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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FROM THE EDITOR

In the first quarter of FY 2005, False Claims Act settlements and judgments recovered nearly $750 million for the U.S. Government. The newspaper headlines scream the final dollar amounts to the nation, drawing attention to this little know area of the law. The number of attorneys "concentrating" in FCA litigation has steadily grown.

While the initial excitement of a large settlement fades over time, the impact of a court ruling remains etched in the law for years. Indeed, the evolving case law establishes the outer parameters of judicial acceptability. The primary role of the *Quarterly Review* is to chart those boundaries, educating practitioners about the potential pitfalls and hurdles along the way. Dedicating the *Quarterly* to this educational mission, this publication now includes the following new sections:

Legislative Update
Documenting Relevant Statutory Changes

In Their Own Words
Providing a Voice to Relators

Lessons from the Frontlines
Detailing Practical Tips

In the Spotlight
Charting the Emerging Trends in the Law

Share your experience and knowledge with the Bar by submitting your ideas to the *Quarterly Review*. Your written impressions not only help to educate the next generation of FCA practitioners, but also help to solidify the acceptable bounds of the Act.

Sincerely,

Jeb White
jwhite@taf.org

Recent False Claims Act & *Qui Tam* Decisions

OCTOBER 1–DECEMBER 31, 2004

FALSE CLAIMS ACT LIABILITY

A. Liability of Subcontractors

U.S. ex rel. Schmidt v. Zimmer, Inc., 386 F.3d 235 (3d Cir. Oct. 6, 2004)

The Third Circuit reversed a Pennsylvania district court's dismissal of a *qui tam* complaint for failure to state a claim, instead finding that the complaint adequately stated a claim under the FCA. The court ruled that the Government had a cause of action against a subcontractor who caused a prime contractor to submit a false claim to the Government, regardless of whether or not the prime contractor was aware of the falsity.

Orthopedic surgeon Richard Schmidt brought a *qui tam* action against Mercy Health Systems and Zimmer, Inc. ("Zimmer"), a manufacturer, seller, and distributor of orthopedic implants. Schmidt explained that Zimmer signed an agreement with Premier Purchasing Partners, a purchasing agent for a group of entities, including Mercy Health Systems, which participates in the Medicare reimbursement program. Under the terms of the contract, Zimmer agreed to provide orthopedic implants to the Premier Participants for five years.

Schmidt alleged that the contract lead to several FCA and Stark Act violations. In building his case, Schmidt pointed out that the contract awarded any Premier Participant that purchased Zimmer's products in sufficient numbers so as to increase Zimmer's market share. Additionally, the contract supposedly stated that the providers would "receive a 2% bonus on implant purchases if the Premier Participant met the pre-set market share and volume purchase commitments."

In the case at bar, Schmidt alleged that these "rewards" were paid to the defendants, and that these payments amounted to illegal kickbacks. Schmidt also alleged that Mercy and Zimmer encouraged physicians in reaching the prescribed goals by offering to share the rewards with those who cooperated. Schmidt maintained that such actions were in violation of the federal Anti-Kickback Act, 42 U.S.C. § 1320a-7b.

Moreover, Schmidt alleged violations of the FCA, when the physicians submitted cost reports to the Medicare program that documented the costs associated with the purchase of orthopedic implants. The relevant reporting form, HCFA-2552, required the physicians to certify that the costs being submitted were true and correct, and that the provider had complied with all laws and regulations regarding the provision of healthcare services. Schmidt alleged that, despite these explicit requirements, the cost reports at issue in this case did not disclose the rewards that they reportedly received from Zimmer. Schmidt also alleged that Premier and Mercy violated the FCA when they falsely certified that they were in compliance with all laws and regulations regarding the provision of healthcare services.

Lastly, based on these allegations, including alleged violations of the Anti-Kickback Act and the Stark Act, Schmidt alleged that Mercy's false certifications of compliance on the HCFA-2552 forms it submitted to the Government violated three provisions of the FCA, rendering both Mercy and Zimmer liable: (1) 31 U.S.C. § 3729(a)(1), which prohibits knowingly presenting, or causing to be presented, to an officer or employee of the United States Government a false claim for payment or approval; (2) § 3729(a)(2), which prohibits knowingly making, using and/or causing to be made or used a false record, claim, or statement to get a false claim paid or approved by the federal government; and (3) § 3729(a)(7), barring false certifications intended to conceal, avoid, or decrease an obligation to refund Medicare payments made by the Government. The Government declined to intervene.

Both the defendants, Mercy and Zimmer, filed a motion to dismiss. The district court dismissed Schmidt's complaint for failure to state a claim under Rule 12(b)(6). The court granted Zimmer's motion to dismiss with prejudice, but granted Mercy's motion without prejudice. Subsequently, Schmidt filed a second amended complaint. Schmidt settled its claim against Mercy; however, Schmidt and Zimmer never reached a settlement, culminating in Schmidt filing the present appeal of the order granting Zimmer's motion to dismiss.

The District Court dismissed Schmidt's complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Relator Raised an Actionable FCA Claim

The Third Circuit reversed the district court's decision. As an initial matter, the court of appeals determined that it was not possible to resolve the Anti-Kickback or Stark Act issues at this stage of the litigation, so the circuit court, for the purposes of the motion to dismiss, assumed that Zimmer's marketing scheme violated both Acts.

In its review of the lower court's decision to dismiss Schmidt's FCA claim against Zimmer, the Third Circuit, construing the facts alleged in the first amended complaint in the light most favorable to Schmidt, ruled that it could fairly be said that "Zimmer knowingly assisted in causing the government to pay claims which were grounded in fraud."

In reaching its ultimate decision about the relator's FCA claims, the court of appeals noted "a false *certification* of compliance [with applicable law] creates liability [under the FCA] when certification is a prerequisite to obtaining a government benefit." *United States ex rel. Hopper v. Anton,* 91 F.3d 1261, 1266 (9th Cir. 1996), 7 TAF QR 8 (Oct. 1996). The court also noted that a certificate of compliance with federal healthcare law is a prerequisite to eligibility under the Medicare program. *See* 42 C.F.R. § 413.24(f)(4)(iv). In turn, the court ruled that "[i]t follows that Schmidt alleged a violation of the FCA when he alleged that *Mercy* certified its compliance with federal healthcare law knowing that certification to be false."

Possible Liability for Knowingly Assisting False Certification

The remaining issue, according to the court, was whether, under the allegations raised in the complaint, Zimmer knowingly assisted in Mercy's false certification.

The lower court stressed that the relator's complaint does not allege that Zimmer "reviewed, approved, or received copies of Mercy's cost reports or participated in their preparation." The Third Circuit ruled that this was not dispositive, and that Zimmer could still be held liable.

First, as an initial matter, the court of appeals pointed to a Supreme Court decision that proclaimed that "the [FCA] . . . gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government." *United States v. Bornstein,* 423 U.S. 303, 309 (1976).

Second, rejecting the district court's laundry list of items missing from the relator's description of the Zimmer-Mercy relationship, the Third Circuit ruled that a party could assist in the filing of a false claim in other ways and still be liable under the FCA.

The Third Circuit, rejecting the district court's conclusion, ruled that the Government could have a cause of action against a subcontractor who caused a prime contractor to submit a false claim to the Government, regardless of whether or not the prime contractor was aware of the falsity. The court observed that if Schmidt, like the plaintiffs in *Bornstein,* proved at trial that "Zimmer created and pursued a marketing scheme that it knew would, if successful, result in the submission by Mercy and others similarly situated of compliance certifications required by Medicare that Zimmer knew would be false," a jury could conclude that Zimmer knowingly caused Mercy's false claims to be filed.

Revisiting the relator's complaint, the court of appeals noted that the alleged purpose of the contractual agreement was to "influence and obtain favorable treatment from providers who participate in the Medicare program by inducing them to purchase Zimmer's products and increase Zimmer's market share for orthopedic implant hardware . . ." Read in a light most favorable to Schmidt, the Third Circuit determined that one could reasonably infer that "Zimmer must have known that Mercy could not purchase its implants, receive kickbacks, and share those kickbacks with its physicians, in the manner provided by the contract unless Mercy falsely certified itself to be in compliance with federal law." Furthermore, the court opined that, while it is true that the hospital may have independently decided to submit a false certification, this was not inconsistent with a determination that Zimmer caused that filing.

Therefore, with the assumption that a jury could reasonably infer Zimmer's influence over Mercy's inappropriate filings and that "Mercy's filing was a normal consequence of the situation created by that scheme," the jury could find Zimmer liable for under the FCA for causing that filing.

Thus, the Third Circuit, concluding that Schmidt stated a claim upon which relief can be granted, reversed the district court's decision.

B. State Law Implications

<u>*U.S. ex rel. Brown v. City of South Burlington*</u>, 2004 WL 2998629 (2d Cir. Dec. 29, 2004)

The Second Circuit vacated and remanded a Vermont district court's summary judgment order in a wrongful termination suit predicated upon the First Amendment, FCA whistleblower provision Section 3730(h), and Vermont State law. The court of appeals stressed that because the drafters of the FCA had not provided relief from the common law rules governing tender and ratification, the court had to assess the reasonableness of relator's delay in tendering back the consideration he received for signing his former employer's release of liability. The lower court failed to outline their assessment of this issue.

In an anonymous January 26, 1999 letter to the local media, Leon Brown, a former fireman with the City of South Burlington, Vermont fire department, alleged, among other things, that the local fire chief had submitted false claims to FEMA, netting the township $870 in fraudulently obtained funds. After the city discovered the true identity of the writer, City Manager Charles Hafter gave Brown the option of resignation or termination. After reluctantly resigning, Brown signed a general release of all claims against the City in consideration of the payment of $7,964.70, an amount that included pay for accrued vacation time, compensatory time, two weeks severance pay, and two weeks sick leave. The court determined that all of these items were normally owed to terminated City employees with the exception of the severance pay.

Brown encouraged FEMA to investigate the allegedly false claims. FEMA eventually determined that the claims were indeed fraudulent. Faced with the possibility of treble damages under the FCA, the City agreed to a settlement in the amount of $2,500 on October 27, 2000. In turn, Brown, after reviewing the events that led to his dismissal and noting that his allegations had been proved correct, Brown brought the action at bar against the City and Mr. Hafter. The defendants moved for summary judgment.

The district court granted the defendants' summary judgment motion. The lower court ruled that because Brown did not offer to tender back the consideration until well after he knew of the alleged misrepresentations, the tender back offer was untimely. The court also refused to accept the relator's argument that the release was void as against public policy, stressing that releases of private claims under the FCA are permitted. Lastly, the district court ruled that ordinary contract principles apply to releases under the FCA and that the tender-back rule applies to claims under the Act. Thus, the court ruled that all of Brown's claims were barred by his ratification of the release. Brown appealed the decision to the Second Circuit.

Lower Court Misapplied Contract Principles

The court of appeals vacated the district court's decision. Brown argued that the release was not binding on account of defendants' alleged misrepresentations. Brown also denied that he adopted the release with the intention of being bound by it. The court of appeals ruled that the lower court did not apply the correct rule of law in assessing the validity of the relator's argument.

The court of appeals, diagramming the existing rule of law, observed that it is a accepted principle that a voidable contract can be cured by ratification through express or implied conduct, but that a person "charged with ratification of such a contract must have acted voluntarily and with full knowledge of the facts." 17A Am. Jur. 2d Contracts § 11 (2004). Further, "a party asserting the defense of ratification of a voidable contract ordinarily must demonstrate that the releasor intended to ratify the agreement." *See* M.C. Dransfield, Annotation, *Ratification of Contract Voidable for Duress,* 77 A.L.R. 2d 426 § 4 (1961).

The Second Circuit noted that with respect to ratification of a release by conduct, the test is "whether the releasor, with full knowledge of the material facts entitling him to rescind, has engaged in some unequivocal conduct giving rise to a reasonable inference that he intended the conduct to amount to a ratification." 66 Am. Jur. 2d Release § 27 (2001). The court also ruled that, "in order to avoid a finding of ratification where consideration has been paid, it is essential that the releasor tender back the sum received."

The circuit court also stressed that, "avoiding a contract of release on the ground of fraudulent misrepresentation . . . requires not only manifestation of an intention to avoid the release within a reasonable time after discovery of the fraud but also return of any consideration received by the releasor within a reasonable time." 66 Am.Jur.2d Release § 46 (2001). Lastly, the court of appeals stated that test of "[w]hether the return was timely is ordinarily a question of fact."

The Second Circuit pointed out that the district court reached its conclusion without further analysis. The circuit court required a more detailed analysis. Providing the lower court with further instructions, the circuit court stated that "[a]ny examination of reasonableness in this case must take into account that the action was commenced within nine months after Brown had notice of the alleged fraudulent misrepresentations that induced him to sign the release." Going one step further, the court of appeals highlighted the fact that the unsealing of the relator's complaint should have put the defendants on notice of the relator's intention to disaffirm and rescind the release.

Tender-Back Requirement Applies to FCA Relators

The relator argued that the FCA provided relief from the common law rules governing tender and ratification. The Second Circuit, rejecting the relator's reading of Section 3730(h), noted that analogous federal statutes, including the Older Workers Benefit Protection Act, Pub.L. 101-433, § 201, 104 Stat. 978, 983 (1990) (codified at 29 U.S.C. § 626(f)), explicitly dispensed with the tender-back requirement. Congress neglected to include similar language in the FCA. Therefore, the Second Circuit ruled that these common law principles applied to the relator's contractual agreement.

Thus, outlining the relevant issues, the Second Circuit remanded the following questions to the lower court: "Whether there was reliance, or the likelihood of reliance, on the Release on the part of Defendants; whether the reliance was justifiable and, in this regard, whether Defendants knew of the grounds that Brown would advance for avoiding the Release; whether Defendants actually were at fault in inducing the execution of the Release by Brown; and whether Brown was at fault in not acting sooner to disaffirm and return the consideration present issues the resolution of which inform a determination of prejudice vel non."

A. Section 3729(a)(1) Presentment Requirement

***U.S. ex rel. Atkins v. McInteer*, 2004 WL 2651341 (N.D. Ala. Oct. 27, 2004)**

An Alabama district court granted defendants' motions to dismiss in a *qui tam* action alleging that the defendant-healthcare providers violated the FCA by certifying compliance with a relevant federal statute but actually providing inadequate care. The court ruled that a healthcare providers' implicit certification to a state Medicaid agency that they were in compliance with Nursing Home Reform Act (NHRA) when they were not in compliance when they sought reimbursement for their inadequate nursing care did not expose the providers to liability under the FCA, unless the relators could show that specific services had not been performed and the request for payment had been made to a federal officer or employee. The district court went as far as to say that, even if the state agency subsequently presented the claim for payment to a federal official, the FCA does not apply, for the *defendants* had not made any request for payment to the federal official.

Bruce Atkins, M.D., brought a *qui tam* action against several healthcare providers, alleging the defendants provided substandard care to nursing home patients, even though the defendants had certified to a state agency that they were complying with an applicable quality-of-care statute. The Government declined to intervene. Thirteen of the fourteen defendants filed motions to dismiss the relator's complaint, arguing the complaint failed to plead the fraud with particularity as required by Fed. R. Civ. P 9(b).

Failed to Satisfy Section 3729(a)(1) Presentment Requirement

The district court granted the defendants' motions. In reaching its final conclusion, the court pointed to a recent D.C. Circuit opinion, *United States ex rel. Totten v. Bombardier Corporation*, 380 F.3d 488 (D.C. Cir. Aug. 27, 2004), 35 TAF QR 17 (Oct. 2004), which held that the FCA creates a cause of action only if a false claim is "presented . . . to an officer or employee of the United States Government." The district court paraphrased the *Totten* interpretation of Section 3729(a)(1) to mandate that, if a false claim is presented to an "entity that, in turn, has received or subsequently receives money from the United States with which to pay the claim, is not actionable, despite the fact that the money, in whole or in part, comes from the United States."

Drawing a parallel to the *Totten* case, in which Amtrak was the federally funded grantee, the court noted that the only directly defrauded entity was the Alabama Medicaid Agency, a grantee of federal funds. The court also observed that the relator made no allegation that the defendants ever presented a false claim directly to a federal officer or employee, as required under the district court's interpretation of 3729(a)(1).

Failed to Satisfy Rule 9(b) and Rule 12(b)(6)

Even without the persuasive authority of the *Totten* decision, the district court ruled that the relator's action falls prey to Rule 12(b)(6) and Rule 9(b), for the complaint, according to the court, lacks the necessary particularity or specificity. In particular, the court noted that there is no description of "any discrete incident of the fraudulent submission of a claim by any defendant, either to an Alabama state employee or to a federal employee." Instead, the complaint supposedly only included conclusory allegations and not the necessary factual connections that have been required by the courts. *See, e.g., United States, ex rel. Clausen v. Laboratory Corp. of America, Inc.*, 290 F.3d 1301 (11th Cir. 2002), 27 TAF QR 14 (July 2002).

The district court also accused the relator of "cloaking alleged violations of the Nursing Home Reform Act . . . with the hopeful FCA mantle." Stating that this case was really about a violation of the NHRA for failing to provide adequate patient care, the court ruled that an FCA *qui tam* suit was not the appropriate action. The court directed the parties' attention to *United States, ex rel. McNutt v. Haleyville Medical Supplies, Inc., et al.*, CV-01-AR-3156-J, a case that has been accepted for interlocutory appeal by the Eleventh Circuit that raises a similar question of law. With the case law in flux in the Eleventh Circuit, the district court pointed to decisions from the other circuits, namely *United States ex rel. Karvelas v. Melrose-Wakefield Hospital*, 360 F.3d 220, 234 (1st Cir. 2004), 34 TAF QR 35 (April 2004) ("[A]lleged violations of federal regulations are insufficient to support a claim under the FCA.") and *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), 7 TAF QR 8 (Oct. 1996), ("Violations of laws, rules, or regulations alone do not create a cause of action under the FCA.").

While the court highlighted and conceded the existing uncertainty surrounding the relevant rule of law, the court still decided to grant the defendants' motions to dismiss. Furthermore, ruling that the court did not have subject matter jurisdiction over this action, the court also dismissed the case against the remaining defendant who had not filed a motion to dismiss.

FALSE CLAIMS ACT RETALIATION CLAIMS

A. Section 3730(h) Retaliation Claims

U.S. ex rel. Williams v. Martin-Baker Aircraft Company, 2004 WL 2680694 (D.C. Cir. Nov. 26, 2004)

See "Federal Rules of Civil Procedure: Rule 9(b) Plead Fraud with Particularity" *below at page 11.*

U.S. ex rel. Schuhardt v. Washington University, 390 F.3d 563 (8th Cir. Dec. 3, 2004)

The Eighth Circuit affirmed in part, reversed in part a Missouri district court's summary judgment in favor of defendant-employer, in an action alleging violations of the FCA, and claiming retaliation under the FCA whistleblower provision, Section 3730(h). The court ruled that, while the relator failed to provide sufficient evidence of an FCA violation, a genuine issue of material fact precluded summary judgment in the retaliation action.

In late 1996 and early 1997, Cynthia Schuhardt and Nancy Becker, former billing coders at Washington University's Department of Surgery, were asked to conduct a large-scale review of the patients' records. During the course of their review, Schuhardt and Becker discovered that the University's physicians were not properly documenting their services. Specifically, they discovered that the surgeons were charging Medicare for procedures as if teaching doctors performed them when the specific procedures were actually performed by "residents, fellows and nurses in the absence of a teaching physician."

Schuhardt alerted her supervisor to the billing problem. In fact, she told her employer that she thought the billing practices were "illegal" and "fraudulent" and that "if the OIG would come in they would frown upon us and they'd pretty much wipe us out." Subsequently, Schuhardt was discharged from her position at the hospital.

Schuhardt filed a *qui tam* action against Washington University. The Government decline to intervene, explaining that they could not verify the relator's allegations.

The defendant filed a Rule 9(b) motion. The court granted the relators leave to file an amended complaint so as to comply with the Rule 9(b) particularity requirement. The University again filed a Rule 9(b) motion, which the court denied. After a lengthy discovery, the University sough summary judgment, arguing the relators failed to provide sufficient evidence of fraud. The University also moved for summary judgment of the Section 3730(h) claim, arguing that Schuhardt did not engage in protected activity within the meaning of the Act. The district court granted the University's motion.

FCA Claim Dismissed

The Eighth Circuit affirmed in part and reversed in part. Without much discussion, the court of appeals quickly determined that the district court committed no error of law or facts as to the FCA claim. In turn, the court affirmed the dismissal of the *qui tam* action.

Relator Raised an Actionable Section 3730(h) Claim

The Eighth Circuit reversed the lower court's summary judgment on the Section 3730(h) retaliation claim, ruling that there is a genuine issue as to a material fact. The court of appeals observed that Section 3730(h) protects employees who are "discharged . . . because of lawful acts done by the employee . . . in furtherance of a [*qui tam* action]." The court, echoing the elemental list from *Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 932-33 (8th Cir. 2002), ruled that a plaintiff must prove that (1) the plaintiff was engaged in conduct protected by the FCA; (2) the plaintiff's employer knew that the plaintiff was engaged in the protected activity; (3) the employer retaliated against the plaintiff; and (4) the retaliation was motivated solely by the plaintiff's protected activity. *Id.* According to the district court, "Schuhardt was not engaged in protected activity, and, even if she was, Washington University did not know she was engaged in the activity." The Eighth Circuit disagreed.

Relator Engaged in "Protected Activity"

In determining whether Schuhardt was engaged in "protected activity," the court of appeals, quoting from *Moore v. Cal. Inst. Tech Jet Propulsion Lab*, 275 F.3d 838, 845 (9th Cir. 2002), ruled that an employee is engaged in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government." The court further noted that the plaintiff still qualified under Section 3730(h), even if the plaintiff had not filed a suit at the time of the alleged retaliation. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 236 (1st Cir. 2004), 34 TAF QR 35 (April 2004).

According to her complaint, Schuhardt complained to her employer that the University's billing practices were illegal and fraudulent. The district court, however, determined that Schuhardt merely fulfilled her regular job responsibilities, so her actions were not "in furtherance" of a *qui tam* action.

The Eighth Circuit determined that the district court "ignored the fact that Schuhardt copied files and took them home to substantiate the existence of fraud." The court of appeals recognized that these actions were not included in her job description. Thus, the court of appeals ruled that there was sufficient evidence that her activity was in furtherance of a *qui tam* action.

Complaint Satisfied Section 3730(h) Knowledge Requirement

Even then, the plaintiff still had to show that the employer had actual or constructive knowledge of the protected activity to establish an actionable Section 3730(h) retaliation claim. *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 715 (8th Cir. 2000).

The Eighth Circuit ruled that Schuhardt's statements to her supervisor were sufficient to put the hospital on notice that Schuhardt is engaged in protected activity. The court pointed out that the Fifth Circuit had previously ruled that an employee's report of illegal activity is sufficient to put the employer on notice. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994). Likewise, the First Circuit ruled that a defendant had sufficient notice when an employer warned about fraudulent Medicare and Medicaid billing by the employer. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 220 (1st Cir. 2004), 34 TAF QR 35 (April 2004).

The Eighth Circuit ruled that the plaintiff showed evidence for all of the Section 3730(h) elements.

Thus, the court of appeals affirmed the dismissal of the relators' FCA claim, but the court reversed the summary judgment order with respect to Schuhardt's retaliation claim.

COMMON DEFENSES TO FCA ALLEGATIONS

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

***U.S. ex rel. Grynberg v. Koch Gateway Pipeline Company*, 390 F.3d 1276 (10th Cir. Dec. 7, 2004)**

The Tenth Circuit affirmed a Wyoming district court's dismissal of a *qui tam* action against a gas producer, alleging the defendant defrauded the Government by fraudulently measuring natural gas it produced on federal and Indian land and thus underpaying royalties to the Government. The court of appeals agreed that the case was barred by the FCA's "first-to-file" bar, where the action raised the same essential claim as was raised in prior suit, although relator alleged additional facts relating to how producer mismeasured the natural gas that were not mentioned in the earlier complaint.

Jack Grynberg, the co-owner of natural gas company, brought an FCA action against some of his competitors, including Koch Gateway Pipeline Company. Koch's extracted natural gas from lands throughout the Midwest, including lands owned by the Government and local Indian tribes.

According to Grynberg's complaint, Koch mismeasured the natural gas it produced on federal and Indian lands, and thus undervaluing the amount of royalties owed to the Government for it natural gas extraction.

In 1991, nearly six years before Grynberg filed his complaint, Precision Company filed a *qui tam* action against Koch, alleging Koch had fraudulently measured the natural gas it produced on federal and Indian lands, and thus underpaid royalties to the Government. In 1997, while Precision's *qui tam* action was still pending, Grynberg filed his complaint.

The Tenth Circuit noted that Congress, adding a first-to-file bar under Section 3730(b)(5), intended to reward relators who first bring the fraud to the Government's attention. It states: "When a person brings a [*qui tam*] action . . . no person other than the Government may intervene or bring a related action *based on the facts underlying the pending action*." 31 U.S.C. § 3730(b)(5) (emphasis added).

The district court dismissed the case at bar, ruling that the relator's complaint was barred by the first-to-file bar. The lower court reasoned that "the operative claim asserted in both Precision and Grynberg complaints was that Koch violated the [FCA] by misrepresenting the amount of natural gas it was taking from federal and Indian lands and underpaying royalties." Grynberg appealed.

Relator's Action Based on Facts in a Pending Suit

The Tenth Circuit affirmed. The Tenth Circuit was faced with the issue of whether the relator's action was a related action based on facts underlying the pending Precision case. In reaching its final Section 3730(b)(5) ruling, the court of appeals examined the facts as they existed at the time the Grynberg action was filed. Most importantly, the court noted that Precision's complaint was still pending at that time.

Most significantly for the Tenth Circuit, the court highlighted that Section 3730(b)(5)'s first-to-file bar is not restricted to situations in which the pending and subsequent complaints exactly mirror each other. Indeed, the relevant section mentions "related" actions, "not identical ones." Therefore, according to the court, "so long as a subsequent complaint raises the same or a related claim based in significant measure on the core fact or general conduct relied upon in the first *qui tam* action," Section 3730(b)(5) prevents the court from having jurisdiction over the subsequent action.

With this judicial backdrop in mind, the Tenth Circuit noted that the essential claim in the Precision and Grynberg complaints centered on Koch's allegedly fraudulent measurements of natural gas productions from federal lands and subsequent underpayment of royalties.

Grynberg countered that his complaint provided additional details not outlined in Precision's earlier complaint, but the court of appeals ruled that the "additional facts relating to *how* Koch mismeasured the natural gas" did not avoid the fact that the essential claim remained the same in the two complaints. Thus, the Tenth Circuit, affirming the lower court decision, ruled that Section 3730(b)(5)'s first-to-file bar.

B. Section 3730(e)(4) Public Disclosure Bar & Original Source Exception

U.S. ex rel. Grynberg v. Praxair, Inc., 2004 WL 2580925 (10th Cir. Nov. 15, 2004)

The Tenth Circuit affirmed in part, reversed in part, and remanded a Colorado district court's dismissal of a reverse FCA action. The court of appeals, agreeing that the court lacked subject matter jurisdiction under the FCA public disclosure bar, held that the information detailed in the relator's complaint was previously disclosed to the public; the relator's complaint was "based upon" the publicly disclosed transaction; and the relator did not satisfy the "direct and independent knowledge" element of the original source exception. However, the Tenth Circuit ruled that the lower court had subject matter jurisdiction over the question of whether the relator should pay attorney fees to the prevailing defendant.

In 1997, Jack Grynberg, a petroleum engineer and co-owner of Grynberg Petroleum Company, telephoned Jim Nielson, president of Nielson & Associates, Inc., a small, privately held corporation that produces and sells oil, hydrocarbon liquids, and carbon dioxide from Colorado fields under leases with the U.S. Government. Grynberg alleged that during his phone conversation with Nielson, Jim Nielson complained that Praxair, Inc., one of Grynberg Petroleum's competitors, was taking 30% of the natural carbon dioxide and using it as part of its processing operation, without accurately paying the Government. Grynberg commenced his own investigation into the matter.

First, after speaking with Jim Williams, Nielson's chief operating officer, Grynberg filed a FOIA request, attempting to obtain a copy of the pricing agreement between Praxair and Nielson, but his request was denied. Rebuffed by the Government, Grynberg sent an employee to search for public records detailing the amount of Neilson's payments for conservation taxes on its carbon dioxide production. In addition, Grynberg referred to an industry publication for additional information.

Based on his collection of information, Grynberg determined Nielson's reported payments received for CO2 and the royalties paid to the Government. Next, he determined the market value of the carbon dioxide by interviewing operators at other plants. Further, he directed one of his associates to take photographs of the Praxair plant from the surrounding public roads, revealing the allegedly inappropriate Praxair vents. Grynberg concluded, based on his investigation, that the volumes Praxair reported to the Government were not accurate, as required by Government regulations. In turn, Grynberg argued that the royalty submissions were knowingly false, for Nielson and Praxair "intentionally violated federal regulations by failing to pay royalties on wellhead production and by reducing the tailgate price through the deduction of processing costs." Grynberg filed a *qui tam* action against Praxair and Nielson, but the Government refused to intervene.

The defendants filed separate motions for summary judgment. The district court, granting the defendants' motions, held that the relator failed to offer evidence that the defendants made "knowingly false" statements. The lower court also ruled that the complaint was barred by the FCA public disclosure bar. The court further ruled that the claim was barred, for it was based on information known to the Government prior to the 1986 amendments to the FCA. Lastly, the district court ordered the relator to pay the defendant's court costs, but rejected the defendants' Section 3730(d)(4) request for the relator to pay the defendants' attorney fees. Grynberg appealed, and Praxair cross-appealed on the issue of the defendant's attorney fees.

Public Disclosure Bar Barred Action

The Tenth Circuit affirmed the lower court's ruling that the relator failed to establish subject matter jurisdiction. The court of appeals rejected the relator's argument, in which he maintained that the lower court misapplied the FCA public disclosure bar. Specifically, Grynberg contended that the lower court erred in holding the transactions on which his claim was based were a matter of "public disclosure" at the time he filed his complaint. Secondly, Grynberg argued that the court erred when it declared he was not the "original source" of the information. Lastly, Grynberg maintained that he, according to the FCA mandates, provided the information to the Government before filing his *qui tam* action.

The court of appeals began its analysis by outlining the appropriate four-step analysis under Section 370(e)(4)(A) of the FCA: (1) whether the alleged "public disclosure contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made "public" within the meaning of the Act; (3) whether the relator's complaint is "based upon" this disclosure; and, if so, (4) whether the relator qualifies as an "original source."

Allegations Were Previously Disclosed to the Public

The Tenth Circuit agreed with the district court's ruling that the transaction underlying Grynberg's complaint, valuation at the tailgate pursuant to the terms of the defendants' pricing agreement, was publicly disclosed prior to Grynberg's action. First, according to the court, the information was disclosed when the Government responded to Grynberg's FOIA request. While the Government had declined to send a complete copy of the requested document, the Government had provided a portion of a letter from Nielson's predecessor. The lower court, after reviewing the contents of the letter, determined that the letter revealed both the "location at which the royalty would be measured (at the tailgate) and how the price would be calculated (a formula based on adjusted fair market values), thus disclosing the basis of the allegedly fraudulent transactions."

The district court also ruled that the allegations had been previously disclosed in a 1996 administrative hearing, in which the information was disclosed to a person "previously unconnected with the fraud."

Grynberg contended that the letter did not include the allegation upon which he based his complaint. He pointed out that the two-page memorandum, with the actual pricing formulas redacted, did not provide the necessary information to disclose the underlying fraud. According to Grynberg, the disclosure in the letter was not sufficient to raise a public disclosure bar to his claim, for it "contain[ed] no statement that the royalty volume was determined at the 'tailgate rather than wellhead;' no statement that 'gas valuation [was] based on the contract price rather than higher finished product sales prices;' and no statement of the great discrepancy between the contract price and the market price."

The court noted that Grynberg largely depended upon *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), to support his argument. In *Springfield Terminal*, the relators, after reviewing an arbitrator's pay vouchers, realized that, when viewed in conjunction with their involvement in the proceedings moderated by this particular arbitrator, the arbitrator had fraudulently billed the Government for services not actually rendered in their mediation proceedings. Following the relators' further investigation into the matter, including calling numbers found on defendant's telephone records, the relators were able to compile the necessary evidence to file an actionable *qui tam* suit.

Indeed, the D.C. Circuit reversed a lower court's application of the public disclosure bar, even though the court of appeals agreed that the information in the relators' complaint was publicly disclosed within the meaning of the FCA. The court of appeals reasoned that, upon further inspection, the disclosed information did not include an "allegation" or "transaction" as required under the Act. The court identified "a distinction between 'allegations or transactions' and ordinary 'information,'" reasoning the common usage of "the term 'allegation' connotes a conclusory statement implying the existence of provable supporting facts" while "[t]he term 'transaction' suggests an exchange between two parties or things that reciprocally affect or influence one another." *Id.* at 653-54. Because the public disclosure previously existed in the form of innocuous public records, the D.C. Circuit ruled that the requisite "allegations or transactions" had not been previously revealed to the public.

Springfield Distinguished

The Tenth Circuit distinguished Grynberg's action from *Springfield*, for the relevant public documents in the Grynberg matter "contained *all* the elemental aspects of the allegedly fraudulent transactions."

First, as an initial matter, the Tenth Circuit joined the chorus of jurisdictions that recognize a response to a FOIA request as being a public disclosure. *See, e.g., United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723- 24 (6th Cir. 1999), 17 TAF QR 7 (July 1999); *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519-20 (9th Cir. 1995), 3 TAF QR 4 (Oct. 1995), *vacated on other grounds*, 520 U.S. 939 (1997); *see also United States ex rel. Reagan v. East Texas Medical Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 845 n. 15 (S.D. Tex. 2003) (and cases cited therein). In turn, the court of appeals determined that the letter provided by the Government in response to Grynberg's FOIA request detailed sufficient information to meet the *Springfield* "allegations or transactions" hurdle. The court ruled that "the only reasonable conclusion [from the letter] is that the royalty will be valued at the point of sale, and such location may entail a loss of value in the base amount used for royalty calculations." The court's summary of the relator's allegations equated with this publicly disclosed information.

Complaint Was "Based Upon" Publicly Disclosed Allegations

The court of appeals quickly agreed that Grynberg's complaint was "based upon" this public disclosure. The Tenth Circuit applied a "restrictive interpretation of the threshold 'based upon' test." *See United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992). "Based upon" means "supported by," according to the court, and the threshold hurdle is "intended to be a quick trigger for the more exacting original source analysis." *Id*. Specifically, the *Precision* test is whether a "substantial identity" exists between the relator's complaint and the publicly disclosed transaction. Without elaborating further, the court of appeals agreed that Grynberg's complaint was "based upon" the publicly disclosed allegations or transactions outlined in the letter.

Relator Is Not an Original Source

Under the next step of the Section 3730(e)(4) analysis, the court of appeals determined that Grynberg was not an "original source" of the information, for he did not have "direct and independent knowledge of the information on which the allegations [were] based," as required by the FCA's original source exception, Section 3730(e)(4)(B). The court defined "direct knowledge" as being "knowledge gained by the relator's own efforts and not acquired from the labors of others." The district court had determined that Grynberg was not an original source, for "Grynberg had not identified a single element of his 'investigation' that involved anything other than second hand information, speculation, background information or collateral research."

Grynberg argued that the lower court did not properly credit his discovery of essential facts in his telephone conversation with Nielson's president. He further maintained that his knowledge was "independent" due to his "extensive investigation of various sources."

In assessing Grynberg's original source argument, the court of appeals pointed to its recent *Kennard* ruling, in which the court further defined direct and independent knowledge as being "marked by the absence of an intervening agency . . . [and] unmediated by anything but [his] own labor." *Kennard v. Comstock Res., Inc.*, 363 F.3d 1039, 1044 (10th Cir. 2004), 35 TAF QR 61 (Oct. 2004).

In *Kennard*, this same appellate court was faced with a case with almost identical facts. Indeed, the *Kennard* relators also reviewed public records to compile evidence showing that the defendant knew it was underpaying royalties to the Government. However, in that case, the Tenth Circuit ruled that the relators were an "original source" of the information, for the relators "did not rely on a Government report dealing with the allegations or transactions dealing with the allegations or transactions on which [their] *qui tam* action [was] based because no such document exist[ed]." In turn, the *Kennard* court ruled that the relators qualified under the original source exception, for the relators "ferreted our the alleged fraud."

Conversely, in the case at bar, the Tenth Circuit agreed that the original source exception did not apply to Grynberg, for, unlike the *Kennard* relators, Grynberg relied upon a "publicly disclosed Government document revealing the transaction forming the basis of his claim." In turn, the Tenth Circuit, agreeing with the lower court, ruled that the district court did not have subject matter jurisdiction.

Court Has Jurisdiction to Determine Attorney Fees Award

The Tenth Circuit also reversed the district court's decision as it pertained to awarding attorney fees, pursuant to FCA Section 3730(d)(4). According to this provision, the court may award attorney fees when "the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." Before diving into the relevant factual analysis, the court of appeals was first faced with the issue of whether the district court had authority to award the fees when the underlying FCA action had been dismissed for lack of subject matter jurisdiction.

Equating Section 3730(d)(4) with the analogous standard used for claims for attorney fees brought under 42 U.S.C. § 1988, the court selectively reached into the case law of the surrounding circuits. The Tenth Circuit, refusing to adopt contrary rules from other circuits, adopted the Seventh Circuit holding, which stated that if the claim for attorney fees is a separate "case or controversy," the court may have authority to determine the matter. *See Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923 (7th Cir. 2000). In the case at bar, the court of appeals classified this stage of the process as a "separate case or controversy," for the summary judgment motion prohibited the relator from bringing further claims on these facts. In turn, the Tenth Circuit found that the district court had subject matter jurisdiction over the issue of awarding attorney fees.

Denial of Attorney Fees Reversed and Remanded for Further Proceedings

The Tenth Circuit, in weighing the defendant's cross-appeal for attorney fees, observed that the Supreme Court instructed the federal courts to review the "entire course of the litigation" in determining whether the relator's claim was "frivolous, unreasonable, or groundless." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The court of appeals remanded the case for further proceedings, for "the timing of Grynberg's discovery . . . [was] contrary to a finding that he could reasonably believe his claim against Praxair had a scintilla of merit throughout litigation." In summary, the Tenth Circuit affirmed the dismissal of Grynberg's claim, but reversed and remanded the denial of attorney fees.

U.S. ex rel. Dingle v. BioPort Corporation, 388 F.3d 209 (6th Cir. Oct. 28, 2004)

The Sixth Circuit affirmed a Michigan district court decision to dismiss a *qui tam* claim for lack of subject matter jurisdiction due to the FCA public disclosure bar. In this case, alleging that a drug manufacturer made false statements about anthrax vaccines produced for the United States military, the court of appeals agreed that public disclosures, in combination, concerned "allegations or transactions" that formed the basis of the relators' complaint. The circuit court also refused to revisit its statutory interpretation of "based upon," which the court had previously defined to mean "supported by" for the purpose of the FCA.

In October 2000, Russell Dingle and Thomas Rempfer filed a *qui tam* action alleging that BioPort Corporation violated the FCA when it allegedly made false claims and statements to the Government when it shipped anthrax vaccines to the U.S. military that were manufactured in a manner inconsistent with the process approved by the Food and Drug Administration and inconsistent with FDA regulations. Specifically, the relators alleged that the defendant breached FDA regulations, Public Health Service regulations, and

BioPort's government contract, when BioPort changed the type of filter from an approved "stintered glass filter" to an unapproved "low-protein-binding nylon membrane filter."

Subsequently, BioPort filed a motion to dismiss the complaint, arguing the FCA public disclosure bar, 31 U.S.C. § 3730(e)(4)(a), prevented the court from having subject matter jurisdiction over the matter. In particular, the defendant pointed to relevant congressional testimony, recent newspaper articles on the subject, and various Internet websites as being public disclosure of the relators' allegations.

Per the defendant's request, the district court took judicial notice of these particular public disclosures, including congressional testimony and a congressional report entitled *The Department of Defense Anthrax Vaccine Immunization Program: Unproven Force Protection*, and a newspaper article from the Lansing State Journal entitled *Documents Hold Anthrax Secrets*. The court noted that sections of each source mentioned issues with the manufacture of the anthrax vaccine at the BioPort facility.

While the defendant argued that these sources could lead one to draw an inference that it was defrauding the Government, the relators argued that the disclosures did not outline the specific problems addressed by their complaint, namely the change in filters. The relators further maintained that the disclosures did not otherwise qualify under the "allegations or transactions" test.

Rejecting the relators' argument, the lower court ruled that a public disclosure had occurred, that the disclosure was of the allegations or transactions that formed the basis of Relators' complaint, that the relators' complaint was based on the public disclosure within the meaning of the public disclosure bar, and that the relators were not original sources of the information. *See United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968 (W.D. Mich. 2003), 31 TAF QR 18 (July 2003). In turn, the district court dismissed the relators' *qui tam* action, ruling it lacked jurisdiction over the matter. The relators appealed the decision.

Allegations Had Been Publicly Disclosed

In affirming the lower court decision, the Sixth Circuit rejected the relators' argument that the district court interpreted the public disclosure bar's "allegations or transactions" phrase too broadly. In assessing the lower court's determination, the circuit court ruled that a case only falls prey to the public disclosure bar when either a public disclosure includes an allegation of fraud, or a public disclosure describes a transaction that includes both the state of facts as they are plus the misrepresented state of facts.

Outlining the relevant case law, the court of appeals highlighted *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). In *Springfield*, the D.C. Circuit reversed a lower court decision in which the relator's allegations relied upon public records, including pay vouchers and the telephone records. The court reasoned that these public records, by themselves, only proved that the Government knew about the misrepresented state of affairs, not the actual state of affairs. Thus, the D.C. Circuit ruled that the public disclosure bar did not bar the *qui tam* action.

The Sixth Circuit also highlighted a case from its own jurisdiction, *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995), 4 TAF QR 5 (Jan. 1996). In *Fine*, the court of appeals applied the public disclosure bar in a case where a GAO report had previously revealed that Department of Energy laboratories were "taxing" nuclear waste accounts to fund R & D activities. While the relator's complaint provided even more specificity by fingering a particular laboratory, the Sixth Circuit ruled that the GAO report described the DOE lab practice in general sufficiently, putting the Government on notice as to the potential fraud at this particular facility. Thus, the court of appeals agreed that the allegations or transactions described in the GAO report formed the basis for Fine's complaint and barred his action.

In the case at bar, the relators argued that the public disclosures described above did not raise the same "allegations or transactions" as they alleged in their complaint. In support of their argument, the relators highlight that none of the sources actually reveal both elements, the misrepresented state of facts and the actual state of facts.

Combination of Sources Disclosed "Allegations or Transactions"

The Sixth Circuit, in accepting the lower court determination, rejects the relators' proposed analysis. The court, while conceding that no one source included both elements, determined that actual state of affairs *and* the misrepresented state of affairs had been publicly disclosed, albeit from a combination of sources. The court ruled that it was irrelevant that the requisite information came from different disclosures. All the court required was that the public disclosures put the government on notice to the possibility of fraud. In this case, the court ruled that this hurdle had been met, in that "these public disclosures allowed it to draw an inference of fraud."

The relators, rejecting the court's "combination of sources" analysis, proposed a hypothetical construct in which they argued that a suit that alleges "fraud on the part of a manufacturer with regard to a car's seats should not preclude a suit alleging manufacturer fraud with respect to the same car's engine." The court agreed with the relators' hypothetical, but only if both suits alleged their particular frauds, and only those facts and frauds, with particularity.

However, the court determined that there was not enough distinction in the present case. Building off the relators' hypothetical, the court reasoned that the present scenario included "multiple general allegations of fraud by public sources with respect to the car and a more specific claim of fraud by Relators with respect to the engine of the car." The court of appeals warned that an adoption of the relators' argument would permit potential relators to avoid the public disclosure bar by merely raising factual details slightly different from more general allegations already publicly disclosed. Such a system, the court envisioned, would only increase the number of "parasitic *qui tam* actions." *Springfield*, 14 F.3d at 651.

In the case at bar, the court of appeals, agreeing with the district court, ruled that the allegations and transactions revealed in the public disclosures were "sufficiently definite to give the government enough information about possible fraud, as they specifically mention the manufacturing process as well as the filters themselves." Thus, the FCA public disclosure bar removed jurisdiction from the lower court.

Court Refuses to Reconsider "Based Upon" Definition

The relators also challenged the circuit court to revisit its statutory interpretation of "based upon," which the court had previously defined as meaning "supported by" for the purpose of the FCA. *See United States ex rel. McKenzie v. BellSouth Telecomm., Inc.*, 123 F.3d 935, 937 (6th Cir. 1997), 11 TAF QR 2 (Oct. 1997).

While recognizing that the relators might be correct, this Sixth Circuit panel refused to review this area of the law. The court noted that a "panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision." *Salmi v. Sec'y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). As a result, the court refused to rule on the relators' request. Thus, the Sixth Circuit affirmed the lower court decision.

A. Subject Matter Jurisdiction

Woods v. United States, 2004 WL 2807944 (Fed. Cir. Dec. 8, 2004)

In an unpublished *per curiam* opinion, the Federal Circuit affirmed the Court of Federal Claims's decision to dismiss the appellant's *pro se* complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.

In 1996, Dr. Nira Schwartz Woods filed a *qui tam* action in a California district court, in which she alleged that her former employer TRW, Inc., and Boeing North America had committed fraud in the process of selecting contractors to develop an Exoatmospheric Kill Vehicle for the Government's National Missile Defense Program. In 2001, she filed a similar action against Raytheon Company.

While the Government initially declined to intervene in either of these actions, the Government later intervened in both cases in order to assert the state secret privilege and to dismiss the actions. The court granted the Government's motion; however, the court allowed Woods to proceed in a separate wrongful discharge claim against TRW.

Woods filed the *pro se* matter at bar in the Court of Federal Claims in response to the Government's dismissal of her *qui tam* claims. She alleged that the Government negotiated a settlement with the defendants that the Government concealed from her, depriving her of "her right to recover from the *qui tam* litigation." Woods further alleged that the Government's actions jeopardized the security of the country and that the Government "blackball[ed]" her so as to conceal illegal government actions.

Woods sought several forms of relief from the Court of Federal Claims, including "damages for the government's breach of her rights as relator in both *qui tam* actions," and "damages for being 'blackballed' and for defamation of character." She also sought damages from the Government for "endangering national security." The Government filed a motion to dismiss all claims.

The lower court granted the Government's request. The court ruled that she had not stated an actionable claim of governmental breach of an implied covenant of good faith and fair dealing. The court also ruled that it lacked subject matter jurisdiction over the appellant's other claims.

Court of Federal Claims Lacked Jurisdiction

The Federal Circuit, without much discussion, affirmed the lower court decision. First, the court reminded the appellant that the Court of Federal Claims is a court of limited jurisdiction, and "claims sounding in tort, such as defamation, are outside the jurisdiction of the court." As for Woods's "endangering national security" claim, the court of appeals determined that the alleged claim is directly tied to her dismissed *qui tam* action, and this particular lower court has no adjudicatory powers over FCA claims.

Lastly, as for her "breach of an implied covenant" argument, Woods maintained that the filing of a *qui tam* action creates an implied contract with the Government. The court of appeals, however, ruled that "[a]ny such implied contract . . . does not arise from 'a meeting of the minds,' but arises from an imputed promise to perform a legal duty." The court observed that this would be a contract implied in law, which cannot form the basis of jurisdiction in this lower court of limited jurisdiction. *See Trauma Service Group v. United States*, 104 F.3d 1321, 1434 (Fed. Cir. 1997). In turn, the Federal Circuit affirmed the lower court's grant of summary judgment.

A. Attorney-Client Privilege

***U.S. ex rel. Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d (E.D. Pa. Oct. 12, 2004)**

A Pennsylvania district court granted the plaintiffs' motion to compel testimony of the defendant pharmacy benefit manager's former employee, for the attorney-client privilege applied only to certain communications involving former employees. In turn, the court ruled that the plaintiffs could, within the bounds of the attorney-client privilege, obtain testimony from the former employee regarding post-employment communications with defendants' counsel.

In a government-intervened *qui tam* action, the relators and the Government sued the defendants under the FCA, the Public Contracts Anti-Kickback Act, and the common law. In the matter at bar, the plaintiffs filed a motion to compel additional testimony from Susan Elliott, a former defendant-Medco employee.

In an earlier deposition with the plaintiffs, Elliot testified that the defendants' attorneys did not represent her. Nonetheless, defendants' counsel asserted attorney-client privilege and instructed Elliott to not answer any questions at the deposition concerning post-employment conversations Elliott had with the defendants' attorneys.

Plaintiffs argued that Elliott made several statements at the deposition that directly contradicted her earlier statements. The plaintiffs sought additional testimony from Elliott regarding statements made by Medco's counsel to Elliott regarding the nature of the case, statements made by Elliott to Medco's counsel regarding her conversations with the Government, and conversations between Medco's counsel and Elliott while she was under oath during the deposition. The plaintiffs maintained that this additional testimony was necessary because Medco's communication had the potential to "affect, influence or change" Elliott's testimony.

The defendants opposed the motion, maintaining that the communications were protected by the attorney-client privilege, even though Elliott was a former employee at the time.

The district court observed that the Supreme Court held that a corporation's counsel's conversations with current employees could be covered by the privilege with the conversations: "(1) were made to the corporate counsel, acting as such; (2) were made at the direction of corporate supervisors for the purpose of securing legal advice from counsel; (3) concerned matters within the scope of the employees' corporate duties; and (4) the employees were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981). The district court noted that the Supreme Court did not specifically address the issue of whether communications between corporate attorneys and former employees were included within the privilege.

Recognizing that the Third Circuit had not addressed this particular issue, the district court reviewed the existing case law from the other circuits. The court cited an Eastern

District of Michigan decision that extended the privilege to former employees, but restricted it to conversations that occurred *during* the former employee's employment. *See Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303 (E.D. Mich. 2000). The present court also cited a Southern District of New York decision, which concluded that, because corporate counsel did not represent the former employee and there was no evidence that the conversations occurred for the purpose of legal advice, the record did not contain any basis for an assertion of the privilege. *See City of New York v. Coastal Oil New York, Inc.*, 2000 WL 145748 (S.D.N.Y. Feb. 8, 2000).

The district court noted that the *Coastal Oil* court explicitly followed the analysis outlined in *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999). In *Peralta*, the court rejected the corporation's assertion of the attorney-client privilege under similar circumstances, limiting the privilege to communications that either: (1) concerned knowledge obtained or conduct that occurred during the course of the former employee's employment; or (2) related to communications which were themselves privileged and which occurred during the employment relationship. *Id*. Notably, the *Peralta* court refused to apply the privilege to information given by corporate counsel to the former employee regarding testimony of other witnesses, or to discussions between the former employee and corporate counsel during breaks in a deposition. *Id*. at 41.

The present court was particularly swayed by the *Peralta* court's explanation that allowing limited discovery in situations such as the present matter was particularly necessary "given their potential to influence a witness to conform or adjust her testimony to such information, consciously or unconsciously."

After noting the factual similarities between the case at bar and *Peralta*, the court applied the underlying ruling: "[I]f the communication sought to be elicited relates to Ms. Elliott's conduct or knowledge *during* her employment with Medco Defendants, or if it concerns conversations with corporate counsel that occurred *during* her employment, the communication is privileged; if not, the attorney-client privilege does not apply." Additionally, the court determined that the alleged conversation "may have influenced her testimony." In turn, the district court granted the plaintiffs' motion to compel Elliott's testimony.

FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 9(b) Failure to Plead Fraud with Particularity

U.S. ex rel. Williams v. Martin-Baker Aircraft Company, 2004 WL 2680694 (D.C. Cir. Nov. 26, 2004)

The D.C. Circuit affirmed in part, reversed in part, and remanded a district court's dismissal of an action involving the FCA *qui tam* and retaliation provisions. The court of appeals agreed that the relator's complaint violated Rule 9(b) by failing to plead the fraud claims with particularity. Conversely, the appellate court, reversing the lower court's decision on the retaliation claims, ruled that the relator raised an actionable Section 3730(h) claim under the more liberal pleading rules that govern whistleblower allegations.

Richard Williams, former Chief Contract Negotiator for defendant Martin-Baker Aircraft Company, manufacturer of the Naval Aircrew Ejection System (NACES) seats for U.S. Navy airplanes, was in charge of assessing the reasonableness of the company's Navy contracts. As part of his job responsibilities, Williams also reviewed the cost and pricing data of Teledyne Technologies, a Martin-Baker subcontractor that manufacturered the "NACES sequencer," an electronic mechanism of the NACES seat.

Williams, familiar with the relevant federal regulations governing government contracts, discovered Martin-Baker and Teledyne had submitted false reports in violation of the Federal Acquisition Regulations (FAR), which require contractors to certify "to the best of [their] knowledge and belief, the cost or pricing data [are] accurate, complete, and current as of the date of agreement on price." *See* 48 C.F.R. § 15.403-4 (2002).

According to the relator's complaint, Martin-Baker suspended Williams after he encouraged the company to "challenge" Teledyne's pricing data for the NACES sequencer. Williams further alleged that Martin-Baker "forced" him to see "a company doctor . . . and then a specialist for a contrived mental illness," even though his personal doctor diagnosed him as being fit for work. Eventually, Martin-Baker fired Williams, according to the complaint, "in retaliation . . . on the contrived and false ground of indeterminate mental illness and mental incapacity." However, the company later "retracted its mental incapacity reason for the employment termination," writing a letter to Williams's insurance company "confirming that its mental incapacity reason for the employment termination of Williams was false."

In 1997, Williams filed a *qui tam* action against his former employer and Teledyne, alleging the defendants violated the FCA by failing to comply with certification requirements under the Truth in Negotiations Act and the accompanying FAR. Specifically, Williams alleged that, because Teledyne certified the data's accuracy to Martin-Baker, which then submitted the data to the Navy, Teledyne made "false statements and lies to the United States Government." Williams also alleged violations of the FCA retaliation provision, Section 3730(h). The Government refused to intervene in the matter.

The defendants filed motions to dismiss, which the district court granted with prejudice. The district ruled that the *qui tam* action failed to satisfy the Rule 9(b) heightened pleading requirement, for it "alleges no specifics as to the time, place, or content of any deceptive submissions actually made to the Government by either defendant, nor did [the plaintiff] identify any ostensibly culpable officials." Likewise, the court dismissed the relator's retaliation claim, finding that it failed to state a claim under Rule 12(b)(6), for "Martin-Baker fired Williams in July 1996, eighteen months before he filed suit." Williams appealed the decision.

Complaint Failed to Satisfy Rule 9(b)

The D.C. Circuit, partially affirming the lower court's decision, agreed that the FCA allegations failed Rule 9(b)'s particularity requirement. Highlighting the controlling case law, the court of appeals reminded the relator that "the pleader [must] . . . state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud." *Kowal v. MCI Communications, Corp.*, 16 F.3d 1271, 1278 (D.C. Cir. 2002)(quoting *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385). The court also reiterated that the pleader must identify the individuals allegedly involved in the fraud. *See Joseph*, 642 F.2d at 1385-86.

In the case at bar, the D.C. Circuit agreed that the relator's complaint failed to meet the Rule 9(b) particularity requirement. First, the court stated that, instead of detailing the time of the allegedly fraudulent actions, the complaint merely alleged that the time period was "at least through 2002," failing to include a start date. The court did recognize that the relator supplied a start date in a later brief, but the court deemed this information prohibitively tardy. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624-25 (D.C. Cir. 1997) ("In determining whether a complaint fails to state a claim, we may consider only the facts alleged in the complaint, any documents attached to or incorporated in the complaint and matters of which we may take judicial notice.").

Second, the court of appeals ruled that the complaint failed to specifically identify the parties involved in the fraudulent activity, instead grouping the parties under a nonspecific "management" heading, thus failing to detail the fraudulent actions of the various "management" individuals. The court found this to be particularly unsettling given that the relator had worked with these individuals for five years.

Third, the D.C. Circuit was further confused by the relator's explanation of the underlying fraud. The court pointed out that the complaint "seems to allege that Martin-Baker's certificates of cost or pricing data were false, for the company failed to use historical actual costs during negotiations with the Government. The court found no case or regulation "requiring the use of such data *during negotiations*." The court's interpretation was that the applicable regulations merely require that contracting parties to "identify and make the information available to the government."

The court, highlighting another potential inconsistency in the relator's case, noted that the relator argued that "Teledyne engaged in misrepresentation by failing to update the costs it did disclose," but the relator informed the district court that Teledyne did not misrepresent the historical actual cost of the sequencer.

The relator directed the court's attention to a district court case from another circuit, *United States ex rel. Harris v. Bernad*, 275 F. Supp. 2d 1, 8-9 (D.D.C. 2003), 32 TAF

QR 33 (Oct. 2003), a decision that relaxed the particularity requirements for *qui tam* plaintiffs. Not explicitly adopting the *Harris* standard, the court nonetheless ruled that the complaint would have failed even under this less stringent standard. In *Harris*, the complaint met the Rule 9(b) hurdle, even though the complaint merely alleged a "span of time," not exact dates, and used a statistical model to describe the fraud. Conversely, the D.C. Circuit noted that Williams failed to allege a start date, supplied a "laundry list of individuals without specifying their relation to the fraudulent scheme," and presented no facts that "exemplif[ied] the purportedly fraudulent scheme."

Recognizing the formidable Rule 9(b) obstacle in his case, Williams argued that his complaint lacked specificity because the defendants possessed the critical documents. The circuit court countered that the relators could have addressed this problem in their complaint by alleging a lack of access. *See Kowal*, 16 F.3d at 1279 n. 3. However, the court of appeals observed that the relator failed to raise this issue in his complaint or his prior district court hearing. Again, the D.C. Circuit rejected the relator's argument as being tardy. *See United States v. Hylton*, 294 F.3d 130, 135 (D.C. Cir. 2002) (argument not made in the "lower tribunal is deemed forfeited"). In fact, Williams, instead of raising the "lack of access to key documents" issue at the district court level, stressed that he "could replead the complaint with particularity if given leave to amend." In turn, the court of appeals, affirming the district court's decision, ruled that the relator's complaint failed to satisfy Rule 9(b).

Relator Engaged in "Protected Activity"

On the other hand, the D.C. Circuit reversed the district court's decision to dismiss the relator's Section 3730(h) retaliation claim. The lower court had ruled that the relator could not have been engaged in "protected activity," for he was fired eighteen months before he filed his complaint. The court of appeals rejected this interpretation.

The court of appeals highlighted its *Yesudian* opinion, in which the D.C. Circuit reversed the lower court's decision for "suggesting that [the relator's] activity was unprotected because he had not initiated a private suit by the time of his termination." *Yesudian v. Howard University*, 153 F.3d 731, 741 (D.C. Cir. 1998), 15 TAF QR 21 (Oct. 1998). The *Yesudian* opinion stressed that it was Congress's intention "to protect employees while they are collecting information about a possible fraud." *Id.* at 740. Thus, the court of appeals stressed, "it is sufficient that a plaintiff be investigating matters that reasonably could lead to a viable False Claims Act case." *Id.*

Martin-Baker argued that the relator was not engaged in "protected activity," under Section 3730(h), for "Williams [had] not alleged any actions on his part beyond his ordinary job requirements in reporting or investigating potential government fraud and noncompliance with federal contract regulations." In turn, the defendant could not have known that the relator was engaged in "protected activity."

The court of appeals reiterated the rule of law from *Yesudian*, which required proof that the relator was engaged in "protected activity" and that the employer had notice of this activity. The D.C. Circuit determined that the defendant's argument failed to address the first prong.

The court of appeals reiterated its *Yesudian* standard for notice: "Unless the employer is aware that the employee is investigating fraud, . . . the employer could not possess the retaliatory intent necessary to establish a violation of § 3730(h)." *Id.* at 744 (internal quotation marks and alterations omitted). Furthermore, the court observed that if the relators had argued that their normal job responsibilities amount to protected activity, the relators must "overcome the presumption that they are merely acting in accordance with their employment obligations" to put their employers on notice. *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 568 (6th Cir. 2003), 32 TAF QR 38 (Oct. 2003).

Applying the flexible *Yesudian* standard to the case at bar, the court of appeals agreed that the relator's actions could not have placed his employer on notice, for Williams's actions fell within his normal responsibilities as Chief Contract Negotiator. Indeed, even the relator acknowledged that he "did his job" by informing his employer about the subcontractor's faulty data.

However, the circuit court stressed that some of the relator's actions fell outside of his job responsibilities, so the defendant should have been put on notice. Specifically, the court ruled that the relator's advice "to continue to challenge" Teledyne's cost or pricing data went beyond his responsibilities to his employer, for the relator went outside the company and alerted the Government. Furthermore, while *Yesudian* did not require the relator to "announce [that] he ha[d] gone outside the institution," the relator did precisely that. In turn, the D.C. Circuit ruled that Martin-Baker's subsequent suspension of the relator following this disclosure "could lead a reasonable factfinder to conclude that management considered Williams's conversation with the [Government] well beyond the scope of his responsibilities."

Defendant Had Notice of Relator's Protected Activity

Martin-Baker, pointing to a Fifth Circuit decision, argued that the relator failed to meet the *Yesudian*'s notice requirement, for the complaint never characterizes his concerns as involving "illegal, unlawful, or false-claims investigations." *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994). D.C. Circuit, rejecting the defendant's argument, stressed that the controlling case law does not require "an employee whose job responsibilities coincide with statutorily protected activity [to] incant talismanic words to satisfy the notice element." The circuit court highlighted that the text of Section 3730(h) does not require the use of such words. Instead, adopting the Fourth Circuit interpretation of the Section, "[N]otice can be accomplished by expressly stating an intention to bring a *qui tam* suit, but it may also be accomplished by any action which a factfinder reasonably could conclude would put the employer on notice that litigation is a reasonable possibility." *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 868 (4th Cir. 1999), 16 TAF QR 20 (Apr. 1999).

Analyzing the case at bar, the D.C. Circuit determined that a "reasonable factfinder could conclude that once Williams informed Martin-Baker that he had told the Navy to continue challenging Teledyne's cost or pricing data, the company was 'on notice that litigation [was] a reasonable possibility.'"

Thus, the D.C. Circuit affirmed the district court's dismissal of the FCA allegations, but the court reversed the dismissal of the Section 3730(h) claim, ruling that the relator had sufficiently alleged a violation of the whistleblower provision.

U.S. ex rel. Bowan v. Education America, Inc., 2004 WL 2712494 (5th Cir. Nov. 30, 2004)

In an unpublished opinion, the Fifth Circuit affirmed a district court decision to dismiss the relator's *qui tam* action. The court determined that because the relator did not raise allegations that the defendants made certifications of compliance with particular regulations on which payment was conditioned, false certifications of compliance with applicable regulations and statutes governing participation in federal student financial aid programs under Title IV of the Higher Education Act did not constitute a basis for imposing liability on the defendants under the FCA.

U.S. ex rel. Graves v. ITT Educational Services, Inc., 2004 WL 2376217 (5th Cir. Oct 20, 2004)

In an unpublished *per curiam* opinion, the Fifth Circuit affirmed a Texas district court's decision to dismiss the relators' *qui tam* action. *See United States ex rel. Graves v. ITT Educational Services, Inc.,* 284 F.Supp.2d 487 (S.D. Tex. 2003). The relators alleged that ITT Educational Services and its auditor Pricewaterhouse Coopers violated the FCA. ITT participated in federal student aid programs under the Higher Education Act (HEA), which allowed ITT students to receive federally insured educational loans and grants. The relators argued that ITT falsely certified that ITT would comply with the HEA. Furthermore, the relators maintained that Pricewaterhouse Coopers made false statements in their audits of ITT by certifying that ITT's financial statements fairly represented its financial condition.

Pricewaterhouse Coopers moved to dismiss under Rules 12(b)(6) and 9(b), while ITT moved to dismiss the complaint under Rule 12(b)(b). The district court granted the defendants' motions. The Fifth Circuit, finding no reversible error, affirmed the lower court's ruling. The court of appeals largely adopted the district court's reasoning; however, the Fifth Circuit stressed that the "implied certification theory" was still not an accepted rule of law in this circuit.

U.S. ex rel. Gay v. Lincoln Technical Institute, Inc., 2004 WL 2341839 (5th Cir. Oct. 15, 2004)

In an unpublished *per curiam* opinion with facts similar to the above opinions, the Fifth Circuit again affirmed a Texas district court's decision to dismiss the relators' *qui tam* action, agreeing that the relators failed to raise an actionable FCA claim. Lincoln Technical Institute, Inc. participated in federal student financial aid programs under the Higher Education Act that, among other things, prohibits participating educational institutions from paying commissions to recruitment staff based on success in securing enrollments or financial aid to students. The relators allege that the defendant falsely certified that it had complied with this particular regulation.

The district court dismissed the relators' complaint under Rule 12(b)(6). *See United States ex rel. Gay v. Lincoln Technical Institute, Inc.*, 2003 WL 22474586 (N.D. Tex. Sept. 3, 2003). Adopting the reasoning espoused by the lower court, the court of appeals affirmed the ruling.

U.S. ex rel. Giles v. Sardie, 2004 WL 2903672 (9th Cir. Dec. 14, 2004)

In an unpublished opinion, the Ninth Circuit affirmed a California district court's summary judgment for defendants in a *qui tam* action alleging the City of Los Angeles and several private contractors submitted false claims to FEMA. Without elaborating further, the court of appeals, in affirming the lower court decision, ruled the district court did not abuse its broad discretion, when it ruled the relator had failed to raise a genuine issue of material fact as to whether FCA violations had occurred.

U.S. ex rel. Werner v. Fuentez Systems Concepts, Inc., 2004 WL 2830713 (4th Cir. Dec. 10, 2004)

In an unpublished *per curiam* decision, the Fourth Circuit affirmed a West Virginia district court's grant of summary judgment in favor of the defendants in a *qui tam* action, which alleged the defendants filed claims for payment that were not permitted under federal regulations. The court of appeals agreed that the "government knowledge" defense defeated the relator's action, for the Government knew and approved of the particulars of the claims before the claims were presented. The court further explained that the "government knowledge" defense effectively negated the fraud or falsity required by the FCA, for the defendant "cannot be said to have knowingly presented a fraudulent or false claim."

Interventions and Suits Filed/Unsealed

OCTOBER 1–DECEMBER 31, 2004

***All-Med Billing Corp. v. Palmetto Government Benefits Administrators*, (S.D. Fla.)**

In November 2004, All-Med Billing Corporation filed a third-party complaint against Medicare carrier Palmetto Government Benefits Administrators, suing the defendant for failing to detect fraud that caused All-Med to be targeted by a $122 million False Claims Act lawsuit.

***Brown v. General Electric*, (D. Ky)**

In November 2004, a Kentucky district court unsealed the complaint of Terri Brown, a former quality control engineer for General Electric. In her 2002 complaint, Brown alleged that the defendant knowingly shipped defective jet-engine blades to the U.S. military. Brown, seeking $64.4 million in damages, also claimed that she was retaliated against for speaking out about the fraud. The Government has declined to intervene in the case. Assistant U.S. Attorney John Kuhn Jr. handled the matter for the Government.

***Pei Tang v. CorSolutions Medical, Inc.*, (D.D.C.)**

In January 2005, Andrew Grosso & Associates, Inc. announced the filing of a lawsuit against CorSolutions alleging violations of the anti-retaliation provisions of the False Claims Act. Ms. Tang, formerly the Vice-President of Informatics and Outcomes for CorSolutions, received retaliatory treatment from the company's senior management after she submitted several confidential reports disclosing fraud and data manipulation and suggestions for internal solutions that would bring the company into compliance with the law.

Judgments & Settlements

OCTOBER 1–DECEMBER 31, 2004

Adventist Health Systems:
***U.S. ex rel. Mulligan v. Fla. Hosp. Waterman, Inc. and Fla. Reg. Emer. Med. Services*, (M.D. Fla.)**
***U.S. ex rel. Wightman v. Laidlaw, Inc.*, (W.D. Tex.)**

In October 2004, the DOJ announced that Adventist Health System Sunbelt Healthcare Corporation, three affiliated hospitals, and a management company that administered their ambulance operations had agreed to pay **$20.3 million** to settle allegations of overcharging Medicare. The Government alleged the company and hospitals created false physician certifications regarding the medical necessity of ambulance transports operated by the hospitals and then billed them to Medicare. Kevin Mulligan and Adam Wightman, former employees, filed their respective *qui tam* lawsuits in 2000 and 2001. Relator Mulligan's share is approximately $1.9 million. Relator Wightman's share was approximately $500,000. HHS OIG investigated the matter.

***U.S. ex rel. Segel v. Photon Research Associates Inc. et al.*, (S.D. Cal.)**

In October 2004, the DOJ announced that Photon Research Associates, Inc. and Dr. James A. Myer had agreed to pay **$1.9 million** to settle allegations of fraudulent labor negotiations with the Government. The Government alleged that Photon negotiated labor salary costs with the government that were to include payraises for employees, then failed to pass the increases on to those employees. Kenneth Segel, a former employee, filed this *qui tam* lawsuit in 2003. The relator's share was 19%, or approximately $361,000. Eric Havian of Phillips & Cohen (San Francisco) represented the relator. DCIS and the Defense Contract Audit Agency investigated the matter. Assistant U.S. Attorney Kevin Seely represented the Government.

***U.S. v. Temple University Physicians*, (E.D. Pa.)**

In October 2004, the DOJ announced that Temple University Physicians, the organization that includes doctors who practice medicine and teach at the North Philadelphia school, agreed to pay **$1.9 million** to settle allegations of improperly billing Medicare. The government alleged that Temple University Physicians submitted claims for care performed by doctors but lacked documentation that those services were actually performed by doctors. The government also alleged that Temple upcoded claims to charge more for services provided. The settlement was the result of an investigation and audit of the Temple doctors' organization's Medicare billing in 1996. HHS OIG investigated the matter. Assistant U.S. Attorneys Virginia Gibson and Margaret Hutchinson represented the government.

***U.S. ex rel. Harris v. Diebold Inc.*, (N.D. Cal.)**

In November 2004, the DOJ announced that Diebold, Inc. had agreed to pay **$2.6 million** to settle allegations of making false claims about the security of its electronic voting machines. The Government alleged that Diebold falsely claimed its voting machines and tabulation systems were secure and certified. James March and Bev Harris, e-voting critics, filed this *qui tam* suit in 2003. The relators' share has not yet been determined. The Law Offices of Lowell Finley (Berkeley) represented the relators.

U.S. v. Nursing Home Care Management **(E.D. Pa.)**

In November 2004, the DOJ announced that Nursing Home Care Management Inc., doing business as Prestige Home Care Agency, had agreed to pay **$1.5 million** to settle allegations of Medicare fraud. The Government alleged that Prestige billed Medicare for services by home health workers who lacked the 75 hours of training necessary to qualify for Medicare reimbursements. As part of the settlement, Nursing Home Care Management has entered into a Corporate Integrity Agreement with HHS which requires the company to establish a compliance and training program that will be binding on its principals, officers and directors, employees, and business practices. HHS OIG investigated the matter. Assistant U.S. Attorney Margaret Hutchinson represented the Government.

U.S. v. Perini Corp., **(D. Mass)**

In November 2004, the DOJ announced that the construction contractor Perini Corporation had agreed to pay **$998,500** to settle allegations of submitting inflated claims and violating of the Contract Disputes Act. The Government alleged that Perini inflated its claim for compensation by $2 million on the construction of a new U.S. embassy building in Caracas, Venezuela. The State Department's Office of Legal Advice for Buildings and Acquisitions investigated and litigated the matter for the Government. The settlement resolves the administrative claims as well as the fraud allegations.

U.S. v. Dr. Holiner, **(N.D. Tex.)**

In November 2004, the DOJ announced that Joel Holiner, M.D. and Holiner Psychiatric Group, P.A. agreed to pay **$250,000** to settle allegations of Medicare fraud. The Government alleged that Dr. Holiner falsely represented to the government the time he spent treating patients along with the complexity of those patients' psychiatric conditions in order to receive greater reimbursements from Medicare. DCIS and HHS OIG investigated the matter. Assistant U.S. Attorneys Sean McKenna and Donna Webb represented the government. As a condition of the settlement, Dr. Holiner has entered into a five-year integrity agreement with the Government.

U.S. v. Dr. Kiser, **(D. Or.)**

In November 2004, the DOJ announced that G. Craig Kiser, M.D. agreed to pay **$213,198** to settle allegations of Medicare fraud. The Government alleged that Dr. Kiser billed the Medicare and Medicaid programs for Lupron samples received for free from TAP Pharmaceutical manufacturers. HHS OIG investigated the matter. Assistant U.S. Attorneys Robert Nesler and Ellyn Sternfield represented the Government. As part of the settlement Dr. Kaiser entered into a corporate integrity agreement with the Government that will allow him to continue to participate as a Medicare and Medicaid provider as long as he follows the affirmative terms of the settlement.

HealthSouth Corp., (W.D. Tex.): *U.S. ex rel. Devage v. HealthSouth Corp.*, *U.S. ex rel. Manning v. HealthSouth Corp.*,

In December 2004, the DOJ announced that HealthSouth Corp. had agreed to pay **$325 million** to settle allegations of Medicare fraud involving outpatient physical therapy services. The Government alleged that HealthSouth, the country's largest provider of outpatient surgery, submitted claims to Medicare, TRICARE, and the Department of Labor Federal Employees' Compensation Act program for outpatient physical therapy services that lacked a properly certified plan of care, were rendered by persons other than licensed physical therapists, or were billed as one-on-one services when the services were not provided. HealthSouth agreed to pay $169 million for seeking reimbursement on such claims. The Government also alleged that HealthSouth submitted Medicare reimbursement claims for unallowable health costs like entertainment and travel costs for the HealthSouth administrators' annual meeting at Disney World. HealthSouth agreed to pay $89 million for seeking reimbursement on such claims. The Government also alleged that HealthSouth submitted reimbursement claims for falsified hospital cost reports and false inpatient discharges. HealthSouth agreed to pay $66 million for seeking reimbursement on such claims.

James Devage, a patient at a HealthSouth facility in San Antonio and DeWayne Manning, a former HealthSouth technician filed separate *qui tam* lawsuits in 2002. Relator Devage's share will be approximately $8.1 million. Relator Manning's share will be approximately $4 million. John Clark of Goode Casseb Jones Riklin Choate & Watson (San Antonio) represented relator Devage. Robert Roden of Shelby & Cartee LLC (Birmingham) represented relator Manning. HHS OIG, the DOJ Civil division, and the DOJ Commercial Litigation division investigated the matter. Assistant U.S. Attorneys Glenn McTaggart (San Antonio) and Harold Brown Jr. (San Antonio) represented the Government. As part of the settlement, HealthSouth has entered into a five-year Corporate Integrity Agreement with HHS.

[Editor's note: Under a separate administrative agreement executed the same day as the settlement, the Centers for Medicare & Medicaid Services agreed to withdraw all pending HealthSouth administrative appeals and related federal court cases, and agreed to the administrative closure of all HealthSouth Medicare cost reports through Dec. 31, 2003.]

U.S. ex rel. Bander v. Gambro Healthcare U.S., Inc., (E.D. Mo.)

In December 2004, the DOJ announced that Gambro Healthcare U.S., Inc. had agreed to pay **$310 million** to settle allegations of Medicare fraud in its kidney dialysis treatment programs. The Government alleged that Gambro provided home dialysis patients equipment and supplies through a "shell" durable medical equipment company, Gambro Supply, in violation of Medicare regulations to inflate reimbursement payments. The Government also alleged that Gambro engaged in upcoding of diagnostic codes on submitted claims. The Government also alleged that Gambro hired and compensated physicians based on anticipated patient referrals in violation of the Medicare Anti-Kickback Act. Dr. Stephen Bander, Gambro's former Chief Medical Officer, filed this suit in 2001. The relator's share has not yet been determined. John Gianoulakis of Kohn, Shands, Elbert, Gianoulakis & Giljum, LLP (St. Louis) represented the relator. The FBI and HHS OIG investigated the matter. Assistant U.S. Attorneys Claire Schenck and Dorotyh McMurtry represented the Government. As part of the settlement, Gambro agreed to allocate an additional $15 million to resolve potential liability for the conduct resolved under the federal agreement pursuant to a preliminary understanding reached with representatives of various state Medicaid programs. As part of the settlement, Gambro has entered into a Corporate Integrity agreement to ensure ongoing compliance.

[Editor's note: In addition to Gambro Healthcare's civil liabilities stemming from this case, Gambro Supply Corporation, a wholly owned shell subsidiary of Gambro Healthcare, admitted to the execution of a healthcare fraud scheme and agreed to plead guilty to criminal felony charges, pay a $25 million fine and be permanently excluded from the Medicare program.]

U.S. ex rel. Schultz v. Liberty Home Pharmaceutical Corp., (D. Mass)
U.S. ex rel. Ben-Barrack v. Polymedica Corp., (S.D. Fla)

In December 2004, the DOJ announced that medical supply company Polymedica Corp. had agreed to pay **$35 million** to settle allegations of Medicare fraud. The Government alleged that Polymedica—through its subsidiaries Liberty Medical Supply Inc. and Liberty Home Pharmacy Corporation—submitted reimbursement claims for diabetic and nebulizer products without first obtaining a signed physician's order. The Government also alleged that Polymedica submitted reimbursement claims without maintaining records showing the necessity of treatment in excess of agency prescribed guidelines. Claire Schultz and Donna Ben-Barrack, former employees, brought their respective *qui tam* lawsuits in 2001. The relators' share has yet to be determined. The FBI and HHS OIG investigated the matter. As part of the settlement, Polymedica has entered into a Corporate Integrity Agreement with the United States and the Securities and Exchange Commission.

[Editor's note: As part of the settlement, U.S. Attorney Daniel Jiménez agreed not to pursue criminal charges in this matter.]

United Healthcare Insurance

In December 2004, the DOJ announced that United HealthCare Insurance Co., a unit of United Health Group Inc. had agreed to pay **$3.5 million** to settle allegations of Medicare fraud. The Government alleged that beginning in 1996 and continuing through 2000, United Healthcare's telephone response unit knowingly mishandled phone inquiries received from Medicare beneficiaries and providers and then falsely reported its performance information to the Centers for Medicare and Medicaid Services concerning the company's handling of those calls. This *qui tam* suit was filed in 2001. The relator's share was 18%, or approximately $647,500. HHS OIG investigated the matter.

U.S. v. Loma Linda University Faculty Practice Plan, (C.D. Cal.)

In December 2004, the DOJ announced that Loma Linda University Faculty Practice Plan had agreed to pay **$2.2 million** to resolve allegations of Medicare fraud. The Government alleged that the faculty practice corporation submitted claims for services directly performed by faculty members, when in fact residents or interns had been personally involved in performing the services being billed to Medicare. The Government also alleged that the faculty practice corporation upcoded claims to charge for greater levels of service than provided. HHS OIG investigated the matter. Assistant U.S. Attorney Frank Kortum represented the Government.

U.S. ex rel. San Francisco Unified School District v. Inter-Tel Technologies Inc., (N.D. Cal.)

In January 2005, it was reported that Inter-Tel Technologies Inc., an Arizona based telecommunications provider, agreed to pay **$7 million** to resolve allegations of false claims, bribery, and bid rigging in connection with the federal E-rate program. The government alleged that Inter-Tel set up a kickback scheme to ensure only certain companies obtained San Francisco Unified School District (SFUSD) contracts, with services and hardware provided at inflated prices. SFUSD filed this *qui tam* action in 2003. The relator's share will be approximately 21% or $1.47 million. The San Francisco City Attorney's office investigated the matter.

[Editor's note: In a separate but related action, Inter-Tel agreed to plead guilty to charges of mail fraud and conspiracy to suppress and eliminate competition in violation of the Sherman Antitrust Act. As part of the plea, Inter-Tel agreed to pay a criminal fine of $1.7 million.]

U.S. ex rel. Reilly v. Catskill Regional Medical Center f/k/a Community General Hospital of Sullivan County, (S.D.N.Y.)

In January 2005, it was reported that Catskill Regional Medical Center had agreed to pay **$1.5 million** to settle allegations of Medicare fraud. The Government alleged that Catskill claimed reimbursements for treating thousands of illegally referred alcohol and substance abuse inpatients. John Reilly filed this *qui tam* action in 2000. The relator's share was approximately 20% or $300,000. Timothy McInnis (New York) and David Koenigsberg of Menz Bonner & Komar LLP (New York) represented the relator. HHS OIG and CMMS investigated the matter. Assistant U.S. Attorney Ramon Reyes Jr. represented the Government.

U.S. v. Pediatric & Adolescent Healthcare, P.C., (D. Conn.)

In January 2005, the DOJ announced that Pediatric & Adolescent Healthcare, P.C. (PAH) and its former owner William Silberberg had agreed to pay **$242,370** to resolve allegations of Medicaid fraud. The Government alleged that from 1997 to 2003, PAH billed Medicaid and other insurance plans for vaccine doses received for free from the Vaccines For Children (VFC) program, a joint federal and state program that provides childhood immunizations. In addition to the payment, PAH has agreed to reimburse all the private insurance companies billed by the practice for free vaccines, in the amount of approximately $112,000 and has entered into a Corporate Integrity Agreement with HHS OIG. The FBI, HHS OIG, and the Health Care Fraud Task Force investigated the matter. Assistant U.S. Attorney Richard Molot represented the Government.

U.S. v. Torrington-Winsted Pediatric Associates, P.C., (D. Conn.)

In January 2005, the DOJ announced that Torrington-Winsted Pediatric Associates, P.C. had agreed to pay **$201,687** to resolve allegations of Medicaid fraud. The Government alleged that from 1997 to 2004, Torrington-Winsted billed Medicaid and other insurance plans for vaccine doses received for free from the Vaccines For Children (VFC) program, a joint federal and state program that provides childhood immunizations. In addition to the payment, Torrington-Winsted has agreed to reimburse all the private insurance companies billed by the practice for free vaccines, in the amount of approximately $300,000 and has entered into a Corporate Integrity Agreement with HHS OIG. The FBI, HHS OIG, and the Health Care Fraud Task Force investigated the matter. Assistant U.S. Attorney Richard Molot represented the Government.

U.S. v. Dr. Bregoli, (D. Mass)

In January 2005, the DOJ announced that Dr. Arthur Bregoli, M.D. had agreed to pay **$100,000** to resolve allegations of Medicare fraud. The Government alleged that from 1995 to 1999 Dr. Bregoli overcharged Medicare patients for nursing facility care in various Massachusetts nursing homes. In addition to the Settlement, Dr. Bregoli has entered into a compliance agreement with HHS. The FBI and HHS OIG investigated the matter. Assistant U.S. Attorney Jeremy Sternberg represented the Government.

U.S. v. Westinghouse Savannah River Co., (D. S.C.)

In January 2005, it was reported that Westinghouse Savannah River Co. had agreed to pay **$2.6 million** to settle allegations of travel fraud. The government alleged that from 1994 to 2004, the company filed travel reimbursement forms for employees who were not traveling. Westinghouse also improperly sought government funds for moving expenses, temporary lodging and meals for employees transferred to Washington, DC, Los Alamos, NM, and Southern California. Bob Daley represented the Government in the matter.

[Editor's note: In an unrelated settlement on the same day Westinghouse agreed to pay $1.8 million to end an investigation that workers at its Environmental Technology section transferred money from one government project to finance an under-funded, unrelated project.]

Legislative Update

OCTOBER 1–DECEMBER 31, 2004

CMS FINALIZES RECORDKEEPING RULE

On November 26, in response to pressure from Taxpayers Against Fraud, Senator Grassley, and federal and state law enforcement, CMS published a rule finalizing a ten-year record-keeping requirement for manufacturers participating in the Medicaid drug rebate program. *See* 69 Fed. Reg. 68815-01, 2004 WL 2680624 (F.R.). Effective January 1, 2005, manufacturers must retain all drug pricing records and related documents for ten years from the date the manufacturer reports the data to CMS. The rule also finalizes a requirement that manufacturers must retain records beyond the ten-year period if the records are known to the manufacturer to be the subject of an audit or a government investigation.

For the past year, the rebate program has been operating under an interim ten-year record-keeping rule, but it was due to expire on December 31, 2004. *See* 69 Fed. Reg. 508514.

The ten-year rule replaces a proposed August 29, 2003, regulation containing a grossly inadequate three-year record-keeping requirement. *See* 68 Fed. Reg. 51912. In comments submitted to CMS on October 27, 2003, TAF joined Senator Grassley, Chairman of the Senate Finance Committee (which has jurisdiction over the Medicaid rebate program), the National Association of Attorneys General, and others in strongly objecting to the three-year rule for allowing the premature destruction of records needed as evidence in False Claims Act cases involving fraud against the program. We urged CMS to promulgate a record-keeping requirement of ten years in keeping with the substantive standard in the FCA.

TAF's formal comments and informal lobbying efforts are generally viewed as significant in getting the ten-year rule established. To read TAF's comments, go to:

http://www.taf.org/comments.htm

To view the final rule, go to:

http://www.taf.org/rebaterecordsrule.htm

In Their Own Words

"WHISTLEBLOWING FROM THE OUTSIDE"

Joseph Gerstein, MD, FACP

Although I may fit the dictionary definition of a whistle-blower ("A person who informs on another or makes public disclosure of corruption or wrongdoing" [Random House Dictionary]), unlike most individuals who are relators in *qui tam* suits I was not an "insider."

Despite this unusual status, some elements of my experience may illuminate the *qui tam* bar to some of the hazards and perceptions of relators or those considering becoming relators.

Many who will be reading this will be familiar with "my" case: *U.S. vs. TAP Pharmaceutical, Inc.* I think it is fair to describe this case as a blockbuster. The company pled guilty to fraud against the U.S. and paid almost $900 million in penalties and restitution. The judge insisted on a five-year intensely-monitored compliance program and warned the company not to attempt to exculpate itself in any public forum or in the media. Recently, a subsidiary suit by Prescription Action Litigation extracted $150 million in settlement of related individual and medical insurer claims. Even in the *qui tam* universe, this is a lot of loot. I should point out that in a derivative criminal trial, most of the executives involved in the schemes exposed by the *qui tam* suit were exonerated. The fate of one who pled guilty before the trial began is still undetermined.

Having become fairly notorious in the Boston area for my zeal in exposing the cant and chicanery of many drug manufacturers' in promoting their products, I was rather astonished to receive a call from a representative of TAP Pharmaceutical offering an "unrestricted medical education grant" of $20,000 to my employer Tufts Health Plan if it would drop a planned elimination of Lupron from its list of reimbursed drugs. Lupron, in our opinion (and subsequently in the opinion of the Agency for Health Care Policy & Research) is therapeutically equivalent to Zoladex for the treatment of metastatic prostate cancer, but it was about $1200 more expensive per year of treatment. Tufts Health Plan had convened a Liaison Committee of eight urologists to ascertain this fact and develop an alliance with urologists, which required almost three years of meetings. I refused TAP's offer and suggested a significant discount on Lupron would likely encourage us to change course. This was, of course, not forthcoming, since it would have impinged on the so-called Average Wholesale Price (A.W.P.) of Lupron, the vaguely-defined and nebulously-derived number reported to Medicare and the basis of payment to urologists prescribing (and selling) the drug. (A.W.P. is known in the trade as "Ain't What's Paid.")

I was scandalized by this offer and considered it a "kickback" in lieu of an actual discount. I immediately informed six senior executives at Tufts Health Plan. Then I demonstrated I was an ingénue in *qui tam* land by attempting energetically to get a report on this proffered transaction on a television expose' show and/or into a major newspaper. Luckily, I failed in both these endeavors, which likely would have resulted anyway in a "he says, she says" type of report or worse, resulted in an expensive legal imbroglio for me as a deep-pockets drug company tried to discredit me.

Again, demonstrating my naiveté, I arranged to meet with a U.S Attorney to ventilate what had happened. After 2 postponements of such a meeting, I wrote a letter the the U.S. Attorney, documenting my perceptions of the episode. Fortune again smiled on me when the telephone book produced an old address (I knew the office was now in a new Federal Building on the waterfront) and while I delayed a day in order to get the new address a large *qui tam* settlement was reported in the news. I then made contact with the law firm mentioned in that case (Phillips & Cohen) and was finally brought into contact with the criminal and civil U.S. Attorneys in the Health Care Fraud section in Boston.

I was shocked when, after having heard my story, Michael Loucks leaned forward over his desk, looked me in the eye and said, "Will you wear a wire?" I had not considered this eventuality. Frankly, I was scared. People get killed for wearing wires. I often worked very late and not infrequently, my car was the only one in the parking lot when I left work. I took about a week to discuss the issue with my family and finally decided I would do it.

Whether the social obligations of one who considered himself a crusader against drug company scams alone would have been sufficient for me to have reached this decision or whether the potential monetary inducements were essential, I'll never know. I had already been threatened by another drug company via a prestigious Boston law firm because of explicitly correct statements I had made to a reporter (later corroborated by a F.D.A. letter published on its website) and did not relish another such unpalatable (and expensive) encounter.

As soon as I decided to go forward with the suit, I went to the President of my company, a 501c4 not-for-profit entity, and revealed what I was up to. I offered bulk of any winnings to the organization if it decided to participate with me as a relator. I did this for four reasons, in order of importance. First, in equity, Tufts Health Plan had spent probably hundreds of thousands of dollars extra paying urologists for Lupron over the years because of the types of business practices demonstrated in the suit. Second, partnering with a large organization with a significant legal staff seemed to offer some protection against a potential ricochet legal attack on me. Third, with the cooperation of Tufts Health Plan, I could use my official office for transactions rather than meeting in a restaurant or similar neutral location, which might raise suspicions and technical problems with recordings. Fourth, if successful, the majority of any reward would go to a charitable organization, thereby blunting potential criticism of myself as a money-grubbing parasite.

Tufts Health Plan had to consider itself potential negative implications of proceeding in terms of possible retribution by drug companies in terms of rebates, hostile response from urologists and the imponderables that inevitably accrue to these sorts of actions. The Senior Management and The Board of the organization had to be involved in such a significant decision but were not informed of the specifics. Both eventually concurred.

Once we became aware of the impending settlement, the Tufts Health Plan public relations people did an in-depth assessment of the Possible public relations impact of same. We were anxious not to have the public perception orient negatively to the venality or the "snitch" issue rather than the crusader-in-the-public-interest issue. Perhaps my plan to donate a significant proportion of my reward (ultimately about half) to initiate a foundation dedicated to improving scientific literacy in Roxbury, MA, where I was born and brought up, now a Black/Hispanic ghetto area, had some beneficial effect on dissipation of potential negativity about our motives. Tufts Health Plan indicated that its share of the reward would be used for charitable contributions to deserving community organizations. Perhaps the fact that there was another relator who received about four times as much reward as we did was also helpful in diminishing potential critical suspicion of our motives.

In the event, there were a few snide remarks and skeptical comments, but on the whole, there was public approved for of what we had done, at least in terms of overt expression.

For internal whistleblowers who have made great personal sacrifices, lost jobs, endured privations, etc., this is not as much of an issue. But still, "management" of the public relations image of those who accrue huge rewards for their courage and candor in blowing the whistle should and can be managed to avoid the implication that they are mendacious Quislings rather than the courageous and self-sacrificing crusaders against corporate corruption and fraud that they actually are. My advice to the Relators' Bar is to consider having a public relations firm to advise about public perception issues and to deflect potentially negative inferences.

Lessons From the Frontlines

"*QUI TAM* RELATORS' COUNSEL AND RULE 4.2(B)"

Ernest T. Lindberg

* From *Washington Lawyer,* Vol. 19, No. 4, December 2004, pp 39–40 (Washington, D.C., The District of Columbia Bar),

[Editor's Note: This article specifically addresses the D.C. Rules of Professional Conduct.]

The ethics panel at a recent conference of *qui tam* relators' counsel considered a lawyer's duties under Rule 4.2 of the D.C. Rules of Professional Conduct when a relator (i.e., whistleblower) identifies to the government lawyers and investigators the name of her attorney and explains that the hospital where she is employed is billing Medicare for surgeries that are not being performed.

Inevitably, the relator is asked to identify people at the hospital who might be able to support her allegations and to identify the location and nature of relevant documents. The relator's information, some of which was acquired by wearing a wire, and interviews of other hospital employees provide sufficient evidence, including a box of documents taken over the past few years, to conclude that at least some of the relator's concerns are likely to be valid and that hospital management may be aware of the phantom surgeries and falsified documents to cover up false billings. Counsel for the hospital, after learning of the search warrant for the billing records, says that she represents not only the hospital but all current and former employees, and no one may interview them without her presence.

Since violation of any rule of professional conduct is misconduct subjecting the lawyer to discipline, careful scrutiny and compliance are in the lawyer's best interest. *See* D.C. Rules of Prof'l Conduct R. 8.4(a); D.C. Ethics Ops. 285 (1998), 295 (2000). Fortunately, for the government lawyer and D.C. relators' counsel, Rule 4.2 is significantly different from the American Bar Association (ABA) model rule.

D.C. Rule 4.2(b) provides:

> During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.

A "party" is identified in 4.2(c) as "any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates." Further elaboration of who is a "party" is found in comment [3] to Rule 4.2, which cites D.C. Ethics Opinion 129 (1983) as continuing authority in interpreting that term. Although Opinion 129 considered DR 7-104, which is no longer the applicable rule, the analysis brought forward by comment [3] affirms Opinion 129's conclusion limiting the determination of "party" to "any person who can bind the organization as to the litigation. The Rule does not bar contacts with employees of the organization who do not have such authority."

ABA Model Rule 4.2 is captioned to address to "persons" rather than "parties," and only in comment [4] considers parties. Consequently, the D.C. rule provides more latitude to relators' counsel.

Rule 4.2 is also beneficial to government attorneys subject to the McDade Amendment, 28 U.S.C. § 530B, which requires government attorneys to obey the state and federal laws and rules of the "State where such attorney engages in that attorney's duties. . ."

D.C. Ethics Opinion 323 (2004), unlike the Oregon court decision in *In re Gatti*, 8 P.3d 966 (2000), *overruled*, Or. DR 1-102(D) & Or. Formal Op. 2003-173, provides that government attorneys "who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct or their official duties." *See also* Va. Ethics Op. 1765 (2003).

The issue of whether it is appropriate for a lawyer to have *ex parte* contact with a former employee of a party-opponent is not expressly addressed in Rule 4.2. D.C. Ethics Opinion 287 (1998) addressed this issue by concluding that

> [a] lawyer may contact unrepresented former employees of a party-opponent without obtaining consent from that party irrespective of the position formerly held by the ex-employee in the opposing organization. Prior to any substantive communication, the lawyer must disclose to the former employee the lawyer's identity and the fact that the lawyer represents a party adverse to the ex-employees former employer. During the communication the lawyer may not solicit privileged information of the party opponent.

In including former employees within the group accessible to relators' and government counsel articulated in Opinion 287, the D.C. Bar Legal Ethics Committee first looked to the reasons for prohibiting contact, as presented in Opinion 129:

> (1) the presumed imbalance of skill between a lawyer and a layman, giving one an unfair advantage over the other; (2) the risk that an uncounseled party will make admissions or concessions or reach judgments from which his lawyer could protect him; and (3) the risk that a lawyer might be compelled to become a witness in a case or forced to choose between advancing his client's interests and not overreaching in communicating with an unprotected adverse part.

The committee, in Opinions 80 (1979) and 167 (1986), sought to balance the reasons for denying contact with the "policy that litigants should have access to all relevant, non-privileged information regarding a matter and, derivatively, lawyers should be allowed to find facts as quickly and inexpensively as possible."

Further, the committee found that the burden on litigants of limiting access unreasonably exceeded the possible danger from *ex parte* contacts. The policies justifying the limitation of access to parties represented by counsel did not extend to former employees because "former employees, as a general rule, cannot bind the organization by decision making, by conduct, or by admission with respect to a pending or prospective matter." Hence, the committee concluded, "Rule 4.2 does not prohibit *ex parte* contacts with these individuals." Whatever information damaging to a former employer or former conduct that would create liability in the former employer is not sufficient "to bind the organization in the manner contemplated by Rule 4.2."

The committee's conclusion is that "lawyers may make *ex parte* contact. . . . As the ABA noted in Formal Opinion 95-396 (1995), Rule 4.2 is not designed to protect against disclosure of prejudicial facts. . . . [T]o forbid *ex parte* contacts with former employees would require parties to spend more time, money, and resources by utilizing formal discovery to obtain information that could have been obtained informally." To ensure the concerns of Rule 4.2 are met, the lawyer must comply with the requirement of identifying at the outset that he or she represents an adverse party to the former employee's former employer.

As for the documents obtained by the *qui tam* relator, see D.C. Ethics Op. 318 (2002) (disclosure of privileged material by third party).

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In the Spotlight

"AN UPDATE: WHISTLEBLOWER AND FEDERAL QUI TAM LITIGATION—SUING THE CORPORATION FOR FRAUD"

Joel M. Androphy

Mark A. Correro

AN UPDATE: WHISTLEBLOWER AND FEDERAL *QUI TAM* LITIGATION—SUING THE CORPORATION FOR FRAUD

Joel M. Androphy *

Mark A. Correro **

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Portions of this article were adapted from an article previously published by the author. *See* Joel Androphy & Adam Peavy, *Bringing Rogues to Justice, The* Qui tam *Provisions of the False Claims Act*, 65 Tex. B.J. 128 (2002) for an additional discussion on federal *qui tam* actions. An earlier version of this article appeared in the South Texas Law Review. *See* Joel Androphy & Mark Correro, Whistleblower and Federal *Qui Tam* Litigation, Suing the Corporation for Fraud, 45 S. Tex. L. Rev. 23 (Winter 2003). This article was republished with permission from South Texas Law Review.

AN UPDATE: WHISTLEBLOWER AND FEDERAL *QUI TAM* LITIGATION—SUING THE CORPORATION FOR FRAUD

> Fraud and prevarication are servile vices. They sometimes grow out of the necessities, always out of the habits, of slavish and degenerate spirits . . . . It is an erect countenance, it is a firm adherence to principle, it is a power of resisting false shame and frivolous fear, that assert our good faith and honor, and assure to us the confidence of mankind.[1]

I. INTRODUCTION

One day Robert Relator, formerly chief financial officer of a major corporation, walks into your office with a story about fraud against the federal government. Mr. Relator has evidence that a large government contractor has been billing the government for services not performed, double-billing the government for services rendered, and falsifying documents in order to accomplish the scheme. His story appears reliable and supported by documentation. Four questions should immediately surface in your mind: (1) What do I have to prove?, (2) What are the pitfalls?, (3) What is the potential recovery?, and (4) How do I file?

This article will assist you in answering these questions. It will guide you through the process of filing a federal *qui tam* action, while explaining the requirements and difficulties you may face. Part II will explain the history of the False Claims Act ("FCA"). Part III walks through the filing basics. Part IV delineates the requisite levels of proof necessary to be successful. Part V discusses some typical types of *qui tam* cases. Part VI examines some common pitfalls. Part VII delineates current state false claim statutes.

II. HISTORY OF THE FALSE CLAIMS ACT

A. Lincoln's Law

Attempting to curb a rash of fraud against the government, Congress passed a law that created incentives for private individuals to report government fraud. President Lincoln signed the law, called the False Claims Act ("FCA"), on March 2, 1863.[2] Also known as the "Informer's Act" or "Lincoln's Law," the original FCA prohibited various acts designed to fraudulently obtain money from the government.[3] Congress initially adopted the FCA with the intention of combating fraud against the United States Army during the Civil War.[4] Although the legislative history of the FCA focused specifically on fraud committed by military contractors, the FCA also applied to fraud committed by all government

1. Edmund Burke, The Works of the Right Honorable Edmund Burke 414 (1899), *available at* http://www.bartleby.com/73/1082.html.
2. False Claims Act, ch. 67, § 1, 12 Stat. 696–99 (1863) (current version at 31 U.S.C. § § 3729–33 (2000)).
3. United States *ex rel.* Graber v. City of New York, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998).
4. United States *ex rel.* Dunleavy v. County of Del., 123 F.3d 734, 738 (3d Cir. 1997) (discussing the history of the *qui tam* provisions of False Claims Act).

contractors.[5] Under the original FCA, defendants were subject to both civil and criminal penalties.[6] There was a $2000 fine for each fraudulent claim in addition to a penalty of double the government's actual damages.[7] Under the 1863 FCA, private individuals known as "relators"[8] could pursue this remedy through a "*qui tam*" action, and the informer was entitled to half the total recovery.[9] The justification for allowing *qui tam* litigation was to encourage citizens to report wrongdoing against the government that would otherwise go unnoticed.[10] In short, the government hoped that economic incentives would promote private enforcement of federal legislation.[11]

B. The 1986 Amendments

Over the years, Congress has twice amended the FCA. The most recent and extensive amendments occurred in 1986.[12] They were designed to "promote incentives for whistleblowing insiders [but also to] prevent opportunistic plaintiffs."[13] As one court stated, "Congress wanted to reward private individuals who take significant personal risks to bring wrongdoing to light, to break conspiracies of silence among employees of malfeasors, and to encourage whistleblowing and disclosure of fraud."[14] Although the percentage recovery provisions were reduced, the new changes as a whole created greater incentives for private citizens to "blow the whistle" against unlawful conduct. The key changes to the FCA consisted of the following: Congress reduced the potential financial recovery available to *qui tam* plaintiffs to between fifteen and twenty-five percent of the action if the government intervened plus reasonable expenses and attorney's fees,[15] if the government did not intervene, the *qui tam* plaintiff could recover between twenty-five to thirty per-

5. False Claims Act, ch. 67, § § 1, 3, 6 Stat. 696–99 (1863) (current version at 31 U.S.C. § § 3729–33 (2000)).

6. *See* United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 680 (D.C. Cir. 1997) (discussing the history of the False Claims Act).

7. False Claims Act, ch. 67, § 3 Stat. 696–99 (1863) (current version at 31 U.S.C. § § 3729–33 (2000)).

8. False Claims Act, ch. 67, § § 1, 3, 6 Stat. 696–99 (1863) (current version at 31 U.S.C. § § 3729–33 (2000)); *see also* 31 U.S.C. § 3730(d); United States *ex rel.* Foulds v. Tex. Tech Univ., 980 F. Supp. 864, 866 (N.D. Tex. 1997).

9. False Claims Act, ch. 67, § § 1, 3, 6 Stat. 696–99 (1863) (current version at 31 U.S.C. § § 3729–33 (2000)). The term "*qui tam*" refers to the Latin expression "*qui tam* pro domino rege quam pro se ipso in hae parte sequitur," which translates to "he who brings an action for the king as well as for himself." Black's Law Dictionary 1251 (6th ed. 1990).

10. United States *ex rel.* Dunleavy v. County of Del., 123 F.3d 734, 738 (3d Cir. 1997) (stating that Congress intended to "offset inadequate law enforcement resources and encouraged 'a rogue to catch a rogue' by inducing informers 'to betray [their] conspirators'").

11. *Id.*

12. *See* United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 680–81 (D.C. Cir. 1997) (discussing the history of the FCA).

13. United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001).

14. United States v. Bank of Farmington, 166 F.3d 853, 858 (7th Cir. 1999) (citing *S. Rep. No.* 99-345, at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267).

15. 31 U.S.C. § 3730(d)(1) (2000). As previously noted, under the original FCA the relator was entitled to half of the total recovery. "The most recent incarnation of the Act has reduced this percentage but it still remains substantial." *Dunleavy*, 123 F.3d at 738 n.7. Although one might wonder how reducing the relator's potential recovery from half increases incentives to bring a *qui tam* suit, on balance the new amendments have enhanced the opportunity for recovery. Prior to the 1986 amendments, the court's interpretation of the FCA was a minefield of procedural roadblocks. *S. Rep. No.* 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5269.

> Since the act was last amended in 1943, several restrictive court interpretations of the act have emerged which tend to thwart the effectiveness of the statute. The Committee's amendments contained in S. 1562 are aimed at correcting restrictive interpretations of the act's liability standard, burden of proof, *qui tam* jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud.

Id.

cent of the action plus reasonable expenses and attorney's fees.[16] Congress also increased the statutory penalty provisions of the FCA to a minimum of $5000 and a maximum of $10,000 for each violation, plus treble the government's actual damages,[17] and eliminated the old "government knowledge bar" which precluded recovery on any violation for which the government already possessed information, and instituted a "public disclosure" bar.[18] Congress restored the normal civil action "preponderance of the evidence" standard of proof,[19] and eliminated the need to prove specific intent and made defendants liable for acting with "deliberate ignorance" or "reckless disregard" of the truth.[20] Additionally, Congress lengthened the statute of limitations from six years to a variable ten,[21] and Congress created a cause of action for any employee who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" as a result of involvement in a *qui tam* suit.[22]

The FCA has become a strong deterrent for those who defraud the federal government. The 1986 amendments have resulted in a dramatic increase in the number of *qui tam* actions filed and the amounts recovered by relators.[23] The price of defrauding the government is rising, the likelihood of being caught is increasing, and the consequences are more severe. The total monetary recoveries and cases filed to date are outlined in the chart on the next page.[24]

III. FILING A *QUI TAM* SUIT—THE BASICS

A. Preparing the Disclosure Statement

The disclosure statement is perhaps the most essential document a relator prepares when initiating a *qui tam* suit. Section 3430(b)(2) states that a relator must provide the government with a "written disclosure of substantially all material evidence and information" possessed.[25] The primary purpose of this requirement "is to provide the United States with enough information on the alleged fraud to be able to make a well reasoned decision on whether it should participate in the filed lawsuit, or allow the relator to proceed

16. 31 U.S.C. § 3730(d)(2) (2000).
17. *See id.* § 3729(a) (2000). This amount is adjusted each year for inflation and the current range is from $5,500 to $11,000. However, a new Senate bill has just passed that will become effective on January 1, 2004, and increases the range to between $7,500 and $15,000. Prescription Drug and Medicare Improvement Act of 2003, S. 1, 108th Cong. § 612 (2003). There is a statutory exception to the imposition of treble damages when the defendant makes full disclosure within thirty days of discovery of the violation, and fully cooperates with the government. At the time of disclosure, there cannot be pending any criminal, civil, or administrative action. In such cases, the court has discretion to award not less than twice the damages sustained by the government. 31 U.S.C. § 3729(a).
18. 31 U.S.C. § 3730(e)(4)(A) (2000). If there has been public disclosure of the information, the relator will have to prove that he was the original source. § 3730(e)(4)(B). The terms "public disclosure" and "original source" have generated much confusion within the circuits and will be discussed *infra* section VI.A.3.
19. 31 U.S.C. § 3730(c) (2000); *see also* United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990).
20. 31 U.S.C. § 3729(b) (2000).
21. *See id.* § § 3731(b)(1)-(2) (2000). Under the old statute, an action had to be brought within six years of the date on which the alleged violation was committed. Now, the government, or the *qui tam* relator acting on his own behalf, must bring the action within six years of the submission of the false claim, or within three years after the government should have learned of the facts underlying the claim, but in no event longer than ten years. *Id.*
22. 31 U.S.C. § 3730(h) (2000).
23. *Qui tam Statistics, available at* http://www.taf.org/statistics.html (last visited Dec. 19, 2004).
24. *Id.*
25. 31 U.S.C. § 3730(b)(2) (2000).

	Qui tam Cases Filed	Total Recovered Where DOJ Intervened	Total Recovered Where DOJ Declined to Intervene
1988	60	$355,000	$35,431
1989	95	$15 million	$0
1990	82	$40 million	$75,000
1991	90	$70 million	$69,000
1992	119	$134 million	$994,456
1993	132	$171 million	$5.9 million
1994	222	$380 million	$1.8 million
1995	277	$245 million	$1.8 million
1996	363	$125 million	$14 million
1997	533	$623 million	$7 million
1998	470	$433 million	$29.2 million
1999	482	$454 million	$62.5 million
2000	367	$1.2 billion	$1.8 million
2001	310	$1.2 billion	$125.8 million
2002	320	$1.04 billion	$25.02 million
2003	326	$1.48 billion	$85.04 million
TOTAL	**4248**	**$7.61 billion**	**$361.04 million**

alone."[26] The authority on exactly what the disclosure statement should contain is relatively sparse.[27] Some federal circuits hold that the disclosure should only recite the relevant facts,[28] and others hold it should also include such information as the relator's legal theo-

26. United States *ex rel.* Bagley v. T.R.W. Inc., 212 F.R.D. 554, 556 (C.D. Cal. 2003) (quoting United States *ex rel.* Woodward v. Country View Care Ctr. 797 F.2d 888, 892 (10th Cir. 1986)); *accord* United States *ex rel.* Koch v. Koch Indus., Inc., 1995 WL 812134, at *9 & n.11 (N.D. Okla. 1995); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc., 755 F. Supp. 1040, 1053 (S.D. Ga. 1990). *See generally* United States *ex rel.* Purcell v. MWI Corp., 209 F.R.D. 21, 26 (D.D.C. 2002) ("The FCA aims to advance the twin goals of (1) rejecting suits which the government is capable of pursuing itself while (2) promoting those which the government is not equipped to bring on its own."). Also, it is

> a threshold matter, that a relator possesses a certain level of actual knowledge about the submission of false claims to the government. This threshold obligation is manifested in the requirement that would-be relators provide to the government material evidence or information in support of their complaints. 31 U.S.C. § 3730(b)(2). The clear import of this provision is that would-be relators must do more than just assert allegations based on speculation and guesswork. Rather, to qualify for relator status under the Act, would-be relators must be able to provide to the United States evidence and information sufficient to provide a basis for their allegations of fraud.

Robert Salcido, *The Government Declares War on Qui tam Plaintiffs Who Lack Inside Information: The Government's New Policy to Dismiss These Parties in False Claims Act Litigation*, 13 *Health Law* 1, 4 (2000).

27. *Bagley*, 212 F.R.D. at 556 (citing United States *ex rel.* Made in the USA Found. v. Billington, 985 F. Supp. 604, 608 (D. Md. 1997)).

28. *Id.* (citing United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 918 F. Supp. 1338, 1346 (E.D. Mo. 1996)) ("The written disclosure statement should simply contain all the relevant factual information in [the relator's] possession

ries and analysis.[29] Generally speaking, it is not recommended that relators merely recite a general overview of the case.[30] The government is inundated with many promising *qui tam* cases, and will reject your case if there is no measurable support for your initial contentions. In that regard, unless you are in the minority, and a relator looking for the government to decline intervention, with the opportunity for a greater percentage of recovery, but with the attendant costs of litigation, be as thorough as possible with your disclosures.31 Whatever you decide, do not forestall filing the disclosure statement. Although investigations should be complete, disclosure statements can always be supplemented. As will be discussed, it is important to prepare the disclosure statement as soon as possible in order to be the first to file.[32]

B. Filing the Complaint

Procedurally, it is advantageous to expeditiously investigate Mr. Relator's claims and file suit in federal court[33] based on two different jurisdictional bars, the first to file bar[34] and

at the time he filed suit."); United States *ex rel.* Burns v. A.D. Roe Co., 904 F. Supp. 592, 594 (W.D. Ky. 1995) (explaining that a disclosure statement "is simply a recitation of factual information"); United States *ex rel.* Robinson v. Northrop Corp., 824 F. Supp. 830, 838–39 (N.D. Ill. 1993) (stating that the disclosure obligation "requires only a statement of facts," and concluding that a disclosure statement "should not contain opinions of an attorney"); United States *ex rel.* Stone v. Rockwell Intern. Corp., 144 F.R.D. 396, 401 (D. Colo. 1992) (stating that a written disclosure statement "contains nothing more than the evidence and information which must come to light in any event once the case proceeds").

29. *Bagley*, 212 F.R.D. at 556 (citing *Made in the USA Found.*, 985 F. Supp. at 608) (explaining that a disclosure statement "should, at a minimum, comprise much of what [the relator] will rely upon to support the contentions in the case at bar . . . . While not a prerequisite necessary to satisfy the disclosure requirement, the Court believes more than a mere recitation of facts, available to the government, is required.") (citations omitted); Grand *ex rel.* United States v. Northrop Corp., 811 F. Supp. 333, 337 (S.D. Ohio 1992) (acknowledging the possibility that the disclosure statement at issue might contain legal analysis and opinion in addition to facts). This inconsistency is also found in the way different relators' counsel prepare disclosure statements. Eric R. Havian, *Discoverability of Statutory Disclosure Statements and Recovery of Statutory Attorneys' Fees in False Claims Act Qui tam Cases,* WL N98CFCB ABA-LGLED L-13, L-15 (1998) (opining that some attorneys "prepare very detailed narratives of the evidence, including analysis by counsel of the legal and factual issues in the case and suggestions to the government regarding how to pursue its investigation. Obviously, the government greatly appreciates such efforts, which simplify the task of sorting through an increasing number of *qui tam* complaints. At the other end of the spectrum, some attorneys simply place a cover sheet on an undifferentiated stack of documents and allow the government to sort it out.").

30. *Bagley*, 212 F.R.D. at 557; *see generally* Salcido, *supra* note 26 (explaining the pros and cons of filing a full disclosure statement versus a sparse disclosure statement).

31. *Bagley*, 212 F.R.D. at 557 ("The statutory purpose of the disclosure requirement, then, is best served by treating disclosure statements in a manner that encourages the relator and his or her counsel to make them as complete, detailed, and thoughtful as possible.") (citing Havian, *supra* note 29, at L-13).

32. The first to file bar is discussed *infra* Part III.B.

33. Although the FCA does not limit jurisdiction to federal courts, 28 U.S.C. § 1355 confers original jurisdiction "exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress." 28 U.S.C. § 1355 (2000). Therefore, because the FCA makes individuals who defraud the government liable "for a civil penalty," the federal courts seem to have exclusive jurisdiction. *See, e.g.,* Stinson, Lyons & Bustamante, P.A, v. United States, 79 F.3d 136, 138 (Fed. Cir. 1996) ("suit [under the False Claims Act] must be brought in district court"); LeBlanc v. United States, 50 F.3d 1025, 1031 (Fed. Cir. 1995) ("*qui tam* suits may only be heard in the district courts"). *But see, e.g.,* Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 646 (N.D. Ohio 2000) ("It is not clear from the text of the statute that federal jurisdiction of whistleblower retaliation claims is exclusive of the states, as Nguyen suggests. Jurisdiction is presumably concurrent. The presumption may be rebutted 'by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.' Here, there is no explicit statutory directive and, despite Nguyen's arguments to the contrary, no unmistakable implication from legislative history. Nor does the Court find a clear incompatibility between state jurisdiction and federal jurisdiction. In any case, although the Supreme Court has restated the rule of *Gulf Offshore*, the only cases in which the Supreme Court has found implied exclusive jurisdiction are the Sherman Act and the Clayton Act, 'where the full extent of [the Court's] analysis was the less than compelling statement that provisions giving the right to sue in the United States District Court show that [the right] is to be exercised *only* in a court of the United States.' Therefore,

the public disclosure bar.[35] The complaint is filed in camera and is kept under seal for at least sixty days.[36] A relator can also proceed under one of the state *qui tam* statutes as a matter of pendant jurisdiction, or in the applicable state jurisdiction. Although generally discussed *infra*, the various state statutes are too diverse for the scope of this article.

During the sixty-day time period, the Department of Justice ("DOJ") has the opportunity to investigate the claim and review the supporting evidence and materials.[37] In practice, it is not uncommon for investigations to proceed for one to two years before the government completes its investigation and/or the court lifts the seal.[38] While the complaint is under seal, the DOJ can exercise a number of options. It can elect to join the lawsuit,[39] decline to join the lawsuit,[40] move to dismiss the action,[41] or attempt to settle the action prior to a formal investigation.[42]

1. Government Intervention

Under the statute, if the government elects to join the lawsuit, it has primary responsibility for prosecuting the case and can limit the relator's role.[43] However, if the government intervenes, the FCA allows the relator to continue participating in the litigation subject to certain enumerated conditions.[44] For example, the court may limit the number of witnesses the relator may call, the length of the witnesses' testimony, or the length of the relator's cross-examination.[45] All of these limitations are discretionary, and the court may impose them if the relator's participation in the case would be repetitious, irrelevant, or harassing to the government's prosecution.[46]

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this Court finds that its jurisdiction over actions brought under § 3730(h) is not exclusive of the state courts.") (internal citations omitted); United States *ex rel.* Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370, 375 (S.D. Tex. 1994) (stating "thus, pursuant to the language of the statute, there is concurrent jurisdiction between the federal and state courts"); United States *ex rel.* Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 631–32 (N.D. Ill. 1992) (stating "[c]learly, federal jurisdiction is not mandatory under the FCA because the statute does not expressly suggest that jurisdiction shall be exclusive").

34. 31 U.S.C. § § 3730(b)(5), (e)(4) (2000). Most courts have interpreted the "first to file" bar embodied in § 3730(b)(5) as precluding suits, the underlying "material facts" of which have previously been alleged in a separate action. *See, e.g.,* United States *ex rel.* Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1187 (9th Cir. 2001).

35. *See* § 3730(e)(4)(A) (This section delineates the public disclosure bar); *Lujan,* 243 F.3d at 1188–89.

36. § 3730(b)(2).

37. *Id.* The written disclosure statement is provided only to the government and is not filed with the court. During this time the complaint, although filed under seal, is not served on the defendant. *Id.*

38. § 3730(b)(3).

> [I]t is inevitable that the DOJ will request an extension of the 60 day seal period to permit it to complete its investigation. As stated previously, six months should be the limit, but no more than one year. Six month to a year extensions should only be granted in very unusual situations with the DOJ being required to provide very good reasons for doing so. The court can require the DOJ to obtain an agreement by the relator for the extensions. However, the relator can also protest the extensions to the court. It should not take more than six months for the DOJ to investigate the merits of the allegations and determine whether to intervene. If it does, and many cases have gone on for two to three years under seal, then there is something very wrong and the court should put the DOJ on the hot seat and explain its actions.

Coordination with the Government and the Government Investigation, at http:// www.quitam.com/potatt4.html (last visited Dec. 19, 2004).

39. § 3730(b)(4)(a).

40. § 3730(b)(4)(b) (The relator can still proceed solo).

41. § 3730(b)(1). The action may only be dismissed after notice and hearing. § 3730(c)(2)(A).

42. § 3730(c)(2)(B). The government may only settle the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. *Id.*

43. § 3730(c)(1).

44. § 3730(c)(2).

45. *Id.*

46. § 3730(c)(2)(C)(i-iii).

The FCA also contains several additional provisions that limit the relator's role in the litigation. For example, the FCA allows the government to intervene in the lawsuit at any time upon a showing of "good cause."[47] The FCA also allows the DOJ to stay discovery when the relator's actions "would interfere with the government's investigation or prosecution of a criminal or civil matter arising out of the same facts."[48] The government is also permitted to pursue the action through an alternative remedy such as administrative relief.[49]

Even if the government decides to intervene in your case, you should still fully participate in the investigation and subsequent litigation. As stated earlier, the FCA provides a relator's share of at least fifteen percent, even if you do nothing more than file the action in federal court and allow the government to prosecute your case.[50] However, it would be a financial mistake to idly sit back and watch potential monetary gain slip away.[51] Congress created a large award of up to twenty-five percent for relators who actively assist in the investigation.

2. The Government Declines Intervention

You should pursue your case vigorously, assuming from the start that the government is not going to intervene.[52] Statistically, the government intervenes in approximately twenty-two percent of all *qui tam* cases filed.[53] If the government elects not to intervene, you have the right and obligation to litigate the case.[54] The government's role will then be limited to receiving copies of deposition transcripts and pleadings filed during the course of litigation.[55] However, in order to receive transcripts and pleadings, the government is required to request the documents and pay for their production.[56] When the government declines to intervene in your case, the DOJ will send you a standard declination letter outlining your duties and responsibilities in continuing the prosecution of your case. After you receive the declination letter and the seal is lifted, you have 120 days to serve the defendant.[57]

IV. WHAT DO YOU HAVE TO PROVE?

As a general rule, the FCA subjects an individual or company to liability for "knowingly" submitting or causing the submission of a false claim.[58] The FCA covers a broad range of misconduct potentially harmful to the federal treasury. The Supreme Court held that "the

47. § 3730(c)(3).
48. § 3730(c)(4).
49. § 3730(c)(5).
50. § 3730(d)(1).
51. *Qui tam Issues for Attorneys with Ongoing Actions, at* http:// www.quitam.com/barg4.html (last visited Dec. 19, 2004).
52. Since the 1986 amendments, *qui tam* payouts are, on average, ninety-two percent smaller when the government opts not to intervene. W. Jay DeVecchio, *Qui tam Actions: Some Practical Considerations,* 28 A.L.I.-A.B.A. 527, 537 (2000).
53. Qui tam Statistics (2002), at http://www.taf.org/statistics.html (last visited Jan. 5, 2004) (As of January 2004, the government intervened in only 750 of the 3,357 cases filed, not including the 891 cases that are currently under investigation).
54. 31 U.S.C. § 3730(c)(3) (2000).
55. *Id.*
56. *Id.*
57. Fed. R. Civ. P. 4(m).
58. 31 U.S.C. § 3729(a) (2000).

[FCA] was intended to reach all types of fraud, without qualification, that might result in financial loss to the government." *United States v. Neifert-White Co.*, 390 U.S. 229, 232 (1968).[59] The Court noted that the "statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the government to pay out sums of money."[60] Virtually all FCA cases are filed under subsections (a)(1) and (2) of § 3729.[61] Regardless of what section the case is brought under, all of the causes of action listed in § 3729(a) include three common elements that must be established to prove a violation under the FCA: (1) a "claim" must be presented to the government by the defendant, or the defendant must "cause" a third-party to submit a claim, (2) the claim must be made "knowingly," and (3) the claim must be "false" or "fraudulent."[62]

A. "Claim"

Determining whether a "claim" has been submitted to the government can be tricky. The Supreme Court addressed the definition of "claim" under the FCA three times before the 1986 amendments. In each case, the Court strictly construed the term to encompass only those situations in which a demand or request was made for payment of money or property of the United States.[63] Congressional disapproval of the restricted definition led Congress to statutorily define it during the 1986 amendments:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.[64]

Thus, a "claim" under the FCA now encompasses virtually all demands or requests that cause the disbursement of federal funds. Essentially, any action by the claimant which has the purpose and effect of causing the United States to pay out money it is not obligated to pay, or any action which intentionally deprives the United States of money it is lawfully due, are properly considered "claims" within the meaning of the FCA.[65]

After Congress significantly broadened the term "claim," judicial interpretations likewise broadened. False representations of compliance with federal regulations incorporated into government contracts,[66] certifications that result in the government assuming

59. United States v. Neifert-White Co., 390 U.S. 229, 232 (1968).
60. *Id.* at 233.
61. *John T. Boese, Civil False Claims and Qui tam Actions* § 2.01, 2-6 (Supp. 2003). Section 3729(a)(1) creates liability for submitting a false claim and § 3729(a)(2) creates liability for "making or using false records in support of a false claim." *Id.* Recoveries under § § 3729(a)(3)- (6) are much less common. *Id.* However, section 3729(a)(7) is becoming one of the fastest growing areas of *qui tam* litigation. *Id.* § 2.01, 2-39.
62. 31 U.S.C. § 3729(a) (2000).
63. United States v. McNinch, 356 U.S. 595, 598 (1958); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545 (1943); United States v. Cohn, 270 U.S. 339, 345–46 (1926).
64. 31 U.S.C. § 3729(c) (2000).
65. United States v. Neifert-White Co., 390 U.S. 228, 233 (1968); *see also* United States v. Rivera, 55 F.3d 703, 709 (1st Cir. 1995); United States v. Richard Dattner Architects, 972 F. Supp. 738, 746–47 (S.D.N.Y. 1997).
66. United States *ex rel.* Fallon v. Accudyne Corp., 880 F. Supp. 636, 638 (W.D. Wis. 1995).

a party's obligations,[67] false progress reports in construction contracts,[68] and proof of loss claims submitted to a federal insurance program to recover property damages[69] have all been characterized as claims under the FCA.

B. "Knowingly"

Congress added the "knowingly" provision to address the level of intent required to prove a violation.[70] Section 3729(b) now makes it clear that "no proof of specific intent to defraud" is required to prove a violation; a defendant will be liable upon demonstration that he or she "knowingly" submitted a false claim.[71] "Knowingly" is defined as: (1) having "actual knowledge of the false information," (2) "acts in deliberate ignorance of the truth or falsity of the information," or (3) "acts in reckless disregard of the truth or falsity of the information."[72] Thus, you are not required to prove that the defendant actually intended to submit false claims under the FCA.[73] Rather, you can establish liability by simply proving deliberate ignorance or reckless disregard for the truth of the claims.[74] However, mere negligence and "innocent mistakes" are not sufficient to establish liability under the FCA.[75] A prime example of a court applying the scienter requirement is the case of *United States v. Lorenzo*.[76] In that case, Dr. Lorenzo and several other dentists were performing oral cancer screenings as part of their standard patient examinations.[77] After performing these procedures, Dr. Lorenzo and other dentists employed by his company decided to bill the cancer screenings to Medicare as "limited consultations."[78] However, Medicare regulations specifically state that "limited consultations" do not include procedures performed during routine screenings.[79] The court held the doctors liable under the FCA because their claims were submitted in "reckless disregard" of the truth.[80] The court stated that the doctors should have known of the Medicare regulations concerning "limited consultations," and even without that knowledge, they violated the statute.[81]

C. "False" or "Fraudulent"

In contrast to the terms "claim" and "knowingly," the terms "false" and "fraudulent" are not defined in the FCA. When falsity is an issue, the question usually centers on the interpretation of a government regulation, contract, or law. Courts have held that a claim cannot be

67. United States *ex rel.* S. Prawer & Co. v. Fleet Bank, 24 F.3d 320, 323–24 (1st Cir. 1994).
68. Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434 (1994). (These cases are based on either an implied or express "false certification" theory, whereby the contractor falsely certifies either contractual or statutory compliance.).
69. United States v. Plywood Prop. Assocs., 928 F. Supp. 500, 509 (D. N.J. 1996).
70. United States v. Ueber, 299 F.2d 310, 314 (6th Cir. 1962) (requiring actual knowledge).
71. 31 U.S.C. § 3729 (2000).
72. *Id.* § 3729(b).
73. *Id.* § 3729(b)(3); United States v. Oakwood Downriver Med. Ctr., 687 F. Supp. 302, 309 (E.D. Mich. 1988).
74. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).
75. United States *ex rel.* Mazzola v. C.W. Roen Constr. Co., 183 F.3d 1088, 1092 (9th Cir. 1999); *see also Hagood*, 929 F.2d at 1421.
76. 768 F. Supp. 1127, 1131–32 (E.D. Pa. 1991).
77. *Id.* at 1130–31.
78. *Id.* at 1129–30.
79. *Id.* at 1130. *See* 42 U.S.C. § 1395(y) (1994 & Supp. V 1999) (prohibiting payment for "routine physical checkups").
80. *Lorenzo*, 768 F. Supp. at 1132.
81. *Id.*

"false" if submitted pursuant to a reasonable interpretation of vague statutory language.[82] For example, in *United States v. Adler,* the Eighth Circuit held that to be actionable a statement must be false under all reasonable interpretations.[83] Therefore, a defendant might defeat a finding of falsity by proving that the conduct was reasonable under at least one interpretation of the law.[84]

V. TYPICAL TYPES OF *QUI TAM* CASES

A. Healthcare

In recent years, Medicare and Medicaid schemes have become the primary targets of investigations by the DOJ.[85] "The health care industry is an attractive target of fraudulent activity which, if not aggressively pursued, can have a significant detrimental effect on the financial stability of the U.S. health care system."[86] Janet Rehnquist, former Inspector General of the Department of Health and Human Services, noted in Congressional testimony that because the department pays millions of dollars every year in fraudulent claims, health care fraud is a top priority, second only to bioterrorism.[87] The fraudulent practice of healthcare contractors can take many forms, the following three of which will be discussed in this article: best price schemes, off-label marketing, and facility deficiencies.

1. Best Price

Finding the mythical needle in a haystack is easier than discovering what the best price[88] of a drug is. The current system literally puts the entire process, practically unmonitored, into the hands of the very people who abuse the system. Federal law prescribes that drug manufacturers must pay rebates to the states to insure that the Medicaid program is receiving the best price on covered drugs. The Medicaid drug rebate process is a system consist-

82. United States v. Adler, 623 F.2d 1287, 1289 (8th Cir. 1980); *see also* United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980).

83. *Adler,* 623 F.2d at 1289.

84. United States v. Anderson, 579 F.2d 455, 460 (8th Cir. 1978). A good example of the application of the term "falsity" is the case of *United States v. Napco International, Inc.*, 835 F. Supp. 493, 496 (D. Minn. 1993). In that case, a government contractor purchased American-made military supplies from an Israeli corporation. The government claimed that the Arms Control Export Act required contractors to purchase items from American companies and not from foreign companies. The contractor, however, read the statute to allow procurement from other entities so long as the "items" were of American origin. The court held that because the statute was ambiguous and the defendants reasonably believed that the Export Act did not apply, their claims were not false or fraudulent under the FCA. *Id.* at 497–98. Therefore, because Congress decided not to define "falsity" in the 1986 Amendments, the determination of whether the defendant in a particular case submitted a false claim will depend on the court's interpretation of the statute at issue in a particular *qui tam* suit.

85. The Department of Health and Human Services and The Department of Justice, *Health Care Fraud and Abuse Control Program Annual Report 2001, at* http://www.usdoj.gov/dag/pubdoc/hipaa01fe19.htm&number;a (last visited Dec. 19, 2004).

86. *Id.*

87. *Department of Health and Human Services Office of Inspector General Fiscal Year 2003 Budget Request,* 108th Cong. (2002) (statement of Janet Rehnquist, Inspector General).

88. "Best price" is defined as the lowest price the manufacturer sells the covered outpatient drug to any purchaser in the United States. When determining the best price, manufacturers must include cash discounts, free goods, volume discounts, and rebates given on the covered drug. 42 U.S.C. § § 1396r-8(c)(i)-(iii). However, best price calculations exclude prices charged to Indian Health Service, Veteran Administration, state homes for disabled veterans, Department of Defense, a state pharmaceutical assistance program, the Federal Supply Schedule of the General Services Administration, and any depot prices and single award contract prices as determined by the Government. *Id.*

ing of five key players.[89] However, the system mainly relies upon a three-way interaction between manufacturers,[90] the Centers for Medicaid and Medicare Services ("CMS"),[91] and the state Medicaid agencies.[92]

The process is a very circular system. The manufacturer provides the Best Price and Average Manufacturer Price ("AMP") to CMS. CMS then calculates the unit rebate amount, and provides that information to the state Medicaid agency. The states then use the utilization data provided by the pharmacies, and the unit rebate amount, to calculate the rebate owed to them by the manufacturer. However, the entire system is based upon the manufacturer honestly conveying to CMS the correct Best Price and AMP. Any mistakes, intentional or unintentional, will cause an underpayment in rebate amounts.

The calculation is composed of three steps: (1) the calculation of the basic rebate, (2) the calculation of any additional rebate, and (3) calculation of the unit rebate amount. First the Basic Rebate must be calculated. The Basic Rebate is equal to the greater of AMP x 15.1% or AMP minus Best Price. AMP is the average price paid to the manufacturer (by a wholesaler) for a covered drug in the United States and distributed to the retail pharmacy class of trade, after deducting customary prompt pay discounts. Calculation of AMP for any given quarter should be adjusted for all returns, rebates, charge backs, and other adjustments affecting actual price relating to sales in that quarter. CMS may permit adjustments to be made in the quarter they are realized.

Basically, AMP is calculated as net quarterly sales divided by the number of units sold. Net quarterly sales are derived after all required adjustments are made. This includes, for example, discounts, rebates for state-only programs, and breakage. Total units sold must be adjusted for returns and charge backs. If there are multiple package sizes of a product, they are combined to create a "weighted AMP." Total units sold for all package sizes are divided into total net sales dollars for all package sizes to arrive at the weighted AMP. The weighted AMP is used for all records for the same product.

All pricing is calculated by unit type. If a product is listed with a unit type (by pill or milliliter) all pricing must be that unit type. If the product is sold in a thirty-milliliter tube, the pricing must be on one milliliter.

Best Price is the lowest price the manufacturer sells a covered outpatient drug to any purchaser in the United States, inclusive of cash discounts, free goods, volume discounts and rebates. The Best Price provision ensures that the government is being provided the lowest price on drugs. Like AMP, Best Price is the same across all package sizes of a product; however, it is not a weighted value.

First, the basic rebate provides for a 15.1% discount off AMP. If the manufacturer has given a customer a larger discount the government should receive the better price. The calculation of AMP/Best Price can create several miscellaneous issues. The manufacturer

89. The key players are: the manufacturer, the wholesaler, the pharmacy, the Centers for Medicaid and Medicare Services and the state Medicaid agencies.

90. The most important player is the manufacturer. Under the current system it sells drugs to the wholesaler, calculates the Average Manufacturer Price ("AMP") and Best Price, submits AMP/Best Price data to CMS, receives rebate invoices from state Medicaid agencies, validates the rebate claims, and then pays the rebates to the state Medicaid agency. It also has the ability to dispute any claimed units sold.

91. CMS receives AMP/Best Price data from the manufacturer, tests AMP for reasonableness, calculates the unit rebate amount, and then distributes unit rebate amount data to state Medicaid agencies.

92. Each state has its own system in place to handle Medicaid rebates. The state Medicaid agency receives the unit rebate amount data from CMS, receives drug utilization data from pharmacies, calculates the Medicaid rebate due, sends a rebate invoice to the manufacturer, and receives the rebate payment from the manufacturer.

may have a situation where Best Price is greater than AMP,[93] a zero or negative AMP,[94] no sales in a quarter,[95] no sales in the first quarter that the product is marketed,[96] or drug sales that are bundled with other products.[97]

Second, any calculation of any additional rebate should be through the Consumer Price Index-Urban ("CPI-U") limitation by comparing the current quarter AMP to the baseline AMP. The baseline AMP for older products is defined as Third Quarter 1990, and for newer products, time of launch. The CPI represents changes in prices of all goods and services purchased for consumption by urban households. User fees (such as water and sewer service) and sales and excise taxes paid by the consumer are also included. Income taxes and investment items (like stocks, bonds, and life insurance) are not included. The CPI-U[98] includes expenditures by urban wage earners and clerical workers, professional, managerial, and technical workers, the self-employed, short-term workers, the unemployed, retirees, and others not in the labor force. If the current quarter AMP exceeds the baseline AMP plus the CPI-U, the excess amount becomes the additional rebate. If the current quarter AMP is equal to or lower than the baseline AMP plus the CPI-U, there is no additional rebate.

Third, a calculation is performed for the unit rebate amount ("URA"). The URA calculation is performed on a quarterly basis for each National Drug Code ("NDC") of a covered drug. The basic rebate is added to the additional rebate, and then the rebates are divided by the per unit amount of the drug.[99] The resulting number is the URA. Finally, the URA is multiplied by the number of units dispensed to Medicaid recipients under each state participating program. The URA is calculated by CMS with AMP and Best Price data provided by the manufacturer. The number of Medicaid units dispensed is collected from retail pharmacies and submitted to manufacturers by the Medicaid state agencies.

Given the complex calculation issues, and the fact that manufacturers are given the most crucial role in the process, best price schemes are so common that it was the first health care area that Inspector Rehnquist addressed.[100] This is the most frequent type of

93. This could occur when discounts, returns, and seasonal sales cause AMP to calculate lower than Best Price. The manufacturer must report Best Price as equal to calculated AMP.

94. Zero or negative AMP cannot be submitted to CMS. The last valid AMP must be submitted.

95. When there are no sales in a quarter the manufacturer must use the AMP of the previous quarter.

96. If there are no sales in the first quarter marketed, then the sales price of the product must be used.

97. Bundled sales refer to the packaging of drugs of different types with the condition that more than one drug type be purchased, or where the resulting discount or rebate is greater than would have been received had the drug products been purchased separately. The sale is contingent upon an additional purchase requirement(s) by the retail purchaser. Valid bundled sales only include drug products that meet the definition of a covered outpatient drug as defined in the drug rebate agreement and statute. Bundled sales will affect the AMP and Best Price calculations. The discounted or contingent drug product's value is proportionately distributed among the other drug products in the bundle. To accomplish correct bundled sales pricing, the following two steps must be completed. Determine the value of the contingent drug product by determining its AMP for the same quarter if it were sold alone. This value is considered a discount, and is proportionately distributed to the other drug products within the bundle. Refigure the AMP/Best Price of the drug products within the bundled sale by applying the value of the discounted/contingent drug product proportionately among the other drug products.

98. The CPI-U for each quarter is available at ftp:// 146.142.4.23/pub/special.requests/cpi/cpiai.txt (last visited Dec. 19, 2004).

99. Centers for Medicare & Medicaid Services, *Unit Rebate Amount Calculation, at* http://cms.hhs.gov/medicaid/drugs/drug12.asp (last visited Dec. 19, 2004).

100. Office of Inspector General, *Compliance Program Guidance for Pharmaceutical Manufacturers, at* http:// oig.hhs.gov/fraud/docs/complianceguidance/042803pharmacymfgnonfr.pdf (last visitedDec. 19, 2004).

health care fraud case,[101] and has become a top priority for the Office of Inspector General ("OIG"), Department of Health and Human Services ("DHHS"), and other health care fraud enforcement agencies. On April 28, 2003, the OIG released the final version of its Compliance Program Guidance for the Pharmaceutical Industry ("Guidance").[102] The Guidance reflects the government's continuing concern about sales and marketing practices by pharmaceutical manufacturers. Two of the major risk areas addressed in the Guidance are the integrity of data used to establish or determine government reimbursement and kickbacks.[103] The Guidance asserts that a manufacturer may be liable under the False Claims Act if: (1) government reimbursement for a product depends partly on pricing information reported directly or indirectly and (2) the manufacturer knowingly or recklessly failed to report such information completely and accurately.[104] Where appropriate, manufacturers' reported prices should take into account discounts, rebates, free goods contingent on a purchase agreement, up-front payments, coupons, goods in kind, free or reduced-price services, grants, or other price concessions or similar benefits offered to purchasers.[105] The Guidance stressed that accurate net prices must be calculated in bundled sales, stating "any discount . . . offered on purchases of multiple products should be fairly apportioned among the products."[106] While not providing instructions on calculating Medicaid rebates, the Guidance urges manufacturers to pay particular attention to calculating Average Manufacturer Price and Best Price accurately.[107]

The second area where Best Price is used to defraud the government is with kickbacks.[108] The new Guidance reminds manufacturers that discounts deserve careful scrutiny particularly because of their potential to implicate the Best Price requirements of the Medicaid Rebate Program.[109] In addition, the Guidance highlighted the OIG's fear that manufacturers have "a strong financial incentive to hide de facto pricing concessions" that could affect Best Price calculations and trigger increased Medicaid rebates.[110]

2. Off-Label

A burgeoning area of health-care fraud is the off-label marketing of prescription drugs by manufacturers. The Federal Food and Drug Administration ("FDA") must approve all prescription drugs sold in the United States. Upon application, the FDA reviews a proposed drug's safety and efficacy. The FDA then will approve that drug for an indication. Once approved for a particular indication, the manufacturers must market the drug for only that use.

Problems arise when the cost of the drug far exceeds the market demand. The low demand may be due to the low occurrence of the disorder in the population. At this point, drug companies will attempt to expand the market for their product by marketing it as

101. Boese, *supra* note 61, § 1.06[A].
102. Office of Inspector General, *Compliance Program Guidance for Pharmaceutical Manufacturers, at* http://oig.hhs.gov/fraud/docs/complianceguidance/042803pharmacymfgnonfr.pdf (last visited Dec. 19, 2004).
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

a treatment for disorders that are more common. The bottom line is always the same—money. Some unscrupulous drug companies will throw caution to the wind in order to recoup the tremendous amount of money that was spent on research and development. However, if a governmental Medicaid or Medicare program pays for these non-approved uses, a false claim arises.

The dissemination of information on off-label drugs must meet certain requirements.[111] A manufacturer may disseminate information concerning the safety, effectiveness, or benefit of a use not described in the approved labeling only if: (1) there is an application filed pursuant to 21 U.S.C. § 355, (2) the information meets the requirements of 21 U.S.C. § 360aaa-1,[112] (3) the information is not derived from clinical research conducted by another manufacturer or permission has been given to use such information, (4) the manufacturer has, within sixty days before dissemination, submitted to the Secretary (A) a copy of the information to be disseminated and (B) any clinical trial information relating to the safety or effectiveness of the new use, (5) the manufacturer has complied with § 360aaa-3[113] of this title, and (6) along with the information on the new use to be disseminated, the manufacturer includes a statement disclosing (A)(i) that the use is not approved, (ii) that the information is being disseminated at the manufacturer's expense, (iii) the names of the authors who have received compensation from the manufacturer, (iv) the official labeling for the drug, (v) a statement that there are products or treatments that have been approved for the use, (vi) identification of any person that provided funding for the research, and (B) a bibliography of other articles that have been published about the use of the drug.[114]

Failing that, the drug is misbranded. Although physicians are free to prescribe a drug for an off-label use, the FDA prohibits distribution of "misbranded" drugs, including drugs which have been distributed while accompanied by literature urging doctors to use the drugs in non-approved ways.[115] Whether a drug is FDA-approved for a particular use will largely determine whether a prescription for that drug will be reimbursable under the Medicaid program. Reimbursement by Medicaid is, with only one rare exception, prohibited if the drug is not being used for a medically-accepted indication.[116] Subsection (k)(6) goes on to define a medically-accepted indication as one which is approved under the Food, Drug and Cosmetic Act.

Additionally, the FDA has published a guidance document that sets forth twelve nonexclusive factors that the FDA will consider in evaluating manufacturers' Continuing Medical Education ("CME") activities and determining the independence of those

111. 21 U.S.C. § 360aaa (2000).

112. This section sets out that the information must be: (1) an unabridged (A) peer-reviewed article that was published in a scientifically sound medical journal (defined by 21 U.S.C. § § 360aaa-5(5)) or (B) a reference publication that is scientifically sound and (2) is not false or misleading and would not pose a significant risk to the public health. Also, a reference publication is defined as a publication that (1) has not been written, edited, excerpted, or published specifically for, or at the request of, a manufacturer of a drug, (2) has not been edited or significantly influenced by such a manufacturer, (3) is generally available in bookstores, not just through the manufacturer, (4) does not focus on any particular drug of a manufacturer that disseminates information under § 360aaa of this title, and does not have a primary focus on new uses of drugs that are marketed or under investigation by a manufacturer and (5) is not false or misleading.

113. This section sets forth the requirement that a manufacturer submit a supplemental application for a new use along with progress reports and details about the study.

114. 21 U.S.C. § 360aaa (2000).

115. *Id.* § 331(a).

116. 42 U.S.C. § § 1396r-8(k)(3) (1994).

activities.[117] The factors are: (1) the degree of control the manufacturer has in the content of the presentation and the selection of moderators, (2) the extent to which the manufacturer has disclosed its financial relationship with the presentation, (3) the focus of the program, (4) the relationship between the CME provider and the supporting company, (5) the extent of provider involvement in sales or marketing, (6) the provider's failure to meet standards of scientific rigor, (7) the number of repeat presentations of the same material, (8) whether invitations or mailing lists were generated by the sales or marketing department, (9) the opportunity for meaningful discussion, (10) whether the information was disseminated after the initial program, (11) the extent of promotional activities at the event, and (12) any complaints raised by the provider, presenters, or attendees regarding attempts by the supporting company to influence the content.[118]

Basically, once the FDA approves a drug for a certain use, it must be promoted by the manufacturer for that use, not a financially preferred use. For example, assume a drug manufacturer ABC Pharmaceuticals Inc., obtained a FDA indication for the use of *X-CREAM* to treat a rare skin disorder. Even though that market is very small, ABC must promote *X-CREAM* for the treatment of only that skin disorder. If a physician wanted to prescribe *X-CREAM* for the treatment of a very common allergic reaction, then he is free to do that. However, ABC may not freely promote *X-CREAM* as a treatment for the allergic reaction, because that is not what it is indicated to treat. If in conversations with drug representatives, the physician first asks about alternative uses for *X-CREAM*, then ABC may, under the above conditions, briefly discuss other studies. However, the studies that ABC uses must meet the above requirements. The same is true in a CME setting. ABC must meet the above requirements, or it may only promote *X-CREAM* for the treatment of the skin disorder—regardless of how much the drug cost to develop or how small the skin disorder market.

3. Facility Deficiencies

Long-term health care facilities will either be too aggressive in patient treatment or deny the essential medical care in order to increase their profits.[119] Although prescribing unnecessary treatment is prohibited, many reported schemes are also accomplished "by ordering fewer tests, using fewer supplies, employing less staff and reducing referrals to specialists."[120] The courts have found that these tactics violate the Nursing Home Reform Act, the Social Security Act, and Medicare/Medicaid laws.[121]

In *Aranda,* the government alleged that a long-term psychiatric facility did not take enough precautions to ensure patient safety.[122] "[A]ppropriate precautions were not taken and . . . physical injury to and sexual abuse of patients occurred because of inadequate conditions, such as understaffed shifts, lack of monitoring equipment, and inappropriate

117. Final Guidance on Industry-Supported Scientific and Educational Activities, 62 Fed. Reg. 64,074, 64,093–100 (Dec. 3,1997).
118. *Id.*
119. John Munich & Elizabeth Lane, *When Neglect Becomes Fraud: Quality of Care and False Claims,* 43 St. Louis U. L.J. 27, 30–31 (1999).
120. *Id.*
121. *Id.* at 36–37.
122. 945 F. Supp. 1485, 1488–89 (W.D. Okla. 1996).

housing assignments."[123] The court found that this conduct violated Medicaid and constituted a false claim.[124]

B. Procurement of Government Contracts

As previously noted, the FCA was first launched to combat fraud perpetuated by underhanded government contractors during the Civil War.[125]

> The statute was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop the plundering of the public treasury.[126]

It is not surprising that these continue to be areas of great concern for the federal government. Just as the United States has experienced vast economic and industrial growth since the Civil War, so too has it experienced a greater demand for competent contractors. Problems have arisen, however, in that simple contracts for food or supplies have given way to complex commercial transactions for the procurement of an enormous array of goods and services. As these contracts become more complex, the fraudulent schemes of greedy contractors become more subtle. At times it is difficult even for an experienced attorney to evaluate how a particular scheme constitutes fraud so as to fall under the FCA. Two examples of how contractors have bilked the federal government are: lying on applications to get federal loans, and falsely certifying compliance with government contracts.

1. Government Loans

The United States Supreme Court in *Neifert-White* first addressed the question: "Does the False Claims Act reach 'claims' for favorable action by the government upon applications for loans or is it [strictly] confined to 'claims' for payments due and owing from the government?"[127] In *Neifert-White*, the question presented to the Supreme Court was "whether the [FCA] applies to the supplying of false information in support of an application to a federal agency, the Commodity Credit Corporation ("CCC"), for a loan."[128] Previously, both the district court and the Ninth Circuit had held that a loan is not covered under the FCA.[129] Both courts reasoned that a loan is not covered under the term "claim" as defined by the FCA.[130] In overturning both courts, the Supreme Court held that the term "claim" as used in the FCA should not be given a narrow reading, and should be read to reach all

123. *Id.* at 1488.
124. *Id.* at 1488–89.
125. United States *ex rel.* Graber v. City of New York, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998).
126. *Id.*
127. United States v. Neifert-White Co., 390 U.S. 228, 230 (1968).
128. *Id.* at 229.
129. *Id.*
130. *Id.*

fraudulent attempts to cause the government to pay out sums of money.[131] The FCA will not apply, however, if the government is merely a guarantor and not the lender. Guaranty-ing a loan only creates an inchoate offense, and a false claim will not result until there is a claim for payment from the government.[132]

2. False Certifications

A false certification occurs when the government has conditioned payment of a claim upon the certification of compliance with, for example, a statute or regulation. The claimant submits a false or fraudulent claim within the meaning of the FCA when he or she falsely certifies compliance with that statute or regulation.[133] For example, in *Thompson*, the relator alleged that:

> as a condition of their participation in the Medicare program, defendants were required to certify in annual cost reports that the services identified therein were provided in compliance with the laws and regulations regarding the provision of healthcare services. He further alleged that defendants falsely certified that the services identified in their annual cost reports were provided in compliance with such laws and regulations. Thus, Thompson 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.[134] These certifications can either be express or implied, depending on which circuit the *qui tam* complaint is filed.[135] Generally speaking, if the contract certifies compliance and the compliance was a condition of payment, then there is a false claim.[136]

However, if the government knew about the false claim, continued making payments to the contractor, and failed to pursue a contractual remedy, then the false certification cannot

131. *Id.* at 233.

> [T]he False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. We believe the term 'claims,' as used in the statute, is broad enough to reach the conduct alleged by the Government in its complaint.

Id.

132. United States v. Van Oosterhout, 96 F.3d 1491, 1494 (D.C. Cir. 1996).

133. *See, e.g.*, United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902–03 (5th Cir. 1998).

134. *Id.* at 902.

135. *See, e.g.*, Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 531–33 (10th Cir. 2000). Invoices submitted by a government photography contractor could be a basis for a FCA claim for the knowing presentation of a false or fraudulent claim for payment or approval, even if they only billed the amount called for by a fixed-price contract and the claim did not contain any factual misrepresentations regarding monthly billings or a contractor's request for equitable adjustment. The invoices falsely and impliedly certified that contractor had complied with the contract provisions requiring recovery of silver from photography chemicals. *Id.*

136. Some courts have held that a claim may be "false" because it contains a false certification of statutory compliance, but only when certification of compliance is a condition of payment. *See, e.g.*, United States *ex rel.* Wilkins v. North Am. Constr. Corp., 173 F. Supp. 2d 601, 624 (S.D. Tex. 2001).

give rise to a *qui tam* action.[137] In *Southland*, the defendant contracted with the Department of Housing and Urban Development ("HUD") to provide low-cost housing.[138] The contract required HUD to make monthly assistance payments that were conditioned on the defendants' certification that the property was "to the best of [their] knowledge and belief . . . in decent, safe, and sanitary condition."[139] If HUD, during its yearly inspections, found that the property was not in satisfactory condition, it could have given written notice of the violation and, if corrective action was not taken, declared a default and foreclose on the property.[140] From 1981 until 1992, the property passed annual HUD inspections.[141] However, in August 1993, HUD reported that repair and maintenance to the property was urgently needed.[142] By 1995, HUD's report indicated that the continued deterioration of the property might jeopardize the subsidy payments.[143] From 1996 until 1997, HUD continued to find problems and urged corrective action.[144] Unable to comply, the defendants finally turned over the property to HUD, and it was auctioned in July 1998.[145] Following the sale, the government initiated a *qui tam* suit to recover all the subsidy payments it made between 1995 and 1997.[146] The government argued that the payments were false because the defendants had certified that the property was in decent, safe, and sanitary condition.[147]

The court reviewed the current law on contract issues, the FCA statutory requirement of "knowingly false," and a new judicially imposed FCA requirement that the false claim be "material."[148] As discussed *supra*, the FCA has three statutory requirements in order for a claim to be actionable.[149] There must be a "claim," that is made "knowingly," and that is "false." Statutorily these are the only requirements. However, the circuits are split on whether or not there is a fourth requirement that the claim must also be "material" to the government's decision to pay.[150] After a long discussion, the *Southland* court concluded that "there should no longer be any doubt that materiality is an element of a civil False Claims Act case."[151] The court then pronounced that the certifications that the property

137. *See generally* United States v. Southland, 326 F.3d 669, 676–77 (5th Cir. 2003) (holding that if stopping payment is a contractual remedy, the contractor's continued billing in the face of some defect in performance that is known to the government cannot be a false claim).
138. *Id.* at 671–74.
139. *Id.* at 672.
140. *Id.* at 673.
141. *Id.* at 672.
142. *Id.* at 673.
143. *Id.*
144. *Id.* at 674.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 675–77.
149. *See* Part IV *supra*.
150. *E.g.*, United States *ex rel.* Costner v. URS Consultants, Inc., 317 F.3d 883, 886–87 (8th Cir. 2003); Luckey v. Baxter Healthcare Corp., 183 F.3d 730, 732 (7th Cir. 1999); United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997) ("[T]he FCA 'interdicts material misrepresentations made to qualify for government privileges or services.'") (quoting United States *ex rel.* Weinberger v. Equifax, Inc., 557 F.2d 456, 461 (5th Cir. 1977)); United States *ex rel.* Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1459 (4th Cir. 1997); United States v. TDC Mgmt. Corp., 24 F.3d 292, 298 (D.C. Cir.1994); United States *ex rel.* Wilkins v. N. Am. Constr. Corp., 173 F. Supp. 2d 601, 618–30 (S.D. Tex. 2001); United States v. Intervest Corp., 67 F. Supp. 2d 637, 646 (S.D. Miss. 1999) (all finding a materiality requirement). *But see* United States *ex rel.* Cantekin v. Univ. of Pittsburgh, 192 F.3d 402, 415 (3d Cir. 1999) (noting that there may not be a materiality requirement under the FCA); United States *ex rel.* Roby v. Boeing Co., 184 F.R.D. 107, 112 (S.D. Ohio 1998) (finding there is not a requirement of materiality under the FCA).
151. *Southland*, 326 F.3d at 679.

was in decent, safe, and sanitary condition were not material.[152] Although the court stated that false certifications could be material, they were not in this case because HUD never invoked any contractual remedy and continued making payments "irrespective of their compliance with the decent, safe and sanitary standard."[153] Also, the evidence did not suggest the government "took the truth or falsity of the defendants' certifications into account" when it decided to pay.[154] The court then decided that a "knowingly" false claim could not be submitted if the government knew the claims were false and paid anyway.[155] Finally, the court decided that since HUD never ceased to make payments, pursuant to its contractual right, no false claim could exist.[156]

3. Equitable Issues

Often a question arises as to whether a false claimant is entitled to any retention of funds under the contract, especially if there was a benefit conferred on the government. More importantly, as relator's counsel, do you invest time and money to pursue a false claim's case if there is some indication that the defendant is entitled to some equitable remedy? The analysis will then generally involve whether the contract is void or voidable. The *Godley* court discussed the difference between contracts that are void and voidable.[157] A contract where the contractor is without knowledge of any wrongdoing is voidable, and a contract that is tainted with fraud known to the contractor is void *ab initio*.[158] The defendant may

152. *Id.* at 679–81.
153. *Id.* at 680.
154. *Id.* at 681; *accord Costner*, 317 F.3d at 888 (holding that the government's knowledge and approval of the "false claims" negates the intent requirement).
155. *Southland*, 326 F.3d at 682; *accord* United States *ex rel.* Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 288–89 (4th Cir. 2002); United States *ex rel.* Durcholz v. FKW, Inc., 189 F.3d 542, 545 (7th Cir. 1999) ("If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim."); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1019–20 (7th Cir. 1999); Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1478 (9th Cir. 1996) ("The inaptly-named 'government knowledge defense' captures the understanding that the FCA reaches only the 'knowing presentation of what is known to be false.'"); United States *ex rel.* Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 326–27 (9th Cir. 1995).
156. *Southland*, 326 F.3d at 676. The court stated:

> The United States does not contend that an abatement of payment by HUD was ever exercised. The central position of the United States in this litigation has been that the claims for housing assistance payments submitted by the Owners during the period covered by the complaint, July 1995 through January 1997, were false claims, i.e., claims for payments to which the Owners were not entitled, because during this period the Owners were in breach of their obligation under the HAP Contract to provide decent, safe, and sanitary housing. What this ignores is that the HAP Contract explicitly addresses a breach of this nature and provides a specific remedy: when the Owners are notified by HUD that they have failed to maintain the property in decent, safe, and sanitary condition and that corrective action must be taken within the time specified in the notice, the Owners continue to be entitled to receive housing assistance payments during the corrective action period and until HUD notifies them in writing that they have failed to take the necessary corrective action and that housing assistance payments will be abated. During the corrective action period, then, claims for housing assistance payments are not false claims because they are claims for money to which the Owners are entitled (and which provide the wherewithal both to operate the property and to take the necessary corrective actions).

Id.
157. Godley v. United States, 5 F.3d 1473, 1475 (Fed. Cir. 1993).
158. *Id.* at 1476 n.2 ("[T]he court should ordinarily impose the binding stamp of nullity only when the illegality is plain."). The difference between a contract that is voidable versus one that is void ab initio is knowledge of the wrongdoing. For example, if a contract is awarded to an innocent contractor, without knowledge of illegalities in the bidding process then the contract is voidable. *Id.* However, if the contractor was aware of the bid rigging scheme, the contract is void ab initio. *Id.*

have some equitable claim to relief despite his false assertions.[159] The general rule is that a government contract tainted by fraud or wrong-doing is void *ab initio*.[160] The *Godley* court stated:

> A contract without the taint of fraud or wrongdoing, however, does not fall within this rule. Illegal acts by a Government contracting agent do not alone taint a contract and invoke the void *ab initio* rule. Rather, the record must show some causal link between the illegality and the contract provisions. Determining whether illegality taints a contract involves questions of fact.

An example of a contract being void *ab initio* is when a government contractor lies about being a small business in order to procure a government contract.[161] The *J.E.T.S.* court stated the contract was acquired by, and therefore infused with fraud.[162] "J.E.T.S. obtained this contract by knowingly falsely stating that it was a small business. Had it stated the truth about its size, it would not have received the contract."[163] The court pronounced that when a government contract is tainted from the beginning by fraud, it is void *ab initio*.[164]

The court outlined the purpose of the Small Business Act.[165] According to the court, the Small Business Act's purpose is to set aside certain government contracts for businesses that are independently owned and are not dominant in their respective fields.[166] A business's annual receipts determine whether it is small.[167] The court concluded that J.E.T.S., a food service contractor, had falsely certified to the Air Force that it was small when in actuality it was not; therefore, it would have never received the contract had it been truthful from the start.[168] On the question of whether to allow J.E.T.S. to recover for services that it had rendered, the court stated "to permit recovery of any further monies under the circumstances would be an affront to the integrity of the federal procurement process."[169]

Once a contract is tainted by fraud and void *ab initio*, the appropriate remedy is forfeiture.[170] The *Brown* court, in deciding damages, stated:

> The Government is also entitled to relief in accordance with the provisions of 28 U.S.C. § 2514 (1988). That statute directs the forfeiture of a

159. Even though courts have held that government contracts predicated on fraud are subject to forfeiture, some question still remains as to whether the defendant will be able to recover in quantum meruit. Some courts have held that where a conflict of interest statute is violated, there cannot be any recovery in quantum meruit. K. & R. Eng'g, Inc. v. United States, 616 F.2d 469, 472–73 (Fed. Cir. 1980). *But see* Greg Pelland Const. v. United States, 833 F.2d 1022, *1–*2 (Fed. Cir. 1987) (unpublished decision) (stating that because the contractor performed without bad faith and the government accepted the supplies, the contractor was entitled to recover on a quantum valebant basis for the reasonable value in the marketplace of the supplies and services) (citing United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986) and Urban Data Sys., Inc. v. United States, 699 F.2d 1147 (Fed. Cir. 1983)).
160. *Godley*, 5 F.3d at 1475. (citing J.E.T.S, Inc. v. United States, 838 F.2d 1196, 1200 (Fed. Cir. 1988)).
161. *J.E.T.S*, 838 F.2d at 1200.
162. *Id.*
163. *Id.*
164. *Id.* (citing United States v. Miss. Valley Generating Co., 364 U.S. 520 (1961); K & R Eng'g Co. v. United States, 616 F.2d 469 (1980)).
165. *Id.* at 1198–99 (citing 15 U.S.C. § 631 (1982)).
166. *Id.* (citing 15 U.S.C. § 632 (1982)).
167. *Id.* (citing 13 C.F.R. § § 121.1–121.13 (1986)).
168. *Id.*
169. *Id.* (citing United States v. Miss. Valley Generating Co., 364 U.S. 520 (1961)).
170. Brown Constr. Trades, Inc. v. United States, 23 Cl. Ct. 214, 216–17 (Fed. Cir. 1991).

> claim against the United States "by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance [of such claim]." This statute has been held to require the forfeiture of any claim affected by fraud, whether intrinsic to the claim or in the presentment of the claim. *Kamen Soap Prods. Co. v. United States,* 129 Ct. Cl. 619, 641, 124 F. Supp. 608, 620 (1954) ("this statute goes further than merely banning fraudulent claims. It provides for a forfeiture of the claim if any fraud is practiced or attempted to be practiced in proving, establishing or allowing a claim."). The Court of Claims has ruled that where fraud is committed in the course of a contract to which the suit pertains, it may not isolate the affected part and allow suit to proceed on the remainder. The practice of a fraud on part of a contract condemns the whole. The rule is set out in *Little v. United States,* 138 Ct. Cl. 773, 778, 152 F. Supp. 84, 87-88 (1957): It is true that the forfeiture statute [28 U.S.C. § 2514] was not intended to forfeit an otherwise valid claim of a claimant merely because, in some other unrelated transaction, he had defrauded the Government. But where, as in the present case, fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it. Since plaintiff's claims are based entirely upon contract V3020V-241, a contract under which he practiced fraud against the Government, all of his claims under that contract will be forfeited pursuant to 28 U.S.C. § 2514. Thus, 28 U.S.C. § 2514 requires the forfeiture of all claims arising under a contract tainted by fraud against the Government. *See also New York Mkt. Gardeners' Ass'n v. United States,* 43 Ct.Cl. 114, 136 (1908).[171]

VI. PITFALLS

A. Statutory

1. Members of the Armed Forces

If the *qui tam* relator happens to be a former or present member of the armed forces, potential problems arise because the FCA prohibits "former or present members of the Armed Forces [from asserting FCA claims] against [another] member of the Armed Forces."[172] However, this section does not prevent an armed service relator from bringing a *qui tam* action against a government contractor.[173] The relator in *Williams,* an attorney for the United States Air Force, learned of a bid rigging scheme by a telecommunications company that sought to procure contracts with the United States.[174] Williams filed a *qui tam* action

171. *Id.* at 216.

172. 31 U.S.C. § 3730(e)(1) (2000).

173. Erickson *ex rel.* United States v. Am. Inst. of Biological Scis., 716 F. Supp. 908, 913 & n.10 (E.D. Va. 1989); *accord* United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1494 (11th Cir. 1991). *But see* United States *ex rel.* LaBlanc v. Raytheon Co., 729 F. Supp. 170, 175–76 (D. Mass. 1992) (disagreeing with *Erickson* and stating that all government employees are excluded from bringing *qui tam* actions).

174. *Williams,* 931 F.2d at 1494.

against the contractor, and the United States attempted to have the action dismissed by arguing that Williams should be barred as a *qui tam* relator because he uncovered the fraud as a result of his employment with the Air Force.[175] The court noted that the 1986 amendments to the FCA allow "any private 'person' the right to bring a civil action under the Act, subject only to four specific exceptions."[176] Since the FCA does not specifically exclude members of the armed forces from bringing *qui tam* suits against government contractors, the court found that Williams' *qui tam* action was not barred.[177] Because a member of the armed forces is also a governmental employee, one should be prepared for the challenge that his claim is barred because of his status as government employee.

2. Government Employees

It is no surprise that the case law is somewhat amorphous concerning the ability of government employees to bring FCA actions.[178] There is however, no per se exclusion of governmental employees from bringing a *qui tam* action.[179] Government employees will only be disqualified as *qui tam* relators if they fall within one of the four categories of plaintiffs enumerated in 31 U.S.C. § 3730(e).[180] Some courts use the fourth exclusion, section 3730(e)(4) which is the public disclosure bar, to preclude governmental employees from

175. *Id.*

176. *Id.* at 1498. The four exceptions are enumerated in note 180 *infra*.

177. *Id.* at 1502.

178. United States *ex rel.* Holmes v. Consumer Ins. Group, 318 F.3d 1199, 1208–09 (10th Cir. 2003) (holding that a United States Postal Service employee qualified as "person" under *qui tam* provision regardless of her status as federal employee, and the fact that her job duties included uncovering and reporting fraud) (citing Hafer v. Melo, 502 U.S. 21, 27 (1991) which concluded, in a case filed under 42 U.S.C. § 1983, that "[a] government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term person"); *accord Williams*, 931 F.2d at 1501; *LeBlanc*, 913 F.2d at 20; Erickson, 716 F. Supp. at 912–13. *But see* United States *ex rel.* Fine v. Chevron, U.S.A. Inc., 72 F.3d 740, 745 (9th Cir. 1995) (holding that the governmental employee's "performance of his job responsibilities, including providing to his superiors the information that later formed the basis of these two suits, was not voluntary within the meaning of the False Claims Act"); Werchinski v. Int'l Bus. Machs., 982 F. Supp. 449, 462 (S.D. Tex. 1997); United States *ex rel.* LaBlanc v. Raytheon Co., 729 F. Supp. 170, 175–76 (D. Mass. 1990) (disagreeing with *Erickson* and stating that all government employees are excluded from bringing *qui tam* actions).

179. *Williams*, 931 F.2d at 1501; *LeBlanc*, 913 F.2d at 20; United States *ex rel.* Givler v. Smith, 760 F. Supp. 72, 74 (E.D. Pa. 1991); United States *ex rel.* McDowell v. McDonnell Douglas Corp., 755 F. Supp. 1038, 1039–40 (M.D. Ga. 1991); United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158, 1159 (S.D. Fla. 1990); *Erickson*, 716 F. Supp. at 912–13.

180. *Givler*, 760 F. Supp. at 74; *Erickson*, 716 F. Supp. at 912–13. Those four categories are:

> Certain actions barred—(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces. (2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought. (B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.). (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party. (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e) (2000).

bringing *qui tam* suits.[181] This reasoning is based on the assumption that "government employees maintain a dual status—arms of the government while at work, private citizens while not at work—a 'public disclosure' necessarily occurs whenever a government employee uses government information he learned on the job to file a *qui tam* suit in his private capacity."[182] However, generally speaking, as long as the governmental employee is not bringing an action against members of Congress, judges, or senior members of the executive branch, they are proper relators.[183]

3. Public Disclosure

As mentioned earlier, the 1986 amendments to the FCA enlarged the ambit of the FCA by allowing a relator, in certain circumstances, to file a suit based on information that the government already had in its possession.[184] To ensure the broader grant of prosecutorial authority did not cause "parasitic lawsuits," Congress created a jurisdictional bar to a relator bringing an action "based upon" information defined as "publicly disclosed," unless the relator is the "original source" of the information.[185] To constitute public disclosure, courts have held that the disclosure must reveal allegations of fraud or the fraudulent nature of the transactions involved.[186] Mere disclosure of the general subject matter of the fraudulent conduct will be insufficient to trigger the exception.[187]

In practice, the public disclosure bar is one of the most difficult concepts for practicing attorneys. The reason for this difficulty arises from the disparate treatment the section receives from the various circuit courts. In some cases, the circuits diverge in their analysis of the public disclosure bar so dramatically that they cannot even agree as to whether it is a substantive or jurisdictional concept.[188] This article will give a general overview of the bar. Practitioners are urged to review the law in their respective circuits.

The statute specifically limits the types of "public disclosures" to those made in criminal, civil, or administrative hearings, in congressional, administrative, or General Accounting Office reports, or from the news media.[189] "Hearing" encompasses both civil complaints

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181. *LeBlanc*, 913 F.2d at 19–20 (disallowing a governmental employee from bringing a *qui tam* action). *But see Williams*, 931 F.2d at 1501 (disagreeing with *Raytheon*); *accord* United States *ex rel.* Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1476 (9th Cir. 1996) (noting that the "jurisdictional bar of section 3730(e)(4) did not preclude his claim").

182. *LeBlanc*, 913 F.2d at 19–20.

183. *Erickson*, 716 F. Supp. at 912–14.

184. DeVecchio, *supra* note 52, at 532.

185. 31 U.S.C. § 3730(e)(4)(A) (2000); United States v. Bank of Farmington, 166 F.3d 853, 858 (7th Cir. 1999). The "original source" exception to the public disclosure bar is discussed in section VI.A.4 *infra*.

186. *See, e.g.*, United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654–56 (D.C. Cir. 1994).

187. *See, e.g.*, United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 553 (10th Cir. 1992). *But see, e.g.*, United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 685–86 (D.C. Cir. 1997). This opinion was authored by the same judge that authored the *Springfield* decision (J. Wald). In *Findley*, J. Wald held that even though the particular facts of the fraud in the case at bar had not been previously disclosed, there had been previous disclosures of this type of fraud, in a 1952 Comptroller General Opinion and that this constituted public disclosure. According to the court this was enough information to reveal the allegation that government employees were improperly maintaining vending machines on federal property. To hold that government possession of knowledge is a bar negates the intent of the 1986 amendments which changed the focus of the jurisdictional bar from mere government possession of knowledge to actual disclosure of the information to the public.

188. *E.g.*, Hughes Aircraft Co. v. United States, 520 U.S. 939, 950–51 (1997) (finding that the public disclosure bar is substantive); United States *ex rel.* Feingold v. Adminastar Fed., Inc., 324 F.3d 492, 495 (7th Cir. 2003) (citing *Hughes Aircraft*). *But see* United States *ex rel.* Laird v. Lockheed Martin Eng'g and Sci. Servs. Co., 336 F.3d 346, 350 (5th Cir. 2003) (finding that the public disclosure bar is jurisdictional).

189. 31 U.S.C. § 3730(e)(4) (2000); *see Koch Indus.*, 971 F.2d at 553.

and criminal indictments.[190] Although the majority of courts have held this list to be exhaustive,[191] courts are divided as to the definition of these categories.[192] The more expansively a court interprets these types of disclosures, the more likely the jurisdictional bar will apply to your case. If, however, the terms are narrowly construed, the applicability of the jurisdictional bar is restricted. This of course will depend on which jurisdiction your case is in and how that circuit defines the term "public disclosure."[193]

a. ADMINISTRATIVE PROCEEDINGS

i. Hearings The manner in which a court defines an "administrative hearing" will determine the scope of its analysis in applying the public disclosure bar. The Ninth Circuit, in *A-1 Ambulance Service*, held that disclosures made during a competitive bidding process constituted "administrative hearings" and thus were public disclosures that barred jurisdiction.[194] After A-1's unsuccessful bid to become the exclusive emergency EMS provider in two California counties, it filed a *qui tam* suit alleging violations of the Medicare Act's anti-kickback provisions.[195] Basically, A-1 contended that the cost of providing ambulance ser-

190. United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1350 (4th Cir. 1994); see United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993).

191. *See, e.g.*, United States *ex rel.* LeBlanc v. Raytheon Co., Inc., 913 F.2d 17, 20 (1990).

192. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

193. The Fourth Circuit has held that information "based upon" public disclosure is synonymous with information "derived from" the public disclosure. Grayson v. Advanced Mgmt. Tech., Inc., 221 F.3d 580, 582 (4th Cir. 2000). Further, for purposes of the public disclosure bar, a "civil hearing" includes the filing of a civil complaint, an "administrative hearing" includes the filing of an administrative complaint, and a putative relator's knowledge is direct if he obtained it through his own exertions, absent any intervening agency. *Id.* at 583. His knowledge is independent if it does not depend on the public disclosure. *Id.* The D.C. Circuit has concocted a formula for when a "public disclosure" has occurred:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.

United States *ex rel.* Settlemire v. D. C., 198 F.3d 913, 918 (D.C. Cir. 1999) (quoting United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994)). The Sixth Circuit also employs this formula, and the Eighth Circuit agrees with its basic premise; namely, that the core elements of fraud must be publicly disclosed for the bar to apply. United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 331 (6th Cir. 1998); United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1512 (8th Cir. 1994). The Third Circuit has held that a public disclosure is a disclosure that "reveal[s] both the misrepresented state of facts and the true state of facts so that the inference of fraud may be drawn." United States *ex rel.* Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 385 (3d Cir. 1999). The Third Circuit has also held that information obtained in discovery, be it filed or unfiled, constitutes publicly disclosed information that will trigger the jurisdictional bar. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1158 (3d Cir. 1991). *But see* United States v. Bank of Farmington, 166 F.3d 853, 860 (7th Cir. 1999) (suggesting that only discovery actually filed constitutes a public disclosure); *Springfield*, 14 F.3d at 652. While the Fifth Circuit holds that only filed discovery triggers the bar, it also holds that a *qui tam* action based in any way, in whole or part, on information publicly disclosed is subject to the bar. Fed. Recovery Serv., Inc. v. United States, 72 F.3d 447, 450–51 (5th Cir. 1995). The Eleventh Circuit has strictly construed the language of § 3730(e)(4)(A) so as to limit the instances in which the jurisdictional bar will apply. *See, e.g.*, United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499–1500 (11th Cir. 1991) ("[W]e will not give the [public disclosure bar] a broader effect than that which appears in its plain language."). For the Second Circuit, the relevant inquiry concerns the "'[p]otential accessibility by those not a party to the fraud . . . .'" United States *ex rel.* Kreindler v. United Techs. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993) (quoting with approval, United States *ex rel.* John Doe v. John Doe Corp., 960 F.2d 318, 322 (2d Cir. 1992)). The Ninth Circuit focuses on "whether the content of the disclosure consisted of the 'allegations or transactions' giving rise to the realtor's claim, as opposed to 'mere information.'" A-1 Ambulance Serv., Inc. v. California, 202 F.3d 1238, 1243 (9th Cir. 2000) (quoting Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473 (9th Cir. 1996)). Further, so long as the "material elements" of the fraud are in the public domain, the bar will apply. *A-1 Ambulance*, 202 F.3d at 1243. Lastly, the First Circuit appears to read the jurisdictional bar narrowly, strictly adhering to and narrowly interpreting the disclosures listed in § 3730(e)(4)(A). *See, e.g.*, *LeBlanc*, 913 F.2d at 20.

194. *A-1 Ambulance*, 202 F.3d at 1238 (holding that competitive bidding proceedings were "administrative hearings" within the meaning of the FCA).

195. *Id.* at 1241.

vices to indigents was being unlawfully shifted to third parties.[196] A-1 argued the counties refused to reimburse the ambulance services for the transportation cost of indigents.[197] As a result, the companies awarded the ambulance service contracts were unlawfully inflating their costs to Medicare patients to offset losses on the transportation of indigents.[198] In the end, the companies were fraudulently compelling Medicare "to subsidize ambulance services at 'exorbitant' rates for indigent patients who are otherwise ineligible for Medicare benefits."[199] The court found that the claims of fraud were previously publicly disclosed in "administrative hearings."[200] In essence, two public meetings were held in contemplation of the service contracts that revealed "the issues of Medicare reimbursement" and the "subsidy for uncollectible ambulance services."[201] The court noted three reasons for its conclusion. First, the competitive bidding process involved several administrative proceedings involving each county's board of supervisors.[202] Second, those proceedings were open to the public, and invited public comment.[203] Finally, the records of each of those proceedings were recorded and distributed as public records.[204] "Thus, in light of the numerous agency proceedings held by the Counties and the inherently public nature of the bidding process . . . [the court was] compelled to conclude that public disclosure occurred in this case through administrative hearings."[205]

In another opinion, the Ninth Circuit also found that disclosures in a Federal Energy Regulatory Commission ("FERC") proceeding were "administrative hearings" that triggered the FCA's public disclosure bar.[206] The relator in *Hagood*, a former Army Corps of Engineers employee, alleged that the Water Springs Dam project was based on a fixed repayment schedule that violated the Water Supply Act.[207] However, the court affirmed the district court's finding that the allegations of fraud had been disclosed previously in a proceeding between the City of Ukiah and the FERC.[208] The City of Ukiah "submitted a petition for rehearing [to the FERC] which alleged that the fixed repayment schedule . . . violated the Water Supply Act."[209] The court noted that Ukiah had all but accused the Water Agency of fraud in the FERC proceeding, and since the proceeding before the FERC was "administrative," public disclosure had occurred.[210]

Contrary to the Ninth Circuit's broad interpretation of "administrative hearing," at least one district court has used a more narrow approach. The *Garibaldi* court held that since a school board meeting was not one of the enumerated areas of § 3730(e)(4),

196. *Id.* at 1242.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 1243.
201. *Id.* at 1242.
202. *Id.* at 1244.
203. *Id.*
204. *Id.*
205. *Id.*
206. *See* Hagood v. Sonoma County Water Agency, 81 F.3d 1465, 1473–74 (9th Cir. 1996) (finding that no specific allegation of fraud needs to be revealed to bar *qui tam* suit, so long as the allegations of the fraud are disclosed in an "administrative hearing").
207. *Id.* at 1467.
208. *Id.* at 1473.
209. *Id.* at 1471.
210. *Id.* at 1473–74 (citing United States v. Northrop Corp., 59 F.3d 953, 966 (9th Cir. 1995)).

information disclosed would not constitute public disclosure.[211] Garibaldi, a director of the Audit Department of the Orleans Parish School Board, alleged that the school board overcharged federal unemployment and worker's compensation programs.[212] Garibaldi reported these violations to his superiors and a meeting of the school board was held to discuss them.[213] The board meeting was open to the public, and included an audit report of an independent company, which concluded that no violations had occurred.[214] However, to constitute public disclosures the "allegations and transactions alleged . . . must have been disclosed" in one of the sources as defined in the statute.[215] Since an "administrative hearing" is an adversarial process, a school board meeting would not qualify.[216] Unlike a civil trial, the school board meeting did not assure due process and counsel representation.[217] The court pointed out that the purpose of the meeting was merely to present the school board's one-sided view that it had not violated any provisions of the FCA.[218]

Clearly, this court diverges from the Ninth Circuit's broad reading of "administrative hearing." The Ninth Circuit focuses on the information being in the public record, while the *Garibaldi* court focuses on a strict reading of the statute, and examines the nature and purpose of the particular proceeding. If the proceeding does not resemble an adversarial hearing, it cannot be an "administrative hearing."

ii. Documents Some courts do not focus on the particular proceeding at issue, and instead focus on the type of document disclosed. In a situation similar to *A-1 Ambulance Service*, an unsuccessful bidder's attorney for a government contract filed a *qui tam* action in *Grayson*. The *Grayson* court held that the information was publicly disclosed because documents filed with the Federal Aviation Administration ("FAA") were not under seal, and were available upon request from the FAA.[219] During the bidding process for a Global Positioning System contract, AMTI represented to the government that if it were awarded the contract it would employ the technically qualified experts of Overlook Systems Technology, Inc. ("Overlook").[220] AMTI was awarded the contract; however, it never hired Overlook.[221] The relators in *Grayson*, were attorneys that had represented the two unsuccessful bidders during administrative proceedings with the FAA.[222] They alleged that AMTI's behavior amounted to no more that a "bait and switch" scheme.[223] However, the relators admitted that they first learned of the "bait and switch" from the complaint filed with the FAA.[224] The court had no trouble concluding that the FCA barred the attorney's *qui tam* case. "We . . . construe 'administrative hearing' to include the filing of an administrative complaint. Where, as in this case, the filing was not under seal and the

211. United States *ex rel.* Garibaldi v. Orleans Parish Sch. Bd., 21 F. Supp. 2d 607, 614–15 (E.D. La. 1998) (holding that a school board meeting where allegations of violations of the FCA occurred was not an "administrative hearing" under the FCA).
212. *Id.* at 610.
213. *Id.* at 611–12.
214. *Id.* at 612.
215. *Id.* at 614.
216. *Id.*
217. *Id.* at 615.
218. *Id.*
219. Grayson v. Advanced Mgmt. Tech., Inc., 221 F.3d 580, 582 (4th Cir. 2000).
220. *Id.* at 581.
221. *Id.*
222. *Id.*
223. *Id.* at 581–82.
224. *Id.* at 582.

document was available upon request to the FAA, the allegations contained . . . were publicly disclosed."[225]

The Ninth Circuit in *Hochman* found that allegations of fraud, previously investigated by the Inspector General ("IG"), did not raise the "public disclosure" bar.[226] Both relators in *Hochman* were physicians at the Veterans Health Administration ("VHA").[227] They alleged that the "defendants submitted inaccurate attendance records for . . . the physicians, thereby charging the government for time that the physicians did not spend at the Clinic."[228] The IG had previously investigated the Clinic for the same allegations, and concluded they were unsubstantiated.[229] The defendants relied on the Inspector General Act, requiring the IG to give Congress semiannual reports and statements that summarize investigational findings.[230] The court found that the IG had released its semiannual report, but did not include its findings.[231] The court distinguished *Hochman* from an earlier case stating: "In *Fine* the plaintiff conceded that the contents of the report at issue were detailed in the IG's publicly disclosed semiannual statement. Here, the district court found that the IG's publicly disclosed semiannual statement did not contain the information gathered in the IG's . . . report."[232]

The Tenth Circuit, in *Fine* concluded that a document such as a memorandum sent to "any member of the public not previously informed" of the fraud would also constitute "public disclosure."[233] In *Fine*, a former Office of Inspector General employee, acting as a relator, accused Advanced Sciences, a federal contractor, of submitting claims for unallowable costs.[234] While employed with the OIG, Fine prepared a memorandum containing his allegations of fraud and requested an audit.[235] However, due to increasing tensions between himself and the OIG, Fine also sent the memorandum to his age discrimination representative at the American Association of Retired Persons ("AARP").[236] He also provided the memorandum to an accounting firm to solicit their opinion.[237] After he filed a *qui tam* action, the court relied on *Ramseyer* and held "that public disclosure occurs when the allegations of fraud or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who are otherwise strangers to the fraud."[238] Since the AARP representative and the accountant were "members of the public not previously informed" of the fraud, the memorandum constituted public disclosure.[239]

225. *Id.*
226. United States *ex rel.* Hochman v. Nackman, 145 F.3d 1069, 1072 (1998) (finding that the allegations of fraud were absent from the IG's publicly disclosed report).
227. *Id.* at 1070.
228. *Id.*
229. *Id.* at 1071.
230. *Id.* at 1072 (citing United States *ex rel.* Fine v. Chevron, U.S.A., Inc., 72 F.3d 740, 743 (9th Cir. 1995)).
231. *Id.*
232. *Id.* (internal citation omitted).
233. United States *ex rel.* Fine v. Advanced Scis., Inc., 99 F.3d 1000, 1006 (10th Cir. 1996); *accord* United States *ex rel.* Fine v. MK-Ferguson Co., 99 F.3d 1538, 1545 (10th Cir. 1996); United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1520–21 (10th Cir. 1996).
234. *Fine*, 99 F.3d at 1001.
235. *Id.* at 1002.
236. *Id.*
237. *Id.* at 1002–03.
238. *Id.* at 1005.
239. *Id.* at 1006 (citing United States *ex rel.* Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1520–21 (10th Cir. 1996)).

A District of Columbia court has also held that if an OIG audit report contains "allegations or transactions" of the fraud, it would constitute public disclosure.[240] In *Schwedt*, an audit report prepared by the OIG and reviewed by an outside accounting firm documented that a government contractor had "submitted flawed products while certifying their completeness, and alleged that in one case [the contractor] was aware that the product was not compliant."[241] The court found that the report, on its face, "contained a 'substantial . . . indication of foul play.'"[242] The court held that the *qui tam* suit, "as a matter of law is 'based upon the public disclosure of allegations or transactions,' and thus is barred."

Along with OIG audit reports, Defense Contract Audit Agency ("DCAA") reports have been held by the Southern District of Texas to raise the public disclosure bar.[243] In *Wercinski*, two relators who were auditors for the DCAA accused IBM of increasing "its overall profits by recovering costs of leasing space in a building it already owned."[244] While working for the DCAA, the relators investigated IBM for this conduct and prepared an audit report that detailed the alleged fraud.[245] The reports were divulged to the House of Representatives, reported in the Los Angeles Times, and provided to McDonnell Douglas in another matter.[246] The court concluded:

> Contrary to Relators assertions, this Court finds that information exposing both the fraudulent transaction and the allegation of fraud have been publicly disclosed on several different occasions. The very essence of the fraud charges against IBM—that IBM had billed the government for leasing space in an office building it owned—was specifically mentioned by both Dingell and Thibault in their published remarks. Moreover, the details of IBM's alleged wrongdoing, including information regarding IBM's misclassification of its lease with Middlebrook Associates which enabled it to bill for costs otherwise not properly chargeable to the government, were provided to McDonnell Douglas in a report prepared by DCAA.[247]

iii. Investigations Administrative investigations generally lead to public disclosures. For example, the Seventh Circuit in *Farmington* held that information that was disclosed to the Federal Farmers' Home Administration ("FmHA") was public disclosure, barring the *qui tam* action.[248] In *Farmington*, Eunice Matthews personally guaranteed a $100,000 line of credit extended to her son from the Bank of Farmington.[249] However, the bank loaned him over $290,000 which he used in connection with his farm operation.[250] After the bank found itself undersecured, it sought an additional guaranty from the FmHA.[251] However, contrary to federal law, when the bank applied to the FmHA, it did not disclose

240. United States *ex rel.* Schwedt v. Planning Research Corp., Inc., 39 F. Supp. 2d 28, 32–33 (D.D.C. 1999).
241. *Id.* at 33.
242. *Id.*
243. Wercinski v. Int'l Bus. Machs. Corp., 982 F. Supp. 449, 457–58 (S.D. Tex. 1997).
244. *Id.* at 451.
245. *Id.* at 451–52.
246. *Id.* at 453.
247. *Id.* at 458.
248. 166 F.3d 853, 861 (7th Cir. 1999).
249. *Id.* at 856.
250. *Id.*
251. *Id.*

the guaranty of Eunice Mathews.[252] Following the son's default, the bank submitted, and was paid on, two loss reports submitted to the FmHA.[253] The bank subsequently sued Eunice Mathews on her guaranty.[254]

Mathews's attorney tried unsuccessfully to plead the bank's concealment of the mother's guaranty as a defense during the state court action.[255] "A loan officer at the bank, Mr. Rich Kimbrell, told [Eunice] Mathews's attorney that the Mathews's guaranty had not been disclosed on the FmHA application, but that it was in . . . [her son's] file at the Bank and would have been reviewed periodically by the FmHA."[256] During the course of the state court action, Eunice Mathews's attorney subpoenaed Mr. Victor Rhea, the FmHA employee responsible for the loan at the time.[257] Upon receipt of the subpoena, Mr. Rhea contacted the bank and was told, for the first time, about the Mathews's guaranty.[258] The court held that since Mr. Rhea was directly responsible for the supervision of these particular loans, public disclosure occurred when the bank confessed their misrepresentations to him over the telephone.[259] The court found this telephone conversation an "administrative investigation" under the FCA.[260] The court determined that "[i]f the disclosure is made, as here, to precisely the public official responsible for the claim, it need not be disclosed to anyone else to be public disclosure within the meaning" of the FCA.[261]

This reading of the FCA by the court is grounded in the Seventh Circuit's narrow interpretation of the public disclosure bar—bringing the fraud to the attention of the proper authorities.[262] The court would not have found public disclosure had the information been disclosed to someone without the ability to intervene on behalf of the government.[263] If, for example, the information would have been disclosed to a "postal carrier or to the Governor of Guam," no public disclosure would have occurred in this case.[264] This interpretation is at considerable odds with other circuits that apply the public disclosure bar to instances of disclosure to "any single member of the public not previously informed thereof."[265]

The Ninth Circuit has also addressed whether internal investigations constitute administrative investigations, and hence instruments of public disclosure. In *Aflatooni*, the circuit court concluded that a subcontractor's own internal investigation would not constitute an "administrative investigation" so as to raise the public disclosure bar.[266] Kitsap Physicians Service ("KPS") employed Dr. Aflatooni to provide medical services.[267] KPS subcontracted to the Health Care Financing Administration ("HCFA") to administer the Medicare Part B program in certain regions of Washington State.[268] Dr. Aflatooni alleged

252. *Id.*
253. *Id.*
254. *Id.* at 857.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* at 862.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* (quoting United States *ex rel.* Fine v. Advanced Scis., Inc., 99 F.3d 1000, 1006 (10th Cir. 1996)).
266. Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 523–24 (9th Cir. 1999).
267. *Id.* at 519.
268. *Id.*

in his *qui tam* action that some doctors were altering patient billing records.[269] Specifically, Dr. Matan, a physician employed by Pathology Associates of Kitsap County ("PAKC"), had reported his partner, Dr. Hallman, to the KPS board of directors for suspected billing irregularities.[270] The board employed its outside counsel to investigate the allegations.[271] An extensive internal investigation was conducted, however, no action was taken and the results were never reported.[272] Dr. Aflatooni alleged in his *qui tam* that doctors Matan and Hallman submitted false claims to the Medicare program and that KPS covered up the fraud.[273] The court considered whether the internal investigation of PAKC amounted to an "administrative investigation."[274] The Ninth Circuit concluded "that the internal investigation of PAKC Defendants conducted by KPS's own lawyer did not constitute an 'administrative investigation' within the meaning of § 3730(e)(4)(A)."[275] The court reasoned "KPS's investigation amounted to a self-inquiry into alleged fraud of its own board member, not an institutional inquiry of the kind contemplated by the statute."[276] Therefore, the *qui tam* was not barred based on that disclosure.[277]

The Southern District of New York, in *Phipps*, recently barred a *qui tam* action based on an "administrative investigation" by the Department of Health.[278] The relator in *Phipps* alleged "that certain relatives of [the] defendants . . . received benefits from the Women, Infants, and Children ("WIC") program that they were not eligible to receive."[279] Prior to Phipps's suit, the New York State Department of Health ("DOH") began investigating "whether people had improperly enrolled into the WIC program."[280] Phipps admitted that some of the allegations in her *qui tam* were the result of disclosures made to her by the DOH during its "administrative investigation."[281] The court concluded "[t]he DOH in this case divulged the allegations of fraud and therefore the allegations were publicly disclosed."[282]

b. civil proceedings

i. Litigation The area of prior litigation is full of mines that unsuspecting *qui tam* plaintiffs should carefully navigate. Prior litigation comes in many forms, each requiring special attention to the way a particular circuit analyzes the public disclosure bar. At the outset, it should be reiterated that the starting point for determining whether a particular litigation document can constitute public disclosure should always be the statutory text of the FCA.

269. *Id.* at 520.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 523–24.
275. *Id.* at 524.
276. *Id.*
277. *Id.*
278. United States *ex rel.* Phipps v. Comprehensive Cmty. Dev. Corp., 152 F. Supp. 2d 443, 454–55 (S.D.N.Y. 2001).
279. *Id.* at 450.
280. *Id.* at 454.
281. *Id.*
282. *Id.*

Prior "civil litigation" is not among the list of items in § 3730(e)(4)(A).[283] However, courts have recognized that the term "civil hearing" enumerated in the FCA properly includes general civil litigation.[284] Therefore, a broad range of documents from civil complaints to criminal indictments have been held to constitute public disclosure.[285]

Sometimes disclosure occurs in a civil context. When this happens the critical inquiry is how broad the court defines the term "civil hearing." *Siller* held that an entire civil proceeding, or any portion thereof, constitutes a "hearing" under the FCA, and will bar *qui tam* actions that result from such information.[286] Siller brought a *qui tam* suit against Becton, Dickinson & Company ("Becton") for overcharging the government for health care products.[287] At the time, Siller was working for Scientific Supply, Inc. ("SSI"), a seller of medical supplies supplied by Becton.[288] Becton canceled SSI's distributorship contract and SSI filed a contract action against them.[289] "The thrust of SSI's complaint was that [Becton] canceled SSI's distributorship because it feared that SSI . . . would disclose that [Becton] was overcharging the government."[290] Following a settlement agreement, Siller filed a *qui tam* action against Becton based on the alleged overcharges.[291] According to the court, dismissal of Siller's *qui tam* would be proper if the SSI suit's disclosure of these allegations constituted a public disclosure in a civil hearing. The court stated "that any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes" of the FCA.[292] Siller unsuccessfully argued that "hearing" as used in the FCA does not include merely filing a complaint.[293] Most circuits agree that filings in prior civil proceedings will constitute public disclosure.

In *Koch*, a relator brought a *qui tam* action asserting that "by deliberate and systematic mismeasurement" the defendants "stole crude oil and natural gas from Federal and Indian lands."[294] Mr. Koch, Precision's majority shareholder, had already filed three civil suits

283. 31 U.S.C. § 3730(e)(4)(A) (2000) (choosing to list instead criminal, civil, or administrative hearings, Congress did not include prior "civil litigation"); *see also* United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 554 n.5 (10th Cir. 1992) ("Allegations disclosed via civil litigation . . . fall within the scope of public disclosure as contemplated by § 3730.").

284. *See, e.g.*, United States *ex rel.* Stinson v. Prudential Ins., 944 F.2d 1149, 1157 (3d Cir. 1991).

285. United States v. Alcan Elec. & Eng'g, Inc., 197 F.3d 1014, 1020 (9th Cir. 1999) (finding that a civil complaint constitutes public disclosure); United States *ex rel.* Lujan v. Hughes Aircraft Co., 162 F.3d 1027, 1032–33 (9th Cir. 1998) (finding that allegations in a coworkers prior *qui tam* complaint constituted public disclosure); United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 331 (6th Cir. 1998) (holding that relator's prior complaint in a Whistleblower Protection Act suit was public disclosure); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1350 (4th Cir. 1994) (rejecting relator's argument that "'hearing' does not encompass the mere filing of a complaint"); *Koch Indus.*, 971 F.2d at 553–54 (holding that RICO complaint constitutes public disclosure); *Stinson*, 944 F.2d at 1155 (holding that a civil hearing does not need to be a live proceeding); United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir. 1990) (stating that claims raised in a prior RICO filing were public disclosures); United States *ex rel.* Foust v. Blue Cross & Blue Shield of Nat'l Capital Area, 26 F. Supp. 2d 60, 67–68 (D.D.C. 1998) (holding that prior breach of contract suit constituted a "civil hearing," and thus supported a finding of public disclosure).

286. *Siller*, 21 F.3d at 1347.

287. *Id.* at 1340–41.

288. *Id.* at 1340.

289. *Id.* at 1341.

290. *Id.*

291. *Id.*

292. *Id.* at 1350; *see, e.g.*, United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994); *accord* United States *ex rel.* Kreindler v. United Tech. Corp., 985 F.2d 1148, 1158 (2d Cir. 1993); United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 554 n.5 (10th Cir. 1992); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1154–56 (3d Cir. 1991).

293. *Siller*, 21 F.3d at 1350.

294. *Koch Indus.*, 971 F.2d at 553.

against the defendants alleging that this conduct also constituted RICO violations.[295] The court held that since the allegations in the *qui tam* were substantially similar to the allegations in the prior civil litigation, public disclosure had occurred,[296] and his *qui tam* suit was dismissed.[297]

Additionally, courts have held that prior civil litigation documents will support public disclosure, even if they were filed in state court proceedings.[298] In *Federal Recovery Services*, the Fifth Circuit held that a prior filing in Louisiana state court supported public disclosure, and barred a *qui tam* action.[299] Quoting *Siller*, the court held that "any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A)."[300]

Even if there is prior litigation, some courts hold that in order for the litigation to raise the public disclosure bar, the allegations in the *qui tam* suit must be similar to the allegations in the prior lawsuit.[301] Therefore, when researching Mr. Relator's FCA claims, the *qui tam* attorney should peruse all publicly filed documents from prior lawsuits in order to determine if there has been public disclosure, the content of the information, and the best forum for the litigation.

ii. Discovery Some courts hold that disclosure of discovery material to a party who is not under any court-imposed limitation as to its use (such as a protective order) is a public disclosure.[302] Discovery material filed with the court, and not subject to protective order, is considered publicly disclosed in a civil hearing (which is roughly synonymous with a proceeding) for purposes of the jurisdictional bar of 31 U.S.C.A. § 3730(e)(4)(A).[303] However, some courts hold that discovery material that "has not been filed with the court, and is only theoretically available upon the public's request," is not "publicly disclosed" within the meaning of § 3730(e)(4)(A).[304]

295. *Id.*
296. *Id.* at 554.
297. *Id.*
298. *See, e.g.*, United States *ex rel.* Fed. Recovery Servs., Inc. v. Crescent City E.M.S., Inc., 72 F.3d 447, 450 (5th Cir. 1996).
299. *Id.*
300. *Id.* (quoting United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1350 (4th Cir. 1994)).
301. *See generally* United States *ex rel.* Found. Aiding the Elderly v. Horizon West, Inc., 265 F.3d 1011, 1015–16 (9th Cir. 2001) (holding that "the evidence [of public disclosure from the prior civil litigation] failed to expose either the fraud alleged or the transactions underlying that fraud."); *accord* United States *ex rel.* Mikes v. Straus, 931 F. Supp. 248, 257 (S.D.N.Y. 1996) (finding that to constitute public disclosure, the *qui tam* action must be based upon the prior litigation).
302. *See, e.g.*, United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1159–60 (3d Cir. 1991); United States *ex rel.* Stone v. Amwest Savings Ass'n, 999 F. Supp. 852, 856 (N.D. Tex. 1997) (stating that "[l]itigation disclosures include all filings, and in the absence of a protective order, information obtained during discovery though never filed with the court."). Traditional discovery requests do not constitute "public disclosure." United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross, 55 F. Supp. 1040, 1050 (S.D. Ga. 1990) ("The Court concludes that Congress meant what it said: a 'hearing' is some sort of live, relatively formal proceeding before a decisionmaking body, with question of law or fact to be tried. Because Stinson Lyons received the information upon which they based this action through traditional discovery requests in the *Leonard* litigation, it was not disclosed publicly in a 'hearing.' The Court holds that the jurisdictional bar of Section 3730 does not apply in this case."). *But see* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential, 944 F.2d 1149, 1158 (3d Cir. 1991) (holding that disclosure of discovery material to a party who is not under any court-imposed limitation as to its use (such as a protective order) is a public disclosure under the FCA).
303. United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 652 (D.C. Cir. 1994).
304. *Springfield*, 14 F.3d at 652 ("We do, however, restrict that interpretation to discovery material such as that involved here which is *actually* made public through filing, as opposed to discovery material which has not been filed with the court and is only *theoretically* available upon the public's request."); Fed. Recovery Serv., Inc. v. United States, 72 F.3d 447, 450–51

The most instructive case on point is *Pentagen*. In *Pentagen*, the defendant, CACI, moved for dismissal of Pentagen's amended complaint for lack of subject matter jurisdiction pursuant to § 3730(e)(4) of the False Claims Act, because Pentagen's allegations were based on information publicly disclosed by CACI or third parties in a deposition from *Runaway Development Group v. Pentagen Technologies, Inc*.[305] The court held that "because the evidence reveals that Pentagen must have learned of some of the elements of its *qui tam* allegation from the RDG I deposition," public disclosure had occurred.[306]

c. CRIMINAL PROCEEDINGS

Can a *qui tam* relator bring suit from information gleaned from a criminal indictment? Although there would appear to be a statutory bar, one of the few courts to address the issue has been answered in the affirmative.[307] Two months following the intervention in a *qui tam* suit, the government filed a criminal indictment that included different factual allegations.[308] The relator amended his complaint to include these new allegations.[309] Northrop alleged that the amended complaint was barred because the new allegations were publicly disclosed in the criminal indictment.[310] The Ninth Circuit held that "if the government's disclosure of the [new allegation] was the result of a criminal investigation that was instigated as a consequence of the information [the relator] provided to the government, it could not be used to bar the *qui tam*."[311] Basically, if the relator supplies the government with information of a specific fraud, and the government uses that information to form

(5th Cir. 1995) (The filings in the Louisiana state court suits brought by Priority E.M.S. were "public disclosures" within the meaning of the statute. "[A]ny information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A)."); *Siller*, 21 F.3d at 1350. This includes civil complaints. *Id.* at 1350–51.) *See generally* U.S. *ex rel.* Laird v. Lockheed Martin Eng'g and Sci. 336 F.3d 346 (5th Cir. 2003) ("In response, Congress amended the FCA to bar a court's jurisdiction over *qui tam* suits that were "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (current version at 31 U.S.C. § 3730 (2000)). However, this amendment led to unintended results as it deprived potential relators, who had themselves given valuable information to the government *before* filing their *qui tam* action, of an ability to sue under the FCA. *See, e.g.*, United States *ex rel.* Wisconsin v. Dean, 729 F.2d 1100, 1106 (7th Cir. 1984) (holding that the district court had no jurisdiction over a *qui tam* action brought by Wisconsin based on information of Medicaid fraud the state had uncovered because the state had reported the Medicaid fraud to the federal government before bringing suit). In response, in 1986, Congress amended the Act (to its current form). Specifically, it repealed the "government knowledge" jurisdictional bar and replaced it with the "public disclosure" bar. *See* United States *ex rel.* Rabushka v. Crane Co., 40 F.3d 1509, 1511 (8th Cir. 1994) (discussing the purpose behind the repeal as an accommodation of both of the FCA's goals of promoting private citizen involvement in exposing fraud against the government, and preventing parasitic suits by opportunistic late-comers who add nothing to the exposure of fraud).

305. United States *ex rel.* Pentagen v. CACI Int'l, 1996 WL 11299, *5 (S.D.N.Y. Jan. 4, 1996).

306. *Id.* at *8. With regard to the original source rule to be discussed *infra* at VI.A.4, the court stated:

> Furthermore, the Second Circuit holds that the party divulging the information deemed publicly disclosed by litigation papers, such as depositions, is the original source of that information despite the fact that another party initiated the court proceeding as part of its discovery investigation. Thus, the former AMC official is the original source of the information publicly disclosed by the RDG I deposition. Therefore, Pentagen failed to satisfy the original source requirements of § 3730(e)(4)(A)-(B) and the court dismisses the first cause of action for lack of subject matter jurisdiction.

Id.

307. United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411–412 (9th Cir. 1993).

308. *Id.* at 409.

309. *Id.*

310. *Id.*

311. *See id.* at 411–12.

the basis of a criminal indictment, then the criminal indictment will not trigger the public disclosure bar.[312]

d. LEGISLATIVE ISSUES

i. Documents In some instances, courts have classified documents as legislative, and unlike Government Accounting Office ("GAO") reports or audits, legislative documents are not specifically enumerated under § 3730(e)(4)(A) as constituting public disclosure.[313] Based on a purely textual interpretation, they should not support a defensive claim of public disclosure. However, even where a court finds the list in § 3730(e)(4)(A) to be exhaustive, the court will analyze the circumstances surrounding the alleged disclosure before making a ruling as to whether public disclosure has occurred.[314]

In *Giles*, the court was presented with the question of whether certain disclosures made in legislative documents could bar a *qui tam* suit.[315] After an earthquake struck Los Angeles, the city contracted with various debris removal companies.[316] The city received seventy-five million dollars in advance from the Federal Emergency Management Agency ("FEMA") in order to assist in its clean-up and restoration efforts.[317] The relator, Diane Giles, was working for the city as an auditor.[318] During a review of all the invoices submitted by the contractors, she discovered various over-billings and mischarges for debris removal services.[319] Upon reporting these findings to her supervisor, she was summoned to a meeting with him and the offending contractor.[320] The contractor stated that he knew of other contractors similarly overbilling and that, if disciplined, he would expose everyone else.[321] Apparently in an attempt to cover up the misconduct, Giles' supervisors paid the contractor for all work billed and fired Giles.[322]

Following her termination, Giles filed a *qui tam* action against various defendants including the city.[323] In defense of the *qui tam* action, the defendants moved to dismiss her *qui tam* complaint by arguing that it was barred by public disclosure.[324] As evidence, they pointed to a report by the Public Works Committee to the City Council that stated "[a]t the Committee meeting there were concerns raised regarding allegations by whistleblowers that some of the contractor [sic] were not diligent in utilizing personnel and equipment on the debris removal activities, and that there were even instances of 'padding' of the payrolls and equipment usage."[325] The defendants asserted, "that application of section

312. *Id.* at 412. The DOJ has adopted a policy of forcing relators and their counsel to waive their *Barajas* rights as a condition of permitting them to look at documents the government obtains. This of course flies in the face of the public/private "partnership" between relators and government, which was clearly contemplated in the FCA's legislative history. *See Barajas*, 5 F.3d at 407 (giving a relator the right to amend a *qui tam* complaint to include new allegations of fraud that were discovered from documents the government had uncovered during its initial investigation).
313. *See supra* note 182 (listing the categories of public disclosure).
314. *See generally* United States *ex rel.* Giles v. Sardie, 191 F. Supp. 2d 1117 (C.D. Cal. 2000) (holding that disclosures made in a legislative document did not raise the public disclosure bar); *see also supra* note 182 (describing § 3730(e)(4)(A)).
315. Giles, 191 F. Supp. 2d at 1124–25.
316. *Id.* at 1119.
317. *Id.*
318. *Id.* at 1120.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.* at 1124.
325. *Id.* at 1120.

3730(e)(4)(A) of the FCA bars the action because the Report by the Public Works Committee constituted a 'public disclosure' . . . ."[326]

In considering the merits, the court first held that legislative reports were not listed in § 3730(e)(4)(A).[327] Second, the court distinguished the present case from *A-1 Ambulance*, the case on which the defense relied.[328] The court opined that in *A-1 Ambulance*, unlike the present case, there was extensive public disclosure in an agency proceeding; however, in this case, the report only contained "one meager sentence at the end of the summary, vague suggestions of over billing without implicating specific contractors or government offices."[329] In this way, the court buttressed its holding by citing the Ninth Circuit's view that "no public disclosure exists where certain wrongdoers are identified and not others."[330] In the case under consideration, the report contained no information implicating the city or any of the other defendants with regard to overbilling and mischarging.[331]

Implicit in this court's opinion is the conclusion that legislative documents can constitute public disclosure if they reveal the "allegations and transactions" of the fraud. The underlying tone of the court's opinion seems to suggest that, factually speaking, there just was not enough disclosed to trigger the bar. In light of the court's finding that the list in § 3730(e)(4)(A) is exhaustive, its engagement in a factual analysis of the reported disclosures seems questionable. The court could have stated that since legislative documents are not listed in the section, they cannot constitute public disclosure. The court gave no explicit guidance as to its stance on legislative documents and how they fall within the public domain.

ii. Hearings Unlike "legislative documents," hearings are clearly within the statutory text of § 3730(e)(4)(A). Therefore, whenever disclosures are made during Congressional hearings, courts will deem the information publicly disclosed.[332] The case of *Settlemire* is instructive. In *Settlemire*, the relator brought suit alleging that the District of Columbia misappropriated federal money allocated for its police department.[333] However, prior to his *qui tam* action, a city official had disclosed the inappropriate use of the money during two Congressional hearings.[334] The court found public disclosure articulating, in somewhat of a flawed fashion, that since these disclosures gave the government an opportunity to investigate the city's use of the money, public disclosure had occurred.[335] Under a public disclosure analysis, the critical issue should be whether or not the information has been

326. *Id.* at 1124.

327. *Id.* (finding the list of items in § 3730(e)(4)(A) to be exhaustive); *accord* United States *ex rel.* Dunleavy v. County of Del., 123 F.3d 734, 744 (3d Cir. 1997); United States *ex rel.* Fine v. Advanced Scis., Inc., 99 F.3d 1000, 1004 (10th Cir. 1996); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 323 (2d Cir. 1992); United States *ex rel.* Williams v. NEC Corp., 931 F.2d 1493, 1499–1500 (11th Cir. 1991); United States *ex rel.* LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990).

328. *Giles*, 191 F. Supp. 2d at 1125.

329. *Id.*

330. *Id.* at 1126 (citing United States *ex rel.* Aflatooni v. Kitsap Physicians Servs., 163 F.3d 516, 522–23 (9th Cir. 1999); United States *ex rel.* Lindenthal v. Gen. Dynamics Corp., 61 F.3d 1402, 1409–10 (9th Cir. 1995); *accord* Cooper v. Blue Cross and Blue Shield of Fla., Inc., 19 F.3d 562, 566 (11th Cir. 1994)).

331. *Id.*

332. *See, e.g.*, United States *ex rel.* Settlemire v. D.C., 198 F.3d 913, 918–919 (D.C. Cir. 1999) (finding disclosures made during Congressional Hearings were public disclosures); United States *ex rel.* Ackley v. Int'l Bus. Machs. Corp., 76 F. Supp. 2d 654, 662 (D. Md. 1999) (finding disclosures made during Congressional Hearings were public disclosures).

333. *Settlemire*, 198 F.3d at 916.

334. *Id.* at 916–17.

335. *Id.* at 919.

placed in the public domain, and not whether someone pursued an investigation, the latter more analogous to the statutorily abolished government knowledge bar.[336]

e. FOIA

The Freedom of Information Act ("FOIA") is the tool of choice for citizens to obtain information from the government.[337] Unless an exemption applies, any information requested by a citizen through FOIA must be disclosed.[338] Sometimes, a relator will possess information concerning a fraud that was obtained through FOIA. The *qui tam* attorney must then determine if such information creates a public disclosure problem. Most courts have concluded that information obtained through FOIA constitutes public disclosure.[339]

The majority of courts follow the Third Circuit's reasoning in *Mistick*. The relator in *Mistick* made a FOIA request for letters from the United States Department of Housing and Urban Development ("HUD") that might contain evidence of fraud.[340] The court determined that information disclosed through a FOIA request is public disclosure for purposes of the FCA.[341] In so holding, the court defined a FOIA request as an "administrative report" for purposes of § 3730(e)(4)(A).[342] However, the court ignored the fact that a FOIA request is not listed, and therefore should be excluded pursuant to the statutory text of § 3730(e)(4)(A).[343] Finally, the court strained the reasoning in *Consumer Product Safety Commission* to support its finding.[344] In doing so, the court equated a public disclosure under the Consumer Product Safety Act ("CPSA") with a public disclosure under the FCA.[345]

> In light of the statutory history of the CPSA, it is troubling that the *Mistick PBT* court found such comfort and persuasive values in this opinion since the legislative and judicial context of the CPSA was wholly unrelated to the issue before the court. For instance, while the stated purpose of the CPSA stresses a need for broad disclosure, the history

336. In United States *ex rel.* Merena v. Smithkline Beecham, the government took the position that the relator was entitled to a share of only $60 million, rather than a share of the full $323 million recovery because the relator had fortuitously "stumbled over" an already existing government investigation that was part of their Labscam initiative. This case has a direct implication for public disclosure analyses. *See generally* United States *ex rel.* Merena v. Smithkline Beecham Corp., 205 F.3d 97 (3d Cir. 2000) (holding that government's agreement to settle did not waive the government's right to contest relators' share of proceeds).

337. *See* James Roy Moncus III, *The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential or Positive Synergy?*, 55 Vand. L. Rev. 1549, 1574 (2002) (citing Herbert N. Foerstel, Freedom of Information and the Right to Know: Origins and Applications of the Freedom of Information Act 44 (1999)).

338. *Id.*

339. United States *ex rel.* Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 378 (3d Cir. 1999) (holding that a disclosure pursuant to FOIA does trigger the public disclosure bar); United States v. A.D. Roe Co., 186 F.3d 717, 723–24 (6th Cir. 1999) (holding that disclosure pursuant to FOIA does trigger the public disclosure bar); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1017–18 (7th Cir. 1999) (holding that a disclosure pursuant to FOIA does trigger the public disclosure bar); United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1518 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 684–86 (D.C. Cir. 1997) (holding that disclosure pursuant to FOIA does trigger the public disclosure bar). *But see* United States *ex rel.* Bondy v. Consumer Health Found., No. 00- 2520, 2001 WL 1397852, at *8 n.2 (4th Cir. Nov. 9, 2001) (holding that *accord*ing to the FCA, disclosure under FOIA does not trigger the public disclosure bar).

340. *Mistick*, 186 F.3d at 376.

341. *Id.* at 383.

342. *Id.*

343. *See supra* note 182.

344. *Mistick*, 186 F.3d at 383.

345. *Id.*

> surrounding the FCA posits no such need. Indeed, both the legislative and judicial history of the FCA emphasize the need for a broad remedial reading of the statute so that fraud will not go unprosecuted.[346]

Disturbingly, most courts to consider the issue have joined in the holding of Mistick.[347] Only an unpublished decision of the Fourth Circuit holds that disclosures under FOIA do not constitute public disclosures under the FCA.[348]

f. NEWS MEDIA

Suppose, prior to the filing of the *qui tam* suit, you discover an article on the front page of the New York Times that discloses the fraud of your relator's company. The majority of circuits hold that if the fraud is disclosed in the news media, it will be barred by public disclosure.[349] Only two circuits add an additional requirement. Both the Ninth and Second Circuits hold that the relator is barred from bringing his *qui tam* action unless he had a hand in the public disclosure.[350] "This view is rejected as having no basis in the text or legislative history [of the FCA]."[351] Although this concept seems to parallel the original source rule exception, the adopting two circuits go further and appear to exclude even original sources from whistleblower standing if the matter was already in the public domain.[352]

g. OTHER ISSUES

Even if a "public disclosure" occurred, the jurisdictional bar is still not triggered unless your suit is "based upon" the public disclosure. Due to the nebulous nature of the phrase "based upon," there is, not surprisingly, a split among the circuits that labored to carve the contours of the phrase.[353] The Fourth and Seventh Circuits have held that a *qui tam* action should be permitted to proceed unless the allegations in the relator's lawsuit are actually "derived from" a prior public disclosure.[354] Under this test, if Mr. Relator was aware of the public disclosure prior to filing his lawsuit and he actually derived the substance of his action from the prior disclosure, then his suit would be barred.

On the other hand, six circuits have taken the position that "based upon" means "supported by" or "substantially similar to."[355] Under this interpretation, if there is any identity

346. Moncus, *supra* note 337, at 1578.

347. *Id.* at 1578–79; *see also supra* note 342.

348. United States *ex rel.* Bondy v. Consumer Health Found., No. 00- 2520, 2001 WL 1397852, at *8 n.2 (4th Cir. Nov. 9, 2001).

349. Wang v. FMC Corp., 975 F.2d 1412, 1418 (9th Cir. 1992); *accord* United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 16 (2d Cir.1990). *But see* United States v. Bank of Farmington, 166 F.3d 853, 865 (7th Cir. 1999) (rejecting the additional requirement by the Ninth Circuit that "the *qui tam* plaintiff herself 'have had a hand in the public disclosure of allegations that are part of one's suit'"); *accord* United States *ex rel.* Fine v. Advanced Scis., Inc., 99 F.3d 1000, 1006–07 (10th Cir. 1996); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1355 (4th Cir. 1994); Cooper v. Blue Cross, Blue Shield of Fla., Inc., 19 F.3d 562, 568 n.13 (11th Cir. 1994); United States *ex rel.* Stinson, Lyons, Gerlin Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991).

350. *Wang,* 975 F.2d at 1418; *accord* Dick, 912 F.2d at 16.

351. *Bank of Farmington*, 166 F.3d at 865. Therefore, in a majority of the circuits, even if the media reports a fraud prior to the filing of the *qui tam* suit, the relator can maintain his cause of action provided he is an original source, which is discussed *infra* VI.A.4.

352. *Wang,* 975 F.2d at 1419.

353. Lamenting over the amorphous "based upon" language, one court of appeals commented, "[t]he inescapable conclusion is that the *qui tam* provision does not reflect careful drafting." United States *ex rel.* Mistick PBT v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 388 (3d Cir. 1999).

354. *Bank of Farmington*, 166 F.3d at 863–64; Siller, 21 F.3d at 1348–49.

355. *Mistick,* 186 F.3d at 386; United States *ex rel.* Jones v. Horizon Healthcare, 160 F.3d 326, 332–33 n.4 (6th Cir. 1998); United States *ex rel.* Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 567–58 n.10 (11th Cir. 1994);

between Mr. Relator's complaint and the content of a prior public disclosure, the jurisdictional bar precludes his lawsuit.

4. Original Source

Even if your suit is "based upon" prior disclosures, Mr. Relator may still recover provided he is an "original source" of the information. The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based, and has voluntarily provided the information to the government before filing an action under this section which is based on the information."[356] Whether Mr. Relator has "direct and independent knowledge" will depend on the facts of your case. Mr. Relator will have "direct knowledge" if he can show that he had firsthand knowledge of the alleged fraud, and that he obtained this knowledge through his own unmediated efforts.

Recently, the Fifth Circuit in *Laird*, completed a detailed analysis of the "original source" exception to the public disclosure bar.[357] James Mayfield, a project specialist, was employed with Lockheed Martin Engineering and Science Company ("Lockheed") from late 1989 until his termination in 1995.[358] One of his responsibilities was to file cost report forms in order for NASA to evaluate Lockheed's expenditures under its engineering contract.[359] The contract Lockheed had with NASA required it to certify that it was reporting these cost figures accurately.[360] Mayfield discovered Lockheed was inflating its costs reports and he began to report these findings to his supervisors.[361] Lockheed terminated Mayfield and he filed a wrongful termination suit against them.[362] However, the Texas district court granted Lockheed's motion for summary judgment, and the Fourteenth Court of Appeals affirmed.[363] Mayfield then filed a *qui tam* action based on Lockheed's inflated cost projections.[364] The court granted Lockheed's motion for summary judgment, found public disclosure, and determined that Mayfield was not the "original source" of the information following the filing of his wrongful termination suit.[365]

As the Fifth Circuit began its analysis of "original source," it noted that the term "is the subject of much disagreement among the courts of appeals."[366] The court discussed that the original source exception required the satisfaction of a two-part test.[367] First, "the relator must demonstrate . . . 'direct and independent knowledge of the information on which the allegations are based.'"[368] Second, "the relator must demonstrate that he or she

United States *ex rel.* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 653–54 (D.C. Cir. 1994); United States *ex rel.* Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1994); United States *ex rel.* Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 552 (10th Cir. 1992).

356. 31 U.S.C. § 3730(3)(4)(B) (2000).
357. *See generally* United States *ex rel.* Laird v. Lockheed Martin Eng'g and Sci. Servs. Co., 336 F.3d 346 (5th Cir. 2003) (construing "original source" of the FCA).
358. *Id.* at 348.
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Id.* at 349 n.1.
365. *Id.*
366. *Id.* at 352.
367. *Id.*
368. *Id.* (citing 31 U.S.C. § 3730(e)(4)(B) (2000)).

has 'voluntarily provided the information to the Government before filing'" the *qui tam*.[369] The Fifth Circuit disagreed with the lower court's finding that Mayfield was not the "original source" because he was not working at Lockheed prior to the filing of that *qui tam* action.[370] It found that Mayfield could still qualify as an "original source" without "direct" and "independent" knowledge of each false claim alleged in his complaint.[371] Instead, to qualify as an original source, the relator must have direct and independent knowledge of the information "contained in the publicly disclosed material."[372] Since Mayfield was the person that filed the publicly disclosed information, he clearly had independent knowledge.[373] Next, the *Laird* court adopted a plain meaning definition of "direct" knowledge. "We interpret the term 'direct' by its plain meaning as knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others."[374] As long as Mr. Relator obtained his knowledge independently of the public disclosures and "by his own efforts," he will be considered an "original source" of the information and the jurisdictional bar will not apply.[375]

B. Pre-Filing Release

Robert Relator has given you a compelling story about fraud and corruption. He tells you, however, that he previously sued his ex-employer for wrongful discharge, and although there was no public disclosure of the fraud, he signed a release of all future claims. How does the pre-filing release affect the viability of the *qui tam* suit?

Generally, Robert Relator can settle his independent employment tort case without jeopardizing his subsequent *qui tam* case.[376] Public policy will prohibit enforcing a broad release executed by a relator before a *qui tam* suit is filed.[377] Green, a criminal investigator at Northrop, uncovered fraud, reported it, and was fired.[378] Following his wrongful termination settlement for $190,000, he filed a *qui tam* action alleging "that the defendants conspired to submit false claims to the United States 'for costs associated with the procurement of Automated Test Equipment ("ATE") that Northrop was required to deliver'"

369. *Id.* (citing § 3730(e)(4)(B)).
370. *Id.* at 353–54.
371. *Id.* The *Laird* court noted that the Third, Ninth, and Tenth Circuits take the minority position and hold the relator must have direct and independent knowledge of the information in the complaint to qualify as the original source. *Id.*; *accord* United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1162 (10th Cir. 1999); United States *ex rel.* Mistick v. Hous. Auth. of Pittsburgh, 186 F.3d 376, 388–89 (3d Cir. 1999); United States *ex rel.* Barajas v. Northrop Corp., 5 F.3d 407, 411 (9th Cir. 1993).
372. *Laird*, 336 F.3d at 354. Thus, the *Laird* court joined the Fourth, Sixth, Eighth, and D.C. Circuits, the majority, in holding that to qualify as the original source, the relator must have direct and independent knowledge of the information "on which the allegations in the public disclosure are based." *Id.*; *accord* Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1048 (8th Cir. 2002); United States *ex rel.* Grayson v. Advanced Mgmt. Tech., Inc., 221 F.3d 580, 583 (4th Cir. 2000); United States *ex rel.* Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 690 (D.C. Cir. 1997); United Sates *ex rel.* McKenzie v. BellSouth Tele., Inc., 123 F.3d 935, 943 (6th Cir. 1997).
373. *Laird*, 336 F.3d at 355 ("As Mayfield is responsible for filing the publicly disclosed information in Mayfield I, it is beyond dispute that dismissal on the basis that his knowledge is not 'independent' of the public disclosure . . . would have been in error.").
374. *Id.* (citing *Webster's New International Dictionary* 640 (3d ed. 1961)); *cf Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1048–49; *Hafter*, 190 F.3d at 1161; United States *ex rel.* Stinson, Lyons, Gerlin Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991); *Findley*, 105 F.3d at 690.
375. *Laird*, 336 F.3d at 352–56 (construing "original source" of the FCA).
376. United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963- 67 (9th Cir. 1995); *accord* United States *ex rel.* DeCarlo v. Kiewit/AFC Enters., Inc., 937 F. Supp. 1039, 1047 (S.D.N.Y. 1996).
377. *Green*, 59 F.3d at 963–67.
378. *Id.* at 956.

under a government contract.[379] The government declined to intervene, and Northrop attempted to have the suit dismissed based on the release that Green signed when he settled his employment claim.[380] The Ninth Circuit concluded that a "prefiling release of False Claims Act ("FCA") *qui tam* claims, when entered into without United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim."[381] Consistent with its reasoning, the Ninth Circuit later enforced a prefiling release as a bar against subsequent *qui tam* litigation when the government had investigated the false claims allegations and decided not to intervene prior to the signing of the release.[382] Under those circumstances, the court ruled that the public interest underlying FCA enforcement by private citizens did not outweigh the public interest of encouraging settlement of private disputes.[383] However, there does seem to be some consensus among the circuits that a prefiling release signed in the context of a bankruptcy proceeding will bar a subsequent *qui tam* case.[384] For now, the extent to which a prefiling release will affect your *qui tam* case will depend on two variables: (1) what circuit the *qui tam* case is filed and (2) whether or not the release was signed prior to the government's investigation.

C. Constitutional

1. Standing

Article III, section two of the U.S. Constitution confines federal jurisdiction to the adjudication of "cases and controversies" in which the plaintiff has standing to maintain the suit.[385] To establish Article III standing, a plaintiff must meet three basic requirements. First, the plaintiff must demonstrate a "concrete injury in fact" that is not "conjectural or hypothetical."[386] Second, there must be a "traceable connection" between the defendant's conduct and the plaintiff's injury.[387] And third, the plaintiff must demonstrate that the requested relief will have a "substantial likelihood" of remedying the injury.[388]

The first of these three elements, the "injury in fact" requirement, has been a key topic of debate concerning *qui tam* litigation. In a *qui tam* case, relators are not "injured" by the

379. *Id.*

380. *Id.* at 956–57. According to the release, Green agreed to:

> release, acquit and forever discharge Northrop [and its] employees . . . from any and all claims . . . rights to payment . . . actions and causes of action of every nature, under any theory under the law, whether . . . statutory or other of any jurisdiction, whether known or unknown . . . which he had or held, or has or holds, or may claim to have or to hold by reason of any and all matters . . . including, but not limited to, those arising out of or relating to the Action and/or Green's employment with and separation from Northrop.

Id.

381. *Id.* at 969.

382. United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997); *accord* United States *ex rel.* Chandler v. Swords to Ploughshares, 1999 WL 144868, *2 (N.D. Cal. Mar. 11, 1999). *But see* United States *ex rel.* Bahrani v. Conagra, Inc., 183 F. Supp. 2d 1272, 1276 (D. Colo. 2002) (characterizing Hall as the exception to the general rule that prefiling releases are unenforceable on public policy grounds).

383. *Hall*, 104 F.3d at 233.

384. *See, e.g.*, United States *ex rel.* Gebert v. Transp. Admin. Servs., 260 F.3d 909, 916 (8th Cir. 2001).

385. *U.S. Const.* art. III, § 2, cl. 2; *see also* Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).

386. Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

387. *Stevens*, 529 U.S. at 771; *see also Lujan*, 504 U.S. at 560–61.

388. *Stevens*, 529 U.S. at 771; *see also Lujan*, 504 U.S. at 561.

defendant's conduct. Rather, the government is the party injured when a defendant commits fraud. The relator's interest in the suit is the percentage he will recover, and it is contingent on the case succeeding. Historically, however, an interest of this kind has been insufficient to establish standing under Article III.[389] The Supreme Court resolved this issue on May 22, 2000, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*.[390] In *Stevens*, the Supreme Court, in an attempt to alleviate conflict among the circuits, held that *qui tam* relators have Article III standing, regardless of their lack of injury.[391] The Court pointed out that a *qui tam* relator's interest in the case, although contingent on victory, is still enough to constitute a "concrete private interest in the outcome of the suit."[392] Even though a *qui tam* plaintiff's rights have not suffered an invasion, the right he seeks to vindicate is enough to satisfy Article III.[393]

2. Eleventh Amendment

Finding in *Stevens* that a relator possessed standing, the Supreme Court turned to consider whether a state was a "person" subject to *qui tam* liability under the FCA and, if so, whether the Eleventh Amendment bars such a suit. Beginning and concluding with the statutory issue, the court applied the "longstanding interpretive presumption that 'person' does not include the sovereign."[394] The court held, "the text of the original statute does less than nothing to overcome the presumption that States are not covered."[395] However, the Supreme Court has done an about face on the issue of whether local governments are persons. In *Cook County* the Court held that "[t]he term 'person' in section 3729 included local governments in 1863 and nothing in the 1986 amendments redefined it."[396] Although the court in *Stevens* failed to address the Eleventh Amendment issue and decided the case on purely textual grounds, the court did express in dicta "serious doubt" that the FCA *qui tam* provisions could pass Eleventh Amendment scrutiny.[397] The *Cook County* Court only addressed whether or not states are immune from suit under the FCA. In a footnote the Court stated:

> Indeed, there is some evidence that Congress affirmatively endorsed municipal liability when it passed the 1986 amendments. See S. Rep., at 8 (noting that "[t]he term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof") (citing, *inter alia*, *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Although in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000), we considered this evidence insufficient to overcome the background

389. *Valley Forge Christian Coll.*, 454 U.S. at 486–87; *see also* Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 107 (1998).
390. 529 U.S. 765, 778 (2000).
391. *Id.*
392. *Id.* at 766.
393. *Id.* at 773.
394. *Id.* at 780.
395. *Id.* at 782.
396. Cook County, Ill. v. United States *ex rel.* Chandler, 123 S. Ct. 1239, 1249 (2003).
397. *Stevens*, 529 U.S. at 787.

> presumption that States are not "persons," in the present case the statement belies the County's argument that Congress meant to change the contrary presumption applicable to local governments and to remove municipal liability.[398]

3. Take Care Clause

The Fifth Circuit in *Riley v. St Luke's Episcopal Hospital*[399] has held that the *qui tam* provisions of the FCA do not violate the Take Care Clause and the Doctrine of Separation of Powers for two separate reasons.[400] First, the court considered the historical importance of the FCA, and noted that "it is logically inescapable that the same history that was conclusive on the Article III question in *Stevens* with respect to *qui tam* lawsuits initiated under the FCA is similarly conclusive with respect to the Article II question" presented by the *Riley* case.[401] The court opined that the history of the FCA, although not definitive, was a "'touchstone illuminating'" the *qui tam* provisions' constitutionality.[402] Second, the Fifth Circuit found *Morrison*, the primary case upon which the *Riley* panel majority relied to analyze the constitutionality of the *qui tam* provisions of the FCA under Article II, to be inapplicable. According to the court, the Ethics in Government Act, at issue in *Morrison*, assigns an independent counsel to act as the United States itself, while the *qui tam* provisions merely allow a private citizen to bring a lawsuit in the name of the government.[403] In addition, an independent counsel undertakes functions relevant to criminal prosecution, whereas relators are simply civil litigants.[404] "Thus, because the independent counsel provisions at issue in *Morrison* and the *qui tam* provisions central to *Riley* involve two different types of lawsuits, the Executive Branch must wield two different types of control in order to ensure that its constitutional duties under Article II are not impinged."[405] Furthermore, the court held "the Executive retains significant control over litigation pursued under the FCA by a *qui tam* relator."[406] Even in cases where the government does not intervene, there are a number of control mechanisms present in the *qui tam* provisions of the FCA so that the executive nonetheless retains a significant amount of control over the litigation. Specific examples of this control include the government's power to veto FCA settlements proposed by relators, prerogative to intervene in a FCA lawsuit at any point, unilateral power to dismiss a *qui tam* suit, authority to request copies of the pleadings and deposition transcripts, and the power to seek alternative relief such as administrative proceedings.[407] Thus, the court concluded that "[a]ny intrusion by the *qui tam* relator in the Executive's Article II power is comparatively modest, especially given the control mechanisms inherent in the FCA to mitigate such an intrusion and the civil context in which *qui tam* suits

398. *Cook County*, 123 S. Ct. 1239, 1248 n.10 (2003).
399. 252 F.3d 749, 752 (5th Cir. 2001).
400. *Id.* at 753. The court further held that the provisions do not violate the Appointments Clause because *qui tam* plaintiffs are not officers of the government. *Id.* Qui tam plaintiffs do not draw a government salary and are not required to demonstrate their fitness for public employment. Consequently, the court held that the constitutional requirements associated with government offices do not apply. *Id.*
401. *Id.* at 752.
402. *Id.* at 753.
403. *Id.* at 754–55.
404. *Id.* at 755.
405. *Id.*
406. *Id.*
407. *Id.* at 753–54.

are pursued."[408] With this opinion, the court has removed the dark cloud of suspicion over *qui tam* suits in the Fifth Circuit.

4. Eighth Amendment

Once liability is found then the court must determine the proper amount of damages. Generally, one would happily argue that the more horrendous the conduct, the greater the amount of fines the company should have to pay. On its face this seems like sound reasoning. That is the thinking behind current increases in the statutory penalties. Currently, the range of statutory penalties under the FCA is from $5,500 to $11,000.[409] Legislation has just recently passed that will increase the range of statutory penalties to between $7,500 and $15,000.[410] However, there seems to be a judicial specter analyzing these statutory penalties and treble damage awards for constitutionality under the Eighth Amendment's Excessive Fines Clause.[411] In *Mackby*, the United States sued the owner of physical therapy facility because he "knowingly caused false claims to be submitted to Medicare between 1992 and 1996 by instructing the clinic's billing company and office manager to use his physician father's Provider Identification Number ("PIN") on claim forms to bill for physical therapy services provided at the clinic."[412] His actions resulted in 111 false submissions that cost the government $58,151.64.[413] The district court awarded the government $729,454.92.[414] On appeal, the Ninth Circuit remanded the case, and ordered the district court to analyze the fines under the Eighth Amendment.[415] On remand, the district court determined that the fine was not excessive and did not violate the Eighth Amendment.[416] The Ninth Circuit has recently affirmed this determination.[417] Although this analysis has not been accepted in a majority of the circuits, the fact that appellate courts are using it should provide some guidance when computing damages in your *qui tam* case.

408. *Id.* at 757.

409. 31 U.S.C. § 3729(a) (2000); *see also supra* note 19.

410. Prescription Drug and Medicare Improvement Act, S. 1, 108th Cong. § 612 (2003).

> Increase in civil penalties under the False Claims Act. (a) In general-- Section 3729(a) of title 31, United States Code, is amended—(1) by striking "$5,000" and inserting "$7,500"; and (2) by striking "$10,000" and inserting "$15,000" (b) EFFECTIVE DATE—The amendments made by subsection (a) shall apply to violations occurring on or after January 1, 2004.

411. *See generally* United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) (ordering that the district court re-evaluate the penalties and damages in light of the Eighth Amendment's Excessive Fines Clause, which states that "[e]xcessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.") (quoting *U.S. Const.* amend. VIII).

412. 261 F.3d at 824.

413. *Id.*

414. *Id.*

415. *Id.* at 831.

416. United States v. Mackby, 221 F. Supp. 2d 1106, 1115 (N.D. Cal. 2002) ("[I]n sum, the [c]ourt finds that neither the civil penalty nor the treble damage award, either individually or collectively, is grossly disproportionate to the gravity of Mackby's violation of the FCA. The [c]ourt therefore concludes that the judgment previously entered in this action does not violate the Excessive Fines Clause of the Eighth Amendment.").

417. *See generally* United States v. Mackby, 339 F.3d 1013, 1019 (9th Cir. 2003) ("Considering both Mackby's culpability and the harm caused by his offense, we hold that the full $729,454.92 judgment against Mackby is not grossly disproportional to the gravity of his offense.").

VII. STATE FALSE CLAIMS STATUTES

In addition to the federal FCA, some states have false claims acts of their own. Currently, fourteen states have enacted a version of the federal FCA.[418] Of the states that have enacted versions of the FCA, most are broad enough to cover all types of fraud.[419] Only Louisiana and Texas have narrow statutes that only apply to Medicaid.[420]

In 1995, Texas enacted the Texas Medicaid Fraud Prevention Statute giving the Attorney General the power to investigate and punish those that defraud the Texas Medicaid program.[421] The objective of the act was to deter fraud on the Medicaid program with consequences such as treble damages, and to provide monetary inducements for private parties, known as relators, who offer assistance.[422] The relator is entitled to a ten to twenty-five percent share of the proceeds of the recovery plus reasonable attorney's fees, expenses, and costs.[423] The Texas statute differs materially not only from the federal statute, but also from most of the false claims statutes of other states.[424] Most notably, the Texas statute only covers fraud on Medicaid.[425] The federal false claims act and most state false claims acts are much broader and cover fraud perpetuated on the government in any area, not just in the Medicaid arena.[426] Also, unlike the federal FCA, which allows relators to proceed without the government, if the Texas State Attorney General declines to take over the suit, the court must dismiss the action.[427]

It has been seven years since Texas passed its *qui tam* legislation aimed to recoup fraudulent claims on behalf of the state's Medicaid program.[428] As a result, Texas has added more than $20 million dollars back to its coffers.[429] With the assistance of private parties, the Texas Medicaid Fraud Prevention Act has provided stiff civil and criminal penalties for those seeking to bilk deceitful gains by making fraudulent claims for reimbursement from the Texas Medicaid program.[430] Based on strong statutory remedies, the Texas Medicaid fraud statute has been a success. With the help of the public and private attorneys, Texas has proclaimed its intolerance for fraud against the Medicaid program. Since its enactment, some notable recoveries realized by the state include: $14.5 million

418. Those states are: (1) Arkansas, Ark. Code Ann. § 20-77-901 (West 2004) (Medicaid only), (2) California, Cal. Gov't Code § 12650 (West 2004), (3) Delaware, Del. Code Ann. tit. 6, § 1201 (2000), (4) District of Columbia, D.C. Code Ann. § 2-308.13 (2000), (5) Florida, Fla. Stat. Ann. § 68.081 (West 2003), (6) Hawaii, Haw. Rev. Stat. § 661-21 (2000), (7) Illinois, 740 Ill Comp. Stat. 1751/1 (2004), (8) Louisiana, L.a. Rev. Stat. Ann. § 46:437.1 (West 2004), (9) Massachusetts, Mass. Gen. Laws. Ann. ch. 12, § 5B (West 2000), (10) New Mexico, NM Stat. Ann. § 27-14-1 (West 2004) (Medicaid only), (11) Nevada, Nev. Rev. Stat. § 367.010 (1999), (12) Tennessee, Tenn. Code Ann. § 4-18-101 (West 2003) (general false claims) and Tenn. Code Ann. § 71-5-181 (West 2003) (Medicaid only), (13) Texas, Tex. Hum. Res. Code Ann. § 36.001 (West 2003) (Medicaid Only) and (14) Virginia, Va. Code Ann. § 8.01–216.1 (West 2004).

419. *Boese*, *supra* note 61, § 6-3.

420. *L.a. Rev. Stat. Ann.* § 46:437.1; *Tex. Hum. Res. Code Ann.* § 36.001; *see also Boese*, *supra* note 61, § § 6.01[K][2], 6.01[J][3].

421. John E. Clark, *Texas Medicaid Fraud Prevention Statute: Sharp, New Teeth for the State and Cash Rewards for Relators Exposing Wrongdoers*, 65 *Tex. B.J.* 120, 122 (2002).

422. *Id.* at 122–23.

423. *Id.* at 123.

424. *Id.* at 122.

425. *Id.*

426. *Id.*; *see also Boese*, *supra* note 61, § 6-3–6-7.

427. Clark, *supra* note 421, at 123.

428. *Id.* at 122.

429. *Id.* at 124.

430. *Id.*

settlement with Driscoll Children's Hospital, $3.46 million from TAP Pharmaceutical Products, and $783,500 from Bayer Corporation.[431] However, in order to mirror the significant recoveries of the federal FCA, Texas should expand on the success of its current act, and broaden it to cover all types of fraud. By increasing the breadth of the statute, the federal government and most states have decreased overall fraud, and increased the government's recovery of losses.[432] By following the federal FCA, Texas could have a new weapon against all types of government fraud and abuse.[433]

VIII. CONCLUSION

The *qui tam* laws operate as a maze of judicial interpretation and inconsistencies. Evaluating a potential case is complex, and requires a thorough investigation of the facts and law in the appropriate venue. Since many cases can be filed in multiple jurisdictions, it is important to devote a considerable amount of time to analyzing each circuit's interpretation of the FCA. Mastering the intricacies of the FCA is mandatory before embarking on an expensive investigation and litigation process. The rewards though can be most compelling. Diligent and legitimate pursuit of *qui tam* actions will also result in a heightened quantum of accountability, both for the government and its contractors.

431. *Id.*
432. *Qui tam Statistics, at* http://www.taf.org/statistics.html (last visited Dec. 19, 2004).
433. The 78th Legislature of Texas failed to act on a pending bill that modeled the federal FCA, and would have expanded the Texas act to cover all types of fraud. Tex. H.B. 400, 78th Leg., R.S. (2003).

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CORRECTIONS & CLARIFICATIONS

- On page 110 of the October 2004 Quarterly Review, Neil Mullin, relators' counsel in the $345 million Schering-Plough settlement, was listed under the incorrect firm name. Mr. Mullin is actually a partner at Smith Mullin, P.C.

- On page 55 of the October 2004 Quarterly Review, the following case included an incorrect citation: *United States ex rel. Taylor v. Gabelli*, 345 F. Supp. 2d 340 (S.D.N.Y. 2004).