adrian thereupon filed a second amended complaint against the remaining defendants in the Louisiana district court, and the defendants again moved to dismiss, arguing that the amended pleading still failed to satisfy Rule 9(b). The Louisiana district court granted the motion and dismissed the action with prejudice. Adrian appealed both the California and Louisiana decisions to the Fifth Circuit.

Claims Against State Agencies Were Properly Dismissed

The Fifth Circuit affirmed the decisions of both courts. The court of appeals ruled that the California district court properly dismissed Adrian's claims against the Regents and Livermore because those entities are California state agencies and the FCA does not provide for *qui tam* actions against state agencies. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787-88 (2000). Moreover, the court ruled, claims against state agency employees in their official capacities are treated as claims against the state agency for purposes of the FCA. Therefore, Adrian had no cause of action against the Livermore employees in their official capacities, and thus the California court properly dismissed those claims as well.

Dismissal With Prejudice Was Not Abuse of Discretion

The Fifth Circuit also ruled that the Louisiana district court did not abuse its discretion in refusing Adrian's request for an additional opportunity to amend before it dismissed his second amended complaint with prejudice for failure to comply with Rule 9(b). Although the Louisiana court's order dismissing the second amended complaint was the first time a court had ruled that Adrian had failed to plead fraud with specificity, Adrian had previously asserted in proceedings before both the California and Louisiana courts that he could allege additional facts to support his fraud claims. Thus, the Louisiana district court refused to allow him to file a third amended complaint, stating that "pleadings review is not a game where the plaintiff is permitted to file serial amendments until he finally gets it right. One opportunity to amend, in the face of motions that spelled out the asserted defects in the original pleadings, was sufficient under the circumstances."

Because Adrian failed to indicate what additional facts he could plead that would correct the deficiencies in his previous complaints, the Fifth Circuit ruled that the district court did not abuse its discretion in dismissing with prejudice. Accordingly, the court of appeals affirmed the judgments of both district courts.

Bankruptcy/Stay of Proceedings

U.S. ex rel. Goldstein v. P&M Draperies, Inc., 303 B.R. 601 (D. Md. Jan. 6, 2004)

A Maryland district court denied the relator's motion for withdrawal of the court's order staying a *qui tam* action in response to a suggestion of bankruptcy filed by the defendant. The court held that a *qui tam* action in which the Government has declined to intervene does not qualify for an exception under the

automatic stay rule as "an action or a proceeding brought by a governmental unit" under the Bankruptcy Code.

Jeffrey Goldstein, the former president and owner of Commercial Drapery Contractors, Inc., was indicted and convicted of defrauding the Government in connection with the sales of draperies and related accessories. In late 2000 and early 2001, Goldstein filed a series of *qui tam* actions against his former competitors in the drapery industry, alleging that they made false representations to the General Services Administration in connection with the negotiation of multiple award schedule contracts. Goldstein's action filed against P&M Draperies, Inc. in 2000 was one of these. (The other *qui tam* actions were ultimately dismissed for failure to comply with Fed. R. Civ. P. 9(b). *See* "Rule 9(b)" above at page 31. In 2002 the Government declined to intervene in the action against P&M, and after cross-motions for summary judgment had been filed, the defendant filed a suggestion of bankruptcy. In November 2003, the court stayed the action. Contending that the bankruptcy stay is inapplicable to FCA *qui tam* actions, Goldstein moved the court to withdraw its order staying the action.

Bankruptcy Stay Applies in Non-Intervened Cases

The court denied Goldstein's motion. Generally, section 362(a) of the Bankruptcy Code provides for an automatic stay of judicial proceedings against the debtor, but carves out an exception in the case of "an action or proceeding by a governmental unit . . . to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4). The court ruled that while it is clear that an FCA action qualifies as an action to enforce the Government's "police or regulatory power," a *qui tam* action in which the Government has declined to intervene does not qualify as an "action or proceeding brought by a governmental unit."

The court observed that the Bankruptcy Code defines "governmental unit" to include the United States, a state or foreign governments, and their agencies, but makes no mention of *qui tam* plaintiffs. Moreover, the legislative history of this provision indicates that "entities that operate through state action as through the grant of a charter or license, and have no further connection with the state or federal government, are not within the contemplation of the definition."

If the *qui tam* plaintiff is not a governmental unit, then the exception applies only if a *qui tam* action may nevertheless be considered an action "by a governmental unit." The court observed that although § 3730(b) of the FCA provides that a private person may bring an action "in the name of the Government," the section is entitled "Actions by Private Persons," and states that a person may bring an action for the person and for the Government. Therefore, the court concluded, although a *qui tam* action is an action "on behalf" of and "for" a "governmental unit," it is not an action "by a governmental unit."

The court observed that in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997), the Supreme Court stated that the *qui tam* relator is "motivated primarily by prospects of monetary reward," while the Government is motivated primarily by "the public good." As a result, the Supreme Court concluded, *qui tam* relators are "less likely than is the government to forego an action arguably based on mere technical compliance with reporting matters that involved no harm to the public fisc." The district court stated that this distinction was arguably relevant to the case at bar, in which a plaintiff "motivated primarily by prospects of monetary reward" and whose own hands were unclean sought priority over other creditors.

The court observed that in *qui tam* cases where the Government has intervened and the defen-

dant subsequently filed for bankruptcy, the action is continued by a governmental unit, and thus the exception to the automatic stay applies. In contrast, where the Government has declined to intervene, under § 3730(b)(4)(B) the *qui tam* plaintiff alone has the "right to conduct the action." The court concluded that when the Government plays no role in pursuing an action, it cannot be considered an action "by a governmental unit," and thus the exception to the automatic stay does not apply. Should the Government conclude that the bankruptcy stay had a substantial adverse impact on its interests and functions, it could always move pursuant to § 3730(c)(3) to intervene on a showing of good cause. Were such a motion granted, the exception to the automatic stay would become applicable.

***U.S. ex rel. Davis v. Litalien*, 2004 U.S. App. LEXIS 2728 (5th Cir. Feb. 18, 2004)**

In February 2004 the Fifth Circuit dismissed as premature an appeal in a *qui tam* action. Carl Davis, a Texas state inmate, filed this action against Florent Luc Litalien, another state inmate, alleging that Litalien had defrauded the Department of Veterans Affairs by collecting benefits while incarcerated. The district court granted summary judgment for Davis on the issue of liability based on matters admitted pursuant to Fed. R. Civ. P. 36(a). However, because the district court had not yet determined damages, it could not issue a final judgment pursuant to Fed. R. Civ. P. 54(b). Therefore, in an unpublished per curiam opinion, the Fifth Circuit dismissed the appeal for lack of jurisdiction.

***U.S. ex rel. Boundy v. Dolenz*, 2004 U.S. App. LEXIS 2958 (5th Cir. Feb. 19, 2004)**

In February 2004 the Fifth Circuit affirmed the voluntary dismissal of a *qui tam* action without prejudice. In 1996 John Boundy filed this *qui tam* action under seal against Bernard Dolenz, a physician and attorney. The complaint alleged that Dolenz had submitted false claims to the Government for the treatment of Charlotte Cobin, an employee of the Department of Defense. Meanwhile, a government criminal investigation of Dolenz was underway. In December 1996, the Government elected to intervene, but moved to stay and administratively close the case under seal pending the outcome of the criminal matter.

In 1998 Dolenz was found guilty of mail fraud, sentenced to 90 months in prison, and ordered to repay $1.68 million in restitution to 45 victims including the Department of Labor, which is the insurance carrier for worker compensation claims made by federal workers. In 1999 the Government withdrew its intervention, and the court unsealed the *qui tam* complaint. In 2000 Dolenz filed counterclaims against Boundy for frivolous litigation, abuse of process, and tortious interference. Boundy moved for summary judgment both on his *qui tam* claim and Dolenz's counterclaims. In October 2002, the district court granted Boundy's motion for summary judgment on Dolenz's counterclaims but denied Boundy's motion for summary judgment on his *qui tam* claim. *See* 2002 U.S. Dist LEXIS 20445 (N.D. Tex. Oct. 21, 2002), 29 TAF QR 22 (Jan. 2003). Boundy subsequently moved to dismiss the action without prejudice and the district court granted the motion. Dolenz appealed the dismissal without prejudice.

In an unpublished per curiam opinion, the Fifth Circuit affirmed. Dismissals without prejudice pursuant to Fed. R. Civ. P. 41(a)(2), the court observed, are reviewed for abuse of discretion. A motion for voluntary dismissal should be granted unless the nonmoving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit. Dolenz failed to make such a showing. His arguments challenging Boundy's standing as an original source were without merit, as they were raised for the first time on appeal. The court observed that Dolenz would be free to raise his standing challenge if Boundy refiled his *qui tam* action. The court declined to address any other issues that Dolenz sought to raise on appeal.

U.S. ex rel. Stone v. Rockwell International Corp., 2004 U.S. App. LEXIS 4363(10th Cir. Mar. 5, 2004)

In an unpublished order and judgment issued in March 2004, a divided Tenth Circuit panel

reaffirmed the judgment of the district court in a *qui tam* action, ruling that the relator had satisfied the FCA's jurisdictional requirements by qualifying as an original source. From 1975 through 1989 Rockwell International Corp. operated the Rocky Flats nuclear weapons plant in Colorado under a contract with the Department of Energy (DOE). The DOE reimbursed Rockwell for its costs plus a yearly "base fee" and a semiannual "award fee" that compensated the company for managing the plant. The "award fee" was the most significant portion of Rockwell's compensation and was based on the DOE's evaluation of Rockwell's performance in a variety of areas including environmental, safety, and health operations. James Stone worked as an engineer at the Rocky Flats plant from 1980 until he was laid off in 1986. In 1987 Stone informed the FBI about a variety of environmental crimes allegedly committed at Rocky Flats during his tenure there. In 1989 the FBI obtained a search warrant and seventy-five FBI and EPA agents conducted a search of the plant, prompting intense media scrutiny. A month after the search Stone filed a *qui tam* complaint under seal alleging that Rockwell had concealed environmental, health, and safety problems at the plant from the DOE throughout the 1980s. The Government initially declined to intervene in the suit.

While Stone's *qui tam* suit was pending, the Government's criminal investigation continued, and in 1992 Rockwell entered into a plea agreement under which it pleaded guilty to ten environmental violations and agreed to pay $18.5 million in fines. Later that year, Rockwell moved to dismiss Stone's *qui tam* complaint for lack of subject matter jurisdiction pursuant to the public disclosure bar. In 1994 the district court denied that motion. In 1996 the Government intervened in some of Stone's allegations, and in a 1999 trial on those allegations the jury found that Rockwell violated the FCA during three separate six-month award fee periods. The court thereupon entered judgment against Rockwell for $4.17 million.

Rockwell appealed, arguing that: (1) the district court erred in finding that Stone was an "original source"; (2) *qui tam* relators lack standing under Article III of the Constitution; (3) the FCA's *qui tam* provisions violate the Take Care and Appointments Clauses of Article II of the Constitution; and (4) the district court erred in instructing the jury that DOE employees' knowledge of the facts that Rockwell allegedly concealed was relevant to the FCA claims only if those employees had "authority to act" under the DOE contract. The Tenth Circuit rejected these arguments and affirmed the rulings of the district court on all counts. *See* 265 F.3d 1157 (10th Cir. 2001), 24 TAF QR 14 (Oct. 2001). However, Judge Briscoe, while concurring with the majority's ruling on every other issue, dissented from its conclusion that Stone qualified as an original source, and would have reversed the judgment for lack of subject matter jurisdiction pursuant to the public disclosure bar.

Rockwell then petitioned for rehearing. The Tenth Circuit granted the motion, modifying its earlier opinion and ordering a limited remand. *See* 282 F.3d 787 (10th Cir. 2002), 26 TAF QR 37 (Apr. 2002). In its 2001 opinion, the court had held that Stone was an "original source" because he satisfied the two statutory prongs requiring (1) direct and independent knowledge of the information upon which his allegations were based and (2) voluntary disclosure of the information underlying his claim to the Government before filing suit. Upon reconsideration in 2002, the Tenth Circuit found that the record did not reveal specific findings of fact to support its conclusion that Stone made a

voluntary disclosure satisfying the second prong. Therefore, the court remanded to the district court for the limited purpose of conducting further proceedings in order to make findings and conclusions on the voluntary disclosure issue. The court of appeals directed the district court to transmit its additional findings upon completion of those proceedings, so that the court of appeals, which continued to retain jurisdiction, could make a final disposition of the appeal.

In its March 2004 order, the Tenth Circuit, after reviewing the additional findings submitted by the district court, reaffirmed the district court's original judgment. The court stated that real point of contention after the limited remand was whether Stone disclosed the facts underlying his claims that Rockwell falsely certified compliance with environmental standards despite Stone's written warning that its process for manufacturing pondcrete blocks resulted in the release of toxic waste. (Pondcrete is a mixture of cement, sludge, and liquid from evaporation ponds containing toxic industrial waste.)

The district court found that Stone had produced an internal Rockwell Engineering Order concerning pondcrete to the Government before filing suit. On the Order, Stone had made these handwritten comments: "This design will not work in my opinion. I suggest that a pilot operation be designed to simplify and optimize each phase of the operation . . . ." In its additional findings, the district court held that this document was insufficient to support a finding that Stone had voluntarily disclosed the information underlying his pondcrete claims to the Government before filing suit.

However, the Tenth Circuit majority rejected the district court's holding on this point as fundamentally inconsistent with the court of appeals' 2002 ruling. In that ruling, the Tenth Circuit stated that the Engineering Order explicitly indicated that the process for manufacturing pondcrete was flawed. *See* 282 F.3d at 801. That 2002 holding, together with the district court's ruling on remand that the document was produced to the Government before suit was filed, were sufficient, in the majority's view, to show that Stone satisfied the voluntary disclosure prong of the original source provision. Accordingly, the court of appeals held that the jurisdictional requirement was satisfied, and again affirmed the original judgment of the district court.

Judge Briscoe again dissented. As in his previous dissent, he concluded that although Stone had accurately predicted in the Engineering Order that the pondcrete plans would not work, there was no evidence that he directly and independently knew that Rockwell actually experienced environmental problems when it began producing pondcrete, or that it concealed these problems from the Department of Energy. Moreover, Judge Briscoe disagreed with the majority's conclusion that Stone's production of the Engineering Order to the Government satisfied the voluntary disclosure prong of the original source rule. Accordingly, he again concluded that Stone's claims should have been dismissed for lack of jurisdiction.

U.S. ex rel. Mills v. New York, 2004 U.S. Dist. LEXIS 3637 (S.D.N.Y. Mar. 10, 2004)

In March 2004, a New York magistrate judge recommended that a relator's motion for relief from a judgment dismissing her *qui tam* action be denied. Jacqueline Mills brought this *qui tam* action against Sullivan County, its Department of Social Services, and the New York State Electric and Gas Corporation (NYSEG). The magistrate judge recommend-

ed that Mills' claims against the municipal defendants be dismissed based on principles of issue and claim preclusion and for failure to state a claim, and in August 2002 the district court adopted that recommendation. In a second report, the magistrate judge recommended that Mills' claims against NYSEG be dismissed as well, based on claim preclusion. In June 2003 the district court adopted this second report as well, and subsequently entered judgment dismissing the case.

In August 2003 Mills moved for relief from the judgment pursuant to Fed. R. Civ. P. 60, and sought leave to file an amended complaint. Mills asserted that she had obtained new evidence that the municipal defendants entered into a lease for which they overpaid, thereby wasting federal funds.

The magistrate judge recommended that Mills' motion be denied. In order to prevail on a Rule 60(b)(2) motion for relief from judgment based on newly discovered evidence, a movant must show that (1) the new evidence was of facts that existed at the time of the dispositive proceeding, (2) the movant was justifiably ignorant of these facts despite due diligence, (3) the evidence was admissible and probably would have changed the outcome, and (4) the evidence was not merely cumulative or impeaching.

At the very least, the magistrate ruled, Mills could not meet the second requirement because her information was simply not new. The lease in question was entered into in 1994, and Mills offered no reason why she was unable to obtain information about this public contract prior to dismissal of her lawsuit. Indeed, she raised this very claim in the supplemental complaint she filed in 2000, indicating that she was aware of the contract early. Because a motion for relief from judgment is not a vehicle for providing details previously available about a claim properly dismissed, the magistrate ruled, there was no basis for vacating the judgment. Accordingly, the magistrate judge recommended that Mills' motion be denied in its entirely.

U.S. ex rel. Prevenslik v. University of Washington, 2004 U.S. App. LEXIS 4828 (4th Cir. Mar. 15, 2004)

In an unpublished per curiam opinion, the Fourth Circuit affirmed the dismissal of a pro se *qui tam* action. The court denied the relator's motion for oral argument and for appointment of counsel, and without discussion affirmed the decision below for the reasons stated by the district court.

THE FALSE CLAIMS ACT AND IMPLIED CERTIFICATION: AN OVERVIEW

James B. Helmer, Jr. and Robert M. Rice[*]

With increasing frequency, courts are grappling with the concept of implied certification as it relates to liability under the False Claims Act. But since the term "implied certification" appears nowhere in the Act, nowhere in the legislative history, and nowhere in the case law prior to the mid-1990s—some 130 years after the Act was first passed, and nearly a decade after the 1986 amendments—courts must address the fundamentals: What is implied certification and how is it applicable to the False Claims Act? In this article, we examine how the courts have been answering this question over the past few years.

In simplest terms, the theory of implied certification means that claims for payment to the United States can be false or fraudulent even if they do not contain an expressly false or fraudulent statement. The very act of submitting a claim for payment carries with it assurances that the claimant has complied with all conditions associated with the payment sought, and while many of those assurances are explicitly given when the claim is made, many others are not. But this should not matter. Silence should be no loophole, and the courts have agreed. They are universal, when squarely confronting the issue, in their willingness to infer falsity from silence, to hold those seeking payment from the Government to the rules, regulations, statutes and contract provisions that they promised to obey as a precondition to payment—even if those promises are not restated every time payment is sought. While express certifications may be powerful evidence of both falsity and knowledge, they are not always needed to state a claim under the False Claims Act.

Thus, even where a claim for payment is not clearly false on its face, and is not accompanied by an expressly false statement tied directly by its language to the claim for payment being made, courts look further. They carefully examine the conduct alleged—violation of contract, statute, rule, regulation, etc.—and look to see whether there was a sufficient nexus between that conduct and the payment being sought. In other words, the courts decide whether payment was conditioned upon compliance with the contract, statute, rule or regulation. If it was, then the claim for payment is deemed false when those preconditions to payment are not met. There is no threshold inquiry to see whether the claimant has, with each claim for payment, express-

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ly and redundantly re-promised to comply with every one of its obligations. Why should False Claims Act liability depend on affirmations, at the time payment is requested, that claimants are still doing what they promised?

By submitting the bill for payment, the contractor is impliedly certifying that he has abided by the terms of the procurement contract, applicable statutes, and regulations, and that he is therefore entitled to payment. If, in fact, he has not so complied—and knows it—the bill is a false claim for payment.

That is the fundamental value of implied certification. It is not so much a whole new theory of False Claims Act liability, as it is a rejection of efforts to restrict the reach of the Act to whatever written promises (if any) are made at the time a claim is submitted—a narrowing of the Act that is not contemplated either by the words of the statute or the legislative history, and that would drastically reduce the effectiveness of the Government's chief weapon against fraud on the public fisc. Congress surely did not intend that artful wording of express certifications would be a vehicle to limit actionable conduct. The theory of implied certification is a tool that helps courts avoid such a result.

Predictably, though, the courts have not always agreed on the scope of the implied certification theory. In their fact-intensive search for what conditions surround payment, some courts are careful to respect the broad remedial purpose of the False Claims Act. Unfortunately, others are not. Before canvassing the decisions, we begin with a brief discussion of the statutory grounds for the theory of implied certification.

I. THE BASIS FOR IMPLIED CERTIFICATION

The terms of the False Claims Act, along with the 1986 legislative history, make clear that expressly false certifications are not needed to trigger liability. First the text. While the term "false certification" appears nowhere in the Act, Congress did separately address the use of expressly false statements in making claims for payment. Of the seven bases for liability under the Act—3729(a)(1) to (a)(7)—two are concerned with express falsehoods. Under subsections (a)(2) and (a)(7), liability attaches because one "knowingly makes, uses, or causes to be made or used, a false record or statement[.]" An expressly false certification is clearly a type of "false record or statement."

Liability under the remaining provisions of the Act does not depend on false expressions. Most notably, the prohibited conduct under subsection (a)(1) is the knowing presentation of a false or fraudulent claim for payment or approval, not the presentation of a false claim *and* a false record or statement.[1] A claimant who does both, of course, triggers potential liability

[1] One recent decision discussed this interplay between (a)(1), (a)(2) and (a)(7) in regards to implied certification: "The 'implied certification' concept that has been employed in some situations to establish liability under 31 U.S.C. § 3729(a)(1) will not apply given the requirement under § 3729(a)(7), comparable to § 3729(a)(2), for a false record or statement." *United States ex rel. Grynberg v. Praxair, Inc.*, 207 F. Supp. 2d 1163, 1177 n.16 (D. Colo. 2001), *citing Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531-532 (10th Cir. 2000) (finding implied certification inapplicable where liability depends on submission of false statement or record) *and United States ex rel. Aakhus v. DynCorp., Inc.*, 136 F.3d 676, 682-83 (10th Cir. 1998) (requiring specific false statement to support action under § 3729(a)(2)).

under subsections (a)(1) and (a)(2)—and, in the process, has created strong evidence of knowledge. So the logical conclusion is inescapable: Congress knew how to penalize expressly false statements as they are used to get false claims paid, but clearly decided that liability under the Act will not necessarily depend on such false expressions.

This is consistent with the legislative history. In amending the Act in 1986, Congress meant to impose liability for more than expressly false statements: "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements *or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.*" S. Rep. No. 345, 99th Cong., 2d Sess. 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added). Furthermore, "claims may be false even though the services are provided as claimed if, for example, the claimant is ineligible to participate in the program, or though payments on the Government loan are current, if by means of false statements the Government was induced to lend an inflated amount." *Id.*[2]

In short, claims for payment can be false without any attendant expressly false certification. Recognizing this, courts invoke the concept of implied certification as a means to get beyond what is said when the claim is made, to see whether a claim is false because conditions attached to the payment have not been met—and such failures were not fully disclosed when the funds were sought. Courts have embraced this approach, and the theory of implied certification, though the results have not always been consistent. The following discussion first identifies the controlling authority from the courts of appeals regarding the theory of implied certification, and then examines how the theory has been applied in the trial courts.

II. IMPLIED CERTIFICATION IN THE COURTS OF APPEALS

A. FEDERAL CIRCUIT

Perhaps the earliest statement of the implied certification theory comes from the Federal Circuit. In *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (1994), a small, minority-owned construction company was awarded a contract by the Small Business Administration (SBA) for the construction of a data processing facility for the Army Corps of Engineers. As a condition of the contract award, Ab-Tech signed a "Statement of Cooperation" promising to comply with the SBA's requirements and regulations for continuing eligibility to participate in the SBA program—a program meant to advantage small, minority-owned businesses. One of the regulations allowed the SBA to terminate Ab-Tech's participation in the program if it entered into a joint venture agreement without prior SBA approval. Despite the regulation, Ab-

[2] The 1986 legislative history demonstrates beyond doubt that Congress meant for the False Claims Act to have broad application to combat fraudulent conduct. *See* JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION, § 2-6 (3d ed. 2002).

Tech did in fact forge a joint venture without notifying the SBA. *Id.* at 432. This conduct violated the SBA regulation, yet Ab-Tech continued to submit claims for progress payments.

In holding Ab-Tech liable under the False Claims Act, the court found it irrelevant that Ab-Tech was not required to explicitly re-certify continuing adherence to all SBA regulations when submitting progress payments. The claims were false nonetheless:

> The payment vouchers represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the [SBA] program. Therefore, by deliberately withholding from SBA knowledge of the prohibited contract arrangement . . . Ab-Tech not only dishonored the terms of its agreement with that agency but, more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the [SBA] program. In short, the Government was duped by Ab-Tech's active concealment of a fact vital to the integrity of that program. The withholding of such information—information critical to the decision to pay—is the essence of a false claim.

Id. at 434. As the *Ab-Tech* court noted, this concept of implied certification honors the broad purpose of the False Claims Act, which, as the Supreme Court long ago recognized, is designed to reach "all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 433, *citing United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). The *Ab-Tech* decision is perhaps most important, though, for its application, rather than simple adoption, of the theory of implied certification. Under *Ab-Tech*, the Government's decision to pay is necessarily tied to "continuing adherence to requirements for participation" in the program under which payment is sought. In short, since there was sufficient nexus between regulatory compliance and payment, failure to follow the regulations rendered the claim for payment false. And that is really the sum total of the implied certification inquiry: Is there such a nexus?

The *Ab-Tech* decision stands as the law in the Federal Circuit, as it was affirmed (though without comment) a year later. *See* 57 F.3d 1084 (Fed. Cir. 1995). Since then, three Circuits (the Second, Sixth and Tenth) have expressly adopted the theory of implied certification, and four more (the D.C., Fourth, Fifth and Ninth) appear willing to do so. But while the Sixth and Tenth Circuits have embraced the theory of implied certification almost exactly as first announced in *Ab-Tech*, other circuits have adopted or seem ready to adopt a more restrictive approach.

B. SIXTH CIRCUIT

In *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409 (6th Cir. 2001), a health care agency submitted some 22 cost reports to the Health Care Financing Administration (HCFA) to receive reimbursement for contributions made to its Employee Stock Ownership Plan (ESOP). *Id.* at 411. Each cost report expressly certified compliance with Medicare regulations governing ESOP contributions. Thereafter, Century violated those regulations by removing the ESOP contributions for general corporate use without filing an amended cost report. *Id.* at 414-415. Though the express certifications were true when executed—

Medicare regulations were not violated until later—the Sixth Circuit relied on the theory of implied certification to find that the cost reports were false claims: "[A] false implied certification may constitute a false or fraudulent claim even if the claim was not expressly false when it was filed. Instead, liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned." *Id.* at 415. There was an obvious nexus between payment of ESOP amounts and adherence to the Medicare ESOP regulations.

C. TENTH CIRCUIT

The Tenth Circuit in *Shaw v. AAA Engineering, Inc.*, 213 F.3d 519 (10th Cir. 2000), adopted a similar approach in the context of a government contract for photography services. Among the allegations in *Shaw* was that the contractor violated a contract provision by failing to recover and properly dispose of trace amounts of silver generated in the photograph development process. *Id.* at 527. Despite this contract violation, the defendant argued that its monthly invoices were not false claims because they accurately billed only for the appropriate amount under the fixed price contract. *Id.* at 531. The Tenth Circuit disagreed. Based primarily on the language and legislative history of the False Claims Act, as well as *Ab-Tech*, the Court agreed with the Government (appearing as *amicus curiae*) that "when AAA submitted its monthly invoices, it impliedly certified that it had complied with the silver recovery provisions in the contract; because AAA was being paid not only for photography services but also for environmental compliance, its false implied certification of compliance with the contract's silver recovery requirements give rise to liability under the FCA." *Id.* at 531.

D. SECOND CIRCUIT

The Second Circuit, while embracing implied certification in *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), significantly narrowed its application. *Mikes* involved allegations that the defendant doctors defrauded Medicare by billing for spirometry services performed with an uncalibrated spirometer—in violation of professionally-recognized health care standards. *Id.* at 694-695. The Relator alleged that this conduct violated two Medicare regulations, one requiring that medical services be "reasonable and necessary," and another obliging the doctors to follow industry standards. *Id.* at 700-701. In dismissing the case, the Second Circuit limited the implied certification theory: "Specifically, implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly states* that the provider must comply in order to be paid." *Id.* at 700 (emphasis added). The court then found that Medicare regulations did expressly condition payment on services being "reasonable and necessary," but not on their meeting industry standards, so the doctors' claims for payment impliedly certified the former but not the latter. Finally, the court found that the "reasonable and necessary" allegations did not render any Medicare claims false, since the relator alleged only that the spirometry exams were "qualitatively deficient," not that they were unreasonable or unnecessary. *Id.* at 701.

Of particular interest is a distinction the *Mikes* court drew between Medicare regulations

that are "conditions of participation" and those that are "prerequisites to receiving reimbursement." *Id.* at 701-702. In the Second Circuit's view, the Medicare regulation stating that "[i]t *shall be* the obligation of any health care practitioner . . . to assure . . . that services . . . *will be* of a quality which meets professionally recognized standards of health care" is a mere condition of participation, which " acts prospectively, setting forth obligations for a provider to be eligible to participate in the Medicare program." *Id.* (citations omitted). This regulation could not impact the Government's payment decision, according to the *Mikes* court, because a provider's failure to follow industry standards triggers "peer reviews" and other sanctions that might, eventually, lead to exclusion from the Medicare program. *Id.* at 702. This logic seems flawed, as it leads to the anomalous result that a provider can be at once ineligible to participate in the Medicare program, and yet still receive payment for the very conduct that makes it ineligible. Moreover, under *Mikes*, if the Government has any discretion in dealing with those who violate regulations—instead of an explicit duty to withhold payment—the False Claims Act apparently is not implicated.

E. FIFTH CIRCUIT

As noted, other Circuits beyond those just identified seem poised to adopt the theory of implied certification. In fact, the Fifth Circuit seems to have already done so, though not in so many words. In *United States ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375 (5th Cir. 2003), the relator alleged that Humana, a provider of Medicare HMO products, violated the False Claims Act because its enrollment practices discriminated against less-healthy potential program participants, in violation of Medicare regulations. *Id.* at 378. While the claims for payment at issue were not explicitly false (since they merely requested payment for individuals recently enrolled), the relator alleged that "by requesting payment, Humana has impliedly represented to the Government that it has complied with applicable statutes and regulations central to performance"—including those prohibiting discriminatory enrollment practices. *Id.* at 381.

Though the Fifth Circuit dismissed the case because the relator's allegations showed no regulatory violation at all, the court in *dicta* found the theory of implied certification inapplicable because compliance with the anti-discriminatory regulations was not a condition of payment. *Id.* at 382 (emphasis in original). In so finding, the court seemed to agree with the restrictive *Mikes* approach, noting that the Government had options in remedying such regulatory violations, including "to suspend future enrollment, suspend *future payments*, or impose monetary penalties, rather than withhold payment for those already enrolled." *Id.* at 382-383. Thus, when the Fifth Circuit does finally expressly address implied certification, it will not be writing on a totally clean slate.

F. D.C. CIRCUIT

The D.C. Circuit has also considered this issue. That Court announced its understanding of the theory of implied certification in *United States ex rel. Siewick v. Jamieson Science &*

Engineering, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000): "Courts have been ready to infer certification from silence, but only where certification was a prerequisite to the government action sought." *Siewick* involved allegedly false invoices submitted by Jamieson pursuant to its contract for technological services provided to the Strategic Defense Initiative Organization. The relator alleged those invoices were impliedly false because, shortly after the contract award, Jamieson hired the government contracting officer who had negotiated terms of the contract, which violated a criminal statute forbidding such "revolving door" abuses. *Id.* at 1374. But since compliance with that law was not mentioned in the contract or in Jamieson's invoices, and the relator could identify nothing else showing the Government's payment was conditioned on compliance with the statute, the Court rejected the relator's claim. Despite this, the Court's willingness to entertain the theory of implied certification is clear.[3]

G. FOURTH CIRCUIT

The Fourth Circuit likewise seems poised to embrace implied certification. The Court in *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) considered the theory of "implied certification by silence," but only in passing. It held that the claim in *Harrison*—that a company managing a nuclear facility for the Department of Energy made false claims for unallowable subcontractor costs—"fails on the pleadings because [the Relator] never asserted that such implied certifications were in any way related to, let alone prerequisites for, receiving continued funding." *Id.* at 793. While this understanding of implied certification appears generally consistent with that of the other circuits, the precise contours of the Fourth Circuit's conception of the theory have not yet fully emerged.

Very recently, the Fourth Circuit had another occasion to explicitly adopt (and set forth its full understanding of) the theory of implied certification, but declined to do so. In *United States ex rel. Hererra v. Danka Office Imaging Co.*, 2004 U.S. App. LEXIS 4825 (4th Cir. March 15, 2004), the defendant contracted with the General Services Administration to provide photocopiers, and was required by that contract to rebate to the Government on a quarterly basis .5% of all sales as a "Fee for Service." *Id.* at *2. Affirming the district court's grant of summary judgment in favor of the defendant, the Fourth Circuit agreed that the defendant's periodic invoices for the photocopiers were not expressly false claims because they did not explicitly certify compliance with the Fee for Service contract term. *Id.* As to the relator's claim that the invoices impliedly certified such compliance, the Fourth Circuit found (as it did in *Harrison*) that its resolution of the case made it unnecessary to decide the viability of the theory of implied certification. *Id.* at *8 n.3. The court instead held that the photocopier invoices at issue could not have been impliedly false

[3] More recently, without mentioning implied certification, the D.C. Circuit cited *Ab- Tech* with approval and allowed a False Claims Act case to proceed even though the claims for payment were not expressly false: "TDC thus defrauded the government by presenting reports in support of payment that omitted information indicating that it was acting in a manner that was contrary to the core terms of the Program." *United States ex rel. TDC Management Corp., Inc.*, 288 F.3d 421, 426 (D.C. Cir. 2002).

since there was no showing that Government payment was conditioned on a certification (express or implied) that the defendant would eventually comply with the contract term calling for remission of the Fee for Service amount. *Id.* at *8-9. In other words, the defendant violated its contract by keeping funds to which it was not entitled, yet escaped False Claims Act liability. Though it carefully avoided confronting the implied certification issue, the Fourth Circuit's ruling certainly seems inconsistent with decisions such as *Augustine* and *Ab- Tech*, which found—-in analogous circumstances—-liability for those violating their "continuing" duty to comply with the contract terms or regulations governing payment.

H. NINTH CIRCUIT

Finally, the Ninth Circuit arguably adopted the implied certification theory, although not by name, in its recent decision in *United States ex rel. Lee v. Smithkline Beecham, Inc.*, 245 F.3d 1048 (9th Cir. 2001). There, the relator Lee alleged that Smithkline billed Medicare for worthless lab tests. The district court found that Lee failed to plead fraud with particularity as required by Rule 9(b), and dismissed the case with prejudice by ruling that amendment would be futile. *Id.* at 1052-1053. In so doing, the district court found that Smithkline never certified (expressly or impliedly) compliance with Medicare regulations governing lab tests because the HCFA-1500 claim forms submitted contained no such certification language. *Id.* at 1053. In reversing, the Ninth Circuit disagreed with this narrow understanding of the False Claims Act, holding that "[i]n an appropriate case, knowingly billing for worthless services or recklessly doing so with deliberate ignorance may be actionable under § 3729, regardless of any false certification conduct." *Id.* The Ninth Circuit was not constrained by the express certifications made at the time of payment (as was the district court), which is, of course, the crux of the implied certification theory.[4]

III. IMPLIED CERTIFICATION AS APPLIED BY THE DISTRICT COURTS

District courts addressing implied certification in False Claims Act cases over the past few years have typically assumed the theory applies and have focused on whether there is a nexus between the payment being sought and the fraudulent conduct alleged. If there is, then the failure by the claimant to make expressly false certifications is irrelevant. Since the implied certification inquiry conducted by the district courts centers on the particular statute, regulation,

[4] Though the Third Circuit has never mentioned implied certification in the False Claims Act context, it did recently affirm a district court decision that expressly adopted that theory. *United States ex rel. Watson v. Connecticut General Life Ins. Co.*, 2004 U.S. App. LEXIS 1736. The trial court held that "a false certification of compliance with a statute, regulation or guideline, whether express or implied, may constitute a violation of the FCA." *United States ex rel. Watson v. Connecticut General Life Ins. Co.*, 2003 U.S. Dist. LEXIS 2054 at *40 n.28, *citing Augustine*, *Mikes* and *Shaw*. The allegations in *Watson* (regarding violations of various Medicare claims-processing regulations) were dismissed, though, because there was no evidence the regulations were violated or, even if they were, no evidence that the defendant's certification of compliance influenced the Government's payment decisions. 2004 U.S. App. LEXIS 1736 at *9.

rule or contract term allegedly violated, we now examine the recent cases by grouping them in that fashion.

A. VIOLATION OF MEDICARE ANTI-KICKBACK AND STARK LAWS

The viability of False Claims Act cases based on violations of Medicare anti-kickback and Stark laws is well accepted by the courts, and they are often based on the implied certification theory.[5] In two related cases, Judge Lamberth in the District of Columbia recently adopted the *Ab-Tech* conception of implied certification: "[W]here the government pays funds to a party, and would not have paid those funds had it known of a violation of a law or regulation, the claim submitted for those funds contained an implied certification of compliance with the law or regulation and was fraudulent." *United States ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F.Supp.2d 28, 33 (D.D.C. 2003); *United States ex rel. Pogue v. Diabetes Treatement Centers Of America, Inc.*, 238 F. Supp.2d 258, 264 (D.D.C. 2002). Since compliance with anti-kickback and Stark laws is a condition of Medicare participation, the court found that violations of those laws would have affected the Government's decisions to pay the claims. *Barrett*, 251 F. Supp. 2d at 32 (citations omitted).[6]

Likewise, the court in *United States ex rel. Bidani v. Lewis*, 264 F. Supp. 2d 612, 614 (N.D. Ill. 2003) (citations omitted) held that claims for payment are impliedly false "where the defendant's certification of compliance with the statutes and regulations in question is a condition of receiving funds from the Government." As for the anti-kickback violations at issue, the *Bidani* court found them actionable under the False Claims Act because "[c]ompliance with the [anti-kickback statute] is thus central to the reimbursement plan of Medicare. To state otherwise would be to allow participation and reimbursement for supplies purchased illegally only because the claimant had the luck of not being caught and convicted in the first place." *Id.* at 616.

Despite the near total weight of authority supporting False Claims Act cases premised on anti-kickback violations (*see Pogue* at 263-266), one lone decision reached the opposite conclusion. In *United States ex rel. Barmak v. Sutter Corp.*, 2002 U.S. Dist. LEXIS 8509 (S.D.N.Y. 2002), the court, *sua sponte* and without benefit of briefing by either party, dismissed the relator's anti-kickback

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[5] Though beyond the scope of this article, it bears noting that Medicare providers often *expressly* certify compliance with anti-kickback and Stark laws, for example in their annual cost reports, making the implied certification analysis unnecessary. Thus, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997), the Fifth Circuit did not need to address implied certification, since it found the relator's allegations of anti-kickback and Stark law violations actionable because he "fairly alleged that the government's payment of Medicare claims is conditioned upon certification of compliance with the laws and regulations regarding the provision of healthcare services, including the anti-kickback statute and the Stark laws, and that defendants submitted false claims by falsely certifying that the services identified in their annual cost reports were rendered in compliance with such laws and regulations."

[6] Judge Lamberth's principled implied certification approach is not infinitely expansive, as Judge Lamberth himself has recently acknowledged. *See United States ex rel. Ortega v. Columbia Healthcare, Inc.*, 240 F. Supp. 2d 8, 20 (D.D.C. 2003). In *Ortega*, the court dismissed False Claims Act allegations premised on a hospital's noncompliance with the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) because "[c]ompliance with the Medicare laws and the regulations promulgated under them is a requirement to participate in Medicare, JCAHO certification is not." In other words, there was no nexus between JCAHO certification and Medicare payment.

allegations. Because the anti-kickback statute is a criminal statute with "no right of private right of action," the court "had no reason to believe, nor have the parties provided [it] any, that Congress intended to subvert the DOJ's exclusive jurisdiction over the anti-kickback statute by grafting the FCA's *qui tam* provisions onto it." *Id.* at **17-18. This reasoning seems flawed, most obviously because the Department of Justice has jurisdiction over *both* the anti-kickback statute *and* the False Claims Act. There is no subversion of jurisdiction, as the DOJ itself has made clear in explicitly supporting *qui tam* actions based on anti-kickback violations. *See, e.g., Bidani*, 264 F. Supp. 2d at 615. However, the *Barmak* court, in reaching its conclusion, did not consider the theory of implied certification. Had it done so, the result may well have been different.

B. SUBSTANDARD AND UNECONOMICAL HEALTHCARE

Courts disagree over whether violations of Medicare regulations prohibiting substandard care or billing for unnecessary services may give rise to a claim under the False Claims Act. The reason for the split turns largely on each court's conception of the theory of implied certification. For instance, in *United States v. NHC Health Care Corp.*, 163 F. Supp. 2d 1051 (W.D. Mo. 2001), the Government alleged that the defendant long-term care facility provided such "insufficient and negligent" care for certain residents that its claims for Medicare/Medicaid reimbursement were rendered false. *Id.* at 1052-53. While the parties debated whether the defendant had expressly certified compliance with standards of care, the court found the distinction meaningless: "Implied certification essentially means that the Government alleges liability based on the proposition that a healthcare provider implicitly certified in its claim for reimbursement that it would adhere to the prevailing standard of care when providing services to its Medicare and Medicaid residents." *Id.* at 1055. There was, in other words, a clear nexus between certification and payment, since "the standard of care is indeed at the heart of the agreement between the parties." *Id.*

In sharp contrast, the court in *United States ex rel. Swan v. Covenant Care, Inc.*, 2001 U.S. Dist. LEXIS 25480 (E.D. Cal. 2001), refused to invoke the theory of implied certification—because the Ninth Circuit had not yet done so—to find that a nursing home's claims for payment, or its Medicare supplier application, certified adherence to Medicare standards of care regulations. Thus, the court held that the claims for payment were not false because they did not explicitly "certify overall compliance" with Medicare laws; and the supplier application, though it did contain such express certifications, dealt only with the defendant's eligibility to participate in Medicare, so the defendant's "failure to comply with program conditions after promising to do so in the [application] form [did] not prove or suggest that its initial promise of compliance was false when it was made." *Id.* at *5.[7]

[7] *Accord United States ex rel. Cooper v. Gentiva Health Services*, 2003 U.S. Dist. LEXIS 20690 (W.D. Pa. 2003) (application for billing privileges involve obligations for participation, not payment). *See also Lum v. Vision Service Plan*, 104 F. Supp. 2d 1237, 1241-1242 (D. Haw. 2000) (citations omitted) ("It is not at all clear that certification was a prerequisite for payment to VSP, but, even if it was, a mere regulatory violation would not give rise to a viable False Claims Act action. There are administrative and other remedies for regulatory violations. Absent express false certifications upon which funding is conditioned, the False Claims Act provides no remedy.")

In a footnote, the *Swan* court said that even under an implied certification theory the allegations failed, since the relator did not demonstrate a connection between payment of Medicare claims and compliance with Medicare standards of care. *Swan* at *4 n. 1. This ruling seems at odds with the broader understanding of the False Claims Act contained in the Ninth Circuit's *Lee* decision (and, more directly, in decisions such as *Augustine* and *NHC*). Given the right opportunity, the Ninth Circuit may well clarify what the *Swan* court ignored: that there is an obvious nexus between continuing compliance with Medicare regulations and the Government's decisions to pay Medicare claims.

This concept was followed in *United States ex rel. Kneepkins v. Gambro Healthcare, Inc.*, 115 F. Supp.2d 35 (D. Mass. 2000). Among the allegations in *Kneepkins* were charges that the defendant performed blood tests in an uneconomical fashion—for example, by conducting tests at different times instead of together at no additional cost—which violated the Medicare regulation requiring that services be "provided economically." *Id.* at 41. Though the defendant's claims included no express certification of compliance with this regulation, the court found that the claims for payment for the blood tests contained an implied certification to that effect because "the entitlement to Medicare reimbursement depends on fulfilling an obligation to perform services economically . . . and the [defendants] are accused of surreptitiously performing those services in an intentionally wasteful manner." *Id.* at 43. Based on this same logic, the *Kneepkins* court also allowed allegations to proceed based on violations of anti-kickback laws. *Id.*

C. VIOLATION OF STATE HEALTHCARE LICENSING REGULATIONS

Medicare and Medicaid regulations require compliance with various state licensing laws, and failure to do so can give rise to False Claims Act liability under the theory of implied certification. For instance, in *United States ex rel. Wright v. Cleo Wallace Centers*, 132 F. Supp. 2d 913 (D. Colo. 2000), the defendant operated various facilities for psychiatric and rehabilitation services for children, and such facilities were eligible for Medicaid reimbursement so long as they were properly licensed by the state. *Id.* at 916. The defendant violated the licensing laws, yet made claims for Medicaid payments anyway. *Id.* at 917. Though the Medicaid claim forms did not have express certifications of compliance with state licensing laws, the court allowed the False Claims Act case to proceed. Finding the Tenth Circuit's logic in *Shaw* instructive even though it was a non-healthcare fraud case, the *Wright* court held: "[A] person who knowingly submits claims to the government for the purpose of acquiring federal Medicaid funds while not in compliance with all relevant laws, rules and regulations may constitute a false claim under the FCA, even without an affirmative or express false statement of such compliance." *Id.* at 926.

In a case from years earlier, *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.*, 984 F. Supp. 374 (D. Md. 1997), the court in clear *dicta* reached the opposite conclusion. The defendant allegedly failed to comply with various Maryland licensing requirements for home health care facilities. While the court spent the balance of the opinion showing that no such violations occurred, it went on to consider whether the defendant had impliedly certified compliance with the state's licensing laws. The court found no such actionable certification: "The relevant statute and regulation simply state that such compliance is a condition

of participation in the Medicare program, but no evidence has been presented suggesting that *certification* of such compliance is a condition to *payment*, the *sine qua non* of FCA liability." *Id.* at 385 (emphasis in original). There is no reconciling this conclusion with that reached in *Wright*, though perhaps the *Joslin* court's views would have been different had it found actual regulatory noncompliance.

D. IMPLIED CERTIFICATION OUTSIDE THE HEALTHCARE FRAUD ARENA

While the theory of implied certification in False Claims Act cases has received most play of late in situations involving Medicare and Medicaid fraud, it applies with equal force against all government contractors. The conceptual framework is usually straightforward: If you claim payment under a Government contract, but are not in compliance with all contract provisions, your claims are false even if they are not accompanied by a list of your contract terms and your certification of compliance therewith.

This approach was followed in *United States ex rel. Holder v. Special Devices, Inc.*, 296 F. Supp. 2d 1167 (C.D. Cal. 2003). For two decades, Special Devices, Inc. (SDI) entered into contracts with the Government to supply explosive and pyrotechnic devices to various agencies, and each of those contracts contained provisions requiring compliance with environmental laws. *Id.* at 1170. The relator alleged SDI systematically violated such laws, leading to knowingly false claims for payment. Seeking summary judgment, SDI argued it could never be liable under the FCA because its contracts did not explicitly require certification of compliance with environmental laws. *Id.* at 1171. The court rejected this argument and, relying mostly on *Ab-Tech* and *Shaw*, fully embraced the theory of implied certification as "consistent with the language and spirit of the FCA." *Id.* at 1176. The court ruled that SDI's claims for payment impliedly certified compliance with, at a minimum, the explicit provisions of SDI's contracts. *Id.*

Similarly, the contractor in *United States v. The Intrados/Int'l Management Group*, 265 F. Supp. 2d 1 (D.D.C. 2002) allegedly submitted false claims for payment under a contract to provide technical training services in the former Soviet Union. The contract authorized reimbursement only for "allowable costs" (and even incorporated a Federal Acquisition Regulation defining that term), yet Intrados submitted invoices that included sums for myriad unallowable costs. *Id.* at 4. Intrados argued that the invoices could not be false because they adhered to the only explicit requirement for their submission, namely that they were mathematically accurate—calculated according to a formula in the contract. Rejecting this argument, the court adopted the Government's position that "each invoice submitted by the defendants contains an implied certification that the sum claimed was proper and due under the contract pursuant to the plaintiff's procurement regulations. . . . [T]he implied certifications submitted by the defendants are, therefore, false because they contain charges for personal items not allowed under the contract." *Id.* at 5. The falsity of the invoices did not depend on whether it was technically deficient, or on whether Intrados re-promised compliance with its contract.

This was also the conclusion of the court in *United States ex rel. Bryant v. Williams Building Corp.*, 158 F. Supp. 2d 1001 (D.S.D. 2001). Defendant Williams Building Corporation (WBC) contracted with the United States Air Force to remodel bathrooms in housing units on

Ellsworth Air Force Base. In the event asbestos was encountered during this effort, the contract required WBC to avoid disturbing the material and to notify the contracting officer immediately. *Id.* at 1003. On many occasions during the project, WBC did discover asbestos, disturbed the dangerous material by stuffing it between refurbished walls, and never told the contracting officer a thing. *Id.* All the while, WBC not only submitted invoices for its work, but also submitted Daily Reports and periodic Progress Reports that explicitly certified contract compliance. The court found that all these documents were, at a minimum, impliedly false, and further noted that

> the application of the implied certification theory seems particularly appropriate in this case where WBC's discovery and disturbance of the asbestos was not readily apparent upon government inspection. In view of this concern, the government included a clause in the contract advising WBC that if it did encounter materials suspected of containing asbestos, it should avoid disturbing the materials and immediately notify the contracting officer. Here, WBC submitted both the reports and the payment invoices repeatedly implying that all was well with the project, though it had encountered and disturbed asbestos in each of the units. Withholding such critical information, while simultaneously seeking payment under the contract, appears to this Court to be the very essence of a false claim.

Id. at 1010 (citation omitted). This is as good a statement as any advocating the value of the implied certification theory. And that value is generally accepted in the contractor fraud cases, just as it is in the healthcare fraud decisions discussed earlier.

Indeed, even when they find that the facts do not support FCA liability based on implied certification, or when they adopt a restrictive version of the theory, the courts still recognize its viability.[8] For instance, the defendant in *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003) operated technical colleges throughout the country, and participated in a Government financial assistance program whereby its students received either direct grants or insured loans. *Id.* at 489. ITT allegedly violated an associated regulation that prohibited incentive payments to its admissions officers and recruiters "based on [their] success in securing enrollments or financial aid to students." *Id.* at 491. The court adopted the implied certification theory, but because it chose the narrow version espoused by the Second Circuit in *Mikes*, it dismissed the claims: "Like one of the regulations at issue in *Mikes*, the regulation that Relators allege was violated is a condition of eligibility to participate in the pro-

[8] *United States ex rel. King v. F.E. Moran, Inc.*, 2002 U.S. Dist. LEXIS 16277 at *33 (citations omitted) (N.D. Ill. 2002) (dismissing claims based on implied certification, but adopting the broad view of the theory exemplified by *Ab-Tech* and *Augustine*: "To succeed under this theory, a plaintiff must show that compliance with the relevant statutes and regulations was a condition to receiving payment.").

gram, not an express condition of payment of specific claims or retention of payments." *Id.* at 502, *citing Mikes*, 274 F.3d at 702. As was the case in *Mikes*, the peculiar result from *Graves* is that the defendant received the benefits of participation in the Government's financial assistance program, while simultaneously being ineligible to do so.

Another Texas court followed *Mikes* a few months later, with even more absurd results. In *United States ex rel. Coppock v. Northrop Grumman Corp.*, 2003 U.S. Dist. LEXIS 12626 (N.D. Tex. 2003), Northrop rented property from the Government, and specifically promised in its lease contracts to comply with environmental laws. Despite this, Northrop admittedly violated this lease provision by causing extensive environmental contamination, failing to inform the Government, and (though its pollution eventually ended) failing to remedy the damage done. *Id.* at **4-5. The court refused to find that Northrop impliedly certified in its rent payments (by which it received approval for the continuing benefit of using the Government's land) that it complied with the environmental provisions of its lease contract. The reason? The lease did not expressly state that continued use of the property depended on compliance with environmental laws: "Coppock does not allege that failure to certify statutory or contractual compliance would *necessarily* have resulted in termination of the leases. Even if Coppock has sufficiently pleaded that Northrop engaged in conduct that breached the lease in question, that breach does not of itself constitute a viable FCA claim." *Id.* at *40 (internal citation omitted).

While the *Graves* and *Coppock* courts at least recognized the theory of implied certification, they applied it quite restrictively, all but ignoring the clear and necessary nexus between payment under federal programs or contracts and compliance with the requirements of those very programs or contracts. Only by recognizing this nexus will courts be able to give effect to an observation made long ago, by one of the first courts to tackle the implied certification issue: "[T]he False Claims Act was intended to govern not only fraudulent acts that create a loss to the government but also those fraudulent acts that cause the government to pay out sums of money to *claimants it did not intend to benefit*." *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1513 (M.D. Tenn. 1996) (emphasis supplied).

IV. CONCLUSION

The state of the law is clear: Courts have embraced the theory of implied certification in False Claims Act cases for ten years, routinely finding that claims for payment to the Government can be false even absent an expressly false statement made when those claims are submitted. This approach makes good sense. It means that claimants who fail to comply with the statutes, rules, regulations or contract terms upon which payment is conditioned (yet make claims for payment anyway) will not escape False Claims Act liability simply because their claim forms do not explicitly recertify that all such conditions have been satisfied. The act of submitting a bill to the United States carries with it such an implied certification of compliance.

But while courts are ready to use the theory of implied certification to look beyond express falsehoods—examining whether there is a sufficient nexus between payment and adherence to

the particular contract term, regulation, rule or statute violated—they approach it differently. Some (like the Sixth, Tenth and Federal Circuits) understand that a broad application of implied certification is necessary to give full effect to the False Claims Act, while others (most notably the Second Circuit) have taken a more conservative approach. Though it is impossible to predict exactly how the other circuits will eventually define the implied certification inquiry, at a minimum it seems clear that more circuits are poised to adopt the theory in some fashion.

In the end, as with many other aspects of judicial treatment of the False Claims Act, practitioners must be cognizant of where they are. Unfortunately, it may not be enough to show that a defendant sought government funds despite knowingly violating the very terms or regulations governing the contracts or participation in the federal programs at issue. Nevertheless, no matter how they apply the theory of implied certification, courts are rejecting defendants' arguments that False Claims Act liability depends on whether an expressly false certification was made at the time a claim for payment was submitted. While the limits of implied certification are being tested and debated, the viability of the theory is well accepted.

ALLEGATION: BILLING FOR UNDELIVERED SUPPLIES

U.S. v. Rotella, No. 04-946 (E.D. Pa.)

In March 2004, DOJ announced it had filed a complaint against the Philadelphia medical supply company Nichole Equipment and Supply Inc., its owner, and two employees. The Government is alleging that Nichole Equipment and its employees sought to enhance their profits by billing Medicaid between January 1996 and February 2000 for incontinence supplies to personal care homes that were never delivered. The State of Pennsylvania has also chosen to intervene in the suit. Assistant U.S. Attorney Paul Shapiro and Senior Deputy Attorney General Elizabeth Dilloway Cleek are representing the Government.

ALLEGATION: CONCEALING FALSE MEDICARE BILLING

U.S. v. Ernst & Young, LLP, No. 04-CV-00041 (E.D. Pa.)

In January 2004, DOJ announced it had filed a complaint against the accounting firm Ernst & Young for concealing illegal Medicare billing practices by nine of its hospital clients. The Government alleges that the nine hospitals submitted over 200,000 improper claims for payment for tests that were billed to Medicare. Prosecutors are seeking treble damages in the sum of $2.7 million. Assistant U.S. Attorney James Sheehan is representing the Government.

Addendum to Vol. 33 (Jan. 2004):

In the case of *United States ex rel. Kaplan v. Metropolitan Ambulance & First Aid Corp., No CV-00-3010 (E.D.N.Y.)*, in which the Government intervened last October as reported at 33 TAF QR 32 (Jan. 2004), Philip Michael of Goodkind Labaton Rudoff & Sucharow LLP (New York) represents the relator.

U.S. ex rel. Baylor v. Kerlan-Jobe Orthopedic Clinic, No. CV 98-10485 (C.D. Cal.)

In January 2004, DOJ announced that Kerlan-Jobe Orthopedic Clinic had agreed to pay **$2.65 million** to settle allegations that it defrauded Medicare and other federal health care programs for eight years. The Government alleged the clinic and its physicians knowingly overbilled Medicare, Medi-Cal, the Department of Labor's Office of Workers' Compensation Programs, and the Department of Defense's TRICARE program for office visits and outpatient procedures. Trevor Baylor, former director of the clinic's health information systems department, filed this *qui tam* action in 1998. The relator's share was approximately 21% or $556,500. Paul Scott (San Francisco) represented the relator. The USPS OIG and U.S. Department of Labor investigated the matter. Assistant U.S. Attorney David Barrett represented the Government.

U.S. v. Shelby Memorial Hospital, No. 02-CV-3094 (C.D. Ill.)

In January 2004, DOJ announced that Shelby Memorial Hospital had agreed to pay **$1.75 million** to resolve allegations it submitted false claims to Medicare. The Government alleged the hospital submitted claims under false pneumonia diagnosis codes to receive a significantly higher reimbursement from Medicare. As part of the settlement agreement, Shelby has entered into a three-year corporate integrity agreement with HHS. HHS OIG investigated the matter. Assistant U.S. Attorney Rodger Heaton handled the case for the Government.

U.S. v. Cleveland Clinic Home Care (N.D. Ohio)

In January 2004, the DOJ announced that Cleveland Clinic Home Care had agreed to pay **$2.3 million** to settle allegations it made fraudulent Medicare claims. The Government alleged Meridia Health System (which was bought by Cleveland in 1997) made fraudulent claims in cost reports, home office cost statements, and reimbursement requests. HHS OIG investigated the matter. Assistant U.S. Attorneys Alex Rokakis and Virginia Hearey handled the case for the Government.

U.S. v. Lighthouse Medical Management Inc. (D.R.I.)

In January 2004, DOJ announced that Lighthouse Medical Management Inc. had agreed to pay **$454,800** to settle allegations that it made false Medicare claims. The Government alleged Lighthouse Medical Management Inc. submitted claims that falsely represented that patients receiving routine dialysis treatment were eligible for reimbursement by Medicare for emergency ambulance transportation to and from dialysis. The Government filed this suit in July 2003. Assistant U.S. Attorneys Lisa Dinerman and Luis Matos handled the case for the Government.

U.S. ex rel. Grau v. Johns Hopkins University, No. 99-1448 (D. Md.)

In February 2004, DOJ announced that Johns Hopkins Bayview Medical Center had agreed to pay **$2.6 million** to settle allegations it misled the Government in seeking federal grants. The Government alleged that Johns Hopkins Bayview Medical Center overstated the percentage of work effort researchers were able to devote and the percentage of effort that personnel actually worked in applications for research grants sponsored by the NIH and other federal agencies. Faye Grau, a former secretary, filed this *qui tam* action in 1999. The relator's share was approximately 17% or $439,582. Robin West of Cohan & West, P.C.

(Baltimore, MD) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorney Roann Nichols represented the Government.

U.S. ex rel. Lopez v. Coast Plaza Doctors Hospital & Estate, No. SA CV 99-1509 (C.D. Cal.)

In February 2004, DOJ announced that a Los Angeles-area hospital and the estate of its former chief executive officer have agreed to pay **$4.1 million** to settle allegations of Medicare fraud. The Government alleged Coast Plaza Doctors' Hospital falsified expense account entries to receive Medicare reimbursements from 1994 to 1999. Raul Lopez, the former CFO, filed this *qui tam* action in 1999. The relator's share was 17.5% or $718,000. Salvatore Scarantino (Los Angeles) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorney Vipal Patel represented the Government.

U.S. ex rel. Abila v. National Mentor Healthcare, No. 00-1512 (D.N.M.)

In February 2004, National Mentor Healthcare reportedly agreed to pay **$1.17 million** to settle a lawsuit accusing the company of defrauding New Mexico's Medicaid program. The Government alleged that the company overbilled for behavioral therapy services and billed for services not provided. Faustino Abila, a former program manager, filed this *qui tam* action in 2000. The relator's share was 15% or $157,950. Roger Michener (Placitas, N.M.) and Vernon Salvador (Albuquerque) represented the relator. HHS OIG investigated the matter. The United States was represented by Howard Thomas in New Mexico and Laura Laemmle of the DOJ Civil Division
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U.S. v. Stony Brook University Hospital, (E.D.N.Y.)

In February 2004, DOJ announced that Stony Brook University Hospital of the State University of New York (Stony Brook) had agreed to pay **$850,000** to settle allegations that it defrauded Medicare. The Government alleged Stony Brook double-billed Medicare for pharmaceuticals administered to patients between 1988 and 1994 by billing separately for medication administered to hospital inpatients. HHS OIG investigated the matter. Senior Trial Counsel Kevan Cleary handled the case for the Government.

U.S. ex rel. Spear v. Quest Diagnostics, Inc., No. 2:97-1229 (D.N.J.)

In March 2004, Quest Diagnostics, Inc. agreed to pay **$11.35 million** to settle an FCA suit alleging that it improperly billed Medicare. The Government alleged that one of Quest Diagnostics, Inc.'s subsidiaries and two of its predecessors failed to properly bill Medicare and performed medically unnecessary tests at several of its laboratories across the country. Kevin Spear, a former sales representative, filed this *qui tam* action in 1997. The relator's share was approximately 21% or $2.4 million. Mary Louise Cohen of Phillips & Cohen LLP (Washington, D.C.) represented the relator. The HHS OIG investigated the matter. Assistant U.S. Attorneys Michael Chagares and Stuart Minkowitz represented the Government.

U.S. ex rel. Climaco v. Montefiore Medical Center, No. 99-Civ-11137 (S.D.N.Y.)

In March 2004, the DOJ announced that Montefiore Medical Center had agreed to pay **$12 million** to settle allegations that it improperly retained Medicare overpayments. The

Government alleged that Montefiore improperly retained $5.6 million in Medicare overpayments for graduate medical education in 1988 and failed to pay $4.2 million in installments to repay an $8.5 million overpayment in 1990. Benjamin Climaco, former Associate Director for Reimbursement, filed this *qui tam* action in 1999. The relator's share has yet to be resolved between Climaco and the Government. Kenneth Nolan (Fort Lauderdale) and Timothy McInnis (New York) represented the relator. U.S. Attorney David Kelley and Assistant U.S. Attorney Beth Goldman represented the Government.

U.S. ex rel. Flanagan v. Baptist Health System Inc., No. CV-97-BE-3070-S (N.D. Ala.)

In March 2004, Baptist Health System, Inc. reportedly agreed to pay **$1.3 million** to settle allegations it made fraudulent Medicare claims. The Government alleged that the company submitted claims to Medicare without the required physician-approved care plan certifying medical necessity. Teri Flanagan, a former physical therapy supervisor, filed this *qui tam* action in 1997. The relator's share was approximately 20% or $260,000. John Malcolm and Robert Schroeder of Malcolm & Schroeder LLP (Atlanta) represented the relator. HHS OIG investigated the matter. Assistant U.S. Attorney Jim Gann represented the Government.

U.S. ex rel. Brouder v. Polaroid Corp., No. 1:99-cv-12427 (D. Mass.)

In March 2004, DOJ announced that the former Polaroid Corporation agreed to pay **$3.2 million** to settle allegations it provided the GSA with false pricing information. The Government alleged that from 1990 to 1997, Polaroid provided false pricing information and certification during the negotiation and award of two Multiple Award Schedule contracts by the GSA for the purchase of instant film. George Brouder, a former Polaroid marketing executive filed this *qui tam* action in 1999. The relator's share was approximately 20%, or $640,000. Brian Kenney of Kenney, Lennon & Egan (Philadelphia) and Scott Shepherd of Shepherd, Finkleman, Miller and Shah (Media, Pa.) represented the relator. GSA OIG investigated the matter. Assistant U.S. Attorneys Eugenia Carris and Thomas Kanwit and Alan Gale of the DOJ Civil Division represented the Government.

U.S. ex rel. Barbera v. Tenet Healthcare Corp., No. 97-CV-6590 (S.D. Fla.)

In March 2004, DOJ announced that Tenet Healthcare Corporation had agreed to pay **$22.5 million** to settle allegations that it improperly billed Medicare. The Government alleged Tenet's North Ridge Medical Center bought physician practices, placed the physicians on salary and paid the physicians for referrals to the hospital, prohibited by federal law. Sal Barbera, a former Tenet executive, filed this *qui tam* lawsuit in 1997. The relator's share was $5.175 million or 23%. Gary Sherman (Fort Lauderdale) represented the relator. HHS OIG investigated the matter. Mark Lavine, Ana Martinez, and Carlos Castillo, Assistant U.S. Attorneys in Miami, and Michael Hertz, David Wiseman, and David Cohen of the DOJ Civil Division in Washington, D.C. represented the Government.

U.S. ex rel. Roemer v. SunGard Employment Benefit Systems (N.D. Ala.)

In March 2004, DOJ announced that SunGard EBS had agreed to pay **$425,000** to settle allegations of falsifying work records. The

Government alleged SunGard overstated the hours it worked to develop an automated record-keeping system for the Federal Thrift Investment Board. Frank Roemer, a former employee, filed this *qui tam* action in 2002. The relator's share was 20% or $85,000. Don McKenna of Hare, Wynn, Newell & Newton (Birmingham) represented the relator.

U.S. ex rel. Jones v. Fisher & Fisher, P.C., No. 00-C-4050 (N.D. Ill.)

In March 2004, the Chicago law firm Fisher and Fisher, P.C. and its two principals reportedly agreed to pay **$676,852** to settle accusations they submitted false charges to federal agencies from 1994 to 2002. The Government alleged the firm overcharged federal agencies that had retained them to handle mortgage foreclosures. Chris Jones, a former employee, filed this *qui tam* action in 2000. The relator's share was $169,213 or 25%. Thomas Beyor of Gencon Legal Services (LaGrange, Ill.) represented the relator. Assistant U.S. Attorney Jonathan Haile represented the Government.

U.S. v. Thacker (D. Mass)

In March 2004, DOJ announced that Vasant Thacker, M.D. had agreed to pay **$203,422** to resolve allegations he overbilled Medicare. The Government alleged that on approximately 1800 occasions between 1997 and 2002 Dr. Thacker charged for "consultation" services that provided higher reimbursement while actually performing regular patient visits. In addition to paying to settle the civil claims, Dr. Thacker has entered into an integrity agreement with HHS OIG in order that her compliance with Medicare guidelines can be monitored. HHS OIG, the FBI, and the Commonwealth of Massachusetts Medical Fraud Control Unit investigated the matter. Assistant U.S. Attorney Eugenia Carris and Assistant Massachusetts Attorney General Anne Ackil handled the case for the Government.

U.S. v. SAIC (D. Md.)

In March 2004, DOJ announced that Science Applications International Corporation (SAIC) had agreed to pay **$484,500** to settle allegations it submitted false claims to the Department of Defense (DOD) for its work on a computer system program. The Government alleged that SAIC misrepresented the progress of the project in numerous reports and caused a significant delay in the implementation of the Defense Occupational and Environmental Health Readiness System, an automated information system designed to support hearing conservation, industrial hygiene and occupational medicine programs within the military health system. The Army Criminal Investigative Division and the DCIS investigated the matter. Assistant U.S. Attorney Thomas Corcoran and Auditor Mary Hammond handled the case for the Government.

TAF NEWS

FCA Conference Materials

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

Qui Tam Practitioner Guide

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

TAF on the Internet

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

Previous Publications

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

Quarterly Review Submissions

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

Anniversary Reports and Video

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

Call for Experts and Investigators

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

Qui Tam Attorney Network

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

TAF Library

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

Acknowledgments

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